

THREATENED: Judicial Independence

Root Causes and the Role of Disinformation

Interviews conducted between March and May 2020



New Tactics
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Table of Contents

EXECUTIVE SUMMARY

KEY TAKEAWAYS	3
THREATS TO JUDICIAL INDEPENDENCE & ROOT CAUSES	3
POLARIZATION OF A NATION & DISINFORMATION IN THE JUDICIARY	3
OPPOSITION AND ALLY TACTICS	4
RECOMMENDATIONS	5
Convening Power Recommendations	5
Procedural Support Recommendations	6
Legislative Support Recommendations	7

FULL REPORT

PROJECT BACKGROUND & DISINFORMATION	8
Context: Foreign and Domestic Disinformation	9
NEW TACTICS IN HUMAN RIGHTS OVERALL FRAMEWORK.....	11
Analysis Framework	11
New Tactics Terminology: ALLY & OPPONENT TACTICS.....	11
ROOT CAUSES	12
ROOT CAUSE #1: INSTITUTIONAL RACISM.....	13
Racist laws and policies (Content)	15
Racism in the implementation of laws and policies (Structure)	19
Breaking with tradition – speaking out on racial injustices (Culture)	23
ROOT CAUSE #2: BIG MONEY IN POLITICS & THE RISE OF “DARK” MONEY:.....	27
Laws and policies that favor deep pockets (Content)	30
Implementation of laws that favor deep pockets (Structure)	33
Deep pockets leverage cultural and identity divides (Culture)	37
ROOT CAUSE #3: LACK OF PUBLIC UNDERSTANDING OF THE JUDICIARY:	39
Disinformation exploits the lack of civic education (Content)	41
Exploitation of public “echo chambers” of communication (Structure)	43
The clash of “rule shifts” and “culture shifts” (Culture)	47
DEMOCRACY, THE JUDICIARY, AND DISINFORMATION: AN OHIO CASE STUDY	52

EXECUTIVE SUMMARY

Judges hold tremendous power over our communities and as voters, it's on us to learn about who they are and what they do so we can hold them accountable.

This report highlights how special interests use disinformation to accentuate pre-existing fissures in our judicial system to threaten the rights of individuals, particularly the most marginalized and vulnerable in our society. The key takeaways and recommendations presented here are the result of interviews **New Tactics in Human Rights**¹ conducted in the spring of 2020 with fifteen professionals working directly or tangentially with the Piper Fund on judicial independence. Those interviewed included grassroots activists, academics, lawyers, journalists, a retired judge, and communications specialists from across the country.

KEY TAKEAWAYS

THREATS TO JUDICIAL INDEPENDENCE & ROOT CAUSES

We asked professionals in the judicial independence field to identify the most pressing threats to an independent judiciary. Interviewees identified issues including, but not limited to, the politicization of judicial elections, lack of recusal laws, jurisprudence that has gradually come to favor the rights of corporations over individuals, legislative attacks on the state level, and lack of diversity on the bench.

When we drilled further to understand what led to these intractable problems, we saw areas of significant, though not unanimous, consensus around issues that provide fodder for disinformation campaigns to be successful in undermining the judiciary. For these reasons we focused our findings around three identified “root causes”:

- Institutional racism
- Money in politics - particularly “dark money”, and
- Lack of public understanding of the judicial system.

POLARIZATION OF A NATION & DISINFORMATION IN THE JUDICIARY

Underlying these root causes is a moment of great polarization in our nation. Interviewees repeatedly identified polarization along cultural identity lines as a major roadblock to solving problems within state and federal courts. Interviewees also described increasingly entrenched opinions among the public,

¹ New Tactics in Human Rights is a program of the Center for Victims of Torture which emerged from CVT'S experience as a creator of new tactics, a leader of coalitions, and as a center that also advocates for the protection of human rights from a unique position – one of healing and of reclaiming civic leadership. New Tactics has developed a five step human rights advocacy process. <https://www.newtactics.org/training#method>

judges, lawyers, and policy makers due to disinformation in mainstream and social media. The polarization is not accidental: Many interviewees described the proliferation of disinformation campaigns funded by wealthy special interests that create and deepen divides along cultural identity such as race, geography and attitudes towards government.

In particular we found that judicial institutions and judges stand at a difficult crossroads, being both targets of disinformation as well as arbitrators for protecting democratic freedoms. If Piper is to play a role in preventing disinformation from eroding an independent judiciary, it must focus on fixing the cracks in the judicial system that are so easy for disinformation campaigns to exploit, namely: institutional racism, the outsized influence of big money on judicial processes and decision making; and the lack of public understanding of the judiciary.

OPPOSITION AND ALLY TACTICS

Over the course of the interviews, we noticed some marked differences between the tactics used by opponents and allies of an independent judiciary. We have put these into three tactical categories of “content,” “structure,” and “culture,” which we further describe in our full report.

Broadly speaking, opponents of judicial independence have used a three-prong approach of changing laws and policies (content), changing implementation mechanisms and regulations regarding that content (structure), and manipulating identity divides (culture), most notably around race, immigration, xenophobia, abortion, and guns. Over the last several decades these tactics have advanced right-wing conservative strategic goals to shift the culture of the legal establishment at law schools, on the bench, and in legal thought toward advancing and protecting corporate interests, curtailing regulation, and consolidating power in the hands of the wealthy.

We found that Piper allies, or advocates for an independent judiciary, focused less on the identity divides (culture) provoked by opponents. Rather, allies have generally focused predominantly on changing the ways policies, laws and regulations are implemented (structure). Allies have relied heavily on legal mechanisms, and particularly litigation, which

The Need for Strategy Development

In other areas we have ready to go policies, but there is a lack of a shared solution on this that makes it difficult to advocate for fair courts. We have a vision but we don't have a shared commitment to the tools to get us there! What are the tangible things we are going to do this year - like merit-based selection, stronger recusal rules.

depend upon the courts to rule in favor of individual and common good rights. Fewer allies explicitly discussed changing **the culture** of the bench, law schools, or judicial independence organizations. Advocates who have indeed addressed identity divides (culture) succeeded in building bridges and understanding between justices, legislators, and citizens through public engagement efforts.

Oppositional gains over the last several decades may have caused judicial independence advocates to be more reactive rather than proactive in their tactics. Even some recent movement in allies' civic education and public outreach efforts requires grappling internally with the thorny issues of power, racism, classism, sexism, elitism, and the role of judges within the judiciary. We wonder whether this may be why more ally tactics focus on structures related to implementation of laws and policies rather than talking about the culture of the judiciary.

RECOMMENDATIONS

Convening Power Recommendations

- *Focus on Conversations on Institutional Racism Within the Judiciary*

Convene groups within and beyond their funding sphere with a range of intersecting movements, such as judicial independence, racial justice, criminal justice, pro-democracy. Any judicial independence movement must address race and culture in order to build a national strategy and address the polarization that fuels disinformation. Facilitate relationship building to address points of divergence, build points of consensus, and build positive messaging. This is challenging as judicial independence issues vary greatly by state. However, there is a need to bridge those who view judicial independence through a “culture, race, and class” lens versus those who view it through a “structure/procedure lens.”

- *Focus on Strategy Building and Messaging Using Emotions / Values / Identity*

Convene groups from across states to identify and mobilize on shared strategy and goals. One way of combating disinformation is by building a judicial independence movement with a strong message and getting that message out to targeted members of the judiciary and the public. Here we encourage further exploration of messaging from the Race-

What people shared...

Messaging

There is not one constitution, there are 50 constitutions, making messaging challenging.

Judicial independence experts are really procedural people and they genuinely get emotional about policy and structure, but the rest of the world isn't like that. They don't get emotional about codes of conducts or other things like that.

Disinformation

We often don't know what or who is behind the opposition and we need to know more.

Judicial Civic Education

Many members of this educated electorate admitted they were embarrassed by how little they knew about judicial elections and the judiciary in general.

Class Narrative Project, especially as it relates to disinformation campaigns intended to exacerbate identity divides. Craft a narrative and guiding points grounded in an emotions/values/identity framework that can be used consistently and adapted by states.

- *Focus on Messengers with Diverse Perspectives and Experiences*

Rather than focusing solely on “diversity” in terms of demographics help groups prioritize and integrate “diverse perspectives and experiences” into their institutional structure, their outreach, and advocacy activities. When supporting judicial independence campaigns, assist groups in identifying multiple messengers that resonate among many racial, gender, and other cultural identity target audiences, including urban and rural.²

- *Focus on Combatting Disinformation*

Organizations struggle to understand, let alone combat, emerging social media tools and the rapid pace of communication. Create a public resource using easily digestible, visual examples of disinformation which can be adapted for education and public outreach with judges, lawyers, and grassroots organizers. The resource should demonstrate how disinformation campaigns tied to wealthy special interests are influencing judicial decision making, threaten an individual’s right to a fair trial, and ultimately the ability to participate in democracy. Share case studies where counter tactics were successful in combatting disinformation.

Public mistrust

For a variety of reasons many members of the American public already mistrust the judiciary, so disinformation that casts doubts on the fairness and independence of the judiciary further erodes confidence in the institutions of justice.

- *Focus on Judicial Civic Education*

Create opportunities for interactions between judges, the public and legislators. Include opportunities for the public and legislators to understand the role of judges; and address explicit and implicit bias in the judicial system by creating opportunities for judges to understand the communities within and outside their jurisdiction.³ Encourage the use of training tools for public engagement on the judiciary and judicial independence. Create new messaging tools based on research demonstrating that people receive messages differently depending on their own identity and the identity of the messenger. Civic education should shift culture within the judiciary and make the courts more understandable and relatable to the public, in part to address opponents messaging that the judiciary is elite and activist.

Procedural Support Recommendations

- *Focus on Grassroots Campaigns Advancing Judicial Procedural Reforms*

² Judicial Independence Message Research 2017, (shared privately with New Tactics), Goodwin Simon Strategic Research, Conducted on behalf of Piper Fund, a Proteus Fund Initiative.

³ National Center for State Courts, Appendix A: Issues Identified in the “Courting Justice” Listening Tour, Last accessed, July 20, 2020, https://www.ncsc.org/data/assets/pdf_file/0025/28465/appendix-a.pdf; and National Center for State Courts and University of Nebraska Public Policy Center, Building Trust by Building Trustworthiness: A Toolkit for Public Engagements Addressing Disparities in the Courts, https://www.ncsc.org/data/assets/pdf_file/0027/28467/overview.pdf

In order to build a judicial independence movement allies need to connect judicial independence to the issues that matter to people. Support grassroots campaigns implementing procedural reforms that target the rights of Black, Brown and other marginalized communities (such as police accountability, voting rights, “cite and release” no-cash bonds, paid sick leave, living wages, clean air, water, and energy, etc.).

- *Focus on Traditional or Newly Emerging Swing States for Judicial Reforms*

Target state-level advocacy in states where legislators may be more likely to implement rules on judicial selection, ethics and recusal.⁴ One interviewee suggested that swing states tend to have politicians representing constituencies from both political parties, and therefore may be able to persuade the public that judicial independence reforms are bipartisan or apolitical.

- *Focus on Modeling Merit-Based Judicial Selection Systems*

Support advocacy efforts working to preserve well-functioning Merit-Based systems to serve as models for other states. We recommend supporting education efforts targeted at legislators and the public to counter attacks on merit-based selection systems. However, the judicial sphere must address bias as a factor limiting diversity on the bench even within Merit-Based systems.⁵

Legislative Support Recommendations

- *Focus on Legislation with Impact on Judicial Independence*

Support efforts to pass legislation, such as the “Judicial Ads Act”.⁶ One important aspect of the bill would require “dark money” judicial groups to reveal their donors. Additionally, support efforts to influence the U.S. Supreme Court to adopt a code of ethics.⁷ Two other forms of legislation that would impact judicial independence are the “Honest Ads Act 243”⁸ introduced in the Senate (‘17), and the more comprehensive “For the People Act”⁹ passed in the House (‘19). Both provide election reforms to address dark and gray money influences. The Honest Ads act, however, would increase disclosure by groups that spend in federal elections, but would not apply to spending in state elections.

- *Focus on Disinformation Legislation*

Support legislative advocacy efforts to address transparency and accountability regarding foreign and domestic interference through measures such as: campaign finance reform, foreign agent disclosure, tagging adversary-operated “bots”, and disinformation reforms that include social media platforms.

⁴ Matthew Menendez and Dorothy Samuels, “Judicial Recusal Reform: Toward Independent Consideration of Disqualification”, Brennan Center, November 30, 2016, <https://www.brennancenter.org/our-work/research-reports/judicial-recusal-reform-toward-independent-consideration-disqualification>

⁵ Judicial Independence Message Research 2017, (an online presentation shared with New Tactics), Goodwin Simon Strategic Research, Conducted on behalf of Piper Fund, a Proteus Fund Initiative.

⁶ “Feinstein, Whitehouse Introduce Bill to Combat Dark Money in Judicial Nominations”, United States Senator Diane Feinstein Office, July 2, 2020, <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=10A6C4A7-0631-4143-8BD9-B4459F4629E4>

⁷ Brennan Center for Justice at NYU School of Law, “Brennan Center Urges Supreme Court Justices to Adopt a Code of Ethics”, Brennan Center, September 24, 2019, <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-supreme-court-justices-adopt-code-ethics>

⁸ Tim Lau, “The Honest Ads Act Explained”, Brennan Center, January 2020, <https://www.brennancenter.org/our-work/research-reports/honest-ads-act-explained>

⁹ “Annotated Guide to H.R. 1, the For the People Act of 2019”, Brennan Center, April 13, 2020, <https://www.brennancenter.org/our-work/policy-solutions/annotated-guide-hr-1-people-act-2019>

PROJECT BACKGROUND & DISINFORMATION

The Piper Fund contracted the Center for Victims of Torture - New Tactics in Human Rights program to use our human rights-based approach to identify potential strategic funding directions for judicial independence advocacy. The project was spurred by Piper's own focus on judicial independence¹⁰ and the growing evidence of how **disinformation** by foreign and domestic actors has been targeting the judiciary, one of the pillars of democracy. Through contract, the Piper Fund sought to cull allies' knowledge on the nature of disinformation regarding the judiciary and the threats disinformation may pose to an independent judiciary.

During the late winter and early Spring of 2020 New Tactics conducted 60 minute interviews with fifteen professionals working directly or tangentially with Piper on judicial independence. These professionals included grassroots activists, academics, lawyers, journalists, a retired judge, and communications specialists who reside across the country. Our questions included:

- Where and how is disinformation being used regarding judicial independence and processes?
- What are the greatest current threats to an independent judiciary, and what do you see as the root cause of these threats?
- What tactics do opponents and allies use to weaken or strengthen judicial independence?
- What recommendations would you give to Piper and other funders?

We recognize that the terminology surrounding disinformation can be as confusing as the concept itself. Some use 'misinformation' and 'disinformation' synonymously. Others refer to misinformation as 'fraudulent news,' 'junk news,' and 'fake news.' In the context of the judiciary, disinformation is used by actors to intentionally harm judicial institutions as a critical pillar of democracy. The differences in terms are outlined in the following way:

- **Disinformation:** Information that is false and deliberately created to harm a person, social group, organisation or country
- **Misinformation:** Information that is false but not created with the intention of causing harm
- **Mal-information:** Information that is based on reality, used to inflict harm on a person, social group, organisation or country.¹¹

For the purposes of this report, we are most concerned with **disinformation**¹², and use a definition from [UNESCO](#) as the foundation:

Disinformation is generally used to refer to deliberate (often orchestrated) attempts to confuse or manipulate people through delivering dishonest information to them. This is often combined with parallel and intersecting communications strategies and a suite of other tactics like hacking or compromising of persons. Misinformation is generally used to refer to misleading information created or disseminated without manipulative or malicious intent. Both are problems for society, but

¹⁰ Piper Fund, "Judicial Independence" 2020, <https://www.proteusfund.org/piper/judicial-independence/>

¹¹ UNESCO, "Journalism, 'Fake News' and disinformation" 2018, <https://en.unesco.org/fightfakenews>; See also a UNESCO video regarding a discussion of disinformation (information disorder): <https://www.facebook.com/4a780be5-2a52-4793-b406-b250cc202171>

¹² Cherilyn Ireton and Julie Posetti, "Journalism, 'Fake News' & Disinformation: Handbook for Journalism Education and Training", UNESCO, 2018, page 7, https://en.unesco.org/sites/default/files/journalism_fake_news_disinformation_print_friendly_0.pdf

disinformation is particularly dangerous because it is frequently organised, well resourced, and reinforced by automated technology. [Emphasis ours.]

