



Koch Brothers and D.C. Conservatives Spending Big on Nonpartisan State Supreme Court Races

By Billy Corriher August 2014

Introduction and summary

In his 2010 dissent in *Citizens United v. Federal Election Commission*, U.S. Supreme Court Justice John Paul Stevens warned that the majority had “unleashe[d] the floodgates of corporate and union general treasury spending” in judicial elections.¹ Justice Stevens wrote, “States ... after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.”² As if to underscore his concerns, judicial campaign cash set a record in 2012, and for the first time, the type of independent spending unleashed by *Citizens United* and other federal court rulings nearly exceeded the amount spent by the candidates.³

The 2014 judicial elections could see even more campaign cash, thanks to unprecedented plans by national partisan groups to spend millions to influence this year’s judicial races. The Washington, D.C.-based Republican State Leadership Committee, or RSLC, is now the first national party organization focused on electing judges.⁴ The RSLC was the biggest spender in the May 5 North Carolina Supreme Court primary election,⁵ and four of the seven seats on the court are up for grabs in November.

The RSLC tried unsuccessfully to unseat three Tennessee Justices on August 7. The group’s opposition campaign was aided by its “strategic partner” group, the State Government Leadership Foundation, or SGLF, and the Koch brothers-affiliated Americans for Prosperity, or AFP, both of which are organized under Section 501(c)(4) of the Internal Revenue Code.⁶ Groups claiming this tax status are not legally required to disclose the source of their money. Although all of the funders for these groups are not disclosed, it is known that the Koch brothers founded and substantially fund AFP,⁷ and the brothers’ corporation—Koch Industries—is one of the biggest donors to the RSLC.⁸

The RSLC, organized under Section 527 of the Internal Revenue Code, describes itself as “the only national organization whose mission is electing Republicans” to statewide office.⁹ The RSLC recently announced that its Judicial Fairness Initiative would “educate” the public about judicial candidates.¹⁰ The RSLC, combined with its SGLF partner, was one of the biggest spenders in the August 7 Tennessee Supreme Court election. The race saw nearly \$1.5 million in cash for television ads, and two groups funded by RSLC—the Tennessee Forum and SGLF—spent more than \$500,000.¹¹ The RSLC helped fund attack ads in an unprecedented opposition campaign in which three judges were vying for new terms on the state supreme court.¹²

Unlike previous Tennessee judicial elections, the justices were forced to run ads funded by campaign cash from attorneys with a financial stake in the court’s rulings. Given its deep pockets, the RSLC could come to dominate nonpartisan judicial elections across the country—just as it has in Tennessee. More money means more attack ads and more fundraising by judicial candidates.

The Democratic Legislative Campaign Committee, or DLCC, is also working to elect state-level candidates, but it has raised much less money than its Republican counterpart in recent years. *Politico* reported that the DLCC “was only able to raise about a third as much” money as the RSLC for the 2010 elections.¹³ Pro-business and conservative groups accounted for 7 of the top 10 spenders in 2010 judicial elections.¹⁴ Although some national liberal groups have spent on judicial elections, no entity affiliated with the national Democratic Party has announced plans to make judicial elections a priority.

A *Washington Post* blogger reported in April that RSLC President Matt Walter predicts his organization will “spend north of \$5 million on judicial elections this year.”¹⁵ The RSLC spent \$27 million on state-level political races in 2012,¹⁶ and *Politico* noted that the RSLC raised a total of \$39 million that year.¹⁷ *The New York Times* described the RSLC’s then-President Ed Gillespie as playing “a central role in efforts to swing state legislatures to Republican control” in 2010.¹⁸

As the RSLC collects money for 2014, new revelations are raising questions about its massive 2010 campaign war chest. *Politico* published an internal RSLC investigation that determined that the RSLC and a prominent Alabama Republican “conspired improperly ... to use the RSLC as a pass-through for controversial Indian tribe donations, essentially laundering ‘toxic’ money from the gaming industry by routing it out of state and then back into Alabama.”¹⁹ The well-known law firm that

conducted the investigation warned the RSLC: “If these events are made public, the resulting media frenzy will be a political disaster for Alabama Republicans, a disaster with which RSLC will forever be associated.”²⁰ A report from ProPublica found that the RSLC also created a dark-money nonprofit group to fund its work on redistricting for GOP politicians.²¹

RSLC President Walter told *The New York Times* that his group had already raised \$24 million in the first half of 2014, which, according to the article, is “close to twice as much as it had raised by the same point in the 2010 election cycle, when his [Walter’s] party took control of 21 state legislative bodies.”²² In contrast, the DLCC raised just \$8.4 million through the end of June.²³ AFP spent more than \$100 million on federal elections in 2012,²⁴ and it has spent millions on state and local elections—including judicial races—in states, including Wisconsin and North Carolina.

