# THE NORTH CAROLINA EXPERIENCE

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Good morning, everyone. It is a pleasure to be here and I think the discussion that we have had so far seems to be going very well and I look forward to adding to it. I want to begin with a brief disclaimer. You're going to hear me talk today about some of my past experiences working on the North Carolina Judicial Public Funding experiment. I want to be clear that my comments here do not imply an endorsement on behalf of the National Center for State Courts. NCSC is agnostic in terms of which system of judicial selection operates the best. So what you are going to hear from me today and what you are going to detect is a fairly obvious bias towards this kind of reform because I think it works and it works effectively.

I think that the discussion so far this morning has brought us to a point where it makes sense to inject a bit of good news. I think it would be very easy to get weighed down in the problems being so vast, the scale of the numbers, and the negativity of the television ads being so daunting that you just sort of throw up your hands and say that this is a problem that is beyond our ability to grapple with. I do not think that is the case because the North Carolina experiment is an interesting microcosm into how a state has dealt with this particular issue. It is also true that you can say that the political challenge to making this happen, or anything happen in terms of reform, are so great that it is not worth discussing. That was certainly what was said in North Carolina before the implementation of the public funding system in 2002. They said, "You'll never get the legislature to adopt this, no way, don't even try it. If they do adopt it you'll never get the program funded. The legislature won't fund it, and the taxpayers won't participate. Forget about it. If that does happen the judicial candidates won't participate. They're not interested, don't even bother." Guess how many of those came to be true? Well, none of them.

The system has actually operated very well. It has been well funded and the candidates have participated. So what I am going to do this morning is walk you through a little bit of the mechanics of how this sort of reform is designed, how it actually operates, and what sort of results we've seen. I will try to really put some meat on the bones in terms of the details of how it works, while not losing sight of the big picture of

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what the goal is, which is to insulate the courts from special interest pressure. We are also going to take a pause about halfway through here, and courtesy of our friends at YouTube, we are going to have a few of the judges who have used this program talk to us a bit about their experiences, and how they compare and contrast to running under a privately financed system.

I was really taken by something that Rich Robinson said earlier. Even though I have studied this area for quite awhile, I did not realize that Michigan did not have its first million-dollar supreme court campaign until 1998. I thought it was well before that. And the reason that surprised me was the impetus for campaign finance reform in North Carolina was exactly that—it was a million dollar Supreme Court campaign in 2000. It was the first one in the state's history and that really shook up a lot of folks in the state who were concerned about big money coming into judicial elections and negative television ads and the appearance problems that that might bring behind it. And so I think that one way to look at this is that the 2000 election was a fork in the road. A lot of states have veered down one direction where things have continued to get worse. North Carolina tackled this in a different way, which is that it legislatively took on this issue and adopted a reform. As you are going to see it has worked out fairly well.

The legislation was passed in 2002 following a number of years of work behind the scenes to try to put together a package of reforms for the judiciary that would be acceptable to the courts and the legislature. It was implemented for the first time in 2004. So, you had the negative campaign, the million-dollar campaign in 2000, you had legislation in 2002, and you had the system implemented and actually used for the first time in 2004. So what exactly did the law accomplish? Because this is not just public funding. And while I am going to focus most of my remarks on that aspect of the law, it was actually a very broad package of reforms that the legislature adopted. For those of you who remember back to 2002, that was the year Congress enacted the Bipartisan Campaign Reform Act (BCRA).[1] This state reform in North Carolina was passed the same year as the Judicial Campaign Reform Act[2] and became known in the state as JCRA.

It did four things and a couple of them were quite controversial. The first thing that it did was convert existing appellate court races in the state from being partisan in the sense that when you went in as a voter into the ballot box, you saw the party identification printed clearly next

1. 2 U.S.C.A. §§ 431-443 (West 2002).
2. N.C. GEN. STAT. §§ 163-278.64 (2002).

to the candidate's name. It stripped that away. The state had previously removed partisan labels from lower court elections and this was an attempt to standardize across the state the non-partisan aspect to all court races. That was very controversial in the legislature as you might imagine. This was a legislature that was narrowly controlled by Democrats, but Republicans had been winning a lot of these down ballot statewide judicial races, so the Republicans and the legislature really did not like this idea at all.

