

Justice for Sale? The Shadow of Dark Money in State Judicial Elections

Holly Kathleen Hall
Arkansas State University

In recent years, “dark money groups” have infiltrated state judicial elections. The spending of these groups is usually targeted in the form of attack ads against candidates that many times are extremely partisan, false and/or misleading. This affects the ability of voters to make sound decisions in the voting booth. Many times, these dark money groups will not disclose their donor list. This lack of transparency also leaves voters uninformed. This study examines rise of dark money in state supreme court judicial elections, represented by specific election examples from the state of Arkansas, including the use of a “Rapid Response Team” (RRT) to attempt to handle candidate complaints of false campaign attacks. Moreover, the marketplace of ideas theory is analyzed in assessing whether the counterspeech doctrine is applicable in today’s judicial election advertising and information dynamic when the ethos (speaker credibility) is indeterminate.

Democracy is grounded in the concept that citizens will make beneficial political choices, given they have the requisite knowledge to make those decisions (Gottfried, 2009). Voters typically make their choices with limited information and time for careful consideration (Wilson, 2010). Research suggests communication and messaging strategies that are carefully targeted and reduced to “sound bites” are very persuasive with voters (Wilson, 2010). Advertisements may be the principal supplier of the knowledge a voter takes with them into the voting booth (Gottfried, 2009). In recent years, following the 2010 United

* Dr. Holly Kathleen Hall is a professor in the Department of Communication at Arkansas State University. Correspondence concerning this article should be addressed to Holly Kathleen Hall, Department of Communication, Arkansas State University, PO Box 1930, State University, AR 72467 or directed to hollyhall@astate.edu. The author would like to acknowledge and thank Mr. Roy Ockert, former member of the Arkansas Rapid Response Team (RRT) for his time, knowledge, and presentation of documents that were invaluable to this study.

States Supreme Court decision in *Citizens United v. FEC*, issue advertising from organizations during elections substantially increased, including from so-called “dark money” (spending by independent groups funded anonymously) organizations (Briffault, 2018). Many of these ads are misleading, yet influential (Misra, 2015). This leads to the question: how can a citizenry make educated political choices when the information their decision-making is based upon is potentially false or deceptive? When voters rely on false or misleading communications or even disbelieve accurate information, is their vote even “correct?” (Wilson, 2010). How can voters make sound decisions when the credibility or ethos of the messenger is unclear?

This paper examines the role of *Citizens United* in paving the way for dark money in state judicial elections in particular, drawing on specific election examples from the state of Arkansas. The author also conducted an interview with a former member of the “Rapid Response Team” (RRT) for Arkansas judicial elections (a group that works to handle candidate complaints of false campaign attacks) to examine the reactions of the group to claims of false or misleading campaign advertising. Moreover, the marketplace of ideas theory is analyzed in assessing whether the counterspeech doctrine is applicable in today’s judicial election advertising in addition to the role ethos (the messenger’s credibility) plays in today’s information dynamic. The paper concludes with recommendations and an exploration of potential solutions to the issues surrounding dark money in judicial races, including methods to mitigate false and misleading advertising effects in state supreme court races, such as changes to the judicial selection process.

The Rise of Dark Money Organizations

Citizens United v. Federal Election Commission (FEC) (2010) struck down part of a federal statute. At issue was Section 203 of the Bipartisan Campaign Reform Act (BCRA). The BCRA prevented corporations or labor unions from using their general treasuries to fund “electioneering communications” that refer to a candidate for federal office within 60 days before a general election and within 30 days of a primary election. The section was declared unconstitutional in a 5-4 Supreme Court decision.

The decision has been both derided and hailed (Avi-Yonah, 2010). It paved the way for groups to get involved in election campaigns with few disclosure and reporting requirements, providing opportunities to use their revenue to create and run advertising to defeat or elect candidates, as long as the groups do not coordinate with the candidates (Kim et al., 2018). Specifically, the *Citizens United* decision along with *SpeechNow.org v. FEC* (2010) in which the U.S. Court of Appeals for the D.C. Circuit struck down limits on the amount of money that individuals could give to organizations that explicitly supported political candidates, led to the development of Super PACs: independent political action committees that can accept unlimited contributions from individuals and organizations and spend unlimited money in support of a candidate but cannot directly contribute money to or coordinate with the candidate it is supporting (Merriam-Webster.com, 2019) as well as nonprofit organizations whose primary purpose is “nonpolitical” and therefore, they do not have to disclose donors and have few reporting obligations (Kim et al., 2018). While outside groups such as Super PACs have to disclose their donors, others do not, such as 501(c)(4) groups known as “social welfare organizations” such as the National Rifle Association (NRA) (“Dark Money Basics,” n.d., para.14). Even groups that are mandated to disclose their donors do not always disclose them in real time. In countless cases, many of the sources of donated money are not disclosed until well after the election cycle (“Dark Money Basics,” n.d.). In short, *Citizens United* and *SpeechNow* sanctioned express advocacy by outside spenders without restrictions, making it simpler for these groups to engage in election spending (Bannon, 2018). *Citizens United* also intensified spending in state elections (Silak & Donnellan, 2017).

