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Sen. Whitehouse bolsters push to shine light on ‘dark money’ at Supreme Court

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Sen. Sheldon Whitehouse has told and retold the story of what he calls “the scheme” for years. The Rhode Island Democrat has written reports and essays, introduced bills, filed briefs, gone on cable TV and made presentations at high-profile Supreme Court confirmation hearings.

But Whitehouse hasn’t been as convincing as he’d hoped in his campaign to curb conservative anonymous donors and their influence on the Supreme Court — even as that “dark money” now floods in to support the judicial nomination process his party controls.

“In terms of Democrats, we’ve fallen short on taking this seriously and communicating to the public what a hazard the dark money operation is,” Whitehouse told CQ Roll Call this month.

But really, he’s been telling anybody and everybody who will listen.

Whitehouse, now with a Senate Judiciary subcommittee gavel in hand, has pushed even harder this year to highlight a complicated slice of government accountability that can be inscrutable to the public and unwieldy to describe.

He has held hearings and has launched a new series of floor speeches. And while he paints conservatives as the villains here, he has reached out to Republicans to find common ground.

“I will tell you what is a lot more rotten than the partisanship between us, is the influence that nobody sees because nobody knows who’s behind the money,” Whitehouse told North Carolina Republican Thom Tillis at one hearing. “And I don’t care which side that comes down on, it is wrong.”

Congressional history is littered with efforts like this on issues that single members care much more about than their colleagues, said Joshua Huder, a senior fellow at Georgetown University’s Government Affairs Institute. The efforts can look futile, and are futile, if the member of Congress lacks the ability to persuade others or build a coalition.

“Can you get other people to care about it the way you do?” Huder said. “And that’s really difficult because they have 9 billion other things that they could be paying attention to as lawmakers from various states and districts.”

A tough argument

Whitehouse's full argument isn't easy to digest, and it delves deep behind the scenes of a federal court system that traditionally is a low priority for most voters. He took 29 pages to make his case in the Harvard Journal on Legislation.

At times, the former Rhode Island U.S. attorney and state attorney general can sound conspiratorial, such as when he testified in the House that he has found "cut-outs, front groups, false narratives, hidden funding. It has the tradecraft of a covert op."

He spent 30 minutes at the confirmation hearing of Justice Amy Coney Barrett to explain it, using a red sharpie to circle names of people and organizations and drawing lines connecting them on a series of 17 small posters.

"That just ... didn't take," Whitehouse said this month. "So you just have to keep striking the match until it flares and you find tinder, and then you can make your case."

Stripped down to one paragraph, his argument is: Corporate interests for decades have focused on controlling America's courts. They have done so with the help of private groups that are not required to disclose donors. Those groups help select and promote conservative judicial nominees using millions in "dark money" for advertising. Those donors also anonymously fund groups that bring and support Supreme Court cases that give cover to their agenda. And that has led to more than 80 partisan 5-4 decisions under Chief Justice John G. Roberts Jr. that gave victories to big Republican donor interests.

Whitehouse's prosecutorial approach and persistence have made waves in the small niche of Washington that focuses on federal courts. Among Democrats, though, Whitehouse said he sees "a slow awakening to the fact this is a serious problem."

Many Democrats have been content to let Whitehouse stay way out in front on pressing the full scope of his argument. Key Republicans are more than skeptical, and his targets have dubbed his push a "quixotic crusade" and "paranoid theatrics."

His main target on the advertising side is the Judicial Crisis Network, a Washington-based nonprofit that uses tax laws and federal rules to keep donations anonymous. He has highlighted two separate \$17 million contributions made to back two of former President Donald Trump's high court appointments.

The group said it spent millions on the three Supreme Court confirmation fights since 2016. It spent \$1.4 million alone for a one-week advertising campaign during Justice Brett M. Kavanaugh's confirmation process ahead of the 2018 congressional elections.

The ad run targeted red state Democrats, urging voters to "Tell your Senator — Confirm Kavanaugh."

And when Sen. Susan Collins cast a key vote to confirm Kavanaugh, the Judicial Crisis Network announced a six-figure campaign thanking the Maine Republican "for being a reasonable voice."

Liberal donors have formed their own anonymously funded group, Demand Justice, which has backed a legislative push to expand the Supreme Court to 13 justices and urged Justice Stephen G. Breyer to retire while Democrats control the Senate and the White House.

Demand Justice this month announced a six-figure digital and radio campaign to build support for Judge Ketanji Brown Jackson's confirmation to the federal appeals court in Washington, as

part of “a wave of Biden judges who will uphold the rights of all of us, not just the rich and powerful.”

