

A VIEW FROM THE BENCH

*Barbara S. Gillers,**
*The Honorable Jonathan Lippman,***
*The Honorable Sue Bell Cobb,****
*The Honorable Maureen O'Connor*****
*& The Honorable Louis Butler******

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REMARKS OF BARBARA S. GILLERS

Good afternoon. It is an honor and privilege to moderate this panel of distinguished judges. For the most part, I'm going to get out of the way. But I want to start the afternoon by introducing our topic. That is, of course, judicial recusal five years after *Caperton*¹: "A View from the Bench." Thirty-eight states now elect their supreme court justices.² We are enormously grateful to our panelists—Chief Justice Sue Bell Cobb, Chief Justice Maureen O'Connor, and former Justice Louis Butler, all of whom serve or have served on elected supreme courts. Our own Chief Justice Jonathan Lippman will tell us about New York's rule, which applies to lower appellate judges. They will all discuss on-the-ground issues that the courts face arising out of campaign financing as it is today.

First, a few facts on spending in the 2011–2012 races: what are we talking about here? Well, in Wisconsin about five million dollars were spent in the election involving the state supreme court.³ In Alabama—in the 2011–2012 election cycle—over four million dollars were spent.⁴ You will hear from former Chief Justice Sue Bell Cobb that the last time she ran for election in 2006, over eight million dollars were spent in that election.⁵ It was, I believe, the second most expensive judicial election in the country up until then,⁶ and is still the second most expensive judicial election ever.⁷ In Ohio—in 2011–2012—four million dollars were spent;⁸ in Michigan, over thirteen million dollars.⁹ So that's the backdrop against which we are considering these issues.

1. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

2. AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.auth_checkdam.pdf (last visited Sept. 1, 2015).

3. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2011–2012: HOW NEW WAVES OF SPECIAL INTEREST SPENDING RAISED THE STAKES FOR FAIR COURTS 6 (2013), <https://www.brennancenter.org/sites/default/files/publications/New%20Politics%20of%20Judicial%20Elections%202012.pdf>.

4. *Id.*

5. *Id.* at 16.

6. *Id.*

7. *See, e.g., Alabama Judge Says Raising Money to Be Elected Is "Tawdry,"* NPR (Mar. 31, 2015, 1:15 PM), <http://www.npr.org/2015/03/31/396595322/alabama-judge-says-raising-money-to-be-elected-is-tawdry> (observing that Alabama's 2006 chief justice race "remains of the second most expensive race ever run for a judicial position in this nation").

8. BANNON ET AL., *supra* note 3, at 6.

9. *Id.*

Our second but related area of concern is the context in which these issues arise—the ugly, negative, and often deceptive advertising fueled by this kind of money. We will show two thirty-second clips, which I think are representative. We’ll show one now and one later in the program—before Justice Butler speaks—because the second clip involves him.

One more introductory note: my compliments to the *Journal* and the Brennan Center for brilliantly bringing together judges who represent four different recusal regimes. You’ll hear that New York has a specific dollar amount requiring automatic reassignment of the judge who received the contribution and an administrative procedure that streamlines the reassignments.¹⁰ You’ll hear that Ohio¹¹ and Alabama¹²—while they have different regimes—have declared that a legal campaign contribution in and of itself, and in the case of Wisconsin, independent expenditures as well, cannot be the sole basis for recusal of a justice.

Enlightened by the experience of these four states, we can consider what the right rules should be, how we get there from here, and what further questions we want answered.

So, on to the program: here’s the first brief ad we want to show you today.¹³ This ad involves Bridget McCormack, who was elected to the Michigan Supreme Court in November of 2012.¹⁴ Before her election, Justice McCormack was a professor at the University of Michigan Law School.¹⁵ She taught Criminal Law and Legal Ethics and some advocacy clinics.¹⁶ A group called the Judicial Crisis Network ran the ad you are about to see.¹⁷ I certainly can’t tell where they

10. N.Y. COMP. CODES R. & REGS. tit. 22, § 151.1 (2015).

11. OHIO CODE OF JUDICIAL CONDUCT Canon 2.11 (2009).

12. H.R. 543, 2014 Leg., Reg. Sess. (Ala. 2014) (providing that the fact of judicial campaign contributions can give rise to “a rebuttable presumption that the justice or judge should recuse himself or herself,” but only if it was “reasonably foreseeable” when the contributions were made that the judge could preside over the case and the donations made up more than a certain percentage of the judge’s overall contributions for that election cycle).

13. FairCourtsPage, *Judicial Crisis Network—“How Could You?,”* YOUTUBE (Oct. 31, 2012), https://www.youtube.com/watch?v=nwxmORkh_EA (television advertisement by the Judicial Crisis Network, which aired in the days leading up to Michigan’s 2012 judicial elections).

14. *Justice Bridget Mary McCormack*, MICH. CTS., <http://courts.mi.gov/courts/michigansupremecourt/justices/pages/justice-bridget-mary-mccormack.aspx> (last visited Sept. 1, 2015).

15. *Id.*

16. *Id.*

17. According to its website, the Judicial Crisis Network is an organization that “is dedicated to strengthening liberty and justice in America,” and whose “commitment is

are coming from or what their point of view is by their name. To me, it sounds like a neutral or nonpartisan group—and maybe they are neutral or non-partisan. But this is the ad that they ran against Justice McCormack. Can we play it, please?

Video: June 16, 2010: the day our life was shattered. My son, Joe, was taken from me—killed when his unit was attacked by terrorists in Afghanistan. My son selflessly gave his life for this country. So when I heard Bridget McCormack volunteered to represent and help free suspected terrorists, I couldn't believe it. My son's a hero and fought to protect us. Bridget McCormack volunteered to help free a terrorist. How could you?¹⁸

Here are the facts: Bridget McCormack served as a volunteer co-counsel for a Guantanamo Bay detainee.¹⁹ The detainee was not freed. Rather, he was transferred to Tajikistan for prosecution, where he is serving a seventeen-year term.²⁰ The ad aired 416 times over eight days through Election Day.²¹ That's representative of what extraordinary spending in judicial elections can fuel.

Let's turn to our panelists. We'll start with the Chief Judge of our Court of Appeals in New York. We are honored and delighted to have Chief Judge Lippman with us today. He has a long record of major achievements.

REMARKS OF THE HONORABLE JONATHAN LIPPMAN

Thank you. It's a delight to be here at my alma mater and to be the one state on this panel that does not have an elected high court. And I think our nomination commission system, merit system, has worked quite well over many decades now. When you see the excess that is going on around the country in terms of races for the high court, I really can't even imagine what it would be like here in New York.

to the Constitution and the Founders' vision of a nation of limited government; dedicated to the rule of law; with a fair and impartial judiciary." *About the Judicial Crisis Network*, JUD. CRISIS NETWORK, <http://www.judicialnetwork.com/about-jcn/> (last visited Sept. 1, 2015).

18. FairCourtsPage, *supra* note 13.

19. See Andrew Rosenthal, Opinion, *Everyone Deserves Legal Representation*, N.Y. TIMES: TAKING NOTE (Nov. 1, 2012, 3:35 PM), <http://takingnote.blogs.nytimes.com/2012/11/01/everyone-deserves-legal-representation/> ("The prisoner Ms. McCormack represented, Wahldof Abdul Mokit, was in fact released from Guantanamo in 2007—by a military tribunal under a process created by the Bush administration—not by Ms. McCormack. He was sent back to his native Tajikistan, where he was arrested and sentenced for being a member of the Islamic Movement of Uzbekistan, which fought alongside the Taliban in Afghanistan.").

20. *Id.*

21. See BANNON ET AL., *supra* note 3, at 24.

You know, on occasion we have some excess here. So I think it's a good system, but the fact is, that's not the way it works in most parts of the country. But we have our own unique problems coming out of *Caperton*, and we have created our own unique solution to deal with it.

Let me first tell you how I really came to focus on the issue that led to the reforms that we have in New York. I went to a session of the chief judges in Washington that focused on *Caperton*. There were a whole bunch of hypotheticals that were given about how much money was contributed in a particular campaign and how that would play out in terms of whether due process is implicated based on *Caperton*. When should a judge recuse himself or herself? When should a lawyer request a recusal? Are there bright lines or not-so-bright lines that could be drawn on recusal issues? What kind of rules could be developed in relation to it? All of it was kind of built around—or at least I thought—the delicate issue of when a judge recuses. What does that mean, and what are we saying? Did the judge do something wrong? For some judges, when they are asked to recuse because of a campaign contribution, that's the case. When a lawyer has to raise his or her hand and say, "Judge, I want you to recuse," is that a good situation? It's an awkward game in a template where we've all been used to a system where judges ultimately determine whether they recuse or don't recuse. Generally, we've looked at it as a decision that the justice, the judge, has to take into account: is there a perception or the reality of a lack of impartiality?

So I went to this conference, and it really struck me that everyone was dancing on the head of a pin as to how to do this, and it's so awkward; it's so difficult. And *Caperton* was really an extreme situation. I tried to apply it to our own climate in New York as to how we select judges. Well, the high court is an appointed system,²² as I mentioned, and I think quite a good one. The trial courts, seventy-five percent of them are elected.²³ And we have had in New York over the years particularly very front-and-center surrogate court races where judges give out lucrative appointments to lawyers.²⁴ Supreme Court

22. N.Y. CONST. art. VI, § 2(e).

23. See *id.* art. VI; see also, e.g., *Methods of Judicial Selection: New York*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=NY (last visited Sept. 1, 2015); N.Y.C. BAR, COUNCIL ON JUDICIAL ADMIN., *JUDICIAL SELECTION METHODS IN THE STATE OF NEW YORK: A GUIDE TO UNDERSTANDING AND GETTING INVOLVED IN THE SELECTION PROCESS* (2014).

24. See Lawrence K. Marks, *Court-Appointed Fiduciaries: New York's Efforts to Reform a Widely-Criticized Process*, 77 ST. JOHN'S L. REV. 29, 29–30, 41–42 (2003).

races—remember in New York, the Supreme Court is not supreme, it's the general-jurisdiction trial court²⁵—we've had very expensive races running over half a million dollars; one million dollars is not the most unusual thing in the world.²⁶

So looking at our situation—and really, the picture that bothered me and bothered others who looked at our elective system as maybe being not the ideal way to select judges—the picture is that the common practice was that lawyers gave contributions to judges, and then appeared before them in a case. The optics of that are really terrible, of course, depending on the size of the contribution and the exact situation. Clearly, in seeing what was going on in the aftermath of *Caperton* and everything that was being talked about, I tried to apply that to New York. And what really came to my mind, after circling this for a long time and trying to see what it meant in the New York situation, I came to a very different approach.