Dark money is meant to influence the decision of a voter. The donor is not disclosed and the source of the money is unknown. Dark money organizations operating to impact the 2016 elections, for example, spent more than \$15 million in 2015, while only \$5 million of that money had to be reported to the FEC. The reported figure is ten times more than what had been reported at that point in 2011, before the previous presidential election cycle (“Dark Money Basics,” n.d.). While people are relying on advertising to get information about candidates, the content of advertising is increasingly

false and/or misleading (Liefkring, 2013). And the philosophical viewpoint of these dark money groups is further obscured by the innocuous names for the groups such as “American Action Network” or the “American Future Fund” (Oklobdzija, 2018).

In judicial elections in particular, the rise of outside spending has led to a change in the substance and tenor of advertisements. The most prevalent messaging strategy for groups such as Super PACs and nonprofits involved in electioneering communications is issue campaigns, which advocate or condemn a political issue (Kim et al., 2018). In state supreme court races during the 2013-2014 cycle, over 90% of television advertising originating from the candidate centered on the candidate’s background and experience. This is compared to over 85% of negative advertising which came from outside groups, with a large proportion of the advertising focused on specific issues such as taxes and health care (Banmon, 2016).

Sheckels (2002) asserts that advertisements can facilitate acceptance of an argument even without compelling proof and that negative advertisements in particular often utilize messengers other than the candidate in order to escape criticism and resentment from the audience. The persuasive effectiveness of such advertising is often analyzed through the lens provided by Aristotle’s *Rhetoric* and subsequent treatises. Aristotle reasoned that rhetorical persuasion works through three elements: ethos (messenger credibility), pathos (emotional influence), and logos (appeals to logic and reason). Kinneavy (1996) argued all three elements are necessary and create a “communication triangle.” Placing different levels of emphasis on different elements can produce a different persuasive result. Ethos in particular is an appeal worth examining in negative attack advertisements funded by dark money, where the source of the message is unclear. Honesty, trust and legitimacy of the speaker - ethos - is also unclear. Kinneavy observes that the messenger’s credibility is established by:

providing direct or indirect evidence of their own honesty, of their concern for the reader’s interests, and of their knowledgeability about the issues involved. Author credibility is often considered the most important of the three appeals—if authors are not believed, everything else they do is wasted effort

(p. 521).

When ethos is missing or lacking, yet the voter is persuaded, is the voter truly making an informed decision? An “intelligent democracy” is one in which access to proof and evidence leads to an informed public (Stucki & Sager, 2018).

Advertising on digital platforms is particularly concerning from the ethos perspective. In Nadler, Crain and Donovan’s (2018) analysis of digital political advertising, they highlight the abundant opportunities for “political manipulation and other forms of anti-democratic strategic communication” through systems of data collection and targeting capabilities called the Digital Influence Machine (p. 1). The targeting abilities allow campaigns to reach the “most receptive and pivotal audiences” while minimizing “the risk of political blowback by limiting their visibility to those who might react negatively” (p. 1). This is combined with weak disclosure rules. For example, Facebook requires political advertising purchasers to prove their identity and provide a disclosure to note who is paying for the advertisement. However, the disclosure is often just the name of the organization and not those funding or donating to it (Nadler, Crain, & Donovan, 2018). This is another way dark money advertisers can avoid transparency and, in effect, ethos of the messenger.

Terry and Bard (2015) found the potential for such advertising as a means to influence the election of a particular judicial candidate that the group hopes or believes will be amenable to their positions on issues “substantially increases the potential for corruption” (p. 308). Direct contributions to judicial candidates have been linked to favorable rulings (Terry & Bard, 2015).

In the state of Wisconsin, for example, a Wisconsin Center for Investigative Journalism analysis found “justices tend to rule in favor of clients whose attorneys contribute to the justices’ election campaigns” (Harper, 2013, para. 6). Terry and Bard (2015) argue that issue ads from outside groups could similarly encourage judges to favor the groups who buy them. A 2010 Harris Poll found over 70% of respondents believed campaign contributions impact courtroom decisions (Hasen & Lithwick, 2014). Kang and Shepherd (2015) found the more television advertising that aired during state

supreme court judicial elections, the fewer justices voted in favor of criminal defendants. The increase in advertising spending and attack advertising produces an environment that is more akin to political elections (Kang and Shepherd, 2015). Kang and Shepherd (2015) conclude there is “reason to worry that the intense campaigning associated with attack advertising influences judicial decision making on important, politically-salient cases” (p. 949). Brown (2017) believes Arkansas is an exception to this trend, citing decisions in general from 1991 to 2012 concerning a wide range of issues from sodomy laws to adoption and fostering of children by same-sex couples as cases that were dealt with by the Arkansas Supreme Court “without fear of political consequences” (p. 548). However, this data is from a time before dark money in judicial elections really impacted Arkansas.

