Session 2: The Problem of State Judicial Campaign "Arms Races"—What Can Be Done in the State Legislatures and State Courts?

Panelists
Chief Justice Shirley Abrahamson, Wisconsin Supreme Court
Justice Hans Linde (ret.), Oregon Supreme Court
Jamie Pedersen, Washington House of Representatives
Judge David Schuman, Oregon Court of Appeals
Charles Wiggins, Wiggins & Masters, PLLC

Moderator
Ronald Collins, First Amendment Center

RON COLLINS: Welcome. My name is Ron Collins. It is a pleasure and an honor to return to yet another Seattle University program and participate as your moderator for the panel entitled, "The Problem of Judicial Campaign Arm Races: What Can be Done in State Legislatures and State Courts?"

I would like to join the chorus of others in thanking Seattle University Law School and Dean Annette Clark for making this event possible. Thank you as well to some remarkable people who played a vital role in shaping this conference. I refer first and foremost to Justice Sandra Day O'Connor, who continues to champion the cause of ethical and meaningful judicial independence. In addition, I would like to thank Seattle University's former Dean, Kellye Testy, as well as Professor Sally Rider and Mary McQueen. All of these women have played a very significant role in making this event possible, and I feel happy and honored to recognize their work today. And finally, a heartfelt thank you to my friend and colleague David Skover for doing a truly remarkable job in making this event both possible and successful during the most trying of times.

Let me begin our discussion with a few thoughts from two champions of realism. First, the infamous political philosopher Niccolò Machiavelli once said that others will tell you what the world should be, but he will tell you what it is. This realistic perspective will be the lens through which this discussion on this panel will follow.

The next realist is a former West Virginia supreme court justice who shall remain unnamed. Many years ago, when my hair was still thick, this justice spoke at a conference on state court judicial elections. I was not there, but the story goes that when it came to an audience question, an idealistic young man asked this West Virginia supreme court justice: How do you go about becoming a state supreme court justice? Do you have to go to a good law school? Do you have to become involved in the state bar association? Do you have to become involved in civic organizations? Do you have to become a trial judge, then an appellate judge, and then tender your resume to the governor and hope that merit is the measure? Is that how you have to do it?

Without pausing for an ethical second, the bold justice from West Virginia said, "Money, my man, money." This is the realist backdrop or subtext for much of the discussion about *Caperton*[1] and also *White*.[2] At least some of the subtext includes an animosity to judicial elections and an attempt to defang them.

We do not like our current method of doing things, and we are more than willing to do whatever we can do to remove the negative aspects of the electoral process from the judicial selection process. We will discuss whether and to what extent the process is a good or bad approach. We have before us a group of people, judges, and lawmakers alike, who have all been tested by the flames of contested elections. In fact, one speaker has been tested five times. Incredibly, many, if not all, of these people who have been tested by the flames of contested judicial elections vigorously support judicial elections. Today, we will hear their views.

Let me introduce our guests. First, Chief Justice Shirley Abrahamson from the Wisconsin Supreme Court. Next, the man I had the honor to work for many years ago, now retired Justice Hans Linde from the Oregon Supreme Court. To my left is Charlie Wiggins, who has served as a judge, has run in a contested election, is a prominent lawyer in the field of judicial elections, and is a man whose knowledge of this subject humbles at least this moderator.

We also have another former Linde law clerk, my friend David Schuman. He now sits on the Oregon Court of Appeals. And finally, I would like to introduce Representative Jamie Pedersen, who brings the legislative perspective with him. He serves in the Washington State House of Representatives and is involved in matters related to the judiciary and judicial oversight.

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1. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, (2009).
2. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

We hope to engage in an uninhibited, robust, and open discussion about a variety of issues. In order to move this discussion along, I will ask questions directed to a particular panelist, ask that panelist to take the lead in responding, and then encourage the other panelists to respond accordingly to ensure a lively and illuminating discussion.