Looking at most of the discussions that have come out of *Caperton* and the ABA around the country and some of our sister states, I felt that, “Gee, why are we putting everyone in such a difficult situation?” Why are we asking the judges and the lawyers to raise their hands and say, “I did something wrong,” “I didn’t do something wrong,” “I’m going to recuse,” or “I’m not going to recuse”? The lawyer is in a quandary. Why shouldn’t we recognize this is something that is damaging to the court system when it is at the very least perceived that lawyers, or even litigants, give money to judges and then appear in front of them?

But principally in New York, there is the idea that lawyers like to give to judges’ campaigns. And of course while in our former world, when we believed or we said that judges don’t know what the contributions come from, it was a fallacy and a farce. The judge would go to

25. See N.Y. CONST. art. VI, § 7(a); N.Y. JUD. LAW § 140-b (McKinney 2015).

26. In 2011, over one million dollars in campaign expenses were spent in a race for ten Supreme Court vacancies in the Tenth Judicial District of New York (Nassau and Suffolk Counties). See Aggregated Contributions and Expenditures in Supreme Court Races in the Tenth Judicial District of New York in 2011, N.Y. ST. BOARD ELECTIONS, <http://www.elections.ny.gov/EXPandCONTONE.html> (select “Sup Crt Justice” from the drop-down menu; then enter “10” in the District field; and then enter “01/01/2011” and “01/01/2012,” respectively, in the date range fields). In 2013, close to one million dollars were spent in a race with five Supreme Court vacancies in the Ninth Judicial District, which includes Dutchess, Orange, Putnam, Rockland, and Westchester counties. See Aggregated Contributions and Expenditures in Supreme Court Races in the Ninth Judicial District of New York in 2013, N.Y. ST. BOARD ELECTIONS, <http://www.elections.ny.gov/EXPandCONTONE.html> (select “Sup Crt Justice” from the drop-down menu; then enter “9” in the District field; and then enter “01/01/2013” and “01/01/2014,” respectively, in the date range fields).

a reception, the cocktail party for contributors, but he or she doesn't know who contributes. So it was kind of a wink-and-a-nod approach.

So I started to look at it and say maybe recusal is not the right focus here. Maybe the focus is on the assignment of the case to the judge. And maybe court administration has a responsibility to take the bull by the horns and say, "This is really bad for the court system." Let's assume the judges are totally able to forget about Joe or Jane Shmoe, who gave *X* amount of dollars to their campaigns—which is almost impossible. The perception is so bad, putting aside anything else that might take place. So I thought about doing something I really thought would make our judges crazy because, again, they are very sensitive. "Do you believe that a contribution of \$5,000 would affect a decision of mine on the bench? That is outrageous." Insulting was the way our judges looked at it. But I said, "You know what? I have an obligation." The court system has an obligation to promote confidence and trust in the courts. So what we're going to do is focus on the assignment of the cases. And if there is a contribution of more than a particular level, we are not going to assign that case to the judge for a period of two years after the contribution. That is the heart of what we decided to do.²⁷

Our rule also recognizes that sometimes contributors may want to contribute to get the judge off the case. If you're going to set limits that if there is so much money given the judge can't hear the case—well if I don't want Judge *X* to hear the case, I'm more than happy, a contribution is a good investment to make. So what we did is we combined it with a waiver approach.²⁸ And what we do—manually, electronically, a little bit of both—is that we have the electronic records from the Board of Elections, which tell us all the contributions.²⁹ So if a case is coming to a judge from someone who has contributed money to his or her campaign, we then hold that assignment because all the assignments are done electronically, and we write to the other side and we say that unless you want to waive for some reason the disqualification of the judge, we will not assign this case to the judge. So the opportunity to decide that—if maybe someone made a contribution to get the judge off the case—the other side can say, "No, no, it's fine; I want to waive; I want to hear it in front of that judge."³⁰ But the judges themselves have no knowledge of any of this when it's happening. Case comes in, that's what we do. We don't assign it and then

27. N.Y. COMP. CODES R. & REGS. tit. 22, § 151.1 (2015).

28. *Id.* § 151.1(C)(2).

29. *Id.* § 151.1(C)(1).

30. *Id.* § 151.1(C)(2).

wait to hear from the other side. And then we do not assign that case to the judge.

My view is that it takes all the awkwardness out of this process. The judges who we thought would hate it, love it. It takes them off the hot seat. They don't have to say, "I'm going to recuse" or "I'm not going to recuse." We've been very happy with it. It doesn't do certain things. It deals with aggregate contributions: it's \$2,500 for a single contribution, \$3,500 for a law firm, or something like that.³¹ But it doesn't deal with this special-interest money that would come in. And for us, our problem was more—again, at least the way we perceived it—that lawyers make a contribution, appear before the judge, and that is terrible for the court system. So we're very pleased with it.

As to results: the bottom line is that it doesn't deal also with other kinds of recusal—you know, my brother-in-law (or whoever it is) is going to appear in front of me. But we think, and I think just to close, I would say that frankly I don't understand, if you're dealing with contributions, why the court system doesn't have an interest. We shouldn't leave it up to the judge. I really think that makes a hell of a lot of sense to us. And that's why we did it. And that's the approach to recusal that we have in New York.

Professor Barbara S. Gillers:

Thank you, Chief Judge Lippman. So New York gives us paradigm one. The New York rule contains an automatic trigger: once a contribution meets the threshold amount, the reassignment is automatic.³² New York concerns only direct contributions.³³ The rules do not address independent expenditures.³⁴ And, of course, the New York rules do not apply to judges of the highest court of the state.

We go next to Alabama. We are honored again to have former Chief Justice Sue Bell Cobb. Chief Justice Cobb was the first woman chief justice in the State of Alabama and elected in a very costly election, as I mentioned to you earlier.³⁵ Chief Justice Cobb is retired from the bench.

31. *Id.* § 151.1(B)(3)(b).

32. *See, e.g.*, William Glaberson, *New York Takes Step on Money in Judicial Elections*, N.Y. TIMES (Feb. 13, 2011), <http://www.nytimes.com/2011/02/14/nyregion/14judges.html> (describing the automatic system by which cases are assigned under the rule); Adam Skaggs, *Victory for Recusal Reform in New York*, BRENNAN CTR. FOR JUST. (Feb. 14, 2011), <https://www.brennancenter.org/blog/victory-recusal-reform-new-york> (discussing the automatic nature of the assignment process).

33. *See* Skaggs, *supra* note 32.

34. *Id.*

35. *See supra* notes 5–7 and accompanying text.

Before handing over the proceeding to Chief Justice Cobb, however, let me briefly describe the Alabama rule. In 1995, the Alabama legislature enacted a recusal regime that was somewhat like New York's today.³⁶ This rule was never implemented, however, because the Alabama Supreme Court believed that it had to be pre-cleared by the Justice Department under Section 5 of the Voting Rights Act.³⁷ It was never pre-cleared.³⁸

In April of 2014, the Alabama legislature adopted a new recusal statute.³⁹ This statute addresses both direct contributions and so-called "electioneering communications."⁴⁰ Under the statute, a judge must recuse "as a result of a substantial campaign contribution" by a "party" if a reasonable person would perceive that the judge's ability to be impartial is impaired or if there is a "serious, objective probability of actual bias" due to the contribution. "Party" is broadly defined to include anyone holding five percent or more of the value of a party that is an entity, an affiliate or subsidiary of a corporate party, and any attorney for a party or their law firms.⁴¹

Let me highlight a few features of this statute: first, the recusal standard is an objective standard. There must be "a serious, objective probability of actual bias."⁴² This language appears to come directly from *Caperton*, although the Supreme Court was establishing the test for a Due Process violation while this is a statutory or rule-based test. Second, the word "party" is quite broadly defined. It includes, for example, affiliates of corporate entities, and the parties' lawyers and their firms. Finally, the statute establishes a rebuttable presumption that a judge will be recused if certain specific contributions have been made.⁴³

36. See Mary Orndorff Troyan, *Alabama Judicial Campaigns Law Unenforced for 15 Years*, AL.COM (Aug. 1, 2010, 3:30 PM), http://blog.al.com/sweethome/2010/08/alabama_campaign_law_unenforce.html.

37. *Id.*; see also Billy Corriher, *Strong Recusal Rules Are Crucial to Judicial Integrity*, CTR. FOR AM. PROGRESS (Nov. 20, 2012), <https://www.americanprogress.org/issues/civil-liberties/report/2012/11/20/45581/strong-recusal-rules-are-crucial-to-judicial-integrity/>.

38. See Troyan, *supra* note 36.

39. H.R. 543, 2014 Leg., Reg. Sess. (Ala. 2014); see also NAT'L CTR. FOR STATE COURTS, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS 2 (2015), <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualificationcontributions.ashx>.

40. H.R. 543.

41. *Id.*

42. *Id.*

43. *Id.*

Against this background, let me turn this over to someone who has now become, I'm happy to say, a friend: former Chief Justice Sue Bell Cobb.

REMARKS OF THE HONORABLE SUE BELL COBB

Thank you so much Professor Gillers, and it is an honor for me to be here. I love New York City, Jonathan. Love it. It is great to be here, and it's an honor to be here at NYU.

Professor Gillers has asked me to share a personal story and to put our topic into context. Understand that when I ran for chief justice, Alabama was one of only seven states that has partisan election of the justices and judges of the appellate courts.⁴⁴ And the chief justice position is unusual in that it is a statewide race.⁴⁵ So it's a partisan statewide race. In 2006, I ran having been a trial judge for thirteen-and-a-half years, a judge on the court of criminal appeals for twelve years. In 2006, my race was the single most expensive judicial race in the United States of America.⁴⁶ It remains the second most expensive race in the history of the United States.⁴⁷ And its not a system that I chose, but it is a system that I had to work my way through.

To help you understand the difference in numbers: in the 2002, 2004, and 2006 election cycles, in the state of California, a state more than six times the size of Alabama⁴⁸ and which uses merit selection and voter retention to elect or retain all of the judges on the appellate courts, the amount that was expended—the reported aggregate amount expended in all of those races in those three election cycles—was less than \$250,000.⁴⁹ It is my understanding that that amount is spent regu-

44. AM. BAR ASS'N, *supra* note 2.

45. *Id.*

46. See Phillip Rawls, *Court Race Most Expensive in Nation*, DECATUR DAILY (Feb. 2, 2007), <http://archive.decaturdaily.com/decaturdaily/news/070202/race.shtml>.

47. BANNON ET AL., *supra* note 3, at 16.

48. See U.S. CENSUS BUREAU, POPULATION DIV., ANNUAL ESTIMATES OF THE RESIDENT POPULATION: APRIL 1, 2010 TO JULY 1, 2012 (2012).