Context: Foreign and Domestic Disinformation

The Piper Fund became interested in disinformation when experts started reporting on the potential for foreign and domestic actors to use disinformation to weaken the judiciary. Robert Mueller's Special Counsel Investigation (2017-19) showed the public just how insidious and sophisticated Russia's efforts were to influence the outcomes of executive and legislative elections. Concurrently some analysts began warning that foreign and domestic actors alike could use disinformation tactics to influence judicial elections and other judicial processes. Indeed, experts went so far as to frame the problem as a national security threat. And while national security experts were sounding the alarm, most judicial independence advocates in the Piper Fund's sphere did not talk about disinformation as an overriding threat to their work. This disconnect caused the Piper Fund to contract New Tactics in Human Rights to explore the nature of disinformation within the judiciary and what might be done about it.

To aid in this exploration we researched and interviewed experts about disinformation and provide here a few helpful points of context, including: who we mean by foreign and domestic actors, experts' opinions on the threat of disinformation in the judiciary and potential solutions; as well as legislative attempts to combat disinformation through media and election regulation.

Over the last decade high profile cases of disinformation have been attributed to foreign adversaries using tactics to undermine United States institutions. Russia is the most active and long-standing adversary and has deliberately and effectively eroded democratic institutions using the Kremlin Playbook¹³. Perhaps the most infamous and well known example includes that of the Internet Research Agency (IRA), a propaganda wing of Russia, which has successfully used social media platforms to exploit America's divides.¹⁴ Russia is now joined by other actors such as Iran, China, and Saudi Arabia engaging in similar tactics. Foreign interference will continue with ever changing tactics that will raise new challenges given constantly emerging technologies.

Foreign Disinformation

The United States requires a national strategy to counter foreign adversary threats to democratic institutions. If the administration is not ready to lead development of such a strategy, it must be created and implemented by concerned individuals in Congress, the judiciary, state and local governments, civil society, and the private sector. This strategy, in brief, must outline how to respond to the 'Kremlin playbook' as implemented in the United States and as it may be adapted by other adversaries.

Suzanne Spaulding, "Countering Adversary Threats to Democratic Institutions" Pages 13-14, Center for Strategic & International Studies, February 14, 2018, <https://www.csis.org/analysis/countering-adversary-threats-democratic-institutions>

¹³ Heather A. Conley, "The Kremlin Playbook" Center for Strategic & International Studies, October 13, 2016, <https://www.csis.org/analysis/kremlin-playbook>

¹⁴ Nicholas Thompson, Issie Lapowsky, "How Russian Trolls Used Meme Warfare to Divide America", Wired, December 17, 2018, <https://www.wired.com/story/russia-ira-propaganda-senate-report/>

For a variety of reasons many members of the American public already mistrust the judiciary, so disinformation that casts doubts on the fairness and independence of the judiciary further erodes confidence in the institutions of justice. Targeting the justice system through disinformation also undermines an effective tool for countering the success of interference by foreign adversaries. Russia's strategic and tactical use of disinformation *"aims to sow discord by incensing individuals on both sides of divisive issues. A recurring theme of the Russian IRA's Facebook ads was racial inequality...Russia's information operations aim to divide Americans by extrapolating instances of judicial shortcomings to the entire judicial system, politicizing the judicial branch, and undermining trust in its ability to make fair, unbiased decisions."*¹⁵

On the domestic front, the realities of institutional racism, political polarization, and other social/cultural divides in the United States accentuate the challenges to successfully counter disinformation. Disinformation is also being fomented by and for Americans on the right and the left. Nathaniel Gleicher, Facebook's head of security stated, *"If you look at volume, the majority of the information operations we see are domestic actors."* He added that Facebook is struggling with taking down domestic networks because of the "blurry lines between free speech and disinformation."¹⁶ Social media platforms are beginning to respond with a variety of actions including: *"revisions to their algorithms; partnerships with third-party fact-checkers and other civic initiatives; increased transparency regarding their advertisements and advertising policies; new waves of account shutdowns for non-compliance with Terms and Conditions; and more active collaboration with political campaigns and the government to proactively combat fraudulent news."*¹⁷

This lack of a national strategy is evident on a number of fronts - particularly legislative and media fronts. Congress has been stymied in its response to disinformation. The Federal Elections Campaign Act (FECA), passed 50 years ago, is sorely out of date. Disclosure of corporate or other foreign political funding is essential to combatting disinformation. Legislative solutions have been introduced such as the Honest Ads Act, introduced in the Senate in 2017. The For the People Act passed the House in 2019 and provides a comprehensive election reform bill that includes updated provisions of the Honest Ads Act 243. These legislative acts have been stalled by Senate Majority leader Mitch McConnell¹⁸ despite two Senate-commissioned reports released in 2018 that described the way in which Russia disproportionately targeted African Americans and other minority groups and the potential impact of these campaigns on the 2016 and 2018 elections. Russian social media propaganda emphasized shared grievances among the targeted groups, undermined a shared national identity and eventually used disinformation to encourage the targeted groups to disengage or protest against corrupt and broken institutions.¹⁹

¹⁵ Suzanne Spaulding, Harvey Rishikof, "How Putin Works to Weaken Faith in the Rule of Law and Our Justice System", Lawfare, September 17, 2018, <https://www.lawfareblog.com/how-putin-works-weaken-faith-rule-law-and-our-justice-system>

¹⁶ Sheera Frenkel, "Facebook Tackles Rising Threat: American Aping Russian Schemes to Deceive", New York Times, October 11, 2018, <https://www.nytimes.com/2018/10/11/technology/fake-news-online-disinformation.html>

¹⁷ Ibid, pg 4.

¹⁸ "Truth on the Ballot: Fraudulent News, Midterms Elections, and Prospects for 2020", Pen America pg. 27, Pen.org, March 13, 2019, <https://pen.org/wp-content/uploads/2019/03/Truth-on-the-Ballot-report.pdf>

¹⁹ Devi Nair, Suzanne Spaulding, "Why Putin Targets Minorities", Center for Strategic & International Studies, December 21, 2018, <https://www.csis.org/analysis/why-putin-targets-minorities>

NEW TACTICS IN HUMAN RIGHTS OVERALL FRAMEWORK

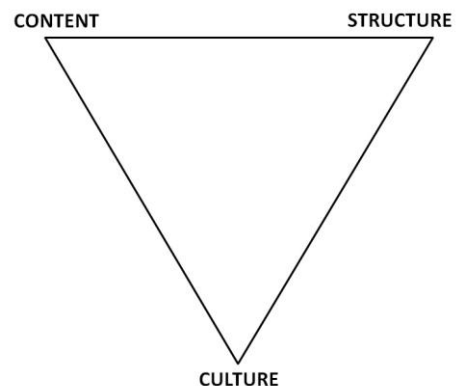
Analysis Framework

The New Tactics' Strategic Effectiveness Method²⁰ provides the Piper Fund with an advocacy framework that includes: perspectives on identifying the problem, mapping a terrain of individuals related to the problem, and determining options for strategic paths. The aim of this method is to help Piper identify avenues for future investments and actions.

As we dug deeper into the threat of disinformation on judicial independence we leaned on a framework embedded within our New Tactics Strategic Effectiveness Method to analyze the problems and root causes Piper allies identified in our interviews. We used a “triangle analysis”²¹ to categorize these problems and roots causes into three main categories of content, structure and culture, which we define below. This provides an opportunity to highlight areas of consensus and divergence regarding threats to judicial independence and formulate responses to: root causes; targets for organizing campaigns and trends in oppositional and allied tactics; and recommendations.

When applying the triangle analysis to judicial institutions and threats to judicial independence, we will consider the following analysis framework:

- **CONTENT:** This refers to legal foundations such as the constitution (federal and state), international treaties, laws, policies, mandates, customary laws, budget appropriations and allocations.
- **STRUCTURE:** This refers to the actual *implementation* or *application* of mechanisms, processes and institutions that are mandated to regulate and enforce law and policy.
- **CULTURE:** This refers to people, the shared or divergent values, attitudes, biases, experiences, and behaviors of people as these relate to both content and structure.



New Tactics Terminology: Tactics

Throughout this report, **tactics refer to a specific action or combination of actions** taken to address some aspect specific to or related to judicial independence and disinformation. Two other terms used are **ally tactics** and **opponent tactics**. **Ally tactics** refer to actions that have been taken by people, groups or institutions that are working on areas of mutual benefit regarding some aspect of disinformation related to or specific to judicial independence. **Opponent tactics** refer to actions taken by people, groups or institutions whose aim has been to obfuscate and influence judicial laws, implementation processes and selection of judges through disinformation or other ways that undermine judicial independence.

²⁰ New Tactics in Human Rights, Strategic Effectiveness Method. <https://www.newtactics.org/training>

²¹ Margaret Schuler, *Empowerment and the Law*, Triangle Analysis, 1986; Lisa VeneKlassen and Valerie Miller, *A New Weave of Power, People, and Politics: The Action Guide for Advocacy and Citizen Participation*, 2002; and Nader Tadros, *Advocacy: People's Power & Participation*, People's Advocacy, 2010.

ROOT CAUSES

To learn more about allied and oppositional tactics we first asked Piper allies, “What are the greatest current threats to an independent judiciary, and what do you see as the root cause of these threats?” We expected most answers to fall along current hot topics related to judicial independence, such as calls for recusal laws and dark money. However we were not anticipating the recurring identification of one theme, which emerged only after we asked probing questions like, “why isn’t there more headway on recusal laws or overturning voter suppression legislation?” We became familiar with long pauses and answers like: “I think it’s because we are so polarized as a country;” or “we are so artificially polarized we can’t even build consensus on security, it’s not even a polarizing issue,” or, “Polarization! Polarization! Polarization!”

We finished up our interviews as states across the nation shut down over the COVID-19 pandemic and days before George Floyd was murdered at the hands of Minneapolis police, setting off social uprising and protests across the country against, generally speaking, government efforts to reign in the Corona virus on the one hand, and systemic racism on the other. These two events have set into motion perhaps the clearest illustration of the polarization mentioned in our interviews, along with the role disinformation can play in further polarizing a nation. However, even before the spring of 2020 those interviewed for this report described how polarization operates through a wide variety of cultural identity divides (whether real or artificially created) including:

- Race: white vs black, brown and other people of color
- Religion: conservative family values vs liberal and LGBTQI rights; pro-life vs pro-choice Christian vs Muslim (as well as other faiths or atheist)
- Geography: rural vs urban; suburban vs inner city; red states/districts vs blue states/districts
- Xenophobia: Americans versus other countries/nationalities
- Issue specific: anti-government regulation vs pro-government regulation that can be seen in various issues such as: gun-rights vs gun-control; pro-immigration vs anti-immigration; public vs private education; pro-business “jobs” vs pro-labor “wages/unions”; criminal justice reform vs law and order (“hard” on crime).

Each of these root causes provides critical insights into how disinformation has been so effective in undermining judicial institutions and independence. Our interviewees rarely brought up disinformation as a primary problem or root cause, but rather as a symptom that highlights other problems regarding the judicial system, such as the judicial selection and election processes where wealthy special interests play an outsized role. The internal and external threats that attack public confidence in our justice system have the longer term potential of not only eroding judicial independence, but of convincing people that the system is “irrevocably broken.”

ROOT CAUSE #1: INSTITUTIONAL RACISM

Our interviews showed subtle but important variations in how race is viewed by those in the more explicit judicial independence sphere (who were mostly white) and those working at the community and grassroots levels who are further removed from the legal sphere (who were multiracial).

Those more closely tied to the legal sphere (judges, lawyers, and policymakers) generally did not prioritize reducing racial inequities in the judicial system as integral to judicial independence. They often referred to the criminal justice sector as a separate field, or mentioned racism as a tertiary problem. In some cases they were reluctant to address racism for fear that it would divide those working to build a judicial independence movement. On the other hand, those working at the community level (grassroots, community based organizers, human rights-specific organizations, and communications specialists) generally operate in broader pro-democracy spheres and see racism as a central root cause that must be addressed. They often expressed institutional racism, implicit bias, the lack of diversity on the bench, and the unequal administration of justice between white and brown as a major threat to an independent independence.

While subtle and important differences emerged in our interviews on the role of racism as a threat to judicial independence, we did find some areas of consensus:

- **Judicial Selection**

Racism exists in the selection of our judges, despite some efforts to address

What people shared...

About Racism

We have deep cracks in our judicial system based on race, but I personally think we focus too much on race in this country, that it further divides us. That is what “they” want us to do. [i.e. Russia, big money interests.]

I think it could be valuable to bring together more grassroots organizers and judicial independence scholars/advocates to have a conversation about institutional racism in the judiciary. But I think that conversation has to be facilitated very carefully. I was recently in a group and made a Chris Rock reference and nobody knew who he was, and I thought, oh boy, this is not going to go well.

About Messaging

Judicial independence advocates are very focused on procedure, and they get emotional about policies. But the rest of the public doesn’t get emotional about processes, so there is a lot of work to be done to connect values and emotions with judicial independence. And you can see how this works in terms of race and the judiciary and the messages we need to create, and the wide range of messengers we need to rely on to carry out these messages.

it. This stems from personal and institutional bias, and an educational system that produces dismal numbers of racial minorities graduating from law schools (among other causes).²²

- **Criminal Justice**

Interviewees agreed: reform efforts within the criminal justice field are critical to fixing the judiciary. However we found a lack of connection and individual relationships between those working in the criminal justice field and judicial independence. Time and time again, judicial independence advocates in legal/scholarly spheres lamented that they should be more in touch with people in the criminal justice field, but that they just lacked connections and institutional history. They were quicker to talk about diversifying the bench than to cite, for instance, unequal sentencing laws as a major threat to judicial independence.

What people shared...

I've noticed in the judicial independence sphere that people sort of tip toe around these issues [race and class] and have a hard time saying 'we live in a racist society and our institutions reinforce that'.

- **Judicial Role in Regulating Racist Disinformation Campaigns**

We might expect the judiciary to play a role in ruling against explicitly racist tactics in judicial and other democratic processes. However due to money in politics, public opinion shaped by disinformation, and, perhaps, due to a lack of diversity on the bench we are not broadly seeing the judiciary swoop in to stop racist tactics from proliferating as a normal part of American politics. We offer “Democracy, the Judiciary and Disinformation: An Ohio Case Study,” at the end of this report as a discussion tool for exploring issues and future action.

There are umpteen books and articles written about racism embedded into the content, structure and culture in our judiciary. We offer just a few examples from our interview with Piper Allies, chosen because they capture the current trends and themes mentioned predominantly across all of our interviews. Our methodology suggests that successful strategy and movement building relies on a deep understanding of opponents' tactics, but also successful tactics implemented by allies. It is our hope that Piper and others will get a chance to further explore some of the successful tactics highlighted in the rest of this report through further convening.

²² Allison E. Laffey and Allison Ng, “Diversity and Inclusion in the Law: Challenges and Initiatives”, American Bar Association, May 2, 2018, <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/#:~:text=In%20terms%20of%20racial%20and,identified%20as%20Hispanic%20or%20Latino>

RACIST LAWS AND POLICIES (CONTENT)

The unequal administration of justice between rich and poor, individuals and corporations, and starkly, between white and black and brown people through institutional racism is at a crisis point. Indeed, it is prime fodder to be exploited by foreign and domestic actors to purposefully widen those cracks by targeting communities with disinformation.

The effectiveness of disinformation in the United States sits squarely on the shoulders of racism, whose structures have been constitutionally and legislatively enshrined in our country's democracy. The first enslaved Africans' arrival in North America in 1619 set in motion over 400 years of slavery and ongoing structures of racial oppression.²³ It has been the judiciary's role to uphold those very systems put in place with the founding of our nation, and civil society's role to push back for incremental change in these systems. Naturally, this makes the issue of breaking racist structures within the judiciary a constant and uphill battle.

Since the 1980's the nation has experienced major losses in this struggle, as members of the far-right have gained traction in a legislative movement that envisions massive changes in the political and judicial order brought in by the New Deal. Those interviewed for this report were quick to contextualize renewed racist legislation within this hyper conservative movement to dismantle regulations that once curtailed corporate power and increased the rights of racial minorities, labor, women and children. As a result of this shift in legislation and cultural attitudes among conservatives the last four decades of jurisprudence has led to the rise of the rights of

People shared... *There is a tension between the concept of "judicial independence" and unwinding institutional racism.*

...

Courts often have, and continue to be, complicit in institutional violence or themselves perpetrators of it and, as a result, I have heard advocates in adjacent spaces say that the idea of judicial independence is one they struggle to support. One recent example of this tension can be seen in [campaigns in Chicago](#) to unseat judges that activists determined to be overly harsh in their sentencing. Anti-retention campaigns are, at their core, a sort of anti-judicial independence effort. But the campaign by Black Lives Matter Chicago and others also unseated a judge who had used his authority and independence to harm Black communities through the criminal justice system. If there are lessons we can learn about how to reconcile calling for "judicial independence" with the need to build a justice system that better recognizes the dignity of the communities it is supposed to serve, I know we would very much benefit from those as well.