Let me turn to Chief Justice Abrahamson first. When one reads some of the United States Supreme Court opinions in this area, it is easy to get the sense that some of the Justices want states to let their judicial systems go to hell in a hand basket if they so choose? With that, how do you feel about state judicial elections: good, bad, or indifferent?

SHIRLEY ABRAHAMSON: Wisconsin has utilized judicial elections since it became a state in the populist era of 1848. I originally came to the bench by Governor Patrick Lucey's appointment without any commission. He selected me rather than others on the basis of merit. And I have proven him correct. I have stood for four contested elections, each for a ten-year term. In Wisconsin, judicial elections are in April rather than during partisan elections in November. Unless there is something special on the April ballot like a presidential primary, the turnout is usually roughly twenty percent of the electorate. However, the polls show that in Wisconsin, the people are unwilling to give up the opportunity to vote. This does not mean that public opinion will not change—it might—but this is the current situation. I favor elections in Wisconsin; however, I am unwilling to say whether I favor elections in different states with different legal or political cultures. This is a state decision, determined by the legislature and, usually, by the constitution.

The states are laboratories for methods of judicial selection. Many states have elected judges. Bert Brandenburg's statistics and figures are generally given, showing that 85% or so of state judges of different levels across the country are subject to some kind of election, including elections for retention or selection, and elections that are partisan or nonpartisan. According to *Caperton*, at least thirty-nine states have elected judges at some level in the justice system. State courts handle up to 98% of all the judicial business in this country. When we talk about the election system for state court judges, we are talking about judges who handle most of the cases in this country. Thus, determining the most effective method for judicial selection is an important decision.

Originally, many viewed the implementation of judicial elections as an improvement over states whose party bosses or legislative leadership selected the judges. In the states that did not have judicial elections, judges were appointed not necessarily on the basis of merit, but on nonmerit based considerations. The people felt that the opportunity to select or retain judges through elections was an important reform.

The issue we face today is whether this reform needs further adjustment. There is no perfect method of selecting judges. Despite how it may look on paper, a system for selecting judges may prove imperfect in operation. The selection method may be captured by particular elements, or it simply may not function very well. The personal views of the United States Supreme Court Justices about judicial elections should not influence a state's decision on the best judicial selection method for that state. What the Justices do or do not like is irrelevant because they are not supposed to decide constitutional issues on the basis of what they think is good policy.

In an elective system, a lot of information is on the table, open to public view. In appointive systems, much information about the selection may be under the table where people cannot see it or gauge it. I hope that we will not refer to appointive systems as merit selection because we get judges with merit by election, as well as appointment.

I leave you with one thought: in an appointive system, like the federal system, there are lobbying groups that go see senators and that consult with the President about which judges should have the consent of the Senate. Paid ads may line the Capital Beltway, which we outside the Beltway don't see saying, "Call your senator and tell him to or tell her to . . . ." Why is the appointive system, as it relates to money and interest groups, any different from the elective system? Why is a confirmation hearing different from an election with regard to free speech? The issues that arise in the elective system seem also to arise in the appointive system where a hundred senators consent to somebody to serve as judge for life. My term of office is only ten years, and don't count me out for 2019.

RON COLLINS: Chief Justice, nobody's counting you out for anything. Chief Justice Abrahamson just spoke about the difference between appointed judges and elected judges. Let me ask David Schuman to put a tail on that kite. Who cares about state judicial elections? Why do they think elections are important?

DAVID SCHUMAN: The first question to ask is, "Who does *not* care?" As Professor Richard Hasen said earlier today, the general public does not care. I think they care about their right to vote as an abstract matter, but they do not particularly care about voting in a judicial election. I have not done independent research on that subject, but my friend Professor Nicholas Lovrich, an expert from Washington State University who has done that research, agreed with my impression over a drink last night, which passes as a literature review. The general public's lack of interest in judicial elections magnifies the effect of money in judicial elections. People with money have the ability to advertise on television

and can build or create a knowledge base instead of trying to change an existing one, which is much more difficult.