Given the historically sleepy nature of nonpartisan judicial elections, why are national conservative groups suddenly spending so much on these races? RSLC President Walter provided some insight, telling *The Washington Post*: “Republicans have had a significant amount of success at the state level, not only being elected to offices but implementing bold conservative solutions. ... Unfortunately, that’s running into a hard stop with judges who aren’t in touch with the public.”²⁵

The RSLC plans to spend big to elect judges who share the group’s political leanings and conservative agenda. Walter’s remarks suggest that this plan is a direct response to judges striking down conservative statutes as unconstitutional.

This unprecedented campaign funding effort by the RSLC and other conservative groups comes as independent spending is playing an increasingly important role in judicial races. All state supreme court candidates raised a combined total of \$33 million in 2011 and 2012. According to a report released by Justice at Stake, the Brennan Center for Justice, and the National Institute on Money in State Politics, outside campaign cash could soon dwarf the amount of money raised by judicial candidates. The report noted, “When independent spending by political parties is also included, total non-candidate spending in 2011–12 was a record \$24.1 million, or 43 percent of total spending.”²⁶

The RSLC announced its national judicial elections initiative shortly after Tennessee Lt. Gov. Ron Ramsey (R) began organizing a campaign to unseat three Tennessee Supreme Court justices in an August 2014 election.²⁷ The three targeted justices—Sharon G. Lee, Cornelia Clark, and Gary R. Wade—were all named to the bench by former Gov. Phil Bredesen (TN-D).²⁸ Two years before the RSLC launched its ambitious judicial elections effort, the group spent more than \$1 million in the 2012 North Carolina Supreme Court race, far more than any other spender.²⁹ Barring unforeseen circumstances, the RSLC could spend even more money in this year’s state supreme court race in North Carolina.³⁰

Independent money dominated May’s Arkansas Supreme Court election as well. The race was overwhelmed by a group that pioneered dark money—campaign cash from undisclosed donors—and soft-on-crime attack ads in judicial elections. Years before the *Citizens United* decision, the secretive Law Enforcement Alliance of America, or LEAA, was running attack ads against judicial candidates it did not like.³¹ In the recently contested Arkansas race, the LEAA ran ads attacking candidate Tim Cullen for arguments he made years earlier while representing an accused criminal as a court-appointed attorney.³² Cullen lost to now-Justice Robin Wynne in a tight race.³³ The LEAA spent more than \$300,000, compared to just over \$40,000 in spending by the candidates.³⁴ Given the low salience of judicial elections, the LEAA’s barrage of attack ads must have made some difference.

The RSLC and AFP are now taking a page from LEAA’s playbook and funding soft-on-crime attack ads to scare the electorate into voting for their preferred judicial candidates. Even worse, these partisan groups are running ads in states where legislatures recently reformed judicial elections from partisan—where candidates appeared on the ballot with a party designation—to nonpartisan contests.

Arkansas, North Carolina, and Tennessee are the states that most recently changed from partisan to nonpartisan judicial elections.³⁵ (Mississippi also switched from partisan to nonpartisan judicial contests in recent years, but it is not included in this report.) Arkansas, North Carolina, and Tennessee witnessed a nationwide explosion of judicial election spending in the late 1990s and took steps to stem the tide of corporate campaign cash in their state elections. Tennessee lawmakers implemented a merit-selection system for appointing its high court justices in 1994. The “Tennessee Plan,” as it was dubbed, replaced a system in which judicial candidates were nominated by state political party committees and then went before the voters in partisan general elections.

Arkansas voters approved a constitutional amendment in 2000 that instituted nonpartisan judicial elections—a change that was supported by the state GOP and opposed by the state Democratic Party.³⁶ Likewise, North Carolina switched from partisan to nonpartisan judicial elections in 2004 through a successful and popular public-financing program for appellate court candidates. This program, however, was repealed by the Republican-dominated North Carolina legislature last year.³⁷

National conservative groups, most of which are headquartered in Washington, D.C., are now inundating the nonpartisan judicial elections in Arkansas, Tennessee, and North Carolina with partisan campaign cash. The 2012 Center for American Progress report “Partisan Judicial Elections and the Distorting Influence of Campaign Cash” asked why partisan judicial elections have seen significantly more total campaign contributions than nonpartisan races have. According to the report, in states with partisan elections:

There is a ready-built infrastructure for ‘bundling’ donations in place, with state parties acting as conduits for special interests. ... In partisan elections, campaign donors can be much more certain of a candidate’s views prior to donating money. ... Justice James Nelson of the Montana Supreme Court said that special interests want ‘their judge’ on the bench. ‘In partisan elections they have a leg up, as they already know the judge’s likely political philosophy.’³⁸

The report concluded, “When campaign costs rise, all judges feel the pressure to please interest groups that spend big on judicial races.”³⁹

The Koch brothers and the RSLC are pouring big money into these nonpartisan races. Increasing campaign cash will lead to more pressure on judges to issue rulings that please campaign contributors and more pressure to appear tough on crime. This increased interest in state judicial elections is simply an effort to protect conservative legislative agendas from legal challenges.

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