Chicago campaign link:

<https://theappeal.org/for-the-first-time-a-chicago-judge-could-lose-his-seat-for-being-too-tough-on-crime/>

²³ 'History' Editors', "First enslaved Africans arrive in Jamestown, setting the stage for slavery in North America" A&E Television Networks History Channel, August 13, 2019, <https://www.history.com/this-day-in-history/first-african-slave-ship-arrives-jamestown-colony>

corporations over the rights of individuals and limits to the role of government.²⁴

This corporate rights legacy returned in 2013 when the Supreme Court struck down the heart of the Voting Rights Act of 1965,²⁵ disproportionately affecting communities of color. The decision freed nine states, and scores of counties and municipalities in other states, from the legislated requirement to seek federal approval in advance of making any changes in their election laws. The gutting of the Voting Rights Act opened the legislative floodgates in states, leading to a wide range of voter suppression tactics that target and disproportionately disenfranchise African Americans and other people of color from their rights to participate in governance.

The grassroots organizers we interviewed were working on just a handful of the hundreds of grassroots (time and money-intensive) initiatives that have emerged across the nation to fight back against renewed voter suppression tactics, as well as other legislation that intentionally or unintentionally chips away at the rights racial minorities.

OPPONENT TACTICS

VOTER SUPPRESSION

The NAACP has outlined how the Trump administration is appointing judges with "appalling records of enabling or defending voter suppression."²⁶ Voter suppression tactics have skyrocketed with voter registration and identification laws (content); cuts to early voting, mass purges of voter rolls, felony disenfranchisement, and gerrymandering of voting districts (structure). Certain communities - people of color, students, the elderly, and people with disabilities - are particularly susceptible to voter suppression and disinformation campaigns (culture).

- The American Legislative Exchange Council (ALEC) has created a highly effective tactic – “cookie cutter bills”²⁷ or legislators to easily introduce in state after state for laws that restrict not only voting rights, but laws that cut off collective bargaining rights, roll back protective environmental regulations on businesses, and a host of other corporate friendly legislation.²⁸
- Texas has some of the strictest voting laws in the United States. In 2017, the Texas Legislature raised penalties to state jail felonies or higher for most mail ballot related offenses. The Attorney General of Texas has made prosecution of voter fraud a key priority²⁹ and claims there are currently 75 voter fraud cases pending in the court.

²⁴ Lisa Graves, “The Koch brothers: The Extremist Roots Run Deep,” The Progressive, July 10, 2014, <https://progressive.org/dispatches/koch-brothers-extremist-roots-run-deep/>

²⁵ Adam Liptak, “Supreme Court Invalidates Key Part of Voting Rights Act,” The New York Times, June 25, 2013, <https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html>

²⁶ NAACP, “Trump’s Judicial Playbook: Weaponizing the Bench,” <https://naacp.org/wp-content/uploads/2019/07/WeaponizingTheBench.pdf>

²⁷ “Resources on ALEC,” Civil Liberties Defense Center, <https://cldc.org/alec/>

²⁸ Charles Denson, “ALEC: Corporate Interests Undermining Democracy in Our State Legislatures,” Civil Liberties Defense Center, May 18, 2015, <https://cldc.org/alec/>

²⁹ “Election Integrity,” Ken Paxton: Attorney General of Texas, <https://www.texasattorneygeneral.gov/initiatives/election-integrity>

ALLY TACTICS

MOBILIZING A COALITION OF ORGANIZATIONS FOR CRIMINAL JUSTICE REFORM

The Brennan Center for Justice and a coalition of more than 100 civil rights groups mobilized to ensure that a moderate, Republican-led criminal justice reform bill was amended to include serious changes to overly-long federal drug sentences. Improving conditions in federal prison was the focus for the White House and Republican leaders and, until civil rights leaders intervened, viewed as sufficient, without any need to touch drug sentencing laws. However, advocates pushed back, noting that federal mandatory minimum sentences were the catalyst for a surge of unnecessarily harsh prison sentences, and insisting on change. More than two-thirds of federal prisoners serving a life sentence have been convicted of nonviolent crimes which disproportionately affect African Americans, Native Americans, and Latinos. Thanks to revisions made at the insistence of the Brennan Center and others, the final version of the First Step Act shortened several key drug sentences. Critically, judges now have greater discretion to deviate from the mandatory minimums during sentencing in some cases. The result is some 2,000 people will receive shorter sentences every year going forward, and around 3,000 people have already had their prison terms retroactively shortened.³⁰ The bill has some notable shortcomings, leaving significant mandatory minimum sentences in place and failing to ensure retroactivity for some key provisions.³¹ And, key parts of the bill – such as expanding educational, vocational, and other programming in prisons – remain under-implemented.³²

FELONY RE-ENFRANCHISEMENT

Due to racial bias in the criminal justice system, felony disenfranchisement laws disproportionately affect Black people. For example, across the country, one in 13 Black Americans cannot vote due to disenfranchisement laws.³³ The Brennan Center has worked on felon re-enfranchisement for nearly two decades. Allies including the Brennan Center, succeeded in 2018, when Florida voters passed a ballot measure³⁴ (structure) that re-enfranchised about 1.4 million Floridians. Florida Republicans immediately responded with legislation (content) to limit the re-enfranchisement. Allies immediately filed suit challenging the new law (structure) and received a small partial victory from the Florida judiciary. Today, 39 states offer some kind of restoration of voting rights to felons (content).³⁵

³⁰ Ames Grawert, “What is the First Step Act and What’s Happening With it?” Brennan Center for Justice, June 23, 2020, <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>

³¹ Aliana Knoepfler and Ames Grawert, “Under Trump’s First Step Act Thousands Have Been Released From Prison,” The Forward, September 12, 2019, <https://forward.com/opinion/431356/under-trumps-first-step-act-thousands-have-been-released-from-prison-much/>

³² Grawert, “What is the First Step Act and What’s Happening With it?”

³³ American Civil Liberties Union, “Block the Vote: Voter Suppression”, American Civil Liberties Union, February 3, 2020, <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/>

³⁴ “Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018),” Ballotpedia, [https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_(2018))

³⁵ Amber Phillips, “How a court battle on felon voting rights in Florida could affect the 2020 election,” Washington Post, February 19, 2020, <https://www.washingtonpost.com/politics/2020/02/19/florida-felon-voting-rights-explained/>

EXPANDING VOTE BY MAIL

MOVE Texas has been using the courts to address and protect priority community concerns such as paid sick leave in San Antonio and working to educate Texas voters on how they can participate in democracy by voting.³⁶ With the current COVID-19 pandemic, MOVE Texas used a Texas law that allows voters with a “disability” to vote by mail. MOVE Texas asserted that this vote by mail provision applies to every voter as the COVID-19 pandemic puts all would-be voters at-risk for “*injuring the voter’s health*.” A lower court judge ruled in favor. However, the Texas Attorney General immediately challenged the ruling and even threatened to prosecute anyone advising someone to vote by mail using COVID-19 as a “disability”. In May, the Texas Supreme Court issued a very confusing and potentially disastrous ruling allowing a “don’t ask, don’t tell” loophole. Given that the threats of prosecution by the Attorney General remain, this puts voters in a difficult situation.³⁷

³⁶ TED Talk H. Drew Galloway, “Democracy 2.0: Technology to Innovate the Texas Ballot Box”, TEDxSanAntonio, February 2018, <https://www.youtube.com/watch?v=egXEqRaH1vY>

³⁷ Richard L. Hasen, “Texas Voters Face Malicious Prosecutions After COVID-19 Absentee Ballot Ruling”, Slate, May 27, 2020, <https://slate.com/news-and-politics/2020/05/texas-supreme-court-voters-covid-19-absentee-ballot.html>

RACISM IN THE IMPLEMENTATION OF LAWS AND POLICIES (STRUCTURE)

The racially biased implementation of laws, policies and regulations, including judicial selection and election processes show how pervasive racism is in every aspect of American society. This is crucial in part because judicial bias is one key factor that leads to the unequal administration of justice. One report from the National Center for State Courts shows racial minorities feel judges do not understand the culture, issues, and structures that make up their communities, resulting in biased sentencing practices.³⁸

We do not have a perfect system for selecting judges that reflect the diversity of the communities they serve. Both judicial appointment and election systems can impose hurdles for diverse candidates, though judicial appointments have overwhelmingly been the path to the bench for people of color.³⁹ Still, if we are to have judges who represent a wide range of our country's diversity and experience, then any judicial selection process must intentionally address bias and racist structures.

Implicit bias, lack of diversity in the bench, and many other factors lead America to the inequitable administration of justice. One interviewee pointed us towards a sobering clip in which Comedian Chris Rock joked about unequal sentencing practices in the judiciary. "We live in a country where two people can do the exact same crime, in the exact same time, in the exact same place, and get a different sentence. Only in America!" Rock even went so far as to propose a solution. "We gotta change the justice system. Yo! The American Justice system should be like Walmart. Just. Like. Walmart. So, hey, if you can find a lighter sentence somewhere else, we'll match it!"⁴⁰

Fixing Judicial Diversity

Fixing the federal judiciary's diversity problem will not happen overnight. Indeed, because federal judges serve for life, it will take years—if not decades—for the United States to have a federal judiciary that more closely mirrors the demographics of the country. Getting there requires a strong commitment to taking affirmative steps to improve the judicial pipeline and selection process in order to ensure that judicial candidates represent a variety of backgrounds and experiences. This commitment and responsibility must be shared by every person and entity who has a hand in the making of federal judges; this includes presidents, senators, sitting judges, law schools, law firms, justice-minded organizations, bar associations, and American voters."

Danielle Root, Jake Faleschini, and Grace Oyenubi, "Building a More Inclusive Federal Judiciary", Center for American Progress, October 3, 2019.

<https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/>

³⁸ "Issues identified on the National Listening Tour", National Center for State Courts, Page 3, https://www.ncsc.org/data/assets/pdf_file/0025/28465/appendix-a.pdf

³⁹ Laila Robbins and Alicia Bannon, with Malia Reddick, "State Supreme Court Diversity," Brennan Center for Justice, Page 14, https://www.brennancenter.org/sites/default/files/2019-08/Report_State_Supreme_Court_Diversity.pdf

⁴⁰ Chris Rock, Twitter Post, June 24, 11 am, <https://twitter.com/chrisrock/status/1275821182936403974?s=20>

OPPONENT TACTICS

UNDERMINING STATE COURTS USING CULTURAL DIVIDES

The Republican controlled legislature has been particularly angered by court rulings that have stopped legislative efforts on abortion, same-sex marriage, and voting rights that specifically undermined the rights of African Americans. As a result, Republicans claimed the judges were “activists” and seeking to be legislators. Our interviewees pointed out that the attempts to label judges as “activist judges” **occurred especially when ruling entailed racial and minority rights**. Republican legislative efforts turned toward politicizing the courts or weakening the courts’ independence. While this has been consistent with trends around the country, North Carolina is a more extreme version. A supermajority there passed legislation that reduced the number of Court of Appeals judges from 15 to 12, preventing the democratic governor from replacing retiring judges. They also made it harder for judges to waive fines and court costs for indigent defendants.⁴¹

A PIPELINE OF CONSERVATIVES TO PACK THE COURTS

Conservatives have been quietly preparing and engaged in a strategic effort over at least the last four decades to shift the culture of the legal establishment at law schools, on the bench, and in legal thought⁴². This long game has created a pipeline of conservatives (structure), that are predominantly male and predominantly white. [See “dark money” for more details on the role of the Federalist Society in packing the courts.]

UNDERMINING PROCEDURAL PRECEDENTS

Senator McConnell and his conservative Senate allies refused to move forward President Obama’s nominations for open judicial appointments.

Packing the Courts

"Conservative judicial ideologues can limit rigorous campaign finance reform; place a judicial stamp of approval on anti-democratic gerrymandering and voter suppression; undermine unions; and gut reproductive rights. They can also undermine future efforts at progressive reform through specious legal claims—and once the Supreme Court has ruled something unconstitutional, it can shut down policymaking in that space completely.

This is not just conjecture. The Roberts Supreme Court has repeatedly sided with big corporate and special interests that are aligned with the conservative movement. And that was before Justice Anthony Kennedy was replaced with the far more conservative Justice Kavanaugh."

Sam Berger, Conservative Court Packing, Center for American Progress, April 3, 2019.

<https://www.americanprogress.org/issues/democracy/news/2019/04/03/468234/conservative-court-packing/>

⁴¹ Barry Yeoman, Law and Disorder in North Carolina, The American Prospect, December 21, 2017, <https://prospect.org/justice/law-disorder-north-carolina/>

⁴² See information regarding The Federalist Society on page 27-28

Republicans held more than 110 judicial seats at the end of the Obama presidency (structure).⁴³ The high appointment numbers under the Trump administration reflect both the filibuster-free Senate but also that unprecedented number of vacancies that McConnell refused to confirm in Obama's final two years, including the Supreme Court nomination of Merrick Garland.⁴⁴ The Trump administration and Senate Republicans have been working to remake the judiciary to shift future rulings to favor corporate and wealthy interests (structure) and issue areas (culture). The Trump administration recently reached two-hundred appointments to date.

ALLY TACTICS

USING LITIGATION AND DOCUMENTING REGULATORY ROLL-BACKS

Allies have been swift with legal challenges, using the courts to counter regulatory processes and Executive Order actions used by the Trump Administration to target Black, Brown and other minority communities. While litigation has been the primary tactic and litigation successes have continued, this may be increasingly difficult in the future with the appointment of conservative judges being packed into the courts. The Leadership Conference on Civil & Human Rights is keeping a tally of the Trump Administration roll-backs on civil and human rights actions (structure), including those taken by the Obama Administration.⁴⁵

USING THE BALLOT BOX TO CHANGE JUDICIAL BIAS & DISCRIMINATORY PROCESSES

Thankfully we are seeing some traction in the national movement in the United States to address unequal sentencing, and other discriminatory practices such as cash bail bond systems. Allies are seeing some success with elected judges responding to public pressure from justice reform advocates regarding the discriminatory use and harms of cash bail. Community organizations across the country are using a variety of tactics - public protests, mass bailouts, *enlisting prominent advocates*, and *using the ballot box* - to move this issue forward.

MOVE Texas and other organizations are advocating for county level judges to use an available Texas law to institute "cite and release" no-cash bonds processes. Cash bail penalizes the poor and disproportionately targets people of color. Voters used the ballot box in Harris County Texas in 2018 to elect all Democrats to replace an almost fully Republican group of misdemeanor judges. This paved the way for these judges to use the Texas law to drastically change county policies to qualify misdemeanor defendants for "cite and release" no-cash bonds. Local law enforcement can issue citations instead of arrest and jail booking for certain misdemeanors. The movement has appealed to taxpayers, raising public awareness to the fact that it costs taxpayers significantly more to jail people awaiting pre-trial hearings for minor offenses than to implement "cite and release" processes. Despite opposition from the Republican commissioners and the bail bonds industry, Harris County commissioners court, voted to end a years-long litigation over its discriminatory bail practices. The settlement ruled by a federal judge solidified the local judges' new policy of automatic, no-cash pretrial

⁴³ "Vacancy Summary for 2017," United States Courts, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/archive-judicial-vacancies/2017/01/summary>

⁴⁴ Sam Berger, "Conservative Court Packing", Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/democracy/news/2019/04/03/468234/conservative-court-packing/>

⁴⁵ "Trump Administration Civil and Human Rights Rollbacks", The Leadership Conference on Civil & Human Rights, 2017 - 2020, <https://civilrights.org/trump-rollbacks/#2020>

release for about 85% of low-level defendants and provided for additional legal and social services for poor arrestees.⁴⁶

In Philadelphia, bail reform advocates have enlisted NFL Activists Torrey Smith, Chris Long and Malcolm Jenkins as important prominent advocates. They have added their voices to speak out on bail reform for nonviolent offenses.⁴⁷

OPPONENT RESPONSE – BIG INDUSTRY FIGHTS BACK

In response to the success in Harris County, the Texas bail bond industry leveraged its significant influence of re-election campaign donations⁴⁸ in Bexar County by putting pressure on the judges and stopped the adoption of “cite and release” no-cash bonds in San Antonio.