Jackson, who was narrowly confirmed, is considered a top candidate if President Joe Biden gets a chance to fill a Supreme Court vacancy.

Legislative push

A bill Whitehouse championed and Republicans opposed — which has a provision to require advocacy groups to disclose donors if they run ads around judicial nomination fights — is included in Democrats’ elections, campaign finance and ethics overhaul bill that stalled in the Senate during a procedural vote Tuesday.

Democrats haven’t incorporated his fuller pitch into their main messaging, which remains focused on what they call Republicans’ theft of a Supreme Court seat.

Whitehouse has used his chairmanship to push the issue. “There are many questions to answer about who is behind this scheme, and how it interconnects, and what the reward is for spending such vast sums,” he said at one hearing.

The hearings have prompted unusual exchanges between Whitehouse and witnesses — but only days after they ended. At the first hearing, Texas Republican Sen. Ted Cruz asked the head of People For the American Way, who was testifying against dark money, to disclose that liberal nonprofit’s top donors.

The group later posted a version of that information online, and Whitehouse said that prompted him to ask the two Republican-called witnesses to make similar disclosures.

Scott Walter from the Capital Research Center responded that he opposes government-coerced donor disclosures. “I trust you can understand why it is difficult to sustain the polite presumption that you are operating in good faith,” Walter wrote.

Whitehouse wrote similar letters to two nonprofit groups that have backed Republican judicial nominees, including the Judicial Crisis Network. The group didn’t respond, but group President Carrie Severino fired back when asked by CQ Roll Call.

“Senator Whitehouse can continue his paranoid theatrics about JCN, but the truth is that public policy in Washington is dominated by the left-wing dark money groups that elected Biden and Senate Democrats,” she said in a statement. “We look forward to his tweet threads on the way Biden is paying those dark money groups back for their support with policy and personnel.”

All of that highlights how Whitehouse faces another headwind: Both parties now take advantage of dark money.

A witness at one of Whitehouse’s hearings about anonymous funding for Supreme Court briefs came ready to criticize Whitehouse’s “quixotic crusade.” Ilya Shapiro of the Cato Institute said his group files those briefs — and so do Republicans, Democrats and Whitehouse. Cato gets only about 3% of its funding from corporate political action committees, “much less than the chairman gets from corporate PACs,” Shapiro said.

Anonymous political spending on judicial nominations is just a small part of the greater dark money arena, in which Democrats surpassed Republicans in the last two election cycles, according to the Center for Responsive Politics.

Some traction

After a letter to the Supreme Court, the policymaking body of the federal courts agreed to look at enforcement of rules barring anonymous amicus briefs. Whitehouse filed a bill on that last Congress.

Whitehouse, meanwhile, teamed up with South Carolina Republican Lindsey Graham, also a Senate Judiciary member, on a letter to the high court about financial disclosure requirements.

And he and Louisiana GOP Sen. John Kennedy have requested justices' travel records as part of a broader look at financial disclosure standards for senior government officials.

Whitehouse said attention to the issues could increase because of the Supreme Court's upcoming ruling in a case about a California law that requires nonprofits to disclose donors to state regulators.

Whitehouse and a group of Democratic senators told the justices in a brief that the challenges from two nonprofits are "the latest move in a steady and methodical campaign pursued by powerful interests to both cement and obscure their influence over the public sphere."

Senate Minority Leader Mitch McConnell filed a brief as well, telling the justices that "donor disclosure requirements threaten great practical harm — harassment, boycotts, violence — to those who espouse controversial or unpopular views." If the justices go that way, Whitehouse said, "they'll be creating a right to basically dark money covert operations that has never existed."

Rep. John Sarbanes, who put together the House version of that bill after 15 years of working on campaign finance and dark money issues, said such legislative efforts are difficult because they must disrupt the status quo.

"Both parties in Washington have gotten more comfortable with the way money operates and influences things than is healthy for the country," the Maryland Democrat said.

"That's why you need voices of moral outrage and clarity, like the voice that Whitehouse has brought to this issue of fighting big money," Sarbanes added.

That brings Whitehouse back to the floor, where he is not new to this style of public education campaign. He gave a floor speech nearly every week for almost nine years on climate change known as "Time to Wake Up."

Last month, he began a new floor speech series with what he sees as the beginning: a memo from corporate lawyer Lewis Powell, two months before President Richard Nixon nominated him to the Supreme Court, that focused on a strategy of corporate America "exploiting judicial action." After describing it, Whitehouse stopped there, in 1972.

"To be continued," he said.