49. See Contributions to Candidates in California Judicial Elections 2002–2006, NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org> (click “Start Here”; then click “Contributions TO. . .”; then click “candidate(s)”; then click “type of office”; then select the boxes next to “State Supreme Court” and “Appellate Court” (under “State” drop-down menu) and “Lower Court” (under “Local” drop-down menu); then click “OK”; then click “Contributions TO. . .” again; then click “specific state(s)”; then select the box next to “California” (under “State” drop-down menu); then click “OK”; then click “Contributions TO. . .” again; then click “specific election year(s)”; then select the boxes next to “2002,” “2004,” and “2006”; then click “OK”; then click “Go!”).

larly on a single, local race, in Alabama—a local trial-court race.⁵⁰ To further put it into perspective, during those three election cycles, to elect the judges on the three appellate courts in Alabama, instead of \$250,000 or less being spent in California, nearly \$25 million were spent in the state of Alabama—less than one-sixth the size of California.⁵¹

Understanding that it was a difficult race, I ran against an incumbent Republican, a wonderful guy, and a fine person. Of course, I was the Democrat running in that race. I raised \$2.6 million and my Republican opponent raised and acknowledged and reported that he spent \$5.5 million.⁵² What is not shown in the numbers that Professor Gillers gave you is that to my recollection at least \$3 million were spent by other third parties, the state Republican Party or other entities that were created.⁵³ As a result, I was outspent about three-to-one⁵⁴ but was still able to win that race by beating my opponent by 3.5 points.⁵⁵

50. For additional background on campaign financing in Alabama, see, for example, EQUAL JUSTICE INITIATIVE OF ALA., CRIMINAL JUSTICE REFORM IN ALABAMA PART TWO: JUDICIAL SELECTION IN ALABAMA 4–5 (2006), <http://www.eji.org/files/judicialselectionreportsm.pdf>; JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, NAT'L INST. FOR MONEY IN STATE POLITICS & JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006, at 3–5 (2007).

51. See Contributions to Candidates in Alabama Judicial Elections 2002–2006, NAT'L INST. ON MONEY ST. POL., <http://www.followthemoney.org> (click “Start Here”); then click “Contributions TO. . .”; then click “candidate(s)”; then click “type of office”; then select the boxes next to “State Supreme Court” and “Appellate Court” (under “State” drop-down menu) and “Lower Court” (under “Local” drop-down menu); then click “OK”; then click “Contributions TO. . .” again; then click “specific state(s)”; then select the box next to “Alabama” (under “State” drop-down menu); then click “OK”; then click “Contributions TO. . .” again; then click “specific election year(s)”; then select the boxes next to “2002,” “2004,” and “2006”; then click “OK”; then click “Go!”).

52. Sue Bell Cobb, *I Was Alabama's Top Judge. I'm Ashamed by What I Had to Do to Get There*, POLITICO MAG., Mar.–Apr. 2015, at 3, <http://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503.html#.VQNfcWTF9ZE>.

53. For information on shortcomings such as this one in state disclosure requirements, see, for example, Reity O'Brien et al., *Justice Obscured: State Supreme Court Judges Reveal Scant Financial Information*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2013/12/04/13808/state-supreme-court-judges-reveal-scant-financial-information>.

54. See, e.g., Sue Bell Cobb, *Introduction to JOANNA SHEPHERD, AM. CONSTITUTION SOC'Y, JUSTICE AT RISK: AN EMPIRICAL ANALYSIS OF CAMPAIGN CONTRIBUTIONS AND JUDICIAL DECISIONS* (2013), [http://www.acslaw.org/ACS%20Justice%20at%20Risk%20\(FINAL\)%206_10_13.pdf](http://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf) (observing the disparity in the funding that the candidates had at their disposal during the 2006 chief justice election).

55. SEC'Y OF STATE, STATE OF ALA., ELECTION RETURNS: STATE OF ALABAMA GENERAL ELECTION 3 (2006), <http://www.alabamavotes.gov/downloads/election/2006/general/certification-statewide-offices-12-29-2006.pdf>.

My daughter was four years old, at the time, a husband busy in his job and career—my family made lots of sacrifices during the two years leading up to that election. And I didn't know where I was going to be the day after the election, but two days after the election I knew exactly where I was going to be: I was going to be at my daughter's school fieldtrip. Win, lose, or draw, I was going to be at my daughter's fieldtrip. I didn't know where we were going. I showed up and of course received lots of great kudos and congratulations. But I was there to pick up my daughter's classmates, I turned to one of the moms and said, "Where are we going?" and she looked at me and she said, "I don't know, I think its something out near Auburn or up Opelika somewhere." I asked someone else, "Where are we going?" and they said, "We're going to a Confederate battlefield," and I went, "Really?" That would certainly be a first for me, because I had never been to a reenactment. This was going to be fascinating.

So we loaded up the kids and off we went. At the Confederate battlefield, we're going to the ammunition tent; we're going to the medicine tent where they show you how they chop off limbs; we're going to all the different places. The phone rings, and I step back, and it is a reporter from the *National Law Journal* here in New York. She asked if she could speak with me. I said, "Well I'm on a fieldtrip with my daughter, but if you could be very brief I will speak to you." And I'm getting ready for her to ask me how it feels to be the first female chief justice in the history of the state of Alabama, or she's going to ask me what it feels like to have been the candidate with twenty-five years' diverse experience, an outspoken, unfettered child advocate, now to be able to run the entire court system—because we have a unified court system in Alabama. Instead, the reporter asked me, "Judge Cobb, how will you convince the people of Alabama that you will not be making your decisions based on the millions of dollars of contributions you received?" Then, the cannon went off—literally, the cannon went *boom*. And I looked up to heaven and said, "Dear Lord, please don't let this Yankee ask me where I am! Please! Please!" And she didn't! My point is—certainly, there's nothing better than a true story—but it's sad that the system we have requires us to try to do one of the most important jobs, a job that protects our democracy, and do it hampered by the justifiable concerns that people have. Ultimately, as many judges and scholars have suggested, when we lose people's respect, we have lost everything, because that is the only asset the courts have: people's respect.

So know that the comments that I will make are from really three different perspectives. One is as a trial judge—a trial judge who re-

cused and didn't recuse, and as most of the judges here will tell you, 99.99% of the recusals are judges recusing themselves. You know, because of their own knowledge, or relationship, et cetera. So, my first perspective was as a trial judge. Then also as a trial judge, I tried cases in forty out of sixty-seven counties in Alabama, being from a rural county where I literally would travel and take cases all over the state appointed by the chief justice in order to fill in when other judges recused or for whatever reason, so I saw it from that perspective. On the Court of Criminal Appeals, we would recuse very seldom, mainly it was if our lawyers had been involved in a case, or something of that nature. But from a third perspective: as chief justice, I was the one who made decisions when judges recused, and had to find those judges who I thought would be appropriate, who had the mental acuity, the ability, the experience to be able to handle some of these very often very complex cases.

I will tell you that I couldn't agree more with what Robert Peck said—whom I've known for a number of years—that the goal is equal justice under the law.⁵⁶ It sounds like a very simple concept, but it's a real one. And we know that the problem is that we're dealing with human beings, both judges and lawyers. As we look at recusal reform, I am absolutely committed to the position that it is a major mechanism by which to achieve fair courts—fair courts not just because of money given, but because of relationships and knowledge and all other kinds of things. But just for a moment on what Professor Gillers said: the new statutory legislation in Alabama that Professor Gillers talked about established a bright line of ten percent.⁵⁷ Applied to my race, ten percent of \$2.6 million would be \$260,000. So when you look at the Alabama legislature's effort to establish an amount, that amount, I would submit to you, is way too high. But it does have positives, and negatives, but it really hasn't been put into practice yet, because it really has just been passed. At this point I would be glad to answer other questions. Thank you.

Professor Barbara S. Gillers:

Thank you, Chief Justice Cobb. We are also very lucky to have with us today with Chief Justice Maureen O'Connor, who is the first woman chief justice in the State of Ohio.⁵⁸ Chief Justice O'Connor also served as lieutenant governor of Ohio for many years and will

56. *See supra* pp. 531–34.

57. ALA. CODE § 12-24-3 (LexisNexis 2015).

58. Press Release, Ohio Republican Party, Maureen O'Connor Becomes First Woman Chief Justice of the Ohio Supreme Court (Jan. 1, 2011), <https://www.ohio>

speak with us about the Ohio regime, which provides us with yet a different paradigm for recusal issues involving elections.

REMARKS OF THE HONORABLE MAUREEN O'CONNOR

Thank you. Thanks very much, Professor, and thank you for the invitation to participate on this panel and the Symposium. I am very honored to be asked to do so. First of all, I want to start by saying: Sue Bell, if someone would have asked me that question, how are you going to convince the voters that you're not going to be biased and influenced by the contributions, I would've said, I don't need to convince them any further, I got their vote and they are assured by the fact that they know me and that they elected me. And so I think that you had their confidence when you became a member of the court.

And I think that voter education certainly helps in the battle that we're all talking about today, and that's the influence of money on elections. And that is a whole different topic with voter education, but it's one that we are addressing in the State of Ohio; and I'm very proud to say that in the next general election of 2015, which will be November of 2015, we will have a website that will be hosted and operated by the University of Akron that will be a complete one-stop shop for all information about every candidate who is on the ballot that year and in subsequent years, candidates running for the judiciary.⁵⁹ So citizens will have an opportunity to go and do one-stop shopping and comparison analysis of the candidates that are running for the judiciary. So that, as an aside, is a great tool that we are going to be able to use, and I think will help address some of these questions about judicial bias and quality of the judges, and who their supporters are, et cetera.

But let's get focused on what we do in Ohio when it comes to recusal or disqualification. We do not have a unified system in Ohio. We have about 395 courts that will represent up to 700, close to 800, maybe 730 judges throughout the state.⁶⁰ We have municipal court

gop.org/maureen-oconnor-becomes-first-woman-chief-justice-of-the-ohio-supreme-court/.

59. *New Study Highlights Need for Expanded Voter Information in Judicial Races*, CT. NEWS OHIO (Jan. 29, 2015), http://www.courtnewsohio.gov/bench/2015/voterEducation_012915.asp#.VR2eq2jD-Xg; Dan Trevas, *Chief Justice O'Connor Asks State Constitution Commission to Consider Moving Judicial Elections to Odd Years*, CT. NEWS OHIO (Jan. 15, 2015), http://www.courtnewsohio.gov/bench/2015/constitutionConvention_011515.asp#.VcgGxnjC6hY.