⁴⁶ Jolie McCullough, "Harris County agreed to reform bail practices that keep poor people in jail. Will it influence other Texas counties?", The Texas Tribune, July 31, 2019, <https://www.texastribune.org/2019/07/31/harris-county-bail-settlement-dallas-texas/>

⁴⁷ Torrey Smith, Chris Long and Malcolm Jenkins, “Pennsylvania: *Using prominent advocates*, in Philadelphia”, USA Today, February 27, 2019, <https://bit.ly/32N5upZ>

⁴⁸ Express News Editorial Board, “Editorial: Past time for bail reform in Bexar County,” San Antonio Express News, <https://www.expressnews.com/opinion/editorials/article/Editorial-Past-time-for-bail-reform-in-Bexar-14888189.php>

BREAKING WITH TRADITION – SPEAKING OUT ON RACIAL INJUSTICES (CULTURE)

In some ways we have seen incremental progress as mass social movements have brought to light problems of racism and implicit bias within the judiciary. There are plenty of laudable efforts that are gaining traction in structural reform in the criminal justice system, supported by some conservative circles;⁴⁹ the make-up of the bench;⁵⁰ and the increased use of plain language in legal content and public outreach materials.⁵¹ And yet, the judicial independence field consists of mostly lawyers and judges, and not, say, anthropologists, or others who think broadly about how racism might be embedded in the symbols, language, norms, values, and artifacts that define legal culture.

One group, the Institute for the Advancement of the American Legal System, described how changing the culture of the civil courts proved much harder than shifting policy. This caused them to shift their strategy to invest in an understanding of legal culture and tactics needed to change it. Though not writing explicitly about racism, their writing provides a useful basis for judicial independence advocates for self-reflection. “*Legal culture*,” they write, is “*defined broadly as the shared norms and values that define the behavior of judges and lawyers, beyond the more formal rules and structure of our legal system—is pivotal to the administration of justice in our country.*”⁵²

Culture—below the surface

Perhaps the most intriguing aspect of culture as a concept is that it points us to phenomena that are below the surface, that are powerful in their impact but invisible and to a considerable degree unconscious...In another sense, culture is to a group what personality or character is to an individual. We can see the behavior that results, but we often cannot see the forces underneath that cause certain kinds of behavior. Yet, just as our personality and character guide and constrain our behavior, so does culture guide and constrain the behavior of members of a group through the shared norms that are held in that group.

Brittany K.T. Kauffman, “Change the Culture, Change the System,” Rule One Initiative: Institute for the Advancement of the American Legal System, 2015, Page 2. [From Edgar H. Schein, **Organizational Culture and Leadership 2** (4th ed. 2010)]
https://iaals.du.edu/sites/default/files/documents/publications/top_10_cultural_shifts_needed_to_create_the_courts_of_tomorrow.pdf

⁴⁹ Arthur Rizer and Lars Trautman, “The Conservative Case for Criminal Justice Reform,” The Guardian, August 15, 2018, <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform>

⁵⁰ “Diversity on the Bench,” Brennan Center for Justice, <https://www.brennancenter.org/issues/strengthen-our-courts/promote-fair-courts/diversity-bench>

⁵¹ “Plain Language, More than a Movement,” The Plain Language Action and Information Network, <https://plainlanguage.gov/resources/articles/beyond-a-movement/>

⁵² Brittany K.T. Kauffman, “Change the Culture, Change the System,” Rule One Initiative: Institute for the Advancement of the American Legal System, 2015, Page 2, https://iaals.du.edu/sites/default/files/documents/publications/top_10_cultural_shifts_needed_to_create_the_courts_of_tomorrow.pdf

While most everyone we spoke with in our interviews acknowledged racism to be a problem, we sometimes found a general hesitancy around the questions of race and judicial culture. For instance, “Do we talk about race too much or too little? How do we talk about race internally and externally, and with whom? How can judges speak out about race without threatening values of impartiality, or being labeled as “activist judges”?”

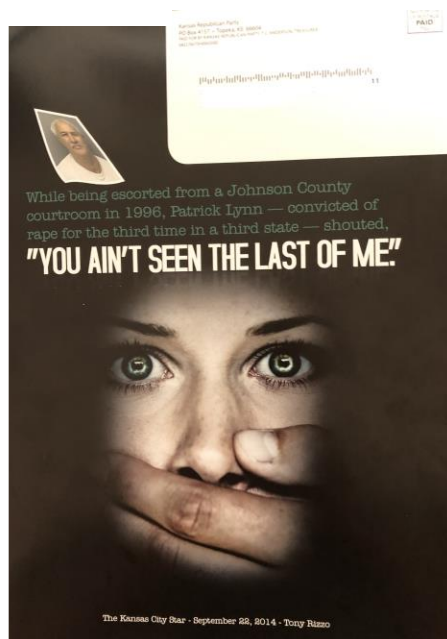
A simple headline in a recent article, “Breaking with Tradition, Some Judges Speak out on Racial Injustices,”⁵³ exemplifies a point of tension brought up in the latter question. It would serve the judicial independence sphere well to shift tradition so that judges and lawyers can address racism inquisitively, boldly, and openly. It will take reframing of judicial independence messaging to establish that the expression of anti-racism is not mutually exclusive with fairness and impartiality.

OPPONENT TACTICS

USING RACIAL DISINFORMATION TO IGNITE SUPPORTERS

Opponents have utilized disinformation to ignite a base of support using racism and abortion issues to bring attacks on so-called “activist” judges as a way to confuse the public and seek structural changes to exert control over or influence judicial selection and democratic processes (See Ohio Case Study).

In Kansas, Governor Brownback joined his conservative legislative allies in criticizing four of the Kansas Supreme Court Justices regarding the Carr brothers case during the justices’ 2016 retention election. Conservatives exploited this racially charged murder case to mislead the public with disinformation. The Kansas Supreme Court had upheld the Carr brothers’ convictions but vacated their death sentences, citing legal technical issues during their sentencing. Governor Sam Brownback, conservative Republicans and Kansans for Justice, a group associated with some victims’ family members used the racially charged murder case involving the Carr brothers to campaign for the ouster of four state Supreme Court justices.⁵⁴ The Kansas Republican Party used the threat of rape using the image of a young white woman’s face with a darker-skinned hand covering her mouth from behind on a mail flier to households in 2014 opposing a state Representative and tying him to his support of the Kansas Supreme Court Justices and “endangering the safety of your family”.⁵⁵

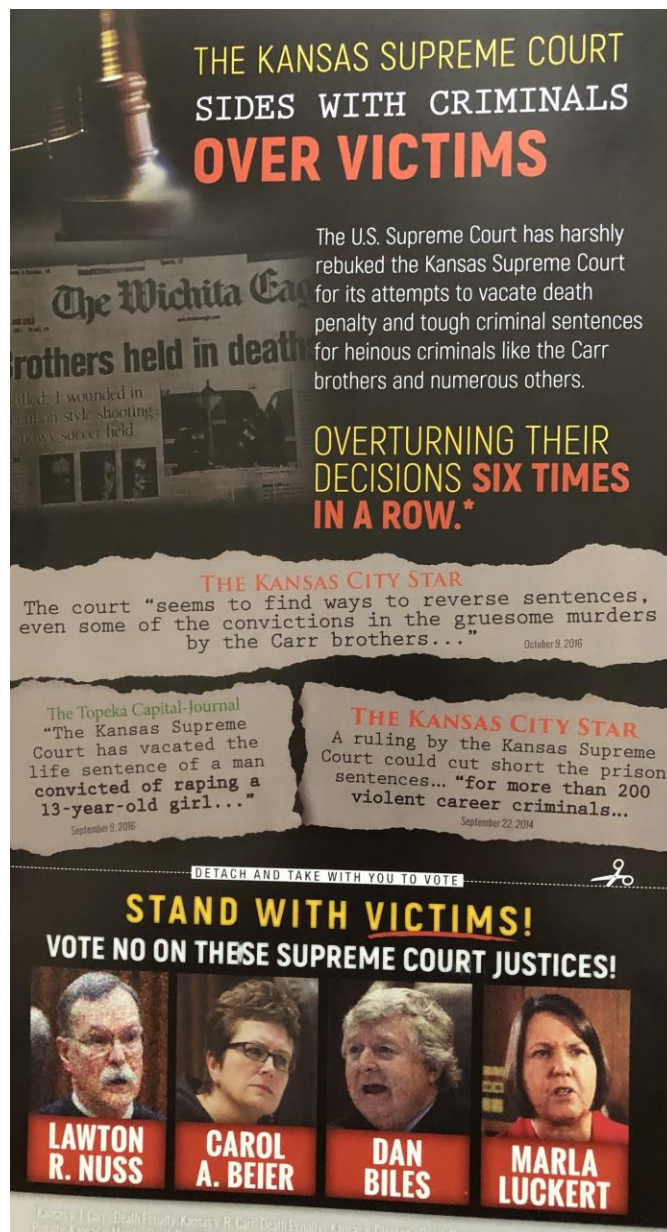


⁵³ Jess Bravin, "Breaking With Tradition, Some Judges Speak Out on Racial Injustices", June 13, 2020, <https://www.wsj.com/articles/breaking-with-tradition-some-judges-speak-out-on-racial-injustices-11592060400>

⁵⁴ Jonathan Shorman, "Group linked to Carr brothers' victims pushes to oust Kansas Supreme Court justices", The Topeka Capital-Journal, August 10, 2016, <https://www.cjonline.com/news/2016-08-10/group-linked-carr-brothers-victims-pushes-oust-kansas-supreme-court-justices>

⁵⁵ The image shown is from the Kansas Republican Party mailer, the quote appeared on the back side of the mailer. The specific date when the mailer was sent in 2014 is not available.

⁵⁷ The images shown above are from the Kansans for Justice mailer sent in 2016. The specific date when the mailer was sent in 2016 is not available.



ALLY TACTICS

DEVELOPING A TOOLKIT FOR PUBLIC ENGAGEMENT ON COURTS

The National Center for the State Courts funded six pilot public engagement programs that worked with the University of Nebraska Public Policy Center. The results of the 18 month project, along with a national listening tour, were collected in a toolkit that included a vision for public engagement, as well as a list of issues, focusing on racial disparities, that came out of the project. "A Toolkit for Public Engagements Addressing Disparities in the Courts"⁵⁸ urges the reduction of disparities in the courts by providing a vision for public engagement and outlining the issues that lead to disparities. (See more detailed information on the project included in "Lack of Public Engagement" section - culture)

Goodwin Simon Strategic Research, in their Judicial Independence Message Research (2017) conducted on behalf of Piper Fund, found a range of effective messages and messengers were required to promote independence and reform concepts. The research suggests why identifying a diverse mix of messengers for promoting judicial independence is important to connect with different target audiences.⁵⁹ If judicial independence advocates want to diversify the bench and their platforms, they will also need to diversify their messengers and their institutions.

EXPLORING AND USING THE RACE/CLASS NARRATIVE

Some grassroots organizers are turning to Anat Shankar Osario and the "Race/Class Narrative Project" for lessons on how to discuss race and mobilize for change.⁶⁰ One such group that trains grassroots movement-builders encourages institutions to: 1) Discuss race overtly; 2) Frame racism as a tool to divide and thus harm all of us; and 3) Connect unity to racial justice and economic prosperity.⁶¹ The project states: *"If we hope to block racially and economically divisive tactics that use racism as a strategy to divide working people and poor people from one another so that a few can gain, we must mobilize around a new narrative. This narrative must help people envision a multiracial country in which everyone has economic opportunity."*

⁵⁸ "Building Trust by Building Trustworthiness: A Toolkit for Public Engagements Addressing Disparities in the Courts," National Center for State Courts, Public Engagement Pilot Projects, <https://www.ncsc.org/pilots>

⁵⁹ Goodwin Simon Strategic Research, Judicial Independence Message Research 2017, (An online presentation shared with New Tactics), Conducted on behalf of Piper Fund, a Proteus Fund Initiative

⁶⁰ "The Race Class Narrative Project," Demos, <https://www.demos.org/campaign/race-class-narrative-project>

⁶¹ "Race Class Narrative Handout,"

https://www.dropbox.com/s/sxe5itvrh3ck6gr/Race_Class_Narrative_Handout_C4.pdf?dl=0

ROOT CAUSE #2: BIG MONEY IN POLITICS & THE RISE OF “DARK” MONEY

While racism provides a tried and true foundation for disinformation to widen identity divides, “dark money” provides the fuel and funding for disinformation campaigns that reinforce the policies and mechanisms that perpetuate racism and advance wealthy interests. Money in politics, and specifically “dark” and gray money, has had an increasing impact on judicial institutions and independence. Judicial nomination processes and elections have become even more skewed over the last decade since the Supreme Court’s ruling in *Citizens United v. Federal Election Commission* (2010).⁶²

This legalization and subsequent influx of dark money into the judicial selection process has opened the doors for disinformation campaigns driven by wealthy special interests at a time when billionaires and millionaires have consolidated wealth in the nation. For instance Forbes reported “Billionaires boast a combined net worth of \$3.229 trillion and their collective wealth skyrocketed up 1,130% between 1990 and 2020.”⁶³ This level of wealth staggers the imagination and is far beyond the comprehension of most Americans.

While judicial independence allies rarely voiced the connection of how wealthy special interests were driving disinformation campaigns, the journalists and academics had greater knowledge regarding how wealthy special interest “dark money” and disinformation are being used to:

- support state legislatures’ attacks to change laws regarding the judiciary (Content)
- finance judicial selection and election processes (Structure)
- sway the public regarding judicial nomination or election processes (Culture)

Race & Wealth Disparities

Enormous wealth disparities exist between families with the same education level. Even in cases where Black and Hispanic household heads have obtained a bachelor’s degree, their families’ median wealth of \$68,000 and \$78,000 respectively is still lower than the \$98,000 median wealth for White families where the head has no bachelor’s degree.... “Compared to White families, other races have lower levels of income and net worth. They are also less likely to hold assets of any type. In fact, 19% of Black families have zero or negative net worth, while only 9% of White households have no wealth.

Jenna Ross, *The Racial Wealth Gap in America: Asset Types Held by Race*, Visual Capitalist, June 12, 2020.
<https://www.visualcapitalist.com/racial-wealth-gap/>

⁶² Tim Lau, “Citizens United Explained”, The Brennan Center, 2019, <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>

⁶³ Jack Kelly, “Billionaires Are Getting Richer During The COVID-19 Pandemic While Most Americans Suffer”, Forbes, April 24, 2020, <https://www.forbes.com/sites/jackkelly/2020/04/27/billionaires-are-getting-richer-during-the-covid-19-pandemic-while-most-americans-suffer/#67e29c0d4804>

From her research in at least 60 countries, Sarah Chayes outlines how the United States is increasingly looking like other corrupt government systems that are designed to maintain the interests of the wealthy. Chayes states that, *"[r]ather than a weakness or a disorder, [contemporary corruption] is the effective functioning of systems designed to enrich the powerful."*⁶⁴ In the United States, the Influence to maintain a flow of resources to the wealthy is being purchased through campaign contributions⁶⁵ and a longer strategy to shift the structure and ideology of the judiciary at the state and federal levels.

Wealthy special interests having power and control to choose and influence judges, support legislative and executive attacks on the judiciary, as well as fund disinformation is not a new phenomenon. However, the roots of corruption have run deeper and wider fueled by the *Citizens United* ruling that opened the legalization and floodgates for the influx of dark money into the judicial selection process. The mechanisms, assumed to have been in place, were not sufficient to provide protections against corruption. "[Corruption] is more like a sophisticated operating system, employed by networks whose objective is to maximize their members' riches."⁶⁶

There is mounting evidence suggesting that an independent judiciary is seriously under threat in the United States. Far-right conservatives have waged a long, strategic and well-financed strategy spearheaded by the Federalist Society⁶⁷ to create a well-oiled pipeline⁶⁸ of conservative legal lawyers and judges. The "pipeline" has been accomplished through the Federalist Society's law school chapters, pro-bono networks, national conferences, media programs, etc., feeding into well-funded campaigns to ensure placement on the courts with conservative judges who have themselves come

Conservative Judicial Pipeline

Don McGahn, former President Trump's White House Counsel, told a Federalist Society gathering in 2017, *"Our opponents of judicial nominees frequently claim the president has outsourced his selection of judges. That is completely false. I've been a member of the Federalist Society since law school. Still am. So, frankly, it seems like it's been in-sourced."* The ineptitude of the Trump administration provided the opportunity for the conservative pipeline to flow effectively into open judicial positions.

Senator Sheldon Whitehouse Staff, The Third Federalist Society, Senator Sheldon Whitehouse, March 27, 2019.
<https://www.whitehouse.senate.gov/news/speeches/the-third-federalist-society>

⁶⁴ Sarah Chayes, "Kleptocracy in America", Book Review, Foreign Affairs, Carnegie Endowment for International Peace, author of the book, [*Thieves of State: Why Corruption Threatens National Security*](#). (Published January 19, 2015 by W. W. Norton & Company), August 15, 2017, <https://carnegieendowment.org/2017/08/15/kleptocracy-in-america-pub-72836>

⁶⁵ Sarah Chayes, This Is How Kleptocracies Work, The Atlantic, February 23, 2020, <https://www.theatlantic.com/ideas/archive/2020/02/how-kleptocracies-work/606958/>

⁶⁶ Ibid.