Another element of the law was to reduce the contribution limits. Previously a candidate for the North Carolina Supreme Court had been allowed to accept up to $4,000 from every individual. When this law was passed, that number was reduced from $4,000 to $1,000. And part of that was an effort to get some of the private money out of the system to complement the public funding element of the law.

The third, and perhaps most heralded piece of this law, was the creation of a statewide voter guide. The idea was that most voters in the state really did not know who the judicial candidates were. Contrary to some states where there were millions of dollars spent in television ads, the state actually had the opposite problem, where voters really had no information at all. The campaigns were not that expensive and there was not that much money being poured into voter contact. So the idea was, "Let's put together a State Board of Elections-endorsed pamphlet that will be mailed out to every single household in the state."

The candidates would be able to write up their own summaries about who they are and why they thought they were the best candidate, provide information on their qualifications, their legal training, their experience, and get this information directly into the hands of the voters. It turned out to be a very popular element of this particular law and has since been expanded to include other offices on the statewide ballot in North Carolina.

Finally, obviously, the public funding element to the law is what I am going to talk about now. Now I think it is really important to keep in mind that this is a voluntary system and public funding critics often say, "You're limiting the speech of certain candidates and voters." But this is a voluntary system through and through, so if you are a candidate that is not interested in accepting public funds, then you're not required to, and you can opt out of the system. You can continue to run a privately financed election just as you always have been able to do in the past. And that still holds, obviously.

Let me give you a little bit of information about how the system actually operates for the candidates. The first is that as a candidate you have to declare your intent to participate in this program and you have to do it well before the election. It is something like eleven months before

the election. You need to file an affidavit with the State Board of Elections that says, "Yes, I am going to make an effort to participate in this program, and I accept the conditions and I accept the limits on spending and I will go forth as a candidate and then attempt to collect the necessary qualifying contributions." And so here you have a situation where not everybody qualifies for public funding just by walking down to the elections office and saying "I'm in, give me money." That's not how the system works at all. There is quite a rigorous process to qualify. For one thing, you have to collect a minimum of 350 contributions, and they have to come from registered voters in your state. So you cannot take money from your cousin Sally outside of the state, you can't take political party money, and you can't take PAC money.

The obvious question that comes up is, "Okay, sounds great, how are you going to pay for this? What's the plan for filling up the fund?" When the legislation was passed, the source for the fund was a $3.00 voluntary check off in the state income tax form, which, like the now defunct presidential system, didn't really change your taxes at all. It was $3.00 out of taxes you already paid, so you were just simply directing it to this fund for this purpose. There was a very controversial $50.00 surcharge on all members of the North Carolina State Bar. And as this piece of legislation marched through the process it was initially a mandatory fee. Every licensed attorney in the state was going to have to pay it, under the idea that attorneys have a special obligation to protect the fairness and the impartiality of the courts. Over the course of the legislative debate, that transitioned from a *mandatory* $50 to a *voluntary* $50, where the bar association agreed to make an effort to encourage members to contribute $50 when paying their annual fees. And that did not work out so well. There was not a lot of voluntary participation by the attorneys and a couple of years later some of the same leaders and legislators said, "Well you didn't really do what you said you were going to do and you haven't really made that much of an effort, so guess what: It's going to be mandatory." And so today it is mandatory.

The fund was structured in such a way that it accepts money really from any source. It could accept monies from corporations, from unions, or from individuals, under the theory that it is a blind trust, so why not allow anybody or anyone the ability to put money into that fund. And that turned out to be a well-written law because there were a couple of philanthropic foundations in North Carolina that were interested in contributing to getting this program off the ground and they were able to do that when the program got started.

So before I get to how the program has actually operated for the candidates, let me just address one piece of logistical information: how much do you get if you're a candidate? And for those of you here in

Michigan, you probably will laugh when I give you these numbers. But that is a reflection of how different the two states are. If you qualify for public funding in North Carolina as a supreme court candidate, you qualify for $233,000. That sounds like a very modest amount, and truthfully it is not a huge amount of money, but it was actually more money than a lot of candidates were able to raise privately. And the $233,000 is a lump sum that you are given as a candidate. And what is one thing you don't have to do under public funding? You do not have to raise money. You would be amazed at how much money in political campaigns is spent raising more money. So that $233,000, while it sounds low, is actually probably a little bit higher than it sounds. The legislation provides for matching funds in the event that a candidate is out spent by a privately financed opponent up to two times the original amount. And this has actually taken place, and the state's chief justice, Sarah Parker, has run two races with public funding and has received about $160,000 in matching funds when she faced an opponent who was privately financed.