60. Bret Crow, *New Year Brings Change to the Bench*, CT. NEWS OHIO (Jan. 3, 2013), http://www.courtnewsohio.gov/bench/2013/newFaces_010313.asp ("All 724 Ohio judges are members of the of the Judicial Conference."). *See generally Ohio*

judges, which are trial judges;⁶¹ county court judges, again trial judges;⁶² common pleas court trial judges.⁶³ And then we have twelve appellate court districts,⁶⁴ which represent sixty-eight appellate judges across the state.⁶⁵ And we have seven members of the Supreme Court of Ohio.⁶⁶

By statute, when there is a motion—or, we call it, an affidavit—of disqualification, and it meets some procedural thresholds, then that affidavit of disqualification goes straight to the chief justice to make the decision in the event that the judge who is the subject of the affidavit does not decide to voluntarily recuse from the case.⁶⁷ And oftentimes, these recusals on the trial level, I never find out about because an attorney involved in a case would come to the judge and say informally, “Judge, I’m going to make a motion to disqualify you in the event that you don’t step back, and here’s the reason why,” and the judge for whatever reason—and oftentimes it’s just because they don’t want to go through any kind of process—will agree not to sit on the case.

I don’t know how often that happens; I don’t suspect that it happens very often at all. So then you move to the next step where there is a formal affidavit of disqualification that is filed with the clerk of court in the supreme court.⁶⁸ It comes to me, and the judge who is the subject of that affidavit is required within a certain amount of days to file a response in writing to the affidavit of disqualification.⁶⁹ We are then mandated to, and we do, review the complaint or the affidavit and

Judicial Structure, SUP. CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/SCO/jurisdiction/structure.pdf> (last visited Sept. 1, 2015) (providing an overview of the structure of the state court system in Ohio).

61. See OHIO REV. CODE ANN. § 2701.031 (LexisNexis 2014) (governing municipal and county court judges).

62. See *id.*

63. See *id.* § 2701.03 (governing common pleas court judges); see also *id.* § 2101.39 (governing judges on probate courts, a division within courts of common pleas). Courts of claims are the final form of lower-level courts immediately below the Ohio Courts of Appeals. See *id.* § 2743.041 (governing judges of the court of claims).

64. See *Ohio Courts of Appeals*, SUP. CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/judsystem/districtcourts/> (last visited Sept. 1, 2015) (providing links to information about each of the twelve districts).

65. See § 2501.13 (governing appellate court judges).

66. OHIO CONST. art. IV, § 2(A); see also *Justices of the Supreme Court of Ohio*, SUP. CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/SCO/justices/default.asp> (last visited Sept. 1, 2015).

67. § 2701.03(C).

68. *Id.* § 2701.03(B).

69. OHIO SUP. CT. PRAC. R. 4.04(C).

the response.⁷⁰ Oftentimes—more often than not, the vast majority of times—it is a frivolous affidavit of disqualification and there is no need for disqualification. At that point there is a preliminary decision that is communicated to the judge and to the party requesting it, and there is a formal decision that is then edited and released at a later time.⁷¹ There is a body of those decisions that is researchable and is open to the public in our archives in the supreme court.

Let's address where there might be some merit to the affidavit of disqualification. What transpires in that case? Well, I look for actual reasons for disqualification, but what is equally important is the appearance of impropriety or the appearance that there may be some bias. Or now, we're talking about campaign contributions. Campaign contributions without more are not going to do it, provided the campaign contributions are under the limits that we have in Ohio—which is another thing I'll talk about in a minute. So without more, there is no reason to grant an affidavit of disqualification.

But say there is a reason for the disqualification, because there's an appearance of impropriety. Whether that is because the judge might have a relationship that might cast some doubts upon his or her ability to be impartial has nothing to do with campaign contributions but just their personal or professional life. There may be some statements that have been made by the judge during the course of handling that case that one could reasonably take a look at and say, "You may not have meant it when you said it, but it does look like you might've prejudged some of these issues that will come before you." And there are a host of other reasons.

At that point, what I do is contact the judge. Not me personally, but I have a member of the staff contact the judge to say, "Here is what the chief justice is prepared to do, and that is to remove you from the case." We will give you another opportunity to voluntarily recuse so it doesn't necessitate an opinion, and it doesn't look like I'm removing a judge against his or her will. And oftentimes when it is explained to the judge, using the reasoning that I'm employing in looking at this case, he or she will say, "I see what you mean and I will recuse and it's not a problem."

There have been a handful, and I mean less than a handful, of cases where the judge has declined to take up that invitation. And those then result in an opinion that is issued by the court that will detail the reasons for granting the recusal motion. And what's good

70. § 2701.03(E).

71. *Cf.* OHIO REP. OP. R. 2.1.

about those, you know, they're few and far between, but I think what is appropriate about those cases and what is good is that they're useful for educating the judiciary—and the lawyers, but importantly, the judiciary—so they know, “Here are some considerations that I should be taking notice of, and here's the way the chief looks at these types of situations.” If I find myself, if I'm a judge sitting on the bench, find myself similarly situated, well hopefully I'm not going to be similarly situated because I've just learned by reading that opinion. But, if in fact there is a situation, I'm going to know that I probably need to just step down from that case and move on.

It's a system that has worked extremely well, and as I said we do it for all levels of the courts. We did have a situation until July of this year where the presiding judge of our common pleas court decided affidavits of disqualification for municipal court judges,⁷² which is the lowest level of the judiciary in that county—we have eighty-eight counties in the state⁷³—and that really presented some problems for these judges who were presiding judges there to then make a call on the performance or the affidavit related to what may be a friend, may be a colleague, may be someone that they've known for an awfully long time. I have found—I did find—a certain unevenness in response in those types of cases, and I went to the legislature and petitioned the legislature to change the law so that all affidavits of disqualification, no matter what level, came to the chief justice for uniformity and conformity, and to relieve that pressure that I felt was on the local judiciary and the dynamics that that would create.⁷⁴ And it has worked out very well since then.

We have, as I said, an open record as to the cases—both the affidavits that have been filed and the disposition of those affidavits. So they are a basis of knowledge that both the bar and the bench can use. When it comes to looking at campaign contributions in Ohio, we have standards that cannot be exceeded when it comes to donations to an individual running for the judiciary.⁷⁵ And it doesn't matter whether you're the incumbent or whether you're a challenger, there are certain gross amounts that cannot be exceeded. There is one

72. OHIO REV. CODE ANN. § 2701.031 (LexisNexis 2013) (amended 2014).

73. See *Ohio Trial Courts & Local Rules*, SUP. CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/judsystem/trialcourts/> (last visited Sept. 1, 2015) (providing individual listings for each of Ohio's eighty-eight counties).

74. H.R. 261, 130th Gen. Assemb., Reg. Sess. (Ohio 2014).

75. OHIO CODE OF JUDICIAL CONDUCT I. 4.4 (2014); see also *Contribution Limits for Judicial Candidates*, SUP. CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/Judiciary/candidates/limits/campaign.asp> (last visited Sept. 1, 2015).

amount if you're involved in a primary campaign.⁷⁶ There's another amount if you're then involved in the general campaign, the general election.⁷⁷ And these limits are placed on individual donors, and they are also placed on the political parties within the state about direct contributions to the coffers of the individuals who are running for the judiciary.⁷⁸ It has nothing to do with third-party dollars. And, let's be honest, that is where most of the dollars come from in a hotly contested race.⁷⁹

We have a little bit of an interesting situation in Ohio in that we have, obviously, elected judiciary for both.⁸⁰ All the way from the lowest level municipal court, all the way up to the chief justice of the supreme court. Chief justice is a designated spot.⁸¹ I have to run statewide. I ran as a member of the judiciary, because I was an associate justice since 2003 on the court.⁸² I've run three times for the supreme court statewide;⁸³ I ran once as lieutenant governor.⁸⁴ So I do have the benefit of having been in a partisan election as well as a nonpartisan election. I would prefer nonpartisan elections, I have to tell you. And I also ran as a local county judge when I was a court of common pleas judge in my home county.⁸⁵ I was also the prosecuting attorney—again, another elected position.⁸⁶ So I am pretty seasoned when it comes to elections and having been a participant in the elections. Fortunately, the elections I mentioned all turned out to be successful.

But, again, we have these dollars amounts that you can't exceed, and if you do exceed and if you do give more dollars to a candidate, both the candidate who has received that money and you as a donor

76. OHIO CODE OF JUDICIAL CONDUCT I. 4.4 (2014).

77. *Id.*

78. *Id.*

79. See, e.g., BANNON ET AL., *supra* note 3, at 4–11 (“The most expensive high-court elections in 2011–12 occurred in four states where courts remain closely divided by judicial philosophy and, in the cases of states with partisan elections, political party Deep-pocketed parties and interest groups overshadowed the candidates’ budgets in these four states, pouring in millions of dollars in independent spending.”); JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000–2008, at 9–10, 23–25 (2008), http://www.justiceatstake.org/media/cms/NPJEGreatLakes20002008_DE945C4A0839D.pdf.

80. AM. BAR ASS’N, *supra* note 2.

81. *Id.*

82. *Chief Justice Maureen O’Connor*, SUP. CT. OHIO & OHIO JUD. SYS., <http://www.supremecourt.ohio.gov/SCO/justices/oconnor/default.aspx> (last visited Sept. 1, 2015).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

have violated the law, and there are repercussions for that.⁸⁷ Oftentimes it's an accidental acceptance, so to speak. But that's no different than if you take money from someone who's precluded from giving it to you. For example: I could never take a donation, no matter how small, from anybody who works for the court, anybody who does business with the court.⁸⁸ If that were inadvertently done, the remedy would be to give it back. Certainly if there was a pattern there that would be a whole different set of circumstances, but an inadvertent violation of these can be corrected and are corrected without ethical repercussions.

But we have these procedural safeguards in place, and if they are violated and there is a pattern or there is some egregious violation, then that spills over into the area of ethics, and there can be consequences for your ethical violations as well as your election-law violations or your procedural, contrary-to-statute violations. So we do have the ability, in Ohio, to do both, and I would suspect all other jurisdictions do as well. They're not mutually exclusive.