⁶⁷ The Federalist Society featured in a number of the interviews that were conducted. The Federalist Society was founded in 1982. Leonard Leo also served as a member of the Trump transition team.
<https://fedsoc.org/contributors/leonard-leo>

⁶⁸ Jeffrey Toobin, "The Conservative Pipeline to the Supreme Court" The New Yorker, Annals of Law, April 17, 2017, <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court>

through the pipeline. The Federalist Society has established chapters in all the American Bar Association (ABA) accredited law schools, as well as other law schools, to shape and promote conservative legal philosophy and placed members at all levels of the judicial system. Leonard Leo, the current co-chairman of The Federalist Society, has advised President Trump on judicial selection, and assisted with the Gorsuch and Kavanaugh Supreme Court selection and confirmation process.

Well-funded, hyper conservative groups, such as the Federalist Society, have been building structural restraints on the power of government. This has been particularly evident in terms of seeking to limit the regulatory power of the state. The investment by the Federalist Society in this pipeline has yielded a far reaching network of conservatives with specific legal policy perspectives. This “pipeline” of conservative judges has in turn served to shape jurisprudence over the last several decades to diminish the rights and protections of individuals and the public good, while protecting and augmenting the rights of corporations.

Senate conservatives are now using this pipeline to pack the courts with tactics that have included:

- blocking confirmation of judges until both the White House and the Senate were under conservative control
- changing the nomination and confirmation process rules so that the most partisan conservative judges can be appointed
- invoking the so-called nuclear option to allow Supreme Court justices to be confirmed through majority votes
- cutting home-state senators out of the judicial nominations process (a century-old tradition)⁶⁹
- using the Federalist Society nomination list and no longer working with the American Bar Association (ABA) to determine whether nominees were qualified to be judges (six Trump nominees were deemed “not qualified” by the ABA)
- breaking the Senate committee review process by packing hearings and markups with too many nominees to properly vet.

⁶⁹ Sam Berger, Conservative Court Packing, Center for American Progress, April 3, 2019, <https://www.americanprogress.org/issues/democracy/news/2019/04/03/468234/conservative-court-packing/>

LAWS AND POLICIES THAT FAVOR DEEP POCKETS (CONTENT)

On the policy front, there have been legislative attempts at the state level meant to weaken the courts and strengthen the power of the legislature or governor in making judicial appointments. These kinds of policy moves and tactics have previously been labeled undemocratic. These moves have included disinformation campaigns fueled by deep-pocketed individuals and organizations intended to weaken the courts and intersect with an overwhelming list of increasing threats to judicial independence.

The Brennan Center "documented 60 bills in 18 states that would have politicized or undermined the independence of state courts" (2018) and "bills introduced in at least 25 state legislatures" (2019) [that] "risked weakening the courts by giving political actors more control over judicial selection, judicial decision-making, or judicial administration."⁷⁰

People shared...

There has been an asymmetry – a massive investment on the right while democratic groups have not seen the judiciary as such a major “chess piece”.

In general for Presidents Clinton and Obama, they believe in appointing fair, independent, impartial judges; they fundamentally believe they have demonstrated a record as a judge; defend with existing precedence. There is care and concern, but they don’t see this judge as “their player” – like the right believes of this person being ‘THEIR’ person.

OPPONENT TACTICS

USING LEGISLATIVE ACTION TO UNDERMINE THE JUDICIARY

The Republican-led Kansas legislature twice tried to make judicial branch funding conditioned upon its courts making rulings favorable to the legislature. In 2014 it passed a bill (content) that, among other things, took away the Supreme Court’s long-standing administrative authority (structure) to appoint chief judges of the judicial districts. The bill also provided approximately \$8 million in new funds to help keep the Kansas courts open. But it additionally contained a non-severability clause that effectively meant if a court ruled any part of the bill unconstitutional – for example, the chief judge selection provision – then the entire bill would fail, including the 8 million dollar appropriation. In 2015 the legislature passed another bill (content). Like the prior year’s bill, the new one also contained some policy issues and included a non-severability provision for itself. That essentially meant if a court ruled any part of this bill unconstitutional, then the entire bill failed – including its 2-year funding of nearly \$270 million for the judicial branch. It also provided that if any part of the 2014 bill – such as the chief judge selection provision – was judicially determined unconstitutional, then all of the 2015 bill would also fail, including the \$270 million. The Kansas Supreme Court was not intimidated. It unanimously ruled that lawmakers had violated the state constitution’s separation of powers doctrine

⁷⁰ Brennan Center, “Legislative Assaults on State Courts – 2019”, The Brennan Center Resource, 2019, <https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2019>

by legislatively taking away the judiciary's power to select chief judges of its judicial districts.⁷¹ This triggered the non-severability clauses designed to defund the court system (structure).⁷² The legislature stepped back from trying to enforce defunding the court system by passing severability clauses for both bills to instead safeguard the judicial branch funding. Having failed these two legislative attempts to change the way chief district judges were selected, prominent conservative legislators sought to pass a bill in 2016 to amend the Kansas constitution (content) to impeach justices for "usurping" the power of other branches of government.⁷³ This bill was proposed but not passed by both houses of the legislature, as required, before presenting the amendment to the voters of Kansas. Finally, they sought to unseat four justices in the 2016 November election (pgs. 24-25).⁷⁴

Republicans in the West Virginia state legislature passed a bill (content) to establish an intermediary court of appeals supported by business that would reduce the power of the state supreme court of appeals. While an intermediary court had been recommended decades ago by an independent panel, currently, there are questions regarding the way this proposed intermediate court would deal only with civil cases. In February 2020, the debate moved to the House of Delegates.⁷⁵ The legislature has made numerous attempts in past sessions to approve similar legislation without success.

ALLY TACTICS

USING LEGISLATION TO DEMAND TRANSPARENCY OF DONOR INFORMATION

In response to the huge influx and influence of dark money in the recent Supreme Court judicial nominations, Democratic lawmakers, including Senators Feinstein and Whitehouse, have sponsored the "Judicial Ads Act". The bill would require "dark money" judicial groups to reveal their donors. Groups spending over \$50,000 per year on advertisements linked to federal judicial nominations must disclose the names of individual donors giving over \$5,000. Organizations backing the bill include the Project on Government Oversight, Campaign Legal Center, Citizens for Responsibility and Ethics in Washington, Public Citizen, Democracy 21 and End Citizens United.⁷⁶ What is unclear is whether the bill tackles dark money spending on social media platforms and other forms of disinformation.

USING LITIGATION TO RESPOND TO STATE EXECUTIVE ACTION

In 2019, the ACLU filed suit against Governor Dunleavy's attempted use of his veto power to remove \$334,700 from the court system's budget for the court system claiming it was equivalent to the cost of abortion services required by Supreme Court rulings.⁷⁷ The ACLU's lawsuit stated this was a violation

⁷¹ *Solomon v. State*, 303 Kan. 512, 364 P.3d 536, December 23, 2015, <https://casetext.com/case/solomon-v-state-206>

⁷² Dion Lefler, "Kansas Supreme Court strikes down judicial selection law; court funding in doubt", The Wichita Eagle, December 23, 2015, <https://www.kansas.com/news/politics-government/article51272475.html>

⁷³ Erick Eckholm, "Outraged by Kansas Justices' Rulings, Republicans Seek to Reshape Court", The New York Times, April 1, 2016, <https://www.nytimes.com/2016/04/02/us/outraged-by-kansas-justices-rulings-gop-seeks-to-reshape-court.html?auth=login-google>

⁷⁴ Erick Eckholm, "Outraged by Kansas Justices' Rulings, Republicans Seek to Reshape Court"

⁷⁵ Brad McElhinny, "Debate over intermediary courts hits the House of Delegates, again," Metro News: The Voice of West Virginia, February 27, 2020, <https://wvmetronews.com/2020/02/27/debate-over-intermediate-court-hits-the-house-of-delegates-again/>

⁷⁶ Brian Schwartz, "Democratic bill would require dark money judicial groups to reveal donors", CNBC, July 2, 2020, <https://www.cnbc.com/2020/07/02/democratic-bill-would-require-dark-money-judicial-groups-to-reveal-donors.html>

⁷⁷ Tegen Hanlon, "ACLU sues Dunleavy for veto to Alaska court system over abortion rulings," July 17, 2019,

of the Alaska Constitution (content) and the separation of powers doctrine. The ACLU's claim is Dunleavy was using the budget to punish and retaliate against the court because he did not agree with their decisions.

IMPLEMENTATION OF LAWS THAT FAVOR DEEP POCKETS (STRUCTURE)

State judicial elections are awash in money, and judges regularly hear cases involving major contributors to their campaigns. Wealthy interests are corrupting both the judicial selection process and judicial decision making, accentuating how wealthy special interests have come to play an outsized role in all branches of government. In Ohio, deep-pocketed individuals and industries demonstrated their influence on judicial decision making. Disinformation campaigns driven by the energy industry embedded itself into the structure of judicial decision making and threatened democratic processes. [See “Ohio Case Study.”] This is an example where wealthy special interests led to missed opportunities for the judiciary to establish jurisprudence curtailing the use of disinformation in democratic processes. A court case involving disinformation was brought to the Ohio Supreme Court but withdrawn due to an inability of advocates to sustain the cost of the litigation. This is a significant and insidious way that disinformation is embedding itself into the judiciary.

People shared...

The normalization of disinformation as a tactic from the spectrum of the political right and left is a critical area for judicial independence advocates to address.

The Wisconsin Supreme Court election in 2019 exemplifies the intersection between “dark money”, judicial election processes and coupled with disinformation. The Republican State Leadership Committee (RSLC) infused a massive surge of \$1.2 million in dark money in the last week of the Wisconsin Supreme Court election. . With hyper-partisan targeting, most of the money was “spent below the radar of the media, in targeted online ads, mailings, and texts, rather than in trackable TV ads”.⁷⁸ The RSLC purchased two URL websites: one called RadicalJudge.org to label and attack “liberal Lisa Neubauer” and one called RuleofLawJudge.com to aid Brian Hagedorn in the week before the election. Lisa Neubauer ran on her qualifications, experience, had the support from nearly every judge in the state, and had consistently polled higher than Hagedorn. As a result of the huge last minute infusion of dark money, the highly controversial Brian Hagedorn beat Lisa Neubauer by less than one percent of the vote.⁷⁹

Dark money is also fueling right-wing conservatives’ attacks on merit-based judicial selection processes practiced in varying forms in 25 states. Merit-based processes receive wide praise from lawyers and jurists alike as an effective, non-partisan mechanism for selecting judges. Alaska has been a testing ground for conservative attacks on its merit-based judicial nomination and appointment system which has been in place since 1956 when its constitution was adopted. The attacks in Alaska began in 2009, when an Indiana attorney James Bopp Jr.,⁸⁰ a Federalist Society contributor and attorney behind *Citizens United*, filed a lawsuit challenging Alaska’s merit-based selection process. A federal judge threw out the lawsuit⁸¹ but these attacks have provided a pattern of response for

⁷⁸ Lisa Graves and Even Vorpahl, “Who Is Capturing Our Courts (Wisconsin Edition)?”, November 7, 2019, <https://www.exposedbycmd.org/2019/11/07/who-is-capturing-our-courts-wisconsin-edition/>

⁷⁹ Ibid.

⁸⁰ James Bopp, Jr. General Counsel, James Madison Center for Free Speech, The Federalist Society, Contributors. <https://fedsoc.org/contributors/james-bopp>

⁸¹ Jonathan Blitzer, “Victory for Merit Selection in Alaska”, Brennan Center for Justice, September 18, 2009, <https://www.brennancenter.org/our-work/analysis-opinion/victory-merit-selection-alaska>

opponents to use disinformation about the rulings and the merit-based process to frame messages to influence public opinion in terms of “elitist”, “activist” and “insider” power. For example, the Judicial Crisis Network was also attacking Iowa’s merit selection system in 2019.⁸²

This kind of disinformation creates significant challenges for citizens. Suzanne Spaulding states, “A better public understanding of the justice system, how it functions, and why its role is so important will build resilience against this campaign of divisiveness.”⁸³ [See Lack of Public Understanding]

OPPONENT TACTICS

MAKING CORRUPTION ACCEPTABLE

One tactic used by corrupt networks is “legalism of some sort”. Sarah Chayes used the example of the unanimous decision of the U.S. Supreme Court to overturn the corruption convictions of former Virginia Gov. Bob McDonnell.⁸⁴ She noted that one puzzling opinion on the Supreme Court stated that prosecuting corruption is worse than committing it. Chayes noted, “All too often, the scandal isn’t that the conduct in question is forbidden by federal law, but rather, how much scandalous conduct is perfectly legal—and broadly accepted.”⁸⁵

CREATING “POP-UP” OR “BURNER” ORGANIZATIONS

The Federalist Society’s Leonard Leo is at the center of a complex network of nonprofits and shell entities funded largely by anonymous donors. That network collected \$250 million in donations between 2014 and 2017,⁸⁶ directed largely towards ads promoting judicial nominations. One such dark money group is the Judicial Crisis Network (JCN) which has given millions in funds to RSLC since 2014, that is then passed through its Judicial Fairness Initiative (JFI) to spend the funds in state judicial elections (structure). A tactic shared during our interviews included “pop-up” or “burner” organizations, like the use of untraceable, disposable cell phones. These tax-exempt non-profit groups accept unlimited cash, and are not required to expose donors or have spending restrictions so that funds can flow to political groups (structure). Such organizations are also used to write amicus briefs to provide “guidance” to justices on how their contributors would like them to rule on cases that land before them (structure).

⁸² Carrie Campbell Severino, A Fight for Better Courts in Iowa, National Review, March 5, 2019, <https://www.nationalreview.com/bench-memos/a-fight-for-better-courts-in-iowa/>

⁸³ Suzanne Spaulding, Harvey Rishikof, “How Putin Works to Weaken Faith in the Rule of Law and Our Justice System” Lawfare September 17, 2018, <https://www.lawfareblog.com/how-putin-works-weaken-faith-rule-law-and-our-justice-system>

⁸⁴ Robert Barnes, “Supreme Court overturns corruption conviction of former Va. governor McDonnell,” June 27, 2016, The Washington Post, https://www.abajournal.com/news/article/aba_committee_gives_kavanaugh_a_well-qualified_rating_hearings_begin_today

⁸⁵ Sarah Chayes, “Hunter Biden’s Perfectly Legal, Socially Acceptable Corruption,” The Atlantic, September 27, 2019, <https://www.theatlantic.com/ideas/archive/2019/09/hunter-bidens-legal-socially-acceptable-corruption/598804/>

⁸⁶ Ephrat Livni, “Senators demand records illuminating dark money ties to Supreme Court appointments,” Quartz, March 12, 2020, <https://qz.com/1816542/senators-demand-records-on-dark-money-ties-to-court-appointments/>

USING INFILTRATION AND DISINFORMATION

Right-wing conservatives are using disinformation against the American Bar Association (ABA) Standing Committee on the Federal Judiciary by labeling it as a liberal advocacy group. This is due to implied “liberal” positions on abortion or gun rights rather than how well the body has provided qualification ratings for nominations for judges during the selection processes for over 60 years.⁸⁷ In recent years, as more nominations are given “not qualified” evaluations even while right-wing conservatives have made significant inroads into taking leading roles on the ABA Standing Committee on the Federal Judiciary. For example: The ABA Standing Committee on the Federal Judiciary rated Robert Bork as an unqualified and extreme candidate, and blocked his nomination. The public posture from the right-wing continues to assert that the ABA Committee is “liberal”, while at the same time the ABA Committee gave Kavanaugh a high rating.

