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[00:00:53] **Speaker 1** A fiery debate produced this week by WISN featured the candidates in the high stakes race for the Wisconsin Supreme Court. The conservative, Waukesha Circuit Court Judge Brad Schimel versus liberal Dane County Circuit Court Judge Susan Crawford. Tonight we unpack the showing with two esteemed attorneys. Conservative Rick Essenberg of the Wisconsin Institute for Law and Liberty and liberal I'm Jeff Mandel with Law Forward and thanks for being here.

[00:01:22] **Speaker 2** Thank you for having us.

[00:01:23] **Speaker 1** So I wanted to start by getting your overall reaction of who won. First to you, Rick Esenberg.

[00:01:31] **Speaker 3** Well, look, I mean, I think that there's a tendency in these debates for people to watch them and declare as the winner, the one that they preferred going into the debate. I think that a lot of what was talked about is somewhat extraneous to the issues that come before Supreme Court justice. But I think as a general matter, you have two candidates with two very different views of the law. I think one is far more likely. to think that judges can impose their policy preferences on the rest of us, and the other candidate is less likely to believe that that's a proper exercise of the judicial function.

[00:02:14] **Speaker 1** Jeff Mandel to that.

[00:02:16] **Speaker 2** Well, I agree with Rick that a lot of this seemed extraneous. Based on what we saw in the debate, if there's one candidate who is more activist and more interested in posing their policy preferences, I thought that came off as being Judge Schimel. Among other things, he was unable to articulate a single example of a time that he had issued a decision that didn't fit his ideological preferences or those of his supporters. Any good lawyer or judge can think regularly of times where the law leads them in a direction they don't want to go.

[00:02:48] **Speaker 1** Let's take a look at some of what came from the debate. It was fast -moving, covered a lot of ground, including the extraordinary spending in this race. Elon Musk is spending big on Brad Chimel, and he counters that Susan Crawford is the recipient of George Soros' money. So let's listen to just one exchange on this.

[00:03:13] **Speaker 4** I want to note something about donations in this race. 97 % of the donors to my campaign are people who vote right here in the state of Wisconsin. Almost 50 % of my opponent's donors can't vote in the state of Wisconsin because they don't reside here.

[00:03:29] **Speaker 5** I have support from all over the country and it is because Elon Schimel is trying to buy this race and people are very upset about that and they are disturbed about that. He is spending over 10 million dollars. That dwarfs the contribution of anybody else in any campaign in Wisconsin.

[00:03:48] **Speaker 1** history. Jeff, do you think this kind of partisan money in the race pollutes the court?

[00:03:55] **Speaker 2** I don't know if it pollutes the court, but I'm not sure that it's great for anybody. This is the reality, but I think that the kind of equivalences that you're hearing drawn here just don't exist. Elon Musk is the world's richest man, and he is outspending everyone else. Judge Schimel can say that 97 % of his donors are in Wisconsin, but the vast majority of the money that's supporting him is coming from one place, and it's not here.

[00:04:21] **Speaker 1** Oh, Rick Eisenberg on that.

[00:04:24] **Speaker 3** Well, look, I think that the spending of money on these judicial rates, which has increased exponentially in the past 20 years, is a function of courts involving themselves in policy disputes and not sticking to the law. And this has been part of the Left Progressive Legal Project since before I began law school. You know, I can answer, you know, Jeff's question about Brad Schimel opposing something that he may have been. favorite from a policy perspective. You know, I've litigated high profile cases in Wisconsin for many years now, including when Brad Schimel was attorney general. I run a conservative litigation shop. Brad Schimel often, I think, agreed with us on the policy perspective we brought to the case, but understood that as attorney general, his duty was to defend the law and not. uh... allow his personal preferences to get in the way and there are a number of cases in which uh... uh... you know he was opposed to uh... the position that uh... uh... we will in our clients there

[00:05:31] **Speaker 1** Thank you for that, for that circling back to that response to Jeff. Another big issue in the debate, and now before Wisconsin Supreme Court, is the 1849 abortion law. Both candidates are saying that the other has made public their positions. Schimel slams Crawford for representing Planned Parenthood, while Crawford slams him for saying the 176 -year -old law is valid. Let's listen to that.

[00:06:01] **Speaker 4** I was asked if the 1849 was a valid law, 1849 law was a valid law. And that was a fail. And the answer is, my answer was, it was passed by two houses of the legislature and signed by a governor. That means it's a valid law. But what I said next was that there's a real question as to whether that law reflects the will of the people of Wisconsin now and today.

[00:06:24] **Speaker 5** If they are pregnant and something goes terribly wrong in their pregnancy, I don't want them to lie bleeding on a hospital bed while their doctors are huddled in another room trying to decide if they're close enough to death before they can deliver health care services to them.

[00:06:39] **Speaker 1** So Rick, is abortion a litmus test because won't it be decided by the current court before the newly elected justice takes their seat or are there other decisions to come?