So I have to say we in Ohio have had the opportunity on several occasions to weigh in on whether or not to keep our elected system. We started with an elected system I believe in 1851.⁸⁹ In the constitution of 1912, they tweaked it.⁹⁰ But, we've had elected judges, as you can see, for quite some time. And Ohioans weighed in, I think it was in 1937, when they were asked, "You want to continue to have elected judges?"⁹¹ There was probably two-to-one, "Absolutely, we want to continue to have elected judges."⁹² They weighed in the late '80s, fifty years later, on the same question. Again—by the same or a greater margin—"Yes, we want to continue to elect our judges."⁹³ In 2012 it

87. See, e.g., OHIO GOV. JUD. R. r. II(5)–(6) (setting forth disciplinary procedures for campaign conduct violations), reprinted in SUPREME COURT OF OHIO JUDICIAL COLL., 2015 JUDICIAL CANDIDATE SEMINAR 17–20 (2015), <http://www.supremecourt.ohio.gov/Judiciary/candidates/handbook.pdf>.

88. OHIO CODE OF JUDICIAL CONDUCT r. 4.4(B) (2014).

89. OHIO CONST. art. IV, § 6.

90. Non-Partisan Judiciary Act of 1911, 1911 Ohio Laws 5 (codified as amended at OHIO REV. CODE ANN. § 3505.04 (LexisNexis 2014)); see also MAUREEN O'CONNOR, OHIO COURTS 2013: A PROPOSAL FOR STRENGTHENING JUDICIAL ELECTIONS 3–4 (2013), <http://ohiojudicialreform.org/wp-content/resources/Plan13.pdf> (discussing the history of Ohio's system of judicial elections).

91. MICHAEL E. SOLIMINE ET AL., UNIV. OF CINCINNATI COLL. OF LAW CTR. FOR LAW & JUSTICE, JUDICIAL SELECTION IN OHIO: HISTORY, RECENT DEVELOPMENTS, AND AN ANALYSIS OF REFORM PROPOSALS 7–8 (2003) (discussing a 1937 initiative by the Ohio State Bar Association to amend the Ohio Constitution so that the state would rely more heavily on judicial appointments, rather than judicial elections).

92. *Id.* at 8.

93. *Id.* at 9–10.

was asked for a poll I think of 1000 or more people, and eighty percent of those polled said, “Yes, we want to continue to elect our judges here in Ohio.”⁹⁴

I have said that I think that’s an incomplete question to put to our public, because I doubt whether they realize that easily sixty to seventy percent of our judges are unopposed.⁹⁵ So while we have the capacity to elect judges in a contested race, year after year, whether it’s an off year or a general-election year (depending on whether the President and the governor are running), the same margin of unopposed members of the judiciary run.⁹⁶ I’m not advocating that in Ohio we have more contested elections, I’m not saying that at all—but if the public is aware that the votes they are casting are merely complimentary votes for the name on the ballot, that it is not a head-to-head contest, I wonder if their answer would be the same with their desire to continue to elect judges in Ohio.

It may very well be that it’s time to ask the question again, and ask it in the context of a more complete knowledge base, and then put it to the public: whether or not we think that possibly some sort of appointed system, with an independent screening process, and then appointment by the governor, and then subsequent retention election where a judge would run the merit of their time on the bench, would be a better fit for Ohio. Again, this is given the fact that we have about seventy percent of our judges that are unopposed on the ballot.⁹⁷

So I think it’s a very interesting dynamic that we have in our state. Third-party money certainly is much involved in the State of Ohio with elections, and not just with judicial elections but of course

94. See Darrell Rowland, *Poll: Ohioans Support System of Selecting Judges*, COLUMBUS DISPATCH (Dec. 12, 2012, 6:50 AM), <http://www.dispatch.com/content/stories/local/2012/12/12/12-justice-selection.html> (reporting that more than 80 percent of respondents to a Quinnipiac poll said they would oppose doing away with competitive elections).

95. Kimball Perry, *500 Ohio, Kentucky Judicial Races, Few Choices*, CINCINNATI.COM (Nov. 1, 2014, 1:03 AM), <http://www.cincinnati.com/story/news/politics/elections/2014/11/01/ohio-kentucky-judicial-races-choices/18265883/> (reporting that in the 2014 elections, sixty-nine percent of Ohio judicial races had only one candidate); see also Andrew Welsh-Huggins, *Ohio’s Chief Justice Revives Call to Appoint Justices*, CANTONREP.COM (Nov. 14, 2014, 12:15 PM), <http://www.cantonrep.com/article/20141114/NEWS/141119560> (“Supreme Court statistics show that 69 percent of judicial races were uncontested this election, just down from 70 percent during an equivalent election year in 2010.”).

96. Cf. Welsh-Huggins, *supra* note 95.

97. *Id.*

with partisan elections as well.⁹⁸ I have said, “Let’s do the proportionality review when it comes to money spent on judicial elections as opposed to money spent on partisan elections.” I think that money spent on judicial elections pales in comparison to what is spent in presidential, gubernatorial, senatorial, even state legislative races and our other statewide elections. So, I think that’s part of the analysis; I think that has to be part of analysis.

You hear people that are outraged about the fact that a million dollars were spent on a judicial election, but they’re not outraged when forty million dollars were spent by both candidates for a gubernatorial election, and that doesn’t count the third-party money. So this is not such a simple question where you can just look at the dollar amount and say, “We shouldn’t have money in judicial elections.” It’s pretty hard to have that as part of your system for selection of the judiciary and not do it with raising and spending dollars. Public financing of elections for the judiciary has not worked out; I think that it’s a great idea, but it’s not something that has gotten traction. I believe that they had it in either North or South Carolina and the legislature repealed the funding.⁹⁹ So it really has not gotten the traction, and so I don’t think that’s an option on the table. I think when we talk about this conversation we need to be realistic about what will work and how we address real problems.

Professor Barbara S. Gillers:

Our next speaker is former Wisconsin Supreme Court Justice Louis Butler. Justice Butler was appointed in 2004. He was the first African American appointed to the Wisconsin Supreme Court.¹⁰⁰ He has a long, distinguished career as an assistant public defender and in other venues and much public service and teaching to his name, as you see in the biographical materials.¹⁰¹

Justice Butler’s term expired in 2008. He then ran for re-election. He lost by about 20,000 votes to a man named Michael Gableman,

98. See generally Keith E. Hamm, *Independent Spending in State Elections, 2006–2010: Vertically Networked Political Parties Were the Real Story, Not Business*, 12 FORUM 305 (2014).

99. See 2013 N.C. Sess. Laws 381. See generally Adam Smith, *North Carolina Legislature Repeals Popular ‘Voter Owned Elections’ Program*, HUFFINGTON POST (July 26, 2013, 9:41 PM), http://www.huffingtonpost.com/adam-smith/nc-campaign-finance_b_3660472.html.

100. *Louis B. Butler: Biography*, GONZALEZ SAGGIO & HARLAN LLP, <http://www.gshllp.com/attorneys/louis-b-butler-jr> (last visited Sept. 15, 2015).

101. *Id.*

now Justice Michael Gableman.¹⁰² Millions of dollars were poured into Justice Gableman's campaign by two groups (and their affiliates): the Wisconsin Manufacturers and Commerce Group and the Wisconsin Club for Growth.¹⁰³

Justice Butler has been active in the ABA efforts to improve the recusal rules, and Justice Butler was a participant in an amicus brief to the Supreme Court in the *Caperton* case.¹⁰⁴ Justice Butler has also been nominated four times to the federal bench.

Justice Butler will introduce us to the fourth paradigm today—the Wisconsin rules. I'll let Justice Butler tell you about how these rules came to be adopted—which is relevant to our issues—but first I would like to show you a thirty-second clip that was sponsored by folks supporting Justice Gableman in the 2008 election. We call this clip the Willy Horton ad. Some of you are old enough to remember the Willy Horton ad, which ran in the 1988 presidential election.¹⁰⁵ The 2008 ad run in Wisconsin accused Justice Butler of putting criminals back on the street by finding a loophole to release a girl's rapist.¹⁰⁶

In 2010, the Wisconsin Judicial Conduct Commission filed an ethics complaint in the Wisconsin Supreme Court against Justice Gableman based on the 2008 ad.¹⁰⁷ The court could not come to a decision, because it split three to three after Justice Gableman recused himself from the matter.¹⁰⁸ The Commission then dropped the case.¹⁰⁹

102. Adam Liptak, *Rendering Justice, with One Eye on Re-Election*, N.Y. TIMES (May 25, 2008), <http://www.nytimes.com/2008/05/25/us/25exception.html?pagewanted=all>.

103. Brendan Fischer, *Supreme Court Challenge to WI Dark Money Probe Raises Questions of Judicial Ethics*, PR WATCH (Feb. 19, 2014, 9:02 AM), <http://www.prwatch.org/news/2014/02/12389/new-challenge-john-doe-raises-questions-judicial-ethics>.

104. *Co-Signers in Caperton v. Massey*, BRENNAN CTR. FOR JUST. (Jan. 6, 2009), <http://www.brennancenter.org/analysis/co-signers-caperton-v-massey>.

105. Patrick Marley et al., *TV Ad by Gableman Comes Out Swinging*, J. SENTINEL (Milwaukee, Wis.) (Mar. 15, 2008), <http://www.jsonline.com/news/statepolitics/29486784.html>.

106. *Id.*; see also Opinion, *A Wisconsin Judge's Refusal to Recuse*, N.Y. TIMES (Jan. 24, 2012), <http://www.nytimes.com/2012/01/25/opinion/a-wisconsin-judges-refusal-to-recuse.html> (“In addition to playing to the fear and racism of some voters, the charge [against Butler in the Gableman ad] was false.”).

107. See Wis. Judicial Comm'n v. Gableman, 784 N.W.2d 605 (Wis. 2010).

108. *Id.*; see also, e.g., Patrick Marley, *State Supreme Court Deadlocks on Gableman's Ethics Case*, J. SENTINEL (Milwaukee, Wis.) (July 1, 2010), <http://www.jsonline.com/news/statepolitics/97557794.html> (discussing the Wisconsin Supreme Court's inability to reach a consensus in Justice Gableman's case).

109. See Patrick Marley, *With Supreme Court Deadlocked, Commission Drops Gableman Ethics Case*, J. SENTINEL (Milwaukee, Wis.) (July 8, 2010).

This and other events highlight the heavily ideological bench in Wisconsin, which is a consequence, I think, of the nature of judicial elections in the state. Perhaps Justice Butler will elaborate on this. And I do hope we get to see the video. But let me now turn the proceedings over to you, Justice Butler.

REMARKS OF THE HONORABLE LOUIS BUTLER

Thank you, Professor Gillers. There was a comment made a little bit earlier in one of the other panels about John Grisham's book, *The Appeal*, and it being a fictional account.¹¹⁰ And all I can say with respect to the fictional account reference is, "Welcome to my world." I think when Grisham wrote the book—and in fact, he was interviewed to discuss this—he wrote it as a warning of what to be aware of and what to guard against in judicial elections.¹¹¹ I think his book has been used as a playbook on how to run judicial elections. And I say that with dismay, as I look around the country and look at what's happening in other states—in Mississippi, Tennessee, a few times in Michigan, I think there have been elections in Ohio that have been very contested, Pennsylvania has had its issues. You can look around the country and see what's happening to judicial elections.