Even with the problems and issues related to advertising in judicial elections, attempts to regulate this area are laden with difficulties in balancing the right to free speech guaranteed by the First Amendment against the governmental interest of maintaining election integrity (Liefkring, 2013). Any regulation of speech involves the First Amendment (U.S. Constitution). If the regulation focuses on the content of the speech, the regulation is reviewed under strict scrutiny, meaning it must be justified by demonstrating a compelling government interest and it must be narrowly tailored to meet that interest (*Republican Party of Minnesota v. White*, 2002). Content-based restrictions are allowed in a few narrow segments of speech including libel, obscenity, fraud, incitement, fighting words, and speech integral to criminal conduct (*U.S. v. Stevens*, 2010).

Instead of carving out additional categories of speech that cannot be protected by the First Amendment or are subject to additional regulation, the Supreme Court has traditionally relied on the marketplace of ideas or counterspeech concept as a solution (*Abrams v. United States*, 1919). This theory posits that more speech and discussion is the preferred means to uncover truth and allow the best ideas to rise to the forefront, as opposed to censoring or regulating content (*Abrams v. United States*, 1919). Justice Louis Brandeis established the counterspeech principle in his concurring opinion in *Whitney v. California* (1927), noting:

public discussion is a political duty... If there be time to expose through discussion the falsehood and fallacies to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence (p. 375-377).

This theory breaks down, however, when the information dynamic includes deceptive advertising that is readily believed and used by the voting population. Napoli (2018) suggests our “reliance on counterspeech is increasingly ineffectual and potentially damaging to democracy” and is unconvincing in light of the speed with which false news travels, coupled with the inability of citizens to determine the truth in today’s media environment (p. 97) as well as the lack of speaker ethos. While Hundley (2017) argues applying strict scrutiny to political speech is inappropriate; that if the political speech is more *false* than it is political, then intermediate scrutiny should apply, which is less rigorous than strict scrutiny.

In the 2015 *Williams-Yulee v. The Florida Bar* case, there was a question about what level of scrutiny should apply concerning a Florida Bar rule prohibiting candidates for judicial offices from directly soliciting campaign donations. In an unusual move, the Court upheld (again, in a 5-4 decision) the restriction. The Court noted Florida’s compelling state interest in “preserving the integrity of [its] judiciary and maintaining the public’s confidence in an impartial judiciary” (In re Kinsey, 2003, p. 87) and the majority agreed this interest was a valid one and the regulation was narrowly tailored to achieve that interest. The Court rejected Yulee’s argument that other limitations were less restrictive, speculating that, for example, recusal requirements would hinder many courts from functioning, and could also encourage forum shopping by donating to certain judges and not others. However, in an article about the case, Andrew Lessig (2016) found “the ruling is of such narrow application and such modest implications that, in light of the Court’s recent full throated support of the unlimited flow of money into politics, Yulee is an overlookable aberration” (p. 156).

Protecting even false political speech and preferring the counterspeech remedy is the inclination of the courts, and the justices in the *Citizens United* majority believed that

unencumbered corporate campaign speech aids the voting public. In a 2012 television interview, Justice Antonin Scalia commented on *Citizens United*:

I think Thomas Jefferson would have said, ‘the more speech the better.’ That’s what the First Amendment is all about, so long as the people know where the speech is coming from (Vasilogrampros & Mimms, 2012, para. 3).

The last phrase, however, is a key element plaguing the advertisements from dark money groups. If citizens cannot tell what information is true, counterspeech and the marketplace of ideas remedy is not a useful aid in the process of developing informed voting choices. And while the court has long prized counterspeech, they also have a history of valuing a well-informed citizenry, such as in *Kleindienst v. Mandel* (1972), where the court affirmed a First Amendment right to “receive information and ideas” and that freedom of speech “necessarily protects the right to receive” (p. 762-763).

Jensen (1998) argued for a replacement metaphor known as a “potluck supper,” noting that the growth of media outlets and concentration of ownership makes effective access to speech a true challenge (p. 563). Jensen calls the marketplace metaphor “unhelpful...romantic nonsense...too painfully accurate a metaphor in a world in which increasingly speech is money” (p. 564). While one of the values of the metaphor is efficiency, “[t]here is no guarantee of justice, democracy or compassion” (p. 578). The potluck supper metaphor contends that rather than competing with each other, everyone will contribute something under the notion that the group is more important than the individual and that the truth is found among the offerings. However, it is difficult to ascertain how this metaphor is fulfilled in our current crowded, fragmented media environment, where the origin of the speech is potentially unknown and, therefore, cannot be responded to.

Justice John Paul Stevens noted that this form of speech from dark money groups would be a corrupting influence; that “flooding the airwaves with slogans and soundbites may well do more to obscure the issues than to enlighten listeners” (*Davis v. FEC*, 2008, p. 2778). Justice Sandra Day O’Connor, who retired in 2006, told an audience she spoke to in 2010 that *Citizens United* had the potential to create “an increasing problem for

maintaining an independent judiciary” and that “if both [unions and corporations] unleash their campaign spending monies without restrictions, then I think mutually-assured destruction is the most likely outcome” (Liptak, 2010, paras. 8, 14). Just days after *Citizens United* was decided, then-President Barack Obama took the rare step of criticizing the Supreme Court decision in his State of the Union address, as members of the high court sat only a few feet away (Silverleib, 2010).