As for people who are interested in judicial elections, I think that there are three categories. The first group consists of directly interested individuals. The second group is made up of what I call reactive interest groups. Finally, there are general, permanent interest groups. I believe that none of the actions of the three interest categories actually leads to a positive impact on judicial elections.

The directly interested individuals include, first and foremost, sitting judges. Justice Otto Kaus once referred to the prospect of an upcoming judicial election and the effect that it has on a sitting judge as the proverbial alligator in the bathtub. You know that it's there and that it's dangerous, but you try to ignore it. Another kind of directly interested individual is someone who is highly qualified and interested in applying for judicial office. For this person, the prospect of a brutal and expensive judicial election serves as a powerful disincentive. Then there are the potential appointees who have no qualifications. Instead, they have access to money, name familiarity, a sputtering career, a grudge, or some combination. Justice Linde refers to these people as self-starters. And then, of course, there are the rare individuals who have pending cases. Although one particular case has been influential, this situation strikes me as extremely rare.

The second category, the reactive interest groups, might get involved in judicial elections for several reasons. They might engage in judicial elections because of some recent high-profile, unpopular decision by a court or a named justice. They may be interested in a case that is coming up for a constitutional test before a particular court. They also might get involved because of some recent legislation.

During my contested election, I faced opposition from the final group—the permanent interest groups. The permanent players, the frequent flyers in our system, include the plaintiff's lawyers, the defense bar, the chamber of commerce, and interestingly, law enforcement and anticrime groups. The anticrime groups typically do not have access to a lot of money, so they tend to piggyback on the other permanent groups.

RON COLLINS: Judge Schuman, some might interpret what you say as, for lack of a better phrase, a progressive critique of judicial elections. Yet, if my memory serves me correctly, the idea of judicial elections was brought to us by people like Josephine Goldmark and Florence Kelley, two women who kept the company of Louis Brandeis. They sought judicial elections as a component of a whole progressive reform movement. Have we reached the point now where judicial elections are contrary to that progressive ethos or ideal?

DAVID SCHUMAN: Judicial elections have become problematic with regard to this ideal due to modern campaign techniques and the advent of big money in judicial elections. I agree wholeheartedly with Chief Justice Abrahamson's sense that an appointive system is, in many ways, no less politicized under many circumstances. However, states could institute other alternatives that would address the abuses that judicial elections were brought into our constitutional system to combat, including the undue influence of particular interest groups. One such alternative might be a commission system where people are nominated by supposedly disinterested experts.

HANS LINDE: I want to go back a step and tell you a little bit more about the West Virginia judge to whom Ron Collins referred. His name is Richard Neely, and I knew him years ago. He is a highly educated person—a private school product out of New England who went to Yale Law School and did well. Richard Neely's grandfather was a United States Senator from West Virginia, and the family name was famous. His grandfather had been elected at least as often as Chief Justice Shirley Abrahamson, I believe, but for six-year terms instead of ten. After he was elected to the West Virginia State Legislature, Richard Neely considered running for the United States Senate and began raising money. The incumbent, who had previously indicated that he intended to retire, decided to run for office again, and Richard Neely suddenly found himself running against a highly organized and well-funded campaign. Richard Neely, who had already collected campaign funds and had a well-known name, responded by thinking, "What else could I run for?" He decided to run for the West Virginia Supreme Court, and of course, he won with no trouble. I share Justice Abrahamson's interest in making it clear that an appointive system does not guarantee merit and an elective system does not exclude it.

We can only judge these judicial selection systems from the perspective of our own states. Justice Abrahamson was very careful to speak of Wisconsin, and I quite agree that it is important to be aware of the political background and the culture of that particular state and also the concerns of people in that state.

My perspective comes from the judicial selection process in Oregon. Oregon, being a much, much older state than Washington, of course, became a state in 1859. From the beginning, the Oregon State Constitution provided for the election of judges. This was not a progressive reform in the modern sense; it was reform that related back to the Jacksonian Era. For seventy years, Oregon held partisan judicial elections, and so you have to ask yourselves: Is there something incongruous about the idea that a party nominates people for judge? Would anybody

today adopt a system involving partisan elections for judges? I would think not, especially if they didn't have it already. Indeed, Oregon got rid of partisan judicial elections in 1931.