So I had some concerns about that, and Professor Gillers already told you I was one of the signers of the amicus brief of twenty-seven former justices in the *Caperton* case,¹¹² and I mention that because one of the positions that we took was that we suggested that the Court apply the Due Process Clause to the case so as to allow states' supreme courts to adopt their own rules governing recusal where a party has provided substantial financial support for the judge's election.¹¹³ Obviously that's something that Justice Kennedy accepted, and I think I needed to make that particular disclosure because it kind of goes toward my comments in terms of what we thought we were urging and what has occurred when you look at the Wisconsin regime.

The League of Women Voters filed a petition urging the Wisconsin Supreme Court to adopt new rules regarding recusal in Wisconsin that would address the concerns that were highlighted in the *Caperton*

110. JOHN GRISHAM, *THE APPEAL* (2008).

111. See Peter Lattman, *John Grisham & Judicial Elections*, WALL ST. J.: L. BLOG (Jan. 29, 2008, 4:29 PM), <http://blogs.wsj.com/law/2008/01/29/john-grisham-judicial-elections/>.

112. Brief *Amicus Curiae* of 27 Former Chief Justices and Justices in Support of Petitioners, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (No. 08-22), http://www.brennancenter.org/sites/default/files/analysis/081231.caperton.amicus.frmr_ssc_justices.pdf.

113. *Id.* at 13–15.

case and identify some of the guidelines and some of the criteria to look at when campaign spending was involved.¹¹⁴ The late former Justice William Bablitch filed a similar petition with the Court, urging the court to study and perhaps implement some guidelines that would take into account some of the *Caperton* issues.¹¹⁵ Shortly on the heels of those two petitions, two additional petitions were filed: one was by Wisconsin Manufacturers and Commerce, the other was by the Wisconsin Realtors Association.¹¹⁶ Both groups have spent a great deal of money in judicial elections. By way of disclosure again, one of the groups—Manufacturers and Commerce—spent millions to urge voters not to support me in the election,¹¹⁷ while the Wisconsin Realtors spent money supporting my election, so I wanted to make sure you knew that those groups were on opposite ends of my campaign.¹¹⁸ However, millions of dollars were spent in the 2008 election in the state of Wisconsin.¹¹⁹ These two groups submitted a number of amendments to the Wisconsin Supreme Court rules regarding recusal and disqualification.¹²⁰ The rules were argued in an open hearing, followed by an administrative proceeding, where, if you read the dissents—it was a four-to-three vote—there was little debate, no study, and the rules from both groups were literally adopted word for word.¹²¹ And those were the rules that Myles told you about a little bit earlier, that just getting money in and of itself is not a campaign violation.¹²²

There was one addition to the Wisconsin rules that I don't think Myles pointed to. The Wisconsin rules were amended because prior to this change in rules a litigant—a party—could not donate to an individual judge or judicial candidate.¹²³ You can now do that in Wisconsin.¹²⁴ So that's one of the additions to the rules. Part of the confusion

114. *In re* Amendment of the Code of Judicial Conduct's Rules on Recusal, 2010 WI 73.

115. *Id.*

116. *Id.*

117. See Jim Pugh, *WMC: Winning for Your Business in the Court of Public Opinion*, WIS. BUS. VOICE (Wis. Mfrs. & Commerce, Madison, Wis.), Mar. 2013, at 6, 7, http://issuu.com/wmc1/docs/businessvoice_specialedition2013-med/8.

118. See *Realtors Back Butler's Bid to Stay on High Court*, NBC15.COM (Dec. 19, 2007), <http://www.nbc15.com/home/headlines/12639111.html>.

119. See JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, NAT'L INST. ON MONEY IN STATE POLITICS & JUSTICE AT STAKE, THE NEW POLITICS OF JUDICIAL ELECTIONS 2000-2009, at 15 (2010).

120. 2010 WI 73.

121. See *id.*

122. See *supra* pp. 523–24.

123. WIS. SUP. CT. R. 60.04(7), 60.06(4); see also 2010 WI 73, ¶ 14 (discussing the change).

124. 2010 WI 73, ¶ 14.

with adopting the rules word-for-word that became somewhat of an embarrassment in Wisconsin is that they later found that there was an inconsistency between the two rules, so they had to go in and amend the rules that were created after one of the parties who submitted the proposed rule recognized the inconsistency and said, “Oops! Let us correct this,” and it was corrected.¹²⁵

So, Wisconsin has adopted these broad rules, very different from what the League of Women Voters thought when they filed their petition and very different from what Justice Bablitch thought when he filed his petition. Instead of trying to identify issues that relate to the giving of campaign spending in judicial races, basically, Wisconsin has adopted rules saying, “We don’t have a problem with it.” That’s the Wisconsin regime. And it has led to some interesting recusal decisions in Wisconsin. And I hesitate—I never know how hard to go on this because: (a) I know all of these people, and (b) it’s extremely embarrassing when I’m talking about my home state. But I don’t know how you can talk about recusal and not talk about what’s happening in Wisconsin, because we’re the poster child for what really you shouldn’t be doing in judicial elections. So I have to describe some of this.

One of the recusal motions—in fact there were a number of recusal motions that were brought in front of one of the justices—had to do with campaign speech, both by the then-candidate and then subsequently by the candidate’s lawyer, with respect to attacking the defense bar in the course of an election and whether or not a person who had served to represent individuals in a criminal case should be sitting on a high court, and whether or not that’s a problem.¹²⁶ That type of argument led to a number of criminal defense lawyers asking that justice to recuse himself off of their cases.¹²⁷ The matter was heard by the court; three of the justices basically came to the conclusion that there should be full briefing and argument, that they didn’t have enough information to determine whether or not this justice should be removed from the court or not; but the justice in question had stepped off the case off of that determination after initially refusing to recuse himself.¹²⁸ He denied the recusal motion, but he did not sit on the

125. *Id.* ¶ 36 (Bradley, J., dissenting) (“Probably much to the embarrassment of the majority which had just adopted the petitions verbatim, the court was advised by letter dated November 24, 2009, from counsel for WMC and the Realtors that there was a problem with adopting the two petitions word-for-word—the language in the petitions was inconsistent.”).

126. *State v. Allen*, 778 N.W.2d 863 (Wis. 2010) (per curiam).

127. *Id.*

128. *Id.* at 863.

determination as to whether he should be removed from the case. The other three justices said, “We do not have the authority to remove him from this case. In Wisconsin that deprives the voters of their elected judiciary, and therefore we are not taking that step, we are not going to remove that justice from the case.”¹²⁹ And so the court essentially split three to three; for lack of a fourth vote you had no real rule in Wisconsin.

Another justice was brought up on recusal issues who initially refused to step off of a case that she had been involved with.¹³⁰ When the question of whether or not she should be removed from the case arose, the court once again split three to three.¹³¹ You did not have four justices to come up with a final ruling. You have to have four, otherwise you’re spitting in the wind, right? You have to be able to count to four. So essentially what happened is that the case came back by way of motion for reconsideration and in the first case that I’m aware of this kind—at least in our state—all seven justices decided the question on whether or not the justice properly sat on the case.¹³² In other words, she decided her own case as to whether or not she should sit. So that’s one of the recusal issues that led to it.

You do run into some interesting due process questions, I suspect—and I think there’s an argument about whether we’re talking due process or not, depending on how you view an initial right to an appeal when you get to the next stage in the supreme court petition for review stage—but in Wisconsin you have to have a quorum of four in order to sit as a court.¹³³ If you don’t have four, you don’t have a court to sit. There is no provision in Wisconsin for designating a judge to replace a justice.¹³⁴ You can do that at the circuit court level, at the municipal court level, the court of appeals level, but you cannot do it at the Wisconsin Supreme Court level.¹³⁵

So there was at least one case that I’m aware of where you had a former union chief who had, upon resigning from his position with the union, become a driver for a number of the judges during their political campaigns.¹³⁶ A majority of the court, four justices, stepped off of

129. *Id.* at 912 (opinion of Roggensack, J.).

130. *State v. Henley*, 802 N.W.2d 175 (Wis. 2011).

131. *Id.* at 185 (Abrahamson, C.J., dissenting) (observing that the justice who had been the subject of the initial disqualification motion cast the deciding fourth vote denying that motion).

132. *Id.*

133. WIS. CONST. art. VII, § 4(1).

134. *Id.* § 4(3).

135. *Id.*

136. *DeBraska v. Quad Graphics, Inc.*, 763 N.W.2d 219 (Wis. Ct. App. 2009).

that case when a petition for review was filed, thereby resulting in the petition not being heard for want of court.¹³⁷ No one heard that case.

Then you had a case—and I know Wisconsin’s been in the news a lot lately for a number of different reasons, and I’m going to attempt to be as delicate about this as I possibly can, but it is not a delicate subject and I just don’t know how you can talk about this issue and not discuss it—you had an allegation at least from the Wisconsin Judicial Commission, which brought a complaint against a sitting justice involving a physical altercation among the justices on the court.¹³⁸ And a number of the justices recused themselves from the case.¹³⁹ Now, if you look at the issue from the rules of mandatory disqualification, there is no question that six of the seven justices were either participants or witnesses to the altercation.¹⁴⁰ Six of the seven. If you’re looking at rules of mandatory disqualification, that fulfills the rules by any way you look at it, right? One of the justices was not privy to that particular action, but there was a second action that was brought involving verbiage used against another justice by the same individual, and that justice was a witness to that.¹⁴¹

So that implicated the rule of necessity, at least in that case. A number of the justices discussed the rule of necessity. The majority of them said the rule of necessity did not trump in this instance.¹⁴² One of the justices said the rule of necessity did trump and looked at the case and said, “We have to sit as a court, people are entitled to a decision, and as long as I think I can be an unbiased observer, I can sit.”¹⁴³ The long and the short of it is that for lack of a court, the case has never been heard.¹⁴⁴

137. *DeBraska v. Quad Graphics, Inc.*, 2010 WI 5U.

138. *See Wis. Judicial Comm’n v. Prosser*, 817 N.W.2d 830, 832 (2012) (describing the complaint that the Wisconsin Judicial Commission filed against Justice Prosser based on Justice Prosser’s role in the physical altercation); *see also* Monica Davey, *Wisconsin Judge Said to Have Attacked Colleague*, N.Y. TIMES (June 25, 2011), <http://www.nytimes.com/2011/06/26/us/26judge.html>.