In today’s targeted digital advertising, some messages may not even be delivered to those who would want to counter them, and this limits the effectiveness of the counterspeech principle. As Nadler, Crain, and Donovan (2018) note, the audiences for targeted advertisements “are convened by the advertisers. Opposition groups have limited ability to convene the same publics for counter-message, nor do individuals receiving such messages have an ability to speak back to these publics” (p. 32). Even when the advertisements do not go to the intended audience, “critics may have little opportunity to contest their claims or messages among the targeted audience. Only the advertiser has access to the convened public receiving the ad” (p. 32). The capabilities of the Digital Influence Machine permit campaigns to “sow division among opponents while also dodging accountability for such manipulations” (p. 34).

Bannon (2018) concentrates the most significant consequence of *Citizens United* on the “*composition* and *transparency* of spending in judicial races” (p. 171). Bannon argues this leads to:

(1) leaving the public in the dark about the interests that seek to shape state courts; (2) exacerbating pressures on judicial decision-making...; and (3) creating new challenges for policies that seek to mitigate the harms from special interest influence in judicial races (p. 171).

A year before *Citizens United*, the Supreme Court confronted the issue of independent campaign expenditures involving a judicial election in *Caperton v. A.T. Massey Coal Co.* (2009). In the case, a judge refused to recuse himself over perceived bias created by the donations by someone who was involved in litigation before the judge. The Court found the risk of bias in the case was considerable and recognized that large campaign donations of this nature could, in fact, have the effect of undermining justice.

This stance appears inconsistent when compared to the decision in *Citizens United*. Howell (2012) argues this conflict could be resolved by an admission from the Court recognizing that judicial elections are profoundly different from political elections and states should be given the power to prevent the taint of corruptive corporate campaign spending practices.

Dark money is “most dangerous in state and local elections” (Silak & Donnellan, 2017, p. 563) due to the relatively inexpensive nature of the campaigns. Dark money groups find their investments go further than in federal campaigns as they often easily spend more than the opposition candidates in state and local elections. While some expenditures fall within reporting and disclosure requirements, most donor disclosure laws concern political committees and “electioneering communications.” Committees that spend money without coordinating with a candidate only have to disclose donors if their electioneering spending reaches a certain level. The Supreme Court defines electioneering as communication that expressly advocates for or against a candidate and “broadcast communications in the immediate pre-election period that clearly name a candidate even if they do not engage in express advocacy” (Briffault, 2018, p. 308).

Judicial Crisis Network (JCN) (a conservative 501(c)(4) nonprofit) and Demand Justice (a liberal, unincorporated entity organized by a tax-exempt fiscal sponsor that provides a legal home to more than 40 such entities that do not have to file separate tax returns, which makes them even less transparent) are two groups that have engaged in dark money spending, notably during Justice Brett Kavanaugh’s nomination process. Undisclosed donors have funneled millions of dollars into JCN since 2005, with most of the spending geared toward television advertising (Massoglia & Washburn, 2018).

In the 2010 Michigan Supreme Court election campaigns for example, \$11 million was spent on predominantly attack ads. Less than 25% of that money came from actual candidate committees (Graham, 2012).

Although both conservative and liberal dark money groups operate, those supporting conservative justices spend far more than the opposing side and the spending level appears to have a correlation to the election outcome. From 2013-2014, over 90% of the contested supreme court seats were won by those who raised the most money

(Bannon, 2016). The stakes are high in court elections as the decisions made by the sitting judges can have a lasting and profound impact, dealing with issues such as the death penalty, tort reform and healthcare. The Brennan Center noted the dynamic of judicial races has changed in recent years, becoming more polarized and influenced by special interests. The trends they have identified as a threat to the fairness and integrity of state courts include (1) the ever-expanding role of money (especially special interest spending) in judicial elections; (2) politicization of campaigns including partisan language and apparent advocacy of issues like gun rights; (3) lack of judicial diversity; and (4) concerns about job security affecting how judges rule in certain cases, which puts impartiality at risk (Bannon, 2016).

The increasing politicization of campaigns generates a question about whether elected judges are policymakers or representatives of their constituency (Briffault, 2018). Even when the judge may be objective and impartial in their decision-making, when judges act like politicians, it creates a perception that they may have difficulty in eschewing political biases (Bannon, 2016). As a retired state justice contended about judicial elections, “I think people lose faith that the court is anything but a political machine” (Bannon, 2016, p. 11).

In Alabama, where judges are elected and can supplant jury recommendations of life sentences in capital cases, research shows they are more likely to exercise that right in election years (Liptak, 2016). As Justice Sonia Sotomayor observed in a 2013 dissenting opinion:

What could explain Alabama judges’ distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures (Woodward v. Alabama, 2013, p. 1050).

Citizens United eliminated laws in 23 states that had prohibited or restricted independent corporate expenditures. Montana continues to try and restrict such funding,

based in part on a long tradition of fighting corruption emanating from the “copper kings” – three mining barons who spent millions to influence the government, leading President Theodore Roosevelt’s Solicitor General to term Montana a state “where open confessions of sales of political and even judicial influence were lightly looked upon” (Howell, 2012, p. 28). This led to the Corrupt Practices Act of 1912, the state’s first ban on corporate campaign disbursements (Howell, 2012).