But, why does the party label make a difference when the same kind of competition arises in nonpartisan judicial elections? We think the partisan system is incongruous with judicial elections because candidates who put on a jersey that says, "I'm a Democrat" or "I'm a Republican," cannot and should not talk about the differences between the two parties or make any promises as a result of their political affiliation. This obviously is a contradiction, and it was perfectly understandable that Oregon eventually got rid of it.

One important point that is often left out of these discussions is that judicial elections usually concern the appellate judges. In contested appellate races, candidates likely will be caricatured either as a liberal activist or a conservative status-quo troglodyte; candidates may choose one side or the other. You also face those four-to-three or five-to-four decisions along predictable lines, so it is not surprising if voters start to think of judges just as counters in this higher level of lawmaking activity. We should at least realize that we are dealing with two different types of questions and two different types of judging: trial and appellate. None of the five-to-four voting lines apply to trial judges or to the interests of people who care about their trial judges. Trial judges deal with people in the courtroom, the real human beings. Appellate judges don't see the clients; they see lawyers. It is useful to keep in mind that we don't necessarily have a one-size-fits-all set of considerations when considering an ideal judicial selection system.

CHARLIE WIGGINS: I would like to give the Washington State perspective after hearing about Wisconsin and Oregon. Although, as Judge Linde says, Oregon is an older state than Washington, this is because Washington took leave of Oregon when Oregon became a state. Washington became a territory in 1853, and for the next thirty-six years, the President of the United States appointed the judges to the Washington Territorial Supreme Court, primarily for political reasons. By 1889, the year of our state constitutional convention, the people of the territory grew tired of appointed judges—political supporters of the President that moved to Washington territory upon appointment. Some were great judges, and others were not. The attitude of the population was best expressed by William Lair Hill in an article in the *Portland Oregonian* when the convention began. He recounted the following exchange: A lawyer was talking to a well-informed citizen about the idea that appointed judges might be better than elected judges because the Governor would have the opportunity to study the problem and would naturally

pick the better person. The citizen responded, "Well that may be, but this is a democracy, and the people of the coming State of Washington are not going to have better judges forced upon them than they really want." And so we elect our judges in Washington.

RON COLLINS: In a previous session, panelists raised many insightful comments about Justice Kennedy's opinion in *Caperton*. Kathleen Sullivan spoke of various limitations on independent campaign expenditures. Professor Andrew Siegel responded that, given Justice Kennedy's fidelity to First Amendment principles, at least in terms of the voting record, Justice Kennedy might be hesitant to endorse ex ante approaches in this area. How does Justice Kennedy's opinion impact influence decisionmaking concerning judicial selection?

CHARLIE WIGGINS: What struck me about the *Caperton* opinion is that Justice Kennedy concludes the opinion with an invitation to the states. He basically says, "We're not going to have any more *Caperton*'s coming up here; the states are going to take care of this." States have their judicial codes, and this raises the following question: How are the states reacting to *Caperton*? The American Bar Association proposed a complete revision of the Code of Judicial Conduct in 2007. As a result, about thirty-five jurisdictions are actively considering what parts of the new code to enact. The ABA recommended a recusal rule based on the level of campaign contributions and financial support to the judge's campaign. Under the ABA model, the judge should recuse herself if a lawyer or a litigant has given more than a designated amount to the judge's campaign.

The responses have been interesting because, of the states that have looked at this issue, only about five have either adopted or have a recommendation before them to adopt a recusal rule based on the ABA's revisions. Of those five jurisdictions, Arizona is the only state that actually adopted a recusal rule. Interestingly enough, Arizona appoints judges by recommendations from a commission, rather than by election. Four other states have task forces that have recommended rules that will include a recusal rule, and I'm pleased to say that Washington is among them. Eleven states either have adopted or have a recommendation before their state supreme court to adopt a version of the Code of Judicial Conduct with no recusal rule, even in the aftermath of *Caperton*. This is not an overwhelming reaction from the states.