139. *See, e.g., Wis. Judicial Comm’n v. Prosser*, 818 N.W.2d 923 (2012) (noting, in granting the defendant’s disqualification motion, that two justices had already disqualified themselves from participating in the proceedings).

140. *See* WIS. STAT. ANN. § 757.19(2)(b) (West 2014).

141. *See Prosser*, 817 N.W.2d at 832 (repeating an allegation concerning an exchange between Justice Prosser and Chief Justice Abrahamson, which had been described in the Wisconsin Judicial Commission’s complaint).

142. *See, e.g., Wis. Judicial Comm’n v. Prosser*, 817 N.W.2d 875, 878 (2012) (citing the rule of necessity in explaining the decision to recuse); *Wis. Judicial Comm’n v. Prosser*, 813 N.W.2d 208, 212–14 (2012) (same).

143. *Prosser*, 817 N.W.2d at 833–35.

144. *See* Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, NEW YORKER (May 5, 2015), <http://www.newyorker.com/news/news-desk/the-destruction-of-the-wisconsin-supreme-court>.

There is at least one other instance, where you talk about recusal issues and the money issues, in which a complaint was brought against a justice for the justice sitting on cases involving a law firm for which the party had filed a petition alleging disqualification for cause because of the firm's belief that the justice had received free legal services for an ethics complaint violation—and yet, the same firm that provided the free legal services was litigating matters before the high court.¹⁴⁵ So these are the types of things that have been happening in the state of Wisconsin, and—for lack of a better word—it ain't good.

And one of the issues I want to address to the Brennan Center, to justices of state courts, and to the ABA: as you look at the issues involving recusal and disqualification, this is a very touchy, sensitive issue for judges. Let me put it like this: every judge that I know, if you talk to them about issues involving recusal—whether or not you're biased, whether or not you feel the need to step off of a case—every judge that I know looks at it pretty much the same way, “I can do that, I know when I shouldn't sit, I know when I shouldn't be on a particular case.” That's how many judges view this issue. Forgive the analogy, but it's kind of like viewing pornography: you know it when you see it. That's part of the concern that judges have when you start talking about somebody else making determinations, but the reality is that there's a difference between the type of recusal that I just described and the motion for cause that's brought by a party, whether it's for disqualification or recusal, when someone is challenging the impartiality of a judge.

And so when you talk about that, that's the concern that I have every time I see the articles written about this topic. There's always a footnote, it's usually footnote number one, that says, “For purposes of this discussion, we view recusal and disqualification as being the same.” It's not quite the same thing. There are distinctions, and those distinctions have got to be recognized. I think every judge understands when he or she is not supposed to sit. If you've got a statute on board that says “you can't sit if you've got a relative on the case,” judges get that. If you've got rules involving mandatory recusal or disqualification in other areas, judges get that. But when you start talking about the issue of bias, and whether or not someone is challenging your impartiality, the question becomes whether the judge who was the subject of the challenge should be making that determination or—as

145. See *Ozanne v. Fitzgerald*, 822 N.W.2d 67 (2012).

Chief Judge Lippman had pointed out in New York¹⁴⁶—should an independent party make that decision?

So as we go forward looking at these issues, I think you have to look at the various ways this issue can come up—I know I've been in discussions with the Judicial Division of the ABA, and judges are very nervous when you start talking about having somebody else making these determinations. But I think if you really explain it in the context of what's really going on, particularly what's going on in a state like mine, they may get a better picture of how this is really impacting the system across the country.

QUESTIONS AND ANSWERS

Questions from Barbara S. Gillers to the Panelists

Professor Barbara S. Gillers:

Thank you, Justice Butler. Before opening the proceedings up to questions from the audience, let me ask whether any of our panelists would like to respond to each other?

Hon. Maureen O'Connor:

I do have one question that I'd like to ask the panelists here. Would not a change in the ability to substitute an appellate judge, for example, for a sitting justice on the court take care of some of the issues and eliminate the necessity to sit for any particular argument and you wouldn't have, for example, a draw in which you had three that wanted to hear and three that didn't? And my understanding is that you do not have the ability for the chief justice—or if the chief justice has to recuse, the senior-most justice—to then pick from the appellate districts an appellate judge to sit.

Hon. Louis Butler:

No, absolutely, Justice O'Connor. That would solve at least that particular problem. The problem we have in Wisconsin is that it's a constitutional mandate, and so in order for that provision to change, you would have to change the Wisconsin Constitution.¹⁴⁷ There are some suggested changes that are being proposed in Wisconsin to deal with some of these issues.

One of the suggestions that is being proposed right now by a blue-ribbon panel by the state bar—and it's a position that I do not

146. See *supra* pp. 552–56.

147. WIS. CONST. art. VII, § 4(1).

agree with—is to try to eliminate the amount of money spent in elections and to take away any incentive that a judge might have for voting on a case to try to get elected.¹⁴⁸ They’re saying, “Let’s get rid of repetitive elections, or reelection cycles. Let’s have one election term in Wisconsin for a sixteen-year period so that there will be no incentive for you to alter your vote to get reelected and then hopefully the money spent in our state will go down.”¹⁴⁹

Hon. Maureen O’Connor:

And no chance of getting elected again then—you’re sixteen years and out?

Hon. Louis Butler:

Sixteen years and you’re done. Sixteen and out. And so that’s the proposal, which, quite frankly, I don’t agree with. I respect the members of the commission who proposed that. I think it’s a bad idea. I think it’s a bad idea for two reasons.

One, I can’t speak for other states, but I’ve never known a judge or a justice at any level to change his or her vote to try to garner additional votes in an election cycle. I think that the reason they sit in the particular seat in which they serve is because they think the way that they think and they vote their consciences. You may not agree with them, you may not agree with any of the rulings I made on the court, but I wasn’t going to change my vote to try to get elected. I was there to vote the way I saw the law, to apply the law to the facts the way I viewed it. So I see it as a red-herring issue. That’s one.

Two, and more importantly, if you tell every independent group in the world that all of the stakes are at one sixteen-year election, do you really think the money is going to go down? It’s going to go up. That is where the money is going to come from. And so I have some real, serious concerns about front-loading all the money in one election, particularly if you don’t know the candidate that you’re going to be electing for the next sixteen years. So I have some concerns about that particular proposal.

There is another constitutional change that they’re proposing in Wisconsin. That is to alter the way you select the chief justice in the

148. STATE BAR OF WIS., JUDICIAL TASK FORCE, JUDICIAL TASK FORCE REPORT AND RECOMMENDATION (2013).

149. *Id.* at 15; see also Joe Forward, *State Bar Board Supports Proposal for One, 16-Year Term for Supreme Court Justices*, ST. B. WIS. (Sept. 28, 2013), <http://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=11060>.

State of Wisconsin.¹⁵⁰ There are a number of people in our state who feel that longevity, seniority, is not the appropriate way to select the chief justice and that the court ought to select its own chief justice.¹⁵¹ So that seems to be the way our state is going.

Hon. Jonathan Lippman:

Can I just say that I think Wisconsin is sui generis? And I don't think it's a product of any one rule about campaign contributions or whatever the hell else is involved there. I think it's—and I have my dear friend who many of us share, Shirley Abrahamson, who is the chief justice, who is spectacular by any standard—but I think this is a court that is in disarray for all kinds of reasons that certainly reflects the politicization of high courts. And I see it. But I don't think there is another court in the country, regardless of their campaign contribution, recusal rules, and all of that—I think that in almost every high court I know we can disagree without being disagreeable. I am not saying that there isn't some, I used the word “excess” before; but I don't think this reflects high courts around the country, and I don't think that Wisconsin in particular is a good place to be a laboratory of recusal rules or campaign contributions. I think we should look at it in the broader picture and not look right now at what is an aberrational situation and let it too much skew our view of where we should be going.

Hon. Sue Bell Cobb:

And Professor Gillers, I want to commend to everyone the new research supported by the American Constitution Society, which is very data-driven. Unfortunately, it shows that rulings for criminal defendants by elected judges in election years and the years immediately preceding elections go down.¹⁵² And that is what the data show. We also know that in states that have death penalty cases, there seems to be data to support some impact as well.¹⁵³ Having experience on both trial and appellate courts for quite some time—I know that my breath-

150. See, e.g., Alan J. Borsuk, *One Term, Sixteen Years*, MARQ. LAW., Summer 2014, at 40, 42–43 (describing the proposed change to the system of chief justice selection in Wisconsin).

151. *Id.*

152. JOANNA SHEPHERD & MICHAEL S. KANG, AM. CONSTITUTION SOC'Y, SKEWED JUSTICE: CITIZENS UNITED, TELEVISION ADVERTISING AND STATE SUPREME COURT JUSTICES' DECISIONS IN CRIMINAL CASES (2014); see also Derek Willis, “Soft on Crime” TV Ads Affect Judges’ Decisions, Not Just Elections, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/22/upshot/soft-on-crime-tv-ads-affect-judges-decisions-not-just-elections.html?abt=0002&abg=1> (discussing the report).

153. See EQUAL JUSTICE INITIATIVE, THE DEATH PENALTY IN ALABAMA: JUDGE OVERRIDE 5 (2011) (reporting the finding that “[t]he proportion of death sentences

ren on the bench, even though we might have voted differently some times—I still do not believe that everyone, every time is going to vote from whence their money came. That doesn't happen. But what *is* apparent is that when you ask the public, lawyers, and even trial judges, “do you believe that campaign donations have an impact on judicial decisions?” the answer is overwhelming “yes.”¹⁵⁴ They believe that it is having an impact.

So I want to really put my two cents' worth in for just one part that would help. Separate from the fact we are grappling with merit selection and different ways to pick judges, which certainly is where we really need to be, is that issue of independent analysis of denials of recusal. I am so glad to hear that the Conference of Chief Justices voted to endorse that,¹⁵⁵ because when a recusal motion is received—and how many times really did lawyers actually make recusal motions even though they know they need to be made? I mean, it just doesn't always happen—but if they knew that if the sitting judge denied their recusal motion, that it would then go to another judge, another judicial panel automatically, who would then rule on whether or not there is an appearance of impropriety, I think they would make those motions more often. I think judges would rule more carefully when they got the recusal motion in the first instance. Like Bob Peck said, I think that's part of the answer that will take us where we want to go, and that's people truly trusting our court system.