As Terry and Bard (2017) conclude, the notion that *Citizens United* has dramatically changed the political landscape is no longer questioned. Judges now frequently define themselves in clearly political terms (Bannon, 2016). Bannon (2016) provides this campaign message example from a 2014 Ohio Supreme Court Justice running for re-election:

I am a Republican...Let me tell you something: the Ohio Supreme Court is the backstop for all those other votes you are going to cast...we are the ones that will decide whether it is constitutional...So forget all those other votes if you don’t keep the Ohio Supreme Court conservative (p. 10).

Television ads are specifically used in many state supreme court elections and contain political language to provide indications to voters regarding their candidate’s liberal or conservative leanings. This is illustrated in recent elections in the state of Arkansas.

Recent Supreme Court Elections in the State of Arkansas

Around 13 states choose their state supreme court justices in entirely nonpartisan elections (elections where candidates are listed on the ballot without designating a party affiliation) (Ballotpedia, n.d.). Popular elections of justices in Arkansas began in 1864 due to the perception that the appointment system used was political and left room for corruption (Brown, 2017). Non-partisan elections of justices began in 2000, to help prevent justices acting more like politicians (Brown, 2017). In 2015, State Representative Matthew Shepherd filed a Joint Resolution at the Arkansas General Assembly to allow the state to vote on the idea of merit selection of justices. It died at the committee level (Brown, 2017). Merit selection includes a nominating commission that submits nominees

to the governor who chooses one person to be justice. If the justice then decides to serve a full term, he/she would stand unopposed for a retention election with a yes or no vote (Brown, 2017).

The Arkansas Bar Association introduced another initiative in 2016, proposing a single 14-year term for justices, following their nomination by a nominating commission and appointment by the governor. The proposal failed to get enough votes to be filed as a bar measure (Brown, 2017). For now, non-partisan popular elections remain the process for supreme court selection in Arkansas.

Beginning in 2014, candidates running for the Arkansas Supreme Court have been targeted with attack ads from outside groups (Moritz, 2018). The two most recent supreme court elections were influenced by one well-funded outside group in particular. JCN spent more money and ran more ads than all candidates combined (Terry & Bard, 2017). In 2012, a task force on Judicial Election Campaigns, created by the Arkansas Bar Association, recommended the creation of a committee to educate voters on judicial candidates and contend with misleading ads by independent groups (Brawner, 2016). The task force anticipated the problems caused in other parts of the United States by misleading campaign ads run by independent organizations. The group that eventually formed in 2015 to confront these issues was the Arkansas Judicial Campaign Conduct and Education Committee (AJCCEC). The committee includes a Rapid Response Team (RRT) tasked with monitoring media communication in state supreme court and court of appeals elections, and acting on complaints by candidates of false campaign attacks, as well as encouraging candidates to sign pledges to follow the Code of Judicial Conduct and renounce false communications that support their campaigns (Brawner, 2016). The AJCCEC also houses a website providing information about judicial candidates such as personal statements and biographical information.

The RRT is a non-partisan group comprised of 5 members appointed by the Board of the Directors of the AJCCEC. The membership is made up of a selection of retired judges, lawyers, members of the media, and non-lawyer voters. The RRT reviews complaints about judicial advertising submitted by the Supreme Court of Arkansas, Arkansas Court of Appeals or campaign committees. The RRT is not allowed to

contribute or actively participate in election campaigns for any candidate for the state supreme court or court of appeals (Willems, 2016).

The RRT's procedure once they receive a complaint is to have each member acknowledge receipt of the complaint and then, if the RRT decides there is reasonable cause to examine an advertisement further, they will notify the promoter of the ad, the candidate who is the ad's subject, and the candidate's opponent (if they are not the proponent of the ad). The proponent then typically has 24 hours to respond to the allegations and either agree to withdraw the ad or provide evidence that the complaint has no merit. If the proponent does not respond, the RRT can take additional actions including issuing a cease and desist letter and/or publishing a press release regarding the matter ("Rapid Response Team Rules & Procedures," n.d.) in an effort to "publicly chastise" the ad (Willems, 2016, para. 6).

The first instance of the RRT responding to a complaint occurred in February 2016 in an election for a position on the Arkansas Supreme Court between Clark Mason and Shawn Womack. A nonprofit based in Washington, D.C. known as the Republican State Leadership Committee (RSLC) through their "Judicial Fairness Initiative" (JFI) arm, developed a flyer with the statement that Mason "Admits his support for Obama's executive actions that kill Arkansas jobs while making trial lawyers rich." The flyer then provided a link to a website which led viewers to a story about former Faulkner County Circuit Judge Mike Maggio who pleaded guilty to a federal bribery charge (Judge Olly Neal, Chair of the Rapid Response Team, personal communication, February 24, 2016). Ryan West, Mason's campaign finance director, emailed a complaint to the RRT (R. Ockert, personal communication, July 11, 2019). The RRT found the flyer to be without factual support and sent a letter to the RSLC. The group received no response. In addition, the JFI launched a website (arkansascourtfacts.com) echoing the claims listed in the flyer. At that point, the RRT sent a cease-and-desist letter to the RSLC and a press release regarding the RRT's actions to the media (R. Ockert, personal communication, July 11, 2019). The RSLC refused to comply and accused the RRT of being full of partisan Democrats (R. Ockert, personal communication, July 11, 2019). Then-member

of the RRT as a representative of the media, Roy Ockert, issued a response, noting in part:

Instead of responding to a complaint duly filed with the Rapid Response Team, the Republican State Leadership Committee has chosen to attack the Arkansas Judicial Campaign & Education Committee and the team itself...Judicial elections in Arkansas are nonpartisan, and this Republican group is obviously trying to make them otherwise (R. Ockert, personal communication, July 11, 2019).

Womack disavowed the ad (Brown, 2017). The RSLC spent an estimated \$120,450 on television ads opposing Mason. Mason lost the election (Bannon, Lisk, & Hardin, 2017).

In 2016, JCN aired ads against Arkansas Supreme Court Chief Justice candidate Courtney Goodson, centered on lavish gifts she had received, though had properly disclosed (Brantley, 2018). She reported on financial disclosure forms in 2011 receiving \$99,000 in jewelry, and other gifts from her husband when they were dating. She also reported in 2013 receiving a \$50,000 trip to Italy from W.H. Taylor, an attorney and friend of her husband's (DeMillo, 2018a). Opponent Dan Kemp did not immediately disavow the ads. Goodson was an effective fundraiser, having garnered over \$1.02 million during the campaign, yet she still lost to Kemp in the most expensive judicial election in Arkansas history. However, she did retain her seat as an associate justice (Bannon, Lisk, & Hardin, 2017).

In 2018, JCN and the RSLC aired ads that attempted to label Goodson in her campaign to be re-elected to the Arkansas Supreme Court as an "insider" with ties to trial lawyers and focused again on the extravagant gifts from friends and her future husband. The messages neglected to add Goodson had recused herself from cases involving lawyers with whom she had financial ties (Moritz, 2018). Goodson called the ads misleading, false and defamatory. Goodson utilized the RRT, complaining about JCN's television ads and flyers. The RRT declared the ads false or misleading (Brawner, 2018). They sent JCN a cease and desist letter, yet the ads continued to run (Hardy, 2018). A state judge blocked several television stations from running the ad. A federal judge rejected the request to block a similar attack ad and mailer by RSLC (DeMillo, 2019). JCN also launched attack ads against another candidate in the race, Kenneth Hixson,

accusing him of being “soft on crime” (R. Ockert, personal communication, July 11, 2019). Leading into the eventual runoff, RSLC spent over \$750,000 on television attack ads while JCN spent \$510,660 (“Buying Time 2018”, 2018) in order to elect David Sterling, a declared conservative Republican (Brantley, 2018). Goodson prevailed in the election.

Dark money had “a profound impact” on the victories of Kemp and Womack (Brown, 2017, p. 554). The Goodson v. Sterling campaign was different. Goodson positioned the race as “a referendum on the influence” of dark money noting, “I think the judiciary is under attack and, not only that, it’s the independence of the judiciary that is at stake here” (DeMillo, 2018b, paras. 7-8). She also used the moniker “Dark Money David” to describe Sterling in her television ads (R. Ockert, personal communication, July 11, 2019).

While not a race concerning the state’s supreme court, the RRT got involved in an Arkansas Appellate Court election in 2018. The RSLC ran television ads the RRT found to be false and misleading regarding Bart Virden who was seeking re-election to the court. The ad in question stated: “Virden overturned the conviction of a habitual rapist on a technicality leaving victims without justice” (“Judicial watch group”, 2018, A10). This claim referred to a 2017 opinion authored by Virden concerning admissibility of evidence to impeach a witness. The RRT found the classification of that instance as “a technicality” unfounded. A panel of judges heard the case and three other judges came to the same conclusion with Virden; therefore, he did not act alone (“Judicial watch group”, 2018, A10). In addition, the accused is actually serving his sentence with a release date set for 2044 (Rapid Response Team, 2018). The RSLC refused to withdraw the ad and accused the RRT of being biased and engaging in “shameless partisan attempts to shield candidates like Bart Virden from having to answer for their records” (“Judicial watch group”, 2018, A10).

Retired U.S. Bankruptcy Judge and member of the RRT, Audrey Evans, responded that the RSLC had previously questioned the RRT’s integrity during the Mason campaign in 2016, and observed, “This is, after all, a non-partisan election, but the Republican State Leadership, which hides behind a mask of anonymity, insists on

trying to make it partisan... Worse, its advertising distorts the facts” (“Judicial watch group”, 2018, A10).

Douglas Keith, counsel at the Brennan Center for Justice noted:

It’s unfortunate...especially this year, where the candidates haven’t raised that much money, this outside spending really could swamp what the candidates end up spending themselves...And voters won’t ever know where that money really comes from (DeMillo, 2018a, para. 9).