DONORS USE AMICUS BRIEFS TO GIVE JUDGES DIRECTION FOR ACCEPTABLE RULINGS

A number of participants mentioned that opponents who provide financial support for judicial reelection campaigns use Amicus Briefs to inform those judges of positions they would like them to take on cases landing in their courtroom. An interesting study utilized an original dataset of more than 14,000 votes of state high-court judges across three distinct areas of law. The study explored “how ideological predispositions and electoral institutions structure the responsiveness of state high-court judges to amicus brief information”. The study points to a conditional relationship where “judicial responsiveness to third-party briefs is more closely tied to the reelection and campaign fundraising considerations of individual judges in politically contentious areas of law.”⁸⁸

ALLY TACTICS

CREATING A DISINFORMATION RAPID RESPONSE NETWORK

The Arkansas Judicial Campaign Conduct and Education Committee (AJCCEC) established a rapid response team to address false advertisements and attacks on a state Supreme Court judicial candidate. The team wrote a “cease and desist” letter to the Washington, DC based Judicial Crisis Network (JCN) confirming the rapid response team’s findings and demanding that the JCN immediately withdraw its false and misleading advertising. The AJCCEC also offered candidates a voluntary pledge to disavow all false communications in the candidate’s favor. The AJCCEC’s Rapid Response Team includes very prominent and highly respected individuals in Arkansas: retired U.S. Bankruptcy Judge Audrey Evans, attorneys Danyelle Walker and Elizabeth Andreoli, Dr. Hal Bass, professor emeritus of political science at Ouachita Baptist University, and journalist Roy Ockert.⁸⁹

⁸⁷ Tim Ryan, “Senate Scours American Bar Association for Liberal Bias”, Courthouse News Service, November 15, 2017, <https://www.courthousenews.com/senate-scours-american-bar-association-liberal-bias/>

⁸⁸ Jenna Becker Kane, “Lobbying Justice(s)? Exploring the Nature of Amici Influence in State Supreme Court Decision Making”, Sage Journals, March 22, 2017, <https://doi.org/10.1177/1532440017697174>

⁸⁹ David Ramsey, “Judicial campaign watch group sends cease-and-desist letter to dark money group over misleading ads”, Arkansas Times, May 11, 2018, <https://arktimes.com/arkansas-blog/2018/05/11/judicial-campaign-watch-group-sends-cease-and-desist-letter-to-dark-money-group-over-misleading-ads>

ENGAGING DIVERSE PERSPECTIVES FOR REFORMING JUDICIAL SELECTION

On the national level, the Project On Government Oversight (POGO) has developed a Taskforce on Federal Judicial Selection consisting of people representing the range of perspectives from conservative to liberal. The Taskforce is made up of retired and current federal court judges, experts and researchers on judicial structure. The Taskforce is working to develop consensus based recommendations designed to lower the stakes of the judicial nominating process.

BUILDING GENUINE RELATIONSHIPS TO EDUCATE LEGISLATORS

Alaska has worked to build genuine bi-partisan relationships with legislators to educate them about the value of the merit-based selection process. They have invested in face-to-face meetings with newly elected legislators, as well as continuing relationships with seasoned legislators. This provides an opportunity to learn about the legislators and to inform them of the importance of the non-partisan judicial selection process. This has been critical to countering the attacks by legislators who wish to change the system and instead delivers the message "the system is not broken, the merit-selection system provides highly-qualified judges who rule based on the constitution, the law and facts in a case." Many Alaska Native organizations have supported the merit-based selection process. Several Alaskan groups, including Alaska Native organizations, are working together to address the issue of diversity on the bench. They are developing strategies and action plans which include supporting programs like the Color of Justice, which encourages diverse youth to enter legal careers; they are developing a Bar to the Bench program for attorneys from diverse backgrounds and they are exploring other strategies to create a bench that is representative of Alaska's diverse cultures.

The Kansas Supreme Court Justices build relationships with legislative leadership and newly elected legislators by hosting lunches to educate them on the role of the court.

DEEP POCKETS LEVERAGE CULTURAL AND IDENTITY DIVIDES (CULTURE)

The process of electing judges is fraught with opportunities for deep pocketed investments in disinformation that fuel cultural, political and racial divides to influence election outcomes.

The amount spent in judicial elections range from small infusions to multi-millions. Even small amounts of money can provide an outsized return on investment in terms of future influence, in part because judicial elections rarely garner much attention or engagement from the public. Thirty-nine states have some form of public election process regarding judges. “Corporations and special interests are already major spenders in judicial campaigns.”⁹⁰ According to the National Center on State Courts, nearly 9 in 10 (87%) of all state judges must run in elections - to gain or keep a seat.

DARK MONEY CANDIDATE SUPPORT

During the Supreme Court nomination hearings for Brett Kavanaugh, millions of dollars flowed from both the right and the left. Conservative networks used disinformation to question and undermine the credibility and testimony of Christine Blasey Ford. For example, the Daily Wire, which presents conservative right positions⁹¹ used the headline “The Single Biggest Hole In Christine Ford’s Story” to discredit her and appeal to a highly conservative base.⁹² The Judicial Crisis Network (JCN) pledged to spend up to \$10 million in support of his confirmation.⁹³ Mike Davis, a former law clerk to Justice Neil Gorsuch and former Chief Counsel for Nominations to Chairman Chuck Grassley, helped steer Gorsuch and Kavanaugh, through confirmation. He has since launched Article III Project,⁹⁴ a 501(c)4 organization, that continues to push the fast-tracking of Trump’s conservative judicial appointments.

People shared...

The explosion of multi-million spending groups that took place post 2010 – Citizen United. This came in the depths of the recession as well. While the country was struggling we saw this change with the influx of money. So I don’t think that a [new] recession will affect wealthy special interests at all.

CREATING FEAR-BASED DISINFORMATION TO PREVENT PUBLIC PARTICIPATION

Generation Now Ohioans for Energy Security funneled dark money to support First Energy Solutions energy company in their bid to obtain a public bailout. They sought to prevent a public referendum on a new law, House Bill 6, which added charges to customers’ bills to subsidize nuclear and coal plants while also undermining Ohio’s clean energy standards. The group used racist and “communist” scare

⁹⁰ Adam Skaggs, “Buying Justice: The Impact of Citizens United on Judicial Elections”, The Brennan Center, May 5, 2010, <https://www.brennancenter.org/our-work/research-reports/buying-justice-impact-citizens-united-judicial-elections>

⁹¹ Media Bias/Fact Check, “The Daily Wire”, July 17, 2020, <https://mediabiasfactcheck.com/the-daily-wire/>

⁹² Matt Walsh, “The Single Biggest Hole In Christine Ford’s Story”, DailyWire.com, Oct 1, 2018, <https://www.dailywire.com>

⁹³ Brian Schwartz, “Conservative dark money groups gear up for battle over DC Circuit Court that once included Brett Kavanaugh,” CNBC, April 3, 2020, <https://www.cnbc.com/2020/04/03/conservative-dark-money-groups-set-to-battle-over-brett-kavanaughs-old-seat.html>

⁹⁴ “Our Team,” The Article III Project, <https://article3project.org/our-team>

tactics through massive mailings, social media, billboard and TV ads which featured disinformation that China was seeking to take over Ohio's energy. The disinformation implored the public to refuse to give their personal information to anyone coming to their door with a petition. Their ad's raised fears with, "*Don't sign the petition allowing China to control Ohio's power.*" They also asked the public to call a hotline number to report the people collecting signatures. However, if you called the number, no one ever answered the phone.⁹⁵ [See Ohio Case Study]

ALLY TACTICS

ENGAGING PUBLICLY RECOGNIZED & PROMINENT SPOKESPEOPLE

Kansans for Fair Courts employed a wide variety of tactics to counter the moves by conservatives to oust four Kansas Supreme Court justices in 2016. They gained the support of all past living governors, as prominent spokespeople publicly recognized in a bi-partisan effort, including Mike Hayden, Bill Graves (Republicans), and Kathleen Sebelius and John Carlin (Democrats).⁹⁶ These publicly recognized figures from both Republican and Democratic parties contributed their credibility for the retention of all five state Supreme Court justices. Kansans for Fair Courts also built a coalition of educators and 40 other groups in total that spanned a wide range of issues with a message of "fair and impartial courts", appealing to Kansans' belief in fairness. They succeeded in retaining all five justices.

⁹⁵ Kathiann M. Kowalski, "Who's behind the Chinese conspiracy ads against Ohio's nuclear referendum?," Energy News Network, September 23, 2019, <https://energynews.us/2019/09/23/midwest/whos-behind-the-chinese-conspiracy-ads-against-ohios-nuclear-referendum/>

⁹⁶ Jonathan Shorman, "Ex-Kansas governors urge voters to retain justices despite anger over Carr brothers case," The Topeka-Capital Journal, September 6, 2016, <https://www.hutchnews.com/befe70f6-74e0-561b-a347-1912ba164a69.html>

ROOT CAUSE #3: LACK OF PUBLIC UNDERSTANDING OF THE JUDICIARY

A lack of public understanding of the judiciary, coupled with unequal administration of justice due to systemic racism, has resulted in a lack of public confidence in the judiciary which provides ripe ground for disinformation. Disinformation targets those already disenfranchised as well as those who perceive themselves to be disenfranchised. This fosters a sense that “change for me, as an average person” is impossible, but also sends a message that the system is broken. Such a public view coupled with a general public that does not understand how the judiciary works is a serious structural fault line in our democracy.

The public’s lack of understanding of judges’ roles makes disinformation more effective. When judges make decisions regarding legal procedures, legal mandates, and ethical rules that protect peoples’ rights, information and identities, these decisions are used to create disinformation. Consider, for instance, the role of memes in judges’ relationship with the public. One expert explained that, “*The most influential driver of disinformation was stand-alone visual posts and memes. They took advantage of the deep partisan divisions, and much of the content was designed to reinforce positions and denigrate the other side, using dog whistles, logical fallacies, and false equivalency.*”⁹⁷ So, a complicated, thoughtful legal process resulting in a judicial ruling can be turned into a witty replicable meme denigrating the judge personally. This is fodder for coordinated political attacks. This is just one example of how social media accentuates the public’s lack of understanding of the judiciary.

Those interviewed for this report are increasingly prioritizing initiatives that make judicial processes more transparent for the public through a wide range of tactics and media. We heard repeatedly of the many judicial systems that remain a mystery to the public, creating a “Wizard of Oz – man behind the curtain” effect. From overly complicated legalese in public records and websites to the rules and structures of the systems themselves, one of the most critical of these is the judicial selection process. These are strikingly difficult to follow even for the politically engaged public.

What people shared...

The threats that go to public confidence in our justice system have the longer term potential of eroding that judicial independence; it convinces people that the system is irrevocably broken.

People don’t have much understanding of HOW our justice system works, the common sense of these issues; having our own strategies and tools in place will be really important, we don’t have that in place yet.

It’s difficult to pitch this [judicial independence] and connect it back to people’s day to day life, their lived experiences, and connect with more diverse audiences. There is a lack of storytellers. This leaves lawyers and academics, who are not the best spokespeople.

⁹⁷ Pen American, “Truth on the Ballot: Fraudulent News, the Midterm Elections, and Prospects for 2020”, Page 9, <https://pen.org/wp-content/uploads/2019/03/Truth-on-the-Ballot-report.pdf>

Allies have found successes in campaigns to educate the public on legislated or mandated judicial policies and structures, sometimes as a way to counter actions seeking to undermine the separation of powers. There have been efforts to shift judicial culture by showcasing judges as “regular” or “ordinary people” through face-to-face events and social media platforms. These forms of public access to judges have served to inform the public on judicial mandates, demonstrate how judicial processes work, or have engaged judges as respected and effective messengers. These efforts have gained public support for the value and importance of judicial independence and selection processes. Thee example below provide insight into the necessary cultural shifts the judiciary and its allies could take to implement new communication strategies for judges to engage with the public.

DISINFORMATION EXPLOITS THE LACK OF CIVIC EDUCATION (CONTENT)

The state of Americans' basic civics knowledge is dismal. Only two in five Americans can even name the three branches of government, and one in five Americans are unable to even name one branch correctly.⁹⁸

Piper allies reported in our interviews that some state legislators are in as much need of a civic refresher as members of the public when it comes to basic judicial structures. The need for civic education in the K-12 system, higher education, and beyond has perhaps never been more urgent, as recognized in recent legislative attempts to fund civic education.⁹⁹

Civic education is especially urgent within a media landscape where disinformation runs rampant and crowds out even creative attempts to educate the public on basic government structures, such as YelloPain's viral video, "My Vote Don't Count." The video describes the three branches of government and powerfully makes a case for why voting matters.¹⁰⁰ YelloPain, a rapper, developed his viral civic education video when his cousin was running for office and gave him a Civics 101 lesson that he never received in school.

"People who are in politics don't know how to speak the language of people who don't understand," he said. "The reason this video is so powerful is because I speak both languages."¹⁰¹

If most Americans need YelloPain's basic lesson in the three branches of government, one can imagine the education that needs to happen around judicial independence. Few have ever delved into the concept of an independent judiciary. Judicial independence research conducted by Goodwin Simon Strategic Research tested how audiences reacted to various messages about the need for judicial independence. They found that audiences valued judicial independence most when introduced

Judicial Independence Wisdom from Founders...

Alexander Hamilton: "There is no liberty if the power of judging be not separated from the legislative and executive powers." [And "The first duty of society is justice."]

Thomas Jefferson: "The most sacred of the duties of a government [is] to do equal and impartial justice to all its citizens."

James Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

George Washington: "The administration of justice is the firmest pillar of government."

⁹⁸ "Americans' Civics Knowledge Increases But Still Has a Long Way to Go," Annenberg Public Policy Center of the University of Pennsylvania, September 12, 2019,

<https://www.annenbergpublicpolicycenter.org/americans-civics-knowledge-increases-2019-survey/>

⁹⁹ "H.R.849 - Civics Learning Act of 2019," www.congress.gov, <https://www.congress.gov/bills/116/congress/house-bill/849>

¹⁰⁰ YelloPain, "My Vote Dont Count," January 14, 2020, <https://www.youtube.com/watch?v=wMALeR1i-FM&t=80s>

¹⁰¹ Amelia Robinson, "Think your vote doesn't count? Dayton native 'schools' non-voters with video with more than 4 million views and counting," Dayton.com, January 28, 2020, <https://www.dayton.com/lifestyles/think-your-vote-doesn-count-dayton-native-schools-non-voters-with-video-with-more-than-million-views-and-counting/qatgmzwSAb3mnflzmIUDJ/>

to some basic anchoring concepts: such as a three legged stool metaphor of the three branches of the government, as well as other messages such as “three separate branches of government,” “separation of powers,” and “checks and balances.”¹⁰² Once audiences were exposed to these messages, their opinion on the value judicial independence increased. When people do not understand the basic democratic structures it is much easier to manipulate them.

Many states are experiencing legislative attacks on the judiciary, including significant attempts to change the laws that govern the judiciary. These range from legislative efforts to defund the judiciary entirely or change the structure of the judiciary, to eliminating merit-based selection processes. Our interviews showed these efforts to be most successful when opponents purposely used disinformation to obfuscate their intent to confuse the public. For instance, a group might attack a merit-based system through a constitutional amendment, but cloak that attempt as a response abortion rulings (see tactic below). Such groups are banking on the public believing these efforts are issue-based, such as abortion, when in fact they are seeking to dismantle mandated judicial selection and independent processes.

What people shared...

As budgets are slashed, and if a more severe recession hits, then yes, [legal] defense services are hit. We will probably see the rise again of troubling incentives put in place to help the judiciary make up for a lack of public financing. You may see Public Defenders relying on fees from their clients, leading to conflicts of interest. While at the same time you will see higher level leadership saying this is the only way to fund the system, while line staff will say this is unethical.

OPPONENT TACTICS

CONSTITUTIONAL AMENDMENT ATTEMPT TO UNDERMINE MERIT-BASED SELECTION

In Alaska, a state legislator introduced a constitutional amendment to drastically change the merit-based judicial selection process. The purpose was to circumvent the non-partisan qualification selection process to give the governor and legislature more power to appoint candidates of their choice. Opponents to the merit-based process centered their argument for the change on reproductive rights rather than judicial candidate qualifications. Focus on the Family, an anti-abortion national organization with a branch in Alaska, lead the charge. The legislator succeeded in pushing the constitutional amendment through very quickly and it got to the State Senate floor before merit-based advocates realized a response was needed. A retired chief justice, a moderate Republican, an aide to former Governor Hammand, and other merit-based system advocates stepped forward to educate state representatives and senators regarding the importance and benefits of maintaining the non-partisan, constitutionally mandated process. The amendment did not ultimately pass, however, conservative efforts continue to seek legislative changes to the constitutionally mandated merit-based judicial selection process.

¹⁰² Goodwin Simon Strategic Research, Judicial Independence Message Research 2017, (An online presentation shared with New Tactics), Conducted on behalf of Piper Fund, a Proteus Fund Initiative

WELL-FUNDED WEBSITES USE PLAIN LANGUAGE AND EASY ACCESS TO FEDERAL AND STATE INFORMATION FOR DIRECTING ACTION

The NRA has been a powerful conduit for leveraging identity divides. Their outsized spending on recent Supreme Court candidates – Gorsuch and Kavanaugh¹⁰³ [See also Dark Money] are partly successful because they do a good job of making legal information accessible and provide messages for their members to amplify to the general public. For example, the National Rifle Association and the Firearms Policy Coalition¹⁰⁴ provide state-specific “support” or “oppose” information for taking action regarding federal and state legislation. The National Rifle Association monitors proposed laws according to every U.S. state.¹⁰⁵ Through its NRA-Institute for Legal Action (NRA-ILA) and support to local community chapters through the Second Amendment Activists Center, the NRA has successfully mobilized its members.