In the face of this underwhelming response from the majority of states, the Washington proposal raises important issues that illustrate the need to modify any recusal rule to the needs of the particular jurisdiction. The first issue to address is what money to consider as financial support for the judge. The ABA recommends that financial support should in-

clude (1) direct contributions to the judge's campaign, (2) independent expenditures, and (3) any money given to an independent political action committee (PAC) or 527 organizations with the understanding that it will be spent to support the judge's election campaign. This third prong creates a tough standard because of the difficultly in detecting earmarking of that sort. Similarly, the Washington recommendation sweeps everything into one pile. If the Washington recommendation was applied to the *Caperton* case, direct contributions would be only $1000, independent expenditures would be a half-million dollars, and the money given to a PAC or independent organization that supported the judge's campaign would be $2.5 million.

After the money is combined, the next issue to arise is how high to set the bar at which a judge should recuse herself? The original Washington recommendation set the bar at the state contribution limit—$1600—a figure that is periodically readjusted. After debate and lobbying, the task force recommended a bar at ten times the state contribution limit—$16,000 in the primary election and $16,000 if the race goes into the general.

The final issue to consider is whether the party who contributes to a judge's campaign can then attempt to prevent the judge from hearing the same party's case. Under the Washington proposal, a motion to recuse could be made only by the party on the opposing side. Thus, a party could not preemptively give money in order to remove a judge from a case because the opposing side must file the motion and will do so only if she genuinely believes the judge is biased due to the contribution. The Washington proposal will be considered by the Washington Supreme Court. Similar proposals will appear in other states as well.

SHIRLEY ABRAHAMSON: Indeed, the states will be faced with proposals for recusal. With more money in campaigns, recusal takes on added significance. In Wisconsin, we have two petitions pending, and I would not be surprised if more are filed. The Wisconsin Supreme Court will hear the two pending petitions in open conference in October. Anyone who wants to come to the hearing may come, and people can send emails or letters in favor of or opposed to the petitions, or they can suggest amendments.

The first petition, presented by the League of Women Voters, sets a contribution limit of $1,000 for a party, lawyer, or law firm representing the party, which is similar to an ABA proposal. In Wisconsin, the legislative limit for contributions is currently $10,000. The second petition comes from the Wisconsin Realtors Association. This association wants a rule that does not allow a contribution, in and of itself, to warrant recusal. I assume that a contribution would be just one factor to consider.

The court will discuss both petitions and may render a decision as to which they will accept, if any.[3]

As states consider reforming their judicial selection process, they will be faced with these kinds of difficult questions about recusal. Furthermore, many proposals include waiver provisions allowing both parties to waive the right to move for recusal. Waiver raises the question whether a judge may recuse herself, in spite of a waiver from both parties, if she sees fit.

RON COLLINS: Before we get to further discussion of the particulars, I would like to bring in the institutional perspective of Representative Pedersen. Undoubtedly, you and your colleagues on the judiciary committee were busy reading the *Caperton* opinion on June 8, 2009. From the vantage point of a state lawmaker, why would you and your colleagues have any interest in state judicial elections? Why does this matter even concern you?

JAMIE PEDERSEN: I think it is useful to give some of the recent history of judicial elections in Washington. Some interest groups made fairly blatant attempts to buy seats on the Washington Supreme Court. In at least one instance, an interest group succeeded. This provides the context to understand why this is an issue that's important to the judiciary committee, in particular, and to the legislature in general.