The RRT attempted to rein in false and misleading state judicial advertising, but faced some challenges in fulfilling its mission. These impediments include: (1) **Communication and messaging:** some members of the RRT concluded that getting the message out to the public about their actions in an effective manner is an obstacle. Press releases about cease and desist orders, for example, sometimes did not get the traction in the media that the RRT hoped. This process was complicated by candidates who would release the news of the RRT’s actions before the RRT. As Ockert observed, “Once that happens...our news is no longer news” (R. Ockert, personal communication, July 11, 2019). Ockert also noted the current fragmentation of the media audience being a hindrance. Getting the public’s attention is exponentially more difficult now that we have so many media outlets (R. Ockert, personal communication, July 23, 2019). (2) **Lack of resources:** the RRT needs dedicated staff to administer communications via regularly maintained social media sites, and provide clerical support, as well as assistance in the time-consuming effort of tracking down contact information for advertisers. (3) **Lack of enforcement mechanisms:** once a cease and desist order is issued in relation to a false or misleading ad, there are no tools available to the RRT that would help them impose a consequence for non-compliance. Due to these deficiencies, Ockert concluded that the concept of having the RRT was probably “a mistake from the beginning” (personal communication, July 23, 2019).

Legislative Efforts to Contend with Dark Money

There have been attempts to legislate disclosure of dark money contributions at both the state and federal level. In 2016, Arkansas State Representative Clarke Tucker (D-Little Rock) proposed House Bill 1005 which originally would have required

disclosure of electioneering communications, including those that refer to a candidate and attempt to influence the vote for or against a candidate. Tucker amended the bill to remove the disclosure requirement after it failed in the House State Agencies Committee (Hardy, 2017). The Committee heard from David Ray of Americans for Prosperity, a conservative independent organization founded by billionaire industrialists and conservative activists, Charles and David Koch. Ray objected to the bill saying its definition of political advertising was too broad and would curtail attempts at educating the public and commenting on candidates. Tucker kept a provision in the bill to prevent groups from coordinating directly with the candidates they help, noting, “We’re virtually the only state left that doesn’t catch those ads,” referring to the ads developed through collusion between the outside groups and candidates (Hardy, 2017, para. 8). The bill died in committee in 2017.

In 2019, Arkansas State Representative Jimmy Gazaway (R-Paragould) filed a bill (HB 1705) broadening the definition of groups required to disclose information about their donors when spending for state Supreme Court or Appeals Court races, if they’re spending to “influence the public’s perception” of a candidate (DeMillo, 2019, para. 2). News of Gazaway’s bill was positively received by Justice Goodson, who stated that it leveled “the playing field” and would “make these bad actors play by the same rules that every other Arkansan has to” (DeMillo, 2019, para. 6). The RSLC denounced the measure, claiming it would “give more say and sway to the special interests...rather than the people” and highlighted a provision allowing individuals to sue in an Arkansas court to enforce compliance as “tailormade to allow special interests to haul their opponents before the courts for daring to challenge the status quo” (DeMillo, 2019, para. 8). This bill also died in committee.

On the federal level, the Democrats’ For the People Act of 2019 (H.R. 1) passed the House in March 2019 and includes sweeping provisions dealing with campaign finance reform, government ethics laws, and expanding voting rights. One particular focus of the bill includes measures to force disclosure of dark money donors. The DISCLOSE (Democracy is Strengthened by Casting Light on Spending in Elections) Act mandates political nonprofits that pay for independent expenditures and electioneering

communications disclose donors who give more than \$10,000. Spending on ads that attack or support a particular candidate would be reported to the FEC, in an attempt to deal with aggressive issue advocacy ads. One potential effect of the legislation is to limit dark money organizations' ability to attack and defend Supreme Court nominees (Evers-Hillstrom, 2019). The Act also supports a constitutional amendment to end *Citizens United* (H.R. 1, 2019).

The bill is meeting with fierce resistance from expected and unexpected coalitions. Majority leader of the Senate, Mitch McConnell, dubbed the proposal the "Democrat Politician Protection Act" (McConnell, 2019, para. 3). McConnell painted the Act as an assault on the First Amendment and an attack on privacy, leaving citizens "vulnerable to harassment over private views" (2019, paras. 6-7).

The American Civil Liberties Union (ACLU) agreed with some provisions of H.R. 1, especially those they viewed as broadening participation in elections. They took issue with the DISCLOSE Act provision as they believed it would chill speech of issue advocacy groups ranging from Planned Parenthood to the National Rifle Association (NRA), stating these groups "need the freedom to name candidates when discussing issues..." and that the act forces "the groups to make a choice: their speech or their donors" (ACLU, personal communication, March 6, 2019, p. 13). The ACLU also noted that "many donors to issue advocacy organizations may be surprised to find themselves held responsible for communications they may not know about, or, potentially even support" (March 6, 2019, p. 15).

The "Stand by Every Ad" portion of the DISCLOSE Act extends disclaimer requirements. Certain organizations would have to reveal in each ad's disclaimers the top five donors to the organization if the ad is a video and the top two donors for audio ads. The ACLU's objections to that measure echoed their previous objections concerning donor privacy (ACLU, personal communication, March 6, 2019, p. 16). The ACLU also took issue with the language in the bill around defining "coordination" between Super-PACs and candidates. The Act attempts to place more restrictions on such coordination (March 6, 2019, p. 18).