ALLY TACTICS

ADVOCATING FOR A SUPREME COURT CODE OF ETHICS

The Project On Government Oversight (POGO) and the Brennan Center for Justice¹⁰⁶ have been advocating for the Supreme Court to adopt a code of ethics to maintain public trust in judicial institutions, including the Supreme Court. POGO asserts that “ethics in government is not a partisan issue” as both Democrats and Republicans have introduced legislation with similar language in both the House and Senate. For example, within the “For the People Act of 2019”, an important provision would extend a code of conduct, which binds lower court judges, to Supreme Court justices. The bill contains language from both Republican and Democratic bills. The Center for Judicial Ethics at the National Center for State Courts provides a wide range of information about judicial ethics, codes of conduct and discipline. Sarah Turberville connects the importance of a code of ethics to the disinformation, “*The danger of misinformation concerning the conduct of the justices is magnified as, paradoxically, they tend not to defend their actions or decisions publicly so as to not risk violating ethical guidelines.*” If the public is able to understand the purpose and reasons why judges cannot comment on cases, perhaps they would be less likely to be manipulated by disinformation.

¹⁰³ Andrew Perez, “Conservative Legal Interests Funneled \$2.7 Million To NRA, Freedom Partners Around Gorsuch Fight”, MapLight Defending Democracy, January 07, 2019, <https://maplight.org/story/conservative-legal-interests-funneled-2-7-million-to-nra-freedom-partners-around-gorsuch-fight/>

¹⁰⁴ Firearms Policy Coalition, <https://www.firearmspolicy.org/act>

¹⁰⁵ National Rifle Association-Institute for Legal Action (NRA-ILA), <https://www.nraila.org/gun-laws/>

¹⁰⁶ Brennan Center, Brennan Center Urges Supreme Court Justices Adopt a Code of Ethics, Brennan Center NYU Law School, September 24, 2019, <https://www.brennancenter.org/our-work/research-reports/brennan-center-urges-supreme-court-justices-adopt-code-ethics>

EXPLOITATION OF PUBLIC COMMUNICATION “ECHO CHAMBERS” (STRUCTURE)

Most Americans believe in processes that will get judges on the bench who are “able to empathize with ordinary people”¹⁰⁷. Public confidence in the judiciary falls when members of the public believe that either the judges cannot empathize with ordinary people, or that the processes that could elect judges who can, are broken. “Without public confidence,” one expert cautioned, “the judiciary cannot function.”¹⁰⁸

Media play a role in amplifying the message that the judiciary is broken. “*The public, and especially younger Americans, are heavily dependent on online news and social media as sources of information. Those who are older, and who have higher levels of education, are particularly concerned about disinformation campaigns that target the justice system. Winning this battle will require finely-tuned messaging.*”¹⁰⁹ This is especially true when so many Americans form their opinions of the judiciary through television and social media “echo chambers”.

The tactics below offer just a few examples where opponents of judicial independence use media and the publics’ lack of understanding of the judiciary to create negative public opinion on judges, their qualifications and the judicial selection process itself. We also provide examples of allies’ success use of media in outreach campaigns that promoted a greater understanding of the judiciary.

America’s identity across races and communities

There are robust, enduring differences in belief across races and communities about just what America's identity should be and how politics are experienced, and they in turn create the political reality of the country. Partisan politics arise from these differences, and exploit them. And these differences might be structural, informed by the basic fact of human geography, a geography itself built on the fact of American apartheid.

Vann R. Newkirk II
“The Racial Divide is the Political Divide”
The Atlantic, February 21, 2019.
<https://www.theatlantic.com/politics/archive/2019/02/racial-divisions-exist-among-whites-blacks-and-hispanics/583267/>.

¹⁰⁷ James L. Gibson, “Expecting Justice and Hoping for Empathy,” Pacific Standard, June 10, 2010, <https://psmag.com/news/expecting-justice-and-hoping-for-empathy-17677>

¹⁰⁸ “Without public confidence, the judicial branch could not function.” Commission to promote Public Confidence in Elections, *In re Raab*, 100 N.Y.2d 305, 315-316, 763 N.Y.S.2d 213, 218 (2003).
<http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/JudicialElectionsReport.pdf>

¹⁰⁹ Public Trust and Confidence Resource Guide, National Center for State Courts, The State of State Courts: A 2019 NCSC Public Opinion Survey, <https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide>

OPPONENT TACTICS

SEEKING TO BY-PASS OR POLITICIZE LEGAL PRECEDENTS

In 2019, Alaska Governor Dunleavy also tried to circumvent the judicial appointment process and illegally insisted that the Alaska Judicial Council provide him with different names than those selected through the Judicial Merit Selection System. Through that system, the Council sends two or more names to the governor for appointment to the bench, the governor chooses the judge from those names, and according to a set schedule, those appointed judges stand for retention at general elections. Governor Dunleavy wanted to challenge the selection process. He is part of a national trend using a far right tactic that seeks to discredit the judicial branch by forcing the courts to hear cases that will clearly lose based on precedent. After they lose the case, proponents of these positions launch media campaigns to blame the judges as "activist" for following the legal precedent. These precedent decisions can then be used by the far right during retention campaigns to discredit judges as "activist".¹¹⁰

USING A NATIONAL MEDIA PLATFORM TO SOW DISINFORMATION UNDERMINING MERIT-BASED JUDICIAL SELECTION PROCESSES

The Wall Street Journal's editorial board attacked Alaska's merit-based judicial selection process using disinformation to undermine the concepts of good government and nonpartisan systems to appoint judges. The editorial asserts that Alaska's merit-based process is in the "hands of a legal elite", that the seven-member judicial recommending Council is "dominated by the liberal Alaska Bar Association", and asserts it to be a system that guarantees "left-leaning courts". Highlighting a particular court ruling regarding abortion, the editorial called upon Alaskans to respond to the "activist" court by altering their constitution. While the merit-based process actually affords voters a key role in the process¹¹¹, such a national level editorial seeks to undermine not only Alaska's constitutionally mandated merit-based selection process but call into question the other 22 states that also have some form of merit-based selection. Expansion attempts for merit-based judicial selection processes to other states since 1994 have been unsuccessful.¹¹²

ALLY TACTICS

TAKING SUPREME COURT PROCEEDINGS TO THE COMMUNITY

Supreme Court Justices in Kansas have used a unique program of bringing judicial court proceedings to local communities. They hear cases throughout the state of Kansas. The local community is encouraged to attend and see for themselves how the court process works. This has made it possible for the public to see the justices as human, speaking plainly, and connected to rural and urban contexts. This has provided direct education to the public to demystify the judicial process and help the public understand the range and complexity of issues presided over by the justices. The justices

¹¹⁰ Libby Bakalar, "Attorney general's war on the judicial branch imperils Alaskans", Anchorage Daily News, November 12, 2019, <https://www.adn.com/opinions/2019/11/12/attorney-generals-war-on-the-judicial-branch-imperils-alaskans/>

¹¹¹ The Editorial Board, "A Recall Coup in Alaska: A fight over judges turns into an attempt to nullify an election", Wallstreet Journal, April 9, 2020, <https://www.wsj.com/articles/a-recall-coup-in-alaska-11586474729>

¹¹² John F. Kowal, "Judicial Selection for the 21st Century", The Brennan Center for Justice, June 6, 2016, <https://www.brennancenter.org/our-work/research-reports/judicial-selection-21st-century>

take time to engage with each local community in a number of significant ways: court proceedings are held at night so that people who work during the day can easily attend; justices host a noon lunch with local judges and attorneys; following the lunch, each of the seven justices partner with a local judge as pairs to speak with students at the different colleges and high schools in the area; following the night court proceedings, justices host a “meet and greet” with all the public members who attended; finally, the morning after the court proceedings, justices host a “community leaders” breakfast for mayors, school board members, city and county commissioners, etc. This one-on-one direct approach and public education has served to counteract disinformation, racist narratives and perspectives that justices are “activist elites” in a way that other news and social media cannot.

PAIRING CONSERVATIVE AND LIBERAL JUDGES AS SPOKESPEOPLE IN COMMUNITY EVENTS

The Kansas Values Institute worked with Supreme Court Justices to coordinate an outreach campaign. They paired conservative and liberal Supreme Court Justices to speak publicly about what they do and the workings of the court. They held almost 150 events throughout Kansas in community centers, public high schools, and other public spaces. They also trained them, and coalition members, on how to speak to the media.

USING VIDEO WITH CREDIBLE AND DIVERSE MESSENGERS TO EDUCATE THE PUBLIC

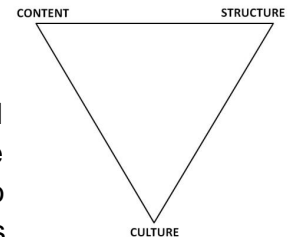
Justice Not Politics Alaska has developed and been successfully deploying videos featuring a range of credible and diverse messengers to explain the merit-based system.¹¹³ These diverse messengers are countering opponents’ messages that would open the door to increased money in politics. These videos have served to educate the public about the selection, role and importance of the judiciary to their everyday lives. There is a requirement in the State Education Standards for civic education, but these are implemented differently throughout the state. Justice Not Politics Alaska is reaching out to school districts to share the video resources, and to promote that judges are willing and available to visit classrooms.

¹¹³ “Videos: Learn why Alaska’s judicial selection and retention system is the envy of the nation,” Justice Not Politics Alaska, <http://justicenotpoliticsalaska.org/videos/>

THE CLASH OF “RULE SHIFTS” AND “CULTURE SHIFTS” (CULTURE)

A pervasive point raised during our interviews was a lack of public understanding of the judiciary. This is genuinely exacerbated by a judicial system that is very hard for most individuals to understand and value. Interviewees stressed how difficult it is for themselves, as advocates in this area, to understand the complexities of 50 different state judicial structural systems. These variations in judicial systems make it challenging and difficult for allies to create a national strategy for educating the public regarding the importance of judicial independence. Texas Chief Justice Hecht has observed: “[J]udicial independence is not really understood, especially in a culture as lacking in civics education as ours.”¹¹⁴

Returning to the “Triangle Analysis” used by New Tactics, the reason that culture is the balancing point of the triangle is that no matter how good the laws and policies (content), or how well these are implemented (structure), if PEOPLE are not willing to shift their attitudes, and more importantly, their behavior (culture) to match the “rule shifting” with “culture shifting” the results will not reach the goals of the laws or policies.



A number of movements that have made legal precedent setting progress over the past 50 decades continue to face challenges with conflicting “rule” and “culture” shifting. Each provides an example of this rule and culture shifting process to illustrate how identity and the divides in society balance on the tip of “culture”:

- civil rights movement with continual voting rights gains and losses
- women’s reproductive rights movement that reached federal law with *Roe vs Wade* but has faced on-going state laws seeking to restrict access to abortions and contraception as well as re-criminalize abortions to systematically undermine the federal law
- gay rights movement with the achievement of federal legalization of same-sex marriage but continues to face state constitutional amendments to undermine federal law.

Creating public conversations

For Stoddard [a gay rights activist], what prompts durable change is not simply the opportunity for ordinary people to bear witness through the news media or through intimate conversations with family and friends. Neither are civil rights entrenched in the culture by litigation or legislation by themselves. What prompts durable change is what Stoddard called ‘culture shifting,’ i.e., the opportunity for members of the public to bear witness, to deliberate and to create a larger public conversation that brings the imagined future to life.

Lani Guinier, “Meaningful Changes Depend on culture Shifts, Not Just Rules,” New York Times, October 29, 2014.

<https://www.nytimes.com/roomfordebate/2013/03/26/civil-rights-decisions-in-courts-or-legislatures/meaningful-changes-depend-on-culture-shifts-not-just-rules>

¹¹⁴ Judge Paul L. Friedman, Threats to Judicial Independence and the Rule of Law, American Bar Association, November 18, 2019, <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/>

Minnesotans United for All Families lead the first successful campaign that defeated the momentum of constitutional amendments that would recognize marriage only between a man and a woman. They credited three vital characteristics that contributed to the campaign's success: it was a coalition of diverse groups; it was a "people-powered" organization of sufficient size to make a sustained effort; and it reached people in every part of Minnesota, focused on opportunities for people to have one on one dialogues, opening a genuine comparison between fears and lived experiences.¹¹⁵ This undermined the ability of pre-existing prejudices to be exploited and created space for "culture shifting".

OPPONENT TACTICS

USING "LIBERAL/CONSERVATIVE" LABELS FOR SPREADING DISINFORMATION

During the Kavanaugh hearings in 2018, the National Rifle Association (NRA) launched a seven-figure national and regional ad campaign targeting 2nd Amendment enthusiasts to support the confirmation of Supreme Court Justice Brett Kavanaugh. The ad sought to politicize the court by claiming Kavanaugh would break the hold of four "liberal" justices who "oppose your right to self-defense" as Kavanaugh was highlighted as a staunchly aligned supporter of the NRA. Voters were urged to contact senators in five states that were considered swing votes: Murkowski, R-Alaska, Jones, D-Alabama, Donnelly, D-Indiana, Manchin, D-West Virginia, and Heitkamp, D-North Dakota.¹¹⁶

USING "ORWELLIAN DOUBLESPEAK" TO CONFUSE THE PUBLIC

Opponent messaging has not only included the "liberal / conservative" dichotomy, but has emphasized doublespeak to confuse the public regarding the very judges who are adhering to the rule of law and legal precedents as "activist judges", or "legislating from the bench". Opponent messages tell the public that the judicial selection process is controlled by "elites" and that more power should be given to the "people's representatives" rather than the reality that the merit-based system has more checks and balances, and actually gives the voting public a larger voice.

ALLY TACTICS

USING POPULAR MEDIA AND HUMOR AS AN EDUCATIONAL TOOL

John Oliver nailed a range of issues related to the election of judges in a 2015 episode, Elected Judges: Last Week Tonight with John Oliver (HBO). Among other tidbits, Alicia Bannon from the Brennan Center for Justice explained why there is currently a lack of accountability focused on the role of money and special interests in judicial elections. Currently, 87% of state judges are elected, with 39 states currently using some form of electing judges.¹¹⁷ This leads many elected judges to run "tough on crime" campaigns, which raises concerns that they will be biased against criminal

¹¹⁵ Sasha Aslanian and Eric Ringham, "EIGHTEEN MONTHS TO HISTORY: How the Minnesota marriage amendment was defeated -- money, passion, allies" MPRnews, November 9, 2012, <https://www.mprnews.org/story/2012/11/09/marriage-how>

¹¹⁶ Nicole Gaudiano, NRA ad campaign urges Supreme Court nominee Brett Kavanaugh's confirmation, USA TODAY, Updated August 7, 2018, <https://www.usatoday.com/story/news/politics/onpolitics/2018/08/07/national-rifle-association-ad-brett-kavanaugh-confirmation/923026002/>

¹¹⁷ John Oliver, Last Week Tonight, "Elected Judges: Last Week Tonight with John Oliver (HBO)", February 2015, <https://www.youtube.com/watch?v=poL7l-Uk3l8>

defendants once on the bench. Studies have shown that elected judges give harsher punishments to criminal defendants as elections near.¹¹⁸ Given dynamics of media coverage and the use of disinformation, judicial decisions can be used to create fear or seek to lead the public to believe that a judge is either “soft” or “tough” on crime [see Carr Brothers case example on page 24].

CONDUCTING A TELEVISED “LISTENING TOUR”

The State Justice Institute and the National Center for State Courts among other supporters conducted a “Courting Justice” multi-part, PBS televised “listening tour”. They engaged judges from around the country in a town-hall style program to dialogue with the communities they serve. The listening sessions were conducted in Los Angeles, Arkansas and Ohio and gave disenfranchised communities an opportunity to discuss the issues that erode their trust in the judicial system. For example, there is a lack of understanding of the issues minority communities face. An illustration of this problem might be seen in the opioid epidemic. Historically, when the problem was largely confined to minority communities, it was met with punishment, increasing sentencing severity, seen as a criminal problem. However, when the same problem of addiction became prevalent in White, middle-class suburbs, there was a change to an addiction-centered treatment-based model. The responses to similar realities of minority and majority communities relating to the causes of opioid abuse were viewed and responded to very differently. The “Listening Tour” resources and videos are available as a resource and give opportunities for public discussions on how bias inserts itself into the culture of the judiciary. Ultimately, these biases impact the decision making of judges and highlight the importance of public engagement to help with needed culture shifts.¹¹⁹ There is a toolkit which provides an outstanding summary of the many implicit and explicit racial biases and barriers faced by minority communities in the judicial system. The toolkit also offers a range of ideas for how public engagement can address issues of fairness and implicit bias.¹²⁰

TRAINING JUDGES TO USE SOCIAL MEDIA TO CONNECT WITH THE PUBLIC

The Kansas Values Institute trained Supreme Court Justices on social media practices. They asked justices to use social media to post general information about their daily lives. This non-political and genuine outreach provided Kansans with a way to learn about each of the justices. They set up a fun competition among Supreme Court Justices as an incentive for social media posting. The social media postings helped to dispel the notion that justices are “elite” people with nothing in common with ordinary Kansans. The public responded with interest in the social media posts and the chief justice drew quite a social media following.