As I mentioned at the outset there was considerable skepticism that members of the judiciary would opt into this sort of program and that has been proven wrong by the facts. There have been three cycles: 2004, 2006 and 2008. Thirty four out of the forty appellate court candidates declared their intent to participate, and three of the thirty four failed to collect the qualifying funds that they needed in order to qualify for the full amount, which is another indicator that that qualifying mechanism is actually fairly rigorous. You really have to work hard to raise 350 contributions. In 2010, all seven of the declared candidates for the supreme court and court of appeals in North Carolina have announced their intention to opt in. And so the participation rate is really quite strong. This is what one candidate said about her experience having both run privately and with the campaign finance reform options: "In the two elections I've run in, one with campaign finance reform and one without, I'll take 'with' anytime, anywhere, any place." That's Judge Wanda Bryant from the North Carolina Court of Appeals. Let us hear a little bit more from the judges right now. I have got a four or five minute video where we can hear from some of the participants and we will see if the technology cooperates. This video was made shortly after the inaugural run in the 2004 supreme court races and court of appeals races in North Carolina.

[Video begins...]

Hopefully that gives you a context of what the judges themselves think about the program. One of the objectives of establishing this program was to try to reduce the perception that there was special interest money in these elections. There was an analysis done following

the first cycle that tried to contrast the 2002 races—the last privately financed campaigns—with the 2004 campaigns— the first publically financed ones. The percentage of money coming from attorneys or interest groups into the candidates' campaigns dropped dramatically from nearly three quarters of all funds contributed in 2002 to a scant 12 percent in the public funding system in 2004.

As you might expect, the system has been challenged. There's been a significant amount of litigation that has taken place around primarily the matching funds provision but also the reporting requirements that then enable the matching funds. Challenges have been based on First Amendment and equal protection violations, and these have been dismissed at every level of the federal courts, from the U.S. District Court in North Carolina[3] to the Fourth Circuit Court of Appeals[4] in Richmond. The U.S. Supreme Court denied certiorari.[5] So I think it is safe to say that this particular program and public funding programs in general continue to be on pretty firm constitutional ground.

It is not a perfect system. There have been some flaws, and I think this is a reflection of the fact that when you adopt campaign reform you have to always go back and tune it up. You're not expecting to get things right the first time. There's maintenance required. You don't run your car for forty-thousand miles without changing the oil. You have to go back and check in on it. So there were issues that came up in the first cycle where a member of the Supreme Court decided to resign in the middle of a general election. The constitution required that that seat be filled in the next election and so they had to fund eight candidates; it was just sort of an anomaly. In 2006, there was some independent spending that came from a "527" group, and because at that point the legislation was still built around the "magic words" test, these television ads did not use those magic words such as "vote for" and "vote against." The candidates who should have received matching funds were ineligible to receive them, and they were obviously very unhappy about intervention of a third party group, and their inability to get matching funds, which they were told would be available. That part of the law has since been cleaned up to make sure that does not happen again.

In the most recent cycle there was a very strange situation where a political party sent out a mailer, which also triggers matching funds, but the mailer mentioned both candidates in one particular race. Thus, both candidates were eligible to receive matching funds when they did not

3. Jackson v. Leake, 476 F.Supp.2d 515 (E.D.N.C. 2006).

4. N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008).

5. Duke v. Leake, 129 S. Ct. 490 (2008).

need them. And so they very kindly gave them back to the state. It is a work in progress, and I think the balance of the evidence indicates that it is a system that is holding up very well and has been adequately funded, contrary to the expectations of many. It is actually a system that has expanded to other offices in the state based on its success. That is my piece about North Carolina.

It is probably worth mentioning that the question came up right before the break. Where else do these systems exist? In the judicial context there are only two others, there's one in New Mexico. New Mexico has a very interesting hybrid system of judicial selection where the election is only one element of how judges reach or stay on the bench. They also have a very small supreme court. At this stage, the system has not actually been used; no candidate has actually opted in to use the New Mexico system. But it is in place, and it is funded.

At the end of last year, Wisconsin moved to adopt a system that is somewhat similar to North Carolina. So, those three states represent places where judicial public financing is in place. There is of course public funding for other offices all over the country, from New York City to Arizona, and places in between.