A group known as Democracy 21, a nonprofit working to combat the influence of private money in politics, defended the dark money disclosure requirement in H.R. 1, highlighting the Supreme Court's decision in *Buckley v. Valeo* regarding the constitutionality of disclosure requirements to "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity" (1976, p. 67). The group even noted how *Citizens United* upheld disclosure provisions that were needed to provide "the electorate with information about the sources of election-related spending" to help voters make intelligent political choices (*Buckley v. Valeo*, 1976, p. 66). *Citizens United* also found disclosures promoted transparency and enabled the "electorate to make informed decisions and give proper weight to different speakers and messages" (2010, p. 371).

In addition, Democracy 21 relied on *Doe v. Reed* (2010) which upheld disclosure requirements for petition signers of ballot measures, quoting Justice Scalia, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed" (p. 228). The group also observed that donors who give \$10,000 or more could contract with the organization to not use those funds for campaign-related activities, thereby not risking the disclosure of the donor's name (Wertheimer & Simon, 2019).

While H.R. 1 had unanimous support from Democrats in both the House and Senate, McConnell refused to bring the bill to the Senate floor (Nilsen, 2019). In McConnell's home state of Kentucky, the League of Women Voters ran a full-page ad in the *Courier Journal*, strongly advocating for fellow Kentuckians to contact their Senators and demand a hearing on H.R. 1 (Forward Kentucky, 2019).

In lieu of a federal solution, states are taking their own steps to deal with dark money. Montana and New Jersey joined in a lawsuit against the IRS to fight a rule change exempting some types of federally tax-exempt organizations from disclosing the names and addresses of large contributors, which the states argue violated the Administrative Procedure Act (Puckett, 2019).

Montana's Disclose Act, passed in 2015 and upheld by the U.S. Supreme Court in 2019, requires that groups who engage in last minute advertising in elections make

public how they spend money to influence Montana's elections (Riesinger, 2019). The bill successfully fought resistance from the National Rifle Association and Americans for Prosperity (Blumenthal, 2015).

California passed legislation that forces creators of political ads to disclose their largest donors (Oklobdzija, 2018). In neighboring Arizona, a former attorney general for the state is fighting for a proposed amendment to the state constitution called the "Voter's Right to Know Act," which would necessitate the disclosure of donors who spend at least \$5,000 to influence the outcome of an election (state or local) in Arizona (Duda, 2019). The cities of Phoenix and Tempe enacted their own anti-dark money laws in 2018, though there are questions about whether state law overrides them (Duda, 2019).

In Mississippi, the legislature moved in the opposite direction. HB 1205, signed into law by Governor Phil Bryant (effective July 1, 2019), in essence prohibits state and local agencies from requiring any disclosure by politically active nonprofits ("Law: No Mandatory Disclosure," 2019).

Conclusion

Transparency is vital in our elections, especially those that concern our judiciary. In the current political climate, however, changes to disclosure laws or funding to support groups such as the RRT appear unlikely. In the absence of laws forcing disclosure, increased aid to bolster organizations like the RRT, or limits to the spending of dark money groups, candidates for judicial office will have to be aggressive if they want to fight a dark money group challenge. The *Goodson v. Sterling* race serves as a template for challenging a candidate supported by dark money. The limitation for some candidates, though, is having the money to spend on legal fees to fight false and misleading advertising.

The judicial selection system for the Arkansas Supreme Court should change to an appointment-based system. An open, transparent appointment process with term limits and checks and balances is the structure recommended by The Brennan Center for Justice (Bannon, 2016).

In addition, Arkansas should implement a system for evaluating judges and release results to the public in a clear, concise way in advance of a judicial election. Judicial evaluations currently exist in several states and assess factors such as integrity, impartiality, prejudice, diligence, temperament, legal knowledge, promptness, and decisiveness. This can increase the chances that the public will make an educated decision without solely relying on campaign advertising that could be false or misleading. For example, the Colorado Office of Judicial Performance Evaluation (2019) has as its mission:

To provide judges, justices and senior judges with useful information concerning their own performance, along with training resources to improve judicial performance as needed, while also establishing a comprehensive system of evaluating judicial performance, so as to provide persons voting on the retention of judges and justices with fair, responsible, and constructive information about individual judicial performance (p. 4).

States should persist in enacting and defending more rigorous disclosure laws for dark money groups, such as the Montana Disclose Act. The American public will continue to lose faith in our system of justice if it appears candidates can be bought and that justice is for sale. As executive director of the Michigan Campaign Finance Network, Rich Robinson, contends, “Unaccountable spending undermines the presumption of impartial justice” (n.d., para. 6).

The ethos or credibility of the speaker or messenger is a crucial missing piece in our marketplace of ideas. We are open to manipulation and uninformed decision-making based on incomplete, false, or misleading information where there is little to no opportunity for the information to be countered or clarified for the audience. Transparency and accountability are fundamental values that must be systematically reclaimed in order to facilitate a fair and just judicial selection process.

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