In the 2002 election cycle, the Building Industry Association of Washington put forward a supreme court justice candidate, who ended up losing in a very close election—50.12% to 49.88%. The candidate lost even though he outspent his opponent three to one; the candidate spent $411,000, while the opponent spent $143,000. The same candidate ran again two years later with even more money, outspending his opponent $539,418 to $155,233. The candidate wound up beating his opponent, even though he had never served in the judicial branch. His opponent, on the other hand, was a longtime and very well qualified court of appeals judge in Division One of the Washington Court of Appeals. He beat her fairly narrowly—52% to 48%. Seventy-two percent of the money that he spent in his campaign came from the Building Industries Association of Washington, which represents small contractors and their allies.

In 2006, the legislature responded to this phenomenon by passing contribution limits on judicial campaigns for the first time. Up to that point, Washington was one of four or five states in the country that did

3. Additional recusal petitions were filed. The Court decided by a 4-3 vote to adopt nearly verbatim and without further study the rule proposed by the Wisconsin Realtors Association and Wisconsin Manufacturers and Commerce.

not have any contribution limits in judicial elections. We imposed the same contribution limits that apply to other candidates for statewide office. As Mr. Wiggins mentioned, the limit initially was $1400 and has since been raised to $1600 per person per election.

Following the imposition of contribution limits, we had not only an increase in campaign contributions, but also a dramatic increase in independent expenditures in our state. For example, our chief justice, who raised $267,000 personally, and received another $379,000 in independent expenditures, ran against a fellow with $433,000 in direct contributions and $1.65 million in independent expenditures. The chief justice ended up winning 54% to 45% in the primary. Another justice, who was taken on by the same coalition, raised $289,000 personally and received another $317,000 in independent expenditures. She faced an opponent who raised $344,000 and received $709,000 in independent expenditures—outspending the incumbent by about five to three. The challenger ended up losing in the general election.

I think it is fair to say that the legislature was alarmed by this influx of money and looked for ways, consistent with the constitutional protections on independent expenditures, to try to protect the independence of the judiciary. The legislature's concern pertained almost exclusively to the supreme court elections. In Washington, well over 70% of superior court judges start out by appointment and wind up unopposed on the ballot when their position comes up for election. King County has fifty-three judicial spots in any given year. Usually, only four or five of those positions are contested. By and large, the superior court level already has a system with both appointment and retention elections.

RON COLLINS: One might say that this is all well and fine, even noble. And yet, when you mentioned that the information about the lopsided nature of money contributions in these elections caused alarm among some of your colleagues, I was reminded of that famous scene in *Casablanca* where Captain Renault says, "I'm shocked, shocked to find that gambling is going on here!" Assume someone presents a lumber initiative to cut all the trees, and interest groups in support of this initiative give hundreds of thousands of dollars, even millions of dollars, to ensure that you get elected; you are their man. Why do you, as a state lawmaker, feel comfortable with and not corrupted by receiving that money, but when a judge gets the same kinds of contributions, you want to place limitations? Why is it noble for a lawmaker to accept such funds, but ignoble for a judge? In other words, if someone that gives both a lawmaker and a judge a lot of money, is that the proverbial alligator in the bathtub?

JAMIE PEDERSEN: We have an expectation that the political branches of government are, and should be, a part of that tug-and-pull. At some level, large movements of political opinion can be shaped by spending on campaigns and by the reaction to such campaigns. It is the prerogative of the people to change that political direction.

RON COLLINS: So a politician can be their man for all legislative matters, but when it comes to judicial elections, candidates should not be persuaded by what they want. Judges cannot be their man, is that right?

JAMIE PEDERSEN: We expect judges to rise above that tug-and-pull, to have a certain amount of allegiance to the constitution and its core enduring principles. In the 2007 session, two bills concerning the judicial selection process came forward in Washington State. One bill addressed the public funding of judicial elections.[4] It got a hearing in the state government and tribal affairs committee, but it did not pass out of the committee. The second bill came to the judiciary committee. It would have changed Washington's judicial selection process to a system with appointment and retention elections. Under the bill, a nominating commission would recommend appointees. This billed passed out of the judiciary committee, but it did not make it out of the rules committee.