Hon. Jonathan Lippman:

I agree with Sue Bell. I do want to make a particular point that you made that I think is so important, which is the perception issue. The public clearly believes that campaign contributions change the way judges vote. That's the long and the short of it. And that's why I believe that let's, as an institution, as a system, attack this problem directly. Let's not hide from it. Judges who receive contributions should not, in the broadest strokes, should not sit on the cases of those people who made the contributions. Period. Whatever the exact means that you do it, whatever the rule is, I think that's the point. It's so destructive of the judiciary and the confidence that people have in it. And to me, that's crystal clear. And while there are differences—we

imposed by override often is elevated in election years”); *see also* SHEPHERD & KANG, *supra* note 152, at 12 (citing the Equal Justice Initiative report).

154. *See, e.g.*, BANNON ET AL., *supra* note 3, at 15 (“In a 2011 national poll of 1,000 voters, 93 percent said judges should not hear cases involving major financial supporters, and 83 percent said that campaign contributions have at least some influence on a judge's decisions.”).

155. *See* NAT'L CTR. FOR STATE COURTS, *supra* note 39, at 1.

have the rule in the trial courts, a lot of places have it in the high courts—that's the one common thread. Campaign contributions—what could be more destructive? What could be worse than to think judges make the decisions on that basis?

Hon. Maureen O'Connor:

Let me just ask a question here, because you are talking about financial contributions, you're talking about third-party dollars, et cetera. How do you translate, though, when an organization endorses you? What's the value of that? I'm always endorsed by the FOP.¹⁵⁶ We hear cases where judges, you know, lower-court judges who have made the decision, and the key deciding factors are testimony of the police. We have union issues, we have amici.

Professor Barbara S. Gillers:

Who is FOP?

Hon. Maureen O'Connor:

Fraternal Order of Police.

Hon. Jonathan Lippman:

Ohio-speak.

Hon. Maureen O'Connor:

Actually, it's a national organization.

Hon. Jonathan Lippman:

In New York City, we don't know. But go ahead. Police? Go ahead.

Hon. Maureen O'Connor:

You get endorsed by them, their labor union, and they weigh in on union issues. They file amici briefs with us. We have cases where sometimes they're parties. I don't recuse from a case that might have tangential or direct FOP involvement. How about when a newspaper does an endorsement for somebody from the judiciary? It happens: all our major newspapers will endorse for the supreme court race and the

156. See, e.g., *Letters in Support of Eric Brown, Maureen O'Connor, Ohio Supreme Court*, DAYTON DAILY NEWS (Oct. 6, 2010, 5:21 PM), <http://www.daytondailynews.com/news/lifestyles/philosophy/letters-in-support-of-eric-brown-maureen-oconnor-of-nNHbX/>.

local races. Now, if one of the newspapers happens to file a public record request—we get those all the time from the newspapers—should we recuse on that? So we can't just limit this conversation to what will trigger a consideration of recusal, because it is not just dollars. Those dollars translate from third parties, they translate to messaging and influence in an election; but so too do endorsements and other intangibles.

Hon. Jonathan Lippman:

I agree, but money has a particular resonance. When contributions—

Hon. Maureen O'Connor:

I don't know how much an FOP endorsement works, but it's a lot.

Hon. Jonathan Lippman:

No, I think more than an endorsement of a particular group, from the *New York Times*, or whatever—money, I think, is something that the public thinks they understand. And while judges are insulted by that inference, as 99.99% should be, I think the optics are really terrible.

Professor Barbara S. Gillers:

We have just a few minutes left, and I do want to give the audience a chance to ask questions. So if you have a question you would like to ask of the panelists, please raise your hand. We will take a few.

Question from Joan Claybrook to the Panelists

Joan Claybrook:

Thank you very much. I'm Joan Claybrook. I am the President Emeritus of Public Citizen in Washington, D.C. This has been a fascinating discussion. Thank you so much for coming. To me, the real question here is that the courts have to regulate themselves in terms of the disclosure of this public money. And you've mentioned, all of you have mentioned, that outside money—not directly related to the judges, but outside money—is the most uncontrolled. It seems to me that you could issue a rule as judges that any litigant coming before the court in a case would have to disclose whether they gave any money. And then the issue of *Caperton* comes into play more effec-

tively because you know whether or not the judge was financed by one of the litigants. I mean, without that, I don't think there is any way you can control the money where you do have judicial elections.

Hon. Sue Bell Cobb:

I don't disagree with you. I mean, that's why we really get back to judicial selection—because truly, in my opinion, merit selection with voter retention is the way to go. But, I mean, that's an idea. It's obviously worth looking at, for sure, because you're putting the onus onto the litigants themselves. I heard it said by a previous panel that in some states there's a wall between them and the donations. I don't get that. I don't think there's a wall. I mean, you do *know*, unfortunately.

Hon. Jonathan Lippman:

I think it goes to public disclosure of all these things. It should be out for everyone to see.

Hon. Maureen O'Connor:

Yeah, it should be a disclosure. Not just when you're a litigant. What we have done through the rulings that have permitted secret dollars and nondisclosure of the identification of the contributors—that's what is at root here; because if it is all out there on the record, that's great. But it's not. There are certain disclosures for certain groups but there are other groups that are exempt from disclosing their contributors.¹⁵⁷

Joan Claybrook:

It's not exempting. They launder the money.

Hon. Maureen O'Connor:

Well, no, there are certain groups that don't disclose.¹⁵⁸

Joan Claybrook:

That's because they are able to launder the money. And so they launder the money from one committee to the next committee. And then no one knows who were the basic—

157. See generally Emma Schwartz, *The Rules that Govern 501(c)(4)s*, PBS FRONTLINE (Oct. 30, 2012, 9:12 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/the-rules-that-govern-501c4s/> (providing an overview of the disclosure requirements imposed on different types of organizations).

158. See *id.*

Hon. Maureen O'Connor:

The contributors to the organization or the entity that does the actual advocacy should have a full disclosure requirement. There's no two ways about that. If you're going to equate money with speech, then why should you be ashamed that you gave?

Joan Claybrook:

That doesn't exist. The question is: can you do it under the rubric of the Court until we get better campaign disclosures?

Hon. Jonathan Lippman:

I think one of the things we dealt with was similar to what you're saying, we looked at that issue exactly. That lawyer has to get up in front of the court; let's say the lawyer in this case says, "You know, I gave \$500 to the judge and I didn't do anything wrong but I just wanted to disclose it—we felt that it was better to come from us." We have the information. We are going to say that the judge is not recusing. We are not assigning the case to the judge, rather than all the players having to be in this position of saying, "Gee, I know I did something really wrong or I didn't do something wrong." I think it's better.

Joan Claybrook:

Think of independent expenditure money. We did not have the money that comes from corporations to the Chamber of Commerce to the Republican National Committee, whatever it is and eventually gets to the campaign. You don't have that information. So unless you have a rule that if a corporation has given money that eventually gets to the judge—

Hon. Jonathan Lippman:

And sometimes you can't tell what money went where or who gave it. I don't disagree with your basic premise, but I don't think it's that simple with that kind of money, with that kind of rule.

Hon. Louis Butler:

If I could: part of the difficulty with the disclosure issue is that because not everyone is required to disclose (a) from a national perspective, (b) because of the First Amendment arguments that have been advanced against disclosure—whether you agree or disagree, there's now a huge First Amendment push that disclosure chills First

Amendment rights, so that issue is out there¹⁵⁹—and then (c) because of the way money is often given in races generally—in other words, you might have individuals or corporate entities on both sides that give money to an organization, and that organization gives money to a different organization, and that organization gives money to a different organization, and eventually, it finds its way into a political campaign but because you don't know who gave what to whom—how does the individual who gave the initial pot of money come into court and disclose, “I gave money in your race”? They might not know they gave money in that race.

Joan Claybrook:

I'll bet you most big corporations who give most of the big money know exactly where that money is going to go. And if they don't find that it's disclosed, and there's a penalty for not disclosing, then they're going to disclose. I don't know of any other way you're going to get to this issue, in our current system right now. *Citizens United* says disclosure is the way to go.¹⁶⁰ It's going to have to take a Supreme Court decision on a First Amendment basis saying you have to disclose—I don't see that happening.

Question from an Audience Member to the Panelists

Audience Member:

Thank you. My question is for Chief Judge Lippman, and it's tangentially related. You noted that the Assignment Rule 151¹⁶¹ does certain things and it does not do certain things, and I'm wondering whether you read the rule literally or whether or not something like an in-kind donation or a donation from a corporation that an attorney owns and controls would qualify toward the \$2,500 limit, and how that works.

Hon. Jonathan Lippman:

Yeah, it's a good question. To me, I'm not as concerned—and you need answers to all those questions—to me, what our rule does is it sensitizes the people who are in our world to the fact that it is not a

159. See, e.g., Robert G. Natelson, *Does “The Freedom of the Press” Include a Right to Anonymity? The Original Meaning*, 9 N.Y.U. J.L. & LIBERTY 160 (2015); Hans A. von Spakovsky & Elizabeth H. Slattery, *Amending the First Amendment: How the Campaign Finance Amendment Will Silence Free Speech*, LEGAL MEMO. (Heritage Found., Wash., D.C.), June 2, 2014, at 1.

160. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

161. N.Y. COMP. CODES R. & REGS. tit. 22, § 151.1 (2015).

good thing. It's a bad perception and a bad reality, and don't give money to our judges and expect them to decide your cases. Really, what has happened with the rule—and again, I think you need answers—is that I think there are plenty of loopholes to our rule, and we know that; but we also know that we have taken away this very brazen way of doing business with lawyers, giving large amounts of money and then expecting an award in our place.

What has happened, and I don't know if this is good or bad—there might be people who would say it's a bad thing—according to my understanding, we've cut in half the number of large contributions to judicial races since the rule has been in effect. It has had more of a preemptive effect, where lawyers do not give large contributions. And to be sure, believe me, they give \$2499 contributions regularly—this is the way this goes. But there are always ways to get around rules. There are different ways to give money, you're right, and I think we have to figure out a way to make the rule reasonably tight. But to me, the rule is making a statement, and it's making a statement by the system itself, rather than putting that burden on judges to defend themselves, and say, "I'm an honest person." Our judges are honest people, but it's obvious to me that having a partisan, elective system for judges is not necessarily the best system in the world to select judges. And that's not to say that the appointive system doesn't have plenty of holes in it too; it's only as good as the appointing authority. But I think the system making a statement—that's what we're talking about with these rules—is important.

Hon. Maureen O'Connor:

But I think one of the problems with even some of the solutions with the merit-selection and retention system is that if you look at historically who has weighed in on retention elections across the state, it has been third parties. It's not lawyers, it's third-party money, undisclosed money, special-interest money that has driven the campaigns in an attempt to unseat a merit-selected or merit-appointed judge.

Professor Barbara S. Gillers:

Unless any of our distinguished panelists want to add anything, we'll close now. Thank you all, very much, for a wonderful panel.