USING A RAPID RESPONSE TEAM FOR JUDGES TO COMBAT DISINFORMATION

The Center for Strategic and International Studies is currently developing a “Rapid Response Network” to intervene in state and national when disinformation campaigns arise regarding judicial

¹¹⁸ Joanna Cohn Weiss, “Tough on Crime: How campaigns for State Judiciary Violate Criminal Defendants’ Due Process Rights”, 2006, <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-81-3-Weiss.pdf>

¹¹⁹ National Center for State Courts, Judges team up for Courting Justice ‘listening tour’, 2016, <https://www.ncsc.org/information-and-resources/racial-justice/community-engagement-initiative/courting-justice>
Appendix A: Issues Identified in the “Courting Justice” Listening Tour, https://www.ncsc.org/_data/assets/pdf_file/0025/28465/appendix-a.pdf

¹²⁰ National Center for State Courts and University of Nebraska Public Policy Center, “Building Trust by Building Trustworthiness: A Toolkit for Public Engagements Addressing Disparities in the Courts”, https://www.ncsc.org/_data/assets/pdf_file/0027/28467/overview.pdf

nomination, selection and election processes. The Center is also working with the National Center for State Courts to inform and alert federal judges in identifying disinformation campaigns and cybersecurity issues.

USING A SURVEY TO GAIN PUBLIC PERSPECTIVES AND RAISE AWARENESS OF JUDICIAL INDEPENDENCE THROUGH MULTIPLE MESSENGERS

In a 2017 online survey with 1,299 engaged voters and social influencers in 28 states, Goodwin Simon Strategic Research (GSSR) found that multiple messengers were effective in raising awareness about judicial independence. The survey included civically engaged people with party affiliations consisting of 50% Democrat, 21% Republican and 29% Independent. Some very interesting points regarding the publics' lack of understanding of the judiciary were revealed: Unfamiliarity with the judiciary did not mean people were uncaring, in fact, they felt guilty for not knowing more about the judiciary; and although the definition of "diversity" varies, diversity of all kinds was seen as critical for justices to be just. The survey served an educational role, as once issues were raised, respondents showed strong support for reforms. Reforms included disclosure, recusal rules, an independent commission to evaluate potential nominees, and evaluation systems. The perception and investment in elections is powerful. The respondents were not only reluctant to give up their role in electing judges, as elections are viewed as an important check and balance. Elections were seen as a way for judges to be "representative"; a "safety valve to weed out bad judges"; and the "answer to corruption," requiring more input from voters. Some effective messages in familiar concepts included: "Three separate branches of government", "Separation of powers" and "Checks and balances".¹²¹ In early 2020, GSSR conducted a survey exploring public understanding and support of the merit-based selection system processes in three states. The results provided particularly positive feedback for Justice Not Politics Alaska's five years of public civics education efforts. The polling showed that 53% of Alaskans were aware of how judges were selected and, once provided with education on how the merit-selection and retention system worked, 64% favor maintaining Alaska's system for selecting and retaining state court judges.¹²²

USING OP-EDS TO INCREASE PUBLIC UNDERSTANDING OF JUDGES AND COURTS

Kansas Supreme Court Chief Justice Lawton Nuss utilized Op-Eds¹²³ in 2013 and 2015 to provide insights to the public regarding the legislature's "chief judge selection" bill attempting to undermine the selection process by forcing the court to bargain away its authority in exchange for funding (as referenced on page 30). In another commentary, Chief Justice Nuss defended merit selection, "[In Kansas] merit selection is a healthy competition that compares side by side the qualifications of numerous applicants. Their names and qualifications are made public, and the selection process itself is open for Kansans to see. Politics and its ever-increasing money play no role."¹²⁴

¹²¹ Goodwin Simon Strategic Research, Judicial Independence Message Research 2017, (An online presentation shared with New Tactics), Conducted on behalf of Piper Fund, a Proteus Fund Initiative

¹²² Goodwin Simon Strategic Research, Judicial Independence in Alaska, Iowa, and Kansas, April 2020, (An online presentation shared with New Tactics), Conducted with support from the Piper Fund, a Proteus Fund Initiative

¹²³ Dodge City Globe, January 3, 2013; Wichita Eagle, February 26, 2015

¹²⁴ Bob Sigman, "Kansans are wisely opposed to abandoning merit selection", Kansas City Star, March 17, 2015 10:35 AM, UPDATED March 31, 2015 05:19 PM, <https://www.kansascity.com/news/local/community/joco-913/joco-opinion/article15005207.html>

Alaska's judges are putting effort into getting out into the communities and being seen. Judges are using OpEds as one outreach method. The Anchorage Daily News published an OpEd from Judge Henderson thanking the public, court staff and everyone for their generous and patient responses regarding court proceedings during the challenges presented by COVID-19.¹²⁵ Judge Wells, a Kenai Peninsula judge, recently had an opinion piece published on how court works is continuing during the COVID-19 crisis. Judge Wells took the time to write an extensive piece for the Anchorage Daily News to explain how the court is continuing to work and function during the COVID-19 pandemic.¹²⁶

CREATING A JUDGE-LAWYER-COMMUNITY MEMBER SPEAKER BUREAU

The Ohio Fair Vote Coalition had just created and launched a speaker's bureau to conduct outreach regarding the judiciary, judicial independence, and the judicial system to people already engaged in community issues when the COVID-19 pandemic hit the community. The group of retired judges, lawyers, and non-lawyers had conducted almost 25 "teach-ins" at churches, community centers and with indivisible groups before the COVID-19 pandemic.

¹²⁵ Jennifer Henderson, "Letter: Thanks for your decency, Alaskans, Anchorage Daily News", April 16, 2020, <https://www.adn.com/opinions/letters/2020/04/16/letter-thanks-for-your-decency-alaskans/>

¹²⁶ Jennifer Wells, "How does the pandemic affect Alaska's justice system?", Anchorage Daily News, July 9, 2020, <https://www.adn.com/opinions/national-opinions/2020/07/09/how-does-the-pandemic-affect-alaskas-justice-system/#>

Democracy, the Judiciary, and Disinformation: **An Ohio Case Study**

Mobilizing the Public: A Coalition Forms

In July 2019 Ohio state lawmakers passed House Bill 6 (HB6), which gave subsidies to nuclear and coal companies, increased consumer monthly energy bills, and weakened incentives for most renewable energy. One company, FirstEnergy Solutions, was set to receive at least \$1 billion in subsidies as a result of HB6, a boon for a subsidiary of a parent company that was working its way through the Ohio bankruptcy courts.¹²⁷ The bill passed with the help of two dark money special interest groups, Ohioans for Energy Security, and Generation Now.¹²⁸

Incensed by the bailout earmarked for faltering coal and nuclear companies and the impact on the future of renewable energy, Ohioans Against Corporate Bailouts (OACB) began mobilizing to reverse the bill through a voter referendum. The Ohio voter referendum process permits voters to collect signatures and put the bill on the ballot for voter approval or disapproval. By state law this referendum could only appear on a ballot through a petition with roughly 266,000 signatures. In order to get started, OACB had to get petition approval from Secretary of State Frank La Rose and Attorney General Dave Yost.¹²⁹

The process proved slow. OACB claimed that the Attorney General and the Secretary of State dragged their feet on the approval process, which took 38 days of waiting. This left the anti-bailout group with just over half of the 90 days entitled under state law. The petition organizers went to the federal courts to ask for more time to gather signatures, but in late October a federal judge denied them the extra time and suggested the state courts settle the matter.¹³⁰ OACB and its coalition of pro-democracy and renewable energy/environmental groups scrambled to mobilize a grassroots campaign to gather the petition signatures ahead of the deadline.

Several Pro-Democracy groups coupled petition efforts with a public education campaign about the role dark money played in the passage of HB6 in an attempt to sabotage a democratic process. In one instance the Ohio Fair Courts Alliance and other groups educated voters on the role the courts could play in this and other similar democratic processes. During some sessions the groups described how the outcome of a court case could be pre-determined, because justices of the Ohio Supreme Court seldom recuse themselves or step away from cases involving their campaign contributors. In this case, FirstEnergy had made significant contributions to business friendly justices for more than 20

¹²⁷ Karen Kasler, "Speaker says he's concerned about funding group opposing nuke bailout," Statehouse News Bureau, July 6, 2019, <https://www.stateneews.org/post/speaker-says-hes-concerned-about-funding-group-opposing-nuke-bailout>

¹²⁸ Energy and Policy Institute, "Who's behind Ohioans for Energy Security's ad campaign to scare voters?" August 28, 2019. <https://www.energyandpolicy.org/ohioans-for-energy-security/>.

¹²⁹ Ibid.

¹³⁰ "Courts approve voluntary dismissal of Ohio House Bill 6 cases," Andrew Cass, February 22, 2020, The News Herald. "U.S. Southern Ohio District Judge Edmund A. Sargus Jr. denied the group's effort, but referred questions related to the petition process to the Ohio Supreme Court. The federal judge wrote in an order issued late Oct. 23 that the window to circulate petitions is only prescribed in the Ohio, not federal, constitution." https://www.news-herald.com/news/courts-approve-voluntary-dismissal-of-ohio-house-bill-cases/article_b250ea6c-468c-11ea-91e2-0b163b747dfa.html.

years.¹³¹ A lead organizer reported that during the civic education events “we helped people connect the dots about how special interests are undermining our faith in our democratic institutions. Many members of this educated electorate admitted they were embarrassed by how little they knew about judicial elections and the judiciary in general.”

A Disinformation Campaign Fueled by Wealthy Special Interests

The prospect of putting the bill to voters did not sit well with Ohioans for Energy Security, one of the two dark money groups tied to FirstEnergy Solutions. To stop the voter referendum from getting on the ballot, the group resorted to a racist and xenophobic disinformation campaign that used television ads¹³², its website¹³³ social media, and traditional mailings to dissuade people from signing petitions by attributing petition efforts to agents of the Chinese Government. There were also scattered reports of unidentified people harassing petition collectors.¹³⁴

When the 90-day deadline came around OACB failed to get the 266,000 signatures needed to put HB6 on the

ballot for voters to vote on a referendum. But they didn't give up and kept pressing through the courts. In November they sued Ohio Secretary of State, Frank LaRose, arguing that the Attorney General and the Secretary of State dragged their feet so much on their petition language that they didn't have time to gather petitions. The Beacon Journal wrote, “Unless some campaign guardrails go up, the resounding success of Ohioans for Energy Security's nasty tactics is sure to breed more of the same in the future.”¹³⁵



¹³¹ “Can Money Buy Justice: Contributions to Ohio Supreme Court Candidates 2018,” Catherine Turcer and Mia Lewis, Common Cause, Ohio 2018, https://www.proteusfund.org/wp-content/uploads/2018/10/2018-Oct-OhioSupremeCourt_WEB_r2.pdf

¹³² “Ads trying to keep HB 6 from the ballot, warning of China taking over Ohio power grid, are far-fetched according to advocates: Ohioans for Energy Security using ads to try and stop petition efforts,” Dan DeRoos, Cleveland19, September 9, 2019, <https://www.cleveland19.com/2019/09/09/anti-hb-ads-warning-china-taking-over-ohio-power-grid-are-far-fetched-according-advocates/>

¹³³ Ohioans for Energy Security, June 12, 2020, <https://ohioansforenergysecurity.com/>

¹³⁴ Andy Chow, “Aggressive Nuclear Bailout Campaign Gets Attorney General's Attention,” WOSU Public Media, Oct 1, 2019, <https://radio.wosu.org/post/aggressive-nuclear-bailout-campaign-gets-attorney-generals-attention#stream/0>

¹³⁵ The Columbus Dispatch, Guest view: Issues raised in referendum fight shouldn't be forgotten, Akron Beacon Journal, February 2, 2020, <https://www.beaconjournal.com/opinion/20200202/guest-view-issues-raised-in-referendum-fight-shouldnt-be-forgotten>

A High Profile Case Goes to the Ohio Supreme Court, Then Disappears

Things simmered down publicly, but they heated up behind the scenes in November when OACB took the case to the Ohio Supreme Court. The court has to vote on whether to take a case, and in this instance three of the seven justices recused themselves from the case. This was because two of the defendants in the case managed the three justice's election campaigns.¹³⁶ One justice did not recuse herself from the case even though she received a campaign contribution from a lobbyist for FirstEnergy Corps who was later arrested in connection with the HB6 case.¹³⁷ As the court considered whether to take the case, FirstEnergy Solutions filed an amicus brief—that is, a brief presented by someone interested in influencing the outcome of a lawsuit but who is not a party to it.¹³⁸

A couple of months later the plaintiffs suddenly submitted a joint application to the State Supreme Court to dismiss the case.¹³⁹ “We have moved to dismiss our suit in federal court, as we could see no clear path to a successful petition drive,” said OACB spokesperson Gene Pierce. The anti-bailout group also declared “it didn’t have the money to continue the fight.”¹⁴⁰ With little money to continue in the court process, the coalition feared a negative outcome for the case that would set dangerous precedence.

Though the case didn’t make its way through the State Supreme Court, the events surrounding HB6 came to a head in the summer of 2020 when the FBI arrested the Speaker of the House, Larry Householder, and several of his aids in a corruption scandal. As one interviewee put it, there are “too many weird and juicy details to believe.” The federal charges described how FirstEnergy spent \$60 million to get Householder elected, pass the bailout, and defend the bill against anti-bailout efforts.¹⁴¹

As of July 2020 efforts continue to repeal HB6 at the state legislature, several lawsuits have been, or will be shortly, filed to address the fallout of the bailout and subsequent arrests in the bribery cases. “Needless to say,” one lawyer told us in an email, “we will need the courts to be the backstop, to stop the law, and get people back the money HB6 took or (will soon take) from Ohioans.”

¹³⁶ Randy Ludlow, “3 Ohio Supreme Court Justices remove themselves from the House Bill 6 case,” Columbus Dispatch, September 27, 2019, <https://www.dispatch.com/news/20190927/3-ohio-supreme-court-justices-remove-themselves-from-house-bill-6-case>

¹³⁷ John Caniglia, “Who is Matthew Borges and What is he Accused of in the Statehouse Bribery Scandal?” The Plain Dealer, July 21, 2020, <https://www.cleveland.com/court-justice/2020/07/who-is-matthew-borges-and-what-is-he-accused-of-in-the-statehouse-bribery-case.html>

¹³⁸ Interview with Piper Grantee, March 2020. Several people cited amicus briefs as a tactic used by wealthy special interests. A dark money group funds a judicial campaign, and then files amicus briefs in court cases that affect the group’s interests. The briefs “signal to justices they helped get elected how they should vote on a case.”

¹³⁹ The Supreme Court of Ohio Case Information, <http://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2019/1447>

¹⁴⁰ “Guest view: Issues raised in referendum fight shouldn’t be forgotten,” Columbus Dispatch, February 2, 2020, Akron Beacon Journal, <https://www.beaconjournal.com/opinion/20200202/guest-view-issues-raised-in-referendum-fight-shouldnt-be-forgotten>

¹⁴¹ Andrew J. Tobias, “Federal charges describe elaborate scheme, bankrolled by FirstEnergy, to corrupt Ohio politics and secure nuclear bailout,” Cleveland.com, July 21, 2020, <https://www.cleveland.com/open/2020/07/federal-charges-describe-elaborate-scheme-bankrolled-by-firstenergy-to-corrupt-ohio-politics-and-secure-nuclear-bailout.html>

FOR REFLECTION

1. What kinds of connections does this case study bring up regarding your own work?
2. What aspects of the case signal a threat to an independent judiciary?
3. What did you notice about the judiciary's role in this case and what do you feel went right and what went wrong?
4. Reflect on the role of disinformation in this case. How did it affect democratic processes? What about the judiciary?
5. What role does racism and xenophobia play in the tactics AND the institutional responses to those tactics?

If you can't tell from this example, draw on similar examples from your work.

6. Our report leans on a "Triangle Analysis" of content, structure and culture. (See below)

How do you see disinformation inserting itself in the content, structure and culture of the judiciary in this case?

7. How do you see disinformation inserting itself in the content, structure and culture of the judiciary within your own community?

CONTENT – the laws, regulations, bylaws, policies, customary laws, and international treaties that relate to the problem. Consider how these may be currently present, absent, insufficient or even discriminatory to a particular community or group of people.

STRUCTURE – the implementing mechanisms of any laws, regulations and policies that relate to the problem. Consider how implementing mechanisms may be currently present, absent, insufficient or discriminatory to a particular community or group of people in the way they are implemented.

CULTURE – the social context and behaviors of people that relate to the problem. Consider how currently present beliefs, values and behaviors within and between communities impact the problem. Consider who is excluded by these beliefs, values and behaviors as well as why and how they are excluded or discriminated against.