Furthermore, Washington will not likely see a constitutional amendment addressing judicial elections. One of the major ways Washington differed from Oregon when it became a state was its process for amending the constitution. In Oregon, constitutional amendments are as easy as initiatives; it just takes enough signatures on petitions followed by a majority vote of the people. The constitutional amendment process in Washington requires a two-thirds majority vote in both houses followed by a vote of the people. The political reality in Washington is that on any controversial subject, whether it's about electing judges or about having a state income tax, there is no possibility of amending the constitution. People who are interested in making that formal change in Washington are just out of luck for the foreseeable future.

In 2008, Washington had a much less controversial judicial election cycle; all three incumbents were reelected, and candidates spent dramatically less money. The jury is still out, as they say, on whether this uncontroversial cycle was because the Building Industry Association of Washington spent most of its money on the highly contested gubernatorial election, because the association decided the money was not well spent in previous cycle, or because of both.

4. H.B. 1186, 60th Leg., Reg. Sess. (Wash. 2007).

During the 2009 session, the public funding of judicial elections bill returned, but our state's priorities were brought into rather sharp focus due to the economic and budget crises. We seriously considered cutting money for the Office of Civil Legal Aid or the Office of Public Defense, for interpretation services, and for the state law library. Moreover, we were unable to advance a proposal for legal representation of children in dependency proceedings. Under these circumstances, I question the relative importance of shifting a function that is privately funded, namely judicial campaigns, to the public sector, given that so many important interests are competing for scarce resources in the state budget.

I would like to contrast spending on political campaigns and judicial campaigns. I represent the forty-third legislative district; Washington has forty-nine legislative districts. I happen to have two of the three law schools in the state in my district, which is geographically part of central Seattle. My 2006 campaign, which was my first, was highly contested. Six Democrats, a Progressive, and a Republican ran for the position. I spent just over $180,000 in the campaign, trying to educate voters about who I was and to convince them that I was the right person for the job. To contrast, look back to the figures I gave earlier about the highly qualified court of appeals judge with a constituency forty-nine times larger than my legislative district who lost to an opponent backed by the Building Association of Washington. She spent $25,000 less than I did on my campaign. If the public elects judges, part of the problem may not be that there is too much money involved. Rather, there is too little money involved for judicial campaigns to penetrate the public consciousness, for voters to have any understanding about the judicial candidates and their qualifications.

Finally, Washington is unusual because it has a nine person supreme court. Only five states in this country have nine justices on their supreme courts. Many states have seven justices, and quite a few that have five as well. One thing that other states looking at this problem might consider is whether increasing the number of justices on a state supreme court makes it less likely that those seats can be purchased in an election.

RON COLLINS: If special interests sometimes pollute the electoral waters, at least with judiciaries, does this influence carry over to state lawmakers, making it difficult for state lawmakers to pass rules or laws in this area? The splendor of what Representative Pedersen discussed is that interest groups do not necessarily have to go to state lawmakers to exert influence. But let me offer an additional consideration: Judge Linde, what role, if any, might Congress play in this area that is consistent with principles of federalism?

HANS LINDE: The title of the program for this conference says that judicial selection is a national concern. If it is a national concern, we can recognize a number of things that could be done. But I am not so sure that most people think selection of state judges is high on the national agenda. One reason for the lack of concern is because major financial activities, industries, and law firms now go to federal courts rather than state courts. The state courts are left to fend for themselves without any great harm to the nation as long as the United States Supreme Court can make sure that they do not violate individual rights. Why would the power players in our nation worry about these state judges?

Furthermore, what could Congress do to address the concerns raised in this conference? One option is to publicize the issue through congressional hearings. For example, an interested member of the Senate Judiciary Committee could simply do what Sam Ervin did back in the Watergate times: conduct a hearing to expose what is going on and emphasize why the need for reform is this important.

Another option, which is more direct yet harder to pass, is that Congress could simply provide a modest amount of money to upgrade the salaries of state judges as long as they meet certain criteria. One criterion could be that the judges are, in fact, elected or selected on a nonpartisan, merit, or qualifications basis. This criterion could be designed to disfavor people who, for whatever reason, think they can get elected without proper qualifications. I do not foresee this happening.

SHIRLEY ABRAHAMSON: To expand on Hans Linde's last point, I would like to share a bit of history. Chief Justice Burger was very interested in the state courts and believed that the state courts should be of very high caliber to encourage people to go to the state courts as well as the federal courts. He worried that if the people, namely the lawyers and litigants, did not trust the state courts, then more business would go to the federal courts and a whole series of problems would arise. Chief Justice Burger was very influential in laying the groundwork for the National Center for State Courts to assist state courts in various research facilities and to assist in making the state court judges equal in competence and quality with the federal courts, preventing litigants from selecting one court or the other on the basis of the judge quality. The National Center for State Courts, which is one of the sponsors for this program, has played that role for many a year. Of course, many federal judges have been state court judges prior to appointment, so one wonders if the appointment process imbues mystical abilities to the same person. Hans Linde's point that the state courts should be run efficiently and effectively with well compensated judges is a very important one. Con-

gress has assisted the state courts with funds for research, drug courts, and technical assistance. Further, there is a bill before Congress to provide funding for interpreters in the state courts. On the other hand, state courts do much that federal courts could learn from as well.

CHARLIE WIGGINS: I would like to go back to a good point that Jamie Pedersen mentioned—that is, whether society needs more money in these races, not less money. Certainly, a few hundred thousand dollars will not educate the voters about the qualifications in a statewide race. The paradox of this situation: more money spent in these races does not necessarily ensure better information. We get terrible television advertising—campaigns that avoid hard information and deal in emotional reaction and responses. Such advertising is a tremendous problem with the money question in our elections. Instead, those concerned with reforming the judicial selection process want to provide voters with more information and better information that will allow them to exercise their vote intelligently.

We ought to think about voter education because we do not teach people how to vote in our schools. We should send friends, relatives, camp followers, and other voters to www.votingforjudges.org. This impartial website has a huge amount of information, and its voter's pamphlet is very helpful. Furthermore, it does not contain too much information, promoting better flow of *good* information. When massive amounts of money come in to an election, horrendous television campaigns appear causing major impediments to voter education. This problem also relates to the need for a reformed recusal rule, an important piece of this conversation.

HANS LINDE: I absolutely agree that the need to reform the recusal process is necessary; this has been argued for years. Oregon has a different rule from the ABA. We created our rule many years ago with a free speech perspective and individual rights in mind. But the image of campaigns is changing in front of our eyes to that of the great television campaigns. Also, we used to have newspaper ads, but now anyone who is mad at a sitting judge can raise enough money to send direct mail to voters.

Young people ought to be thinking, "What do I do if I want to run for election some day? That stuff gets thrown away; nobody pays much attention to it. The content doesn't amount to anything. How do you campaign nowadays?" What if a membership organization of some kind creates a website and uses social networks, like Facebook, and other modern technology that I myself do not know because I am much too old to do any of that. The idea of limiting how people campaign would fail because there is no clear way to limit campaign techniques consistent

with the free speech provisions or with the technological reality that has changed the campaign methods people use. However, Oregon does publish a voter's pamphlet that is undoubtedly more helpful in judicial elections than in many other elections because it tells voters which candidates have a qualified background and which candidates are unemployed, painting houses, or have famous names but no experience.

To be realistic about judicial elections, we have to get down from the supreme court level, which is a different kind of ballgame. We could talk about why people want to run for this office. Oregon judges are low paid judges by national standards, which does not help select or keep qualified judges. Now if a state raises the judges' salaries, as it should, without changing the selection system, then the problems may get worse. The job will become attractive to more people who can get elected, and who begin to think that this is a pretty good gig.

RON COLLINS: Now if there are house painters who would like to run for the state supreme court or others who would like to ask a question, please come up to the microphones on the right or the left, we welcome your questions.