[00:06:51] **Speaker 3** well it will be decided by the current court and you know i i i dislike this tendency in political campaigns uh... to uh... near for people to take a statement they're made but made by their opponent and uh... claim that they know better with speaker and then the speaker about what was said he's explained his position the eighteen forty nine lost certainly was a valid enactment of law was a lot of the state for a hundred twenty five years uh... it quite clear That is doesn't reflect the majority sentiment in the state of Wisconsin, and it probably needs to be changed. Now, the way that you do that is not by running to a court. The Supreme Court, it's not the Supreme Court's job. The way that you do that is by going to the legislature who represent the people. That's what democracy is all about, and you ask them to make the necessary changes.

[00:07:47] **Speaker 2** Well, I guess what I would say is that the, you know, Rick is correct that it is our legislature that makes laws. But the problem is that what our Supreme Court does is it interprets laws and applies the Constitution. And what I heard from Judge Schimel is not that. It's actually very similar to what Rick was decrying earlier about public policy because he said the question now is whether the 1849 law reflects the current views of Wisconsinites. That is not a question judges ask. Judges ask the question of what does it say? What does it mean and how does it line up with the Constitution?

[00:08:21] **Speaker 1** Interesting, so thank you for that on abortion. The other thing that we're seeing all over the place, online, on air, are these attack ads over sentencing decisions. So let's listen to kind of a longer clip on that.

[00:08:41] **Speaker 6** In 2020, you did sentence a child sex offender to four years in prison after prosecutors requested 10. Do you regret that sentence?

[00:08:48] **Speaker 5** I don't regret that sentence because I followed the law in that case, as I always do. I applied the law which says that judges have to consider every relevant factor in sentencing. You have to consider both the aggravating and mitigating factors. as a judge. And the Supreme Court has said, you have to order the minimum amount of prison time you believe is necessary to protect the public. That's what I did in that case and every other case. And my goal is always to keep the community safe. And those have been sentences that have been successful. They have kept the community safe, unlike the short jail sentences that Brad Schimel has entered over and over where people have gone on to commit new crimes. That's when you know the sentence has failed.

[00:09:31] **Speaker 6** to some of the ads people have seen about you, Judge Schimel, nine rape kits tested in your first two years as attorney general. Do you regret that?

[00:09:38] **Speaker 4** My opponent just revealed the problem in her judgment, that in weighing all the factors, giving the minimum amount of time to a dangerous sex offender. That is what the law requires. ways higher than protecting the community, that's what she just revealed to you.

[00:09:52] **Speaker 5** That is not what I said.

[00:09:53] **Speaker 4** And she has not found one case, she hasn't found one case.

[00:09:56] **Speaker 5** The court requires you to order the sentence.

[00:09:59] **Speaker 4** Go ahead.

[00:10:00] **Speaker 5** the sentence necessary to protect the community and that's what I've done and that's what those sentences did. go right ahead.

[00:10:06] **Speaker 6** Judge Shimon on rape kits.

[00:10:09] **Speaker 4** By the way, on her ads, she hasn't found one case in her ads where I failed to follow the wishes of the victim and the prosecutor. The sentences I gave were at least what the victim and the prosecutor recommended in every one of them.

[00:10:24] **Speaker 1** So all of that, and notwithstanding that, Jeff, are sentences in criminal cases a good measure of fitness for a Supreme Court justice?

[00:10:32] **Speaker 2** I don't think so. This is something that circuit court judges, that our trial court judges spend quite a bit of time working with, but it's really not what the Supreme Court does. And it is, as Rick said earlier, really extraneous. All of these attack ads, a lot of this debate is really a sidelight from what matters about the court.

[00:10:51] **Speaker 1** So Rick, what should voters make of all of these attack ads, then, that are focusing so heavily on sentencing decisions?

[00:11:00] **Speaker 3** Well, look, I think it's very, very difficult for voters who are non -lawyers to understand the role of a Supreme Court justice, and I agree with Jeff. The Supreme Court sentences no one. I think the criticism of a judge's sentencing decisions might reveal something about his her judgment. But, you know, I think that the discussion that we're having here, to some extent, reflects the extraneous nature of much of this debate. The reason that it's important to note that the 1849 law may not be supported by most voters in the state of Wisconsin, is that the way that you fix that, the way that you fix a law that is not good policy and the opinion of most voters, is you go to the legislature, you don't go to judges. And similarly here, I think that the best you can do with discussion about sentencing is to get some sense of who these candidates might be as a person. But To be honest with you, I don't get... uh... i don't get particularly exercised about these arguments about uh... sentencing because i think it's very very difficult in the confines of campaign each in campaign ads to uh... uh... to get a handle on what actually happened in case

[00:12:28] **Speaker 1** Jeff Mendel, I'll give you the final word on all of this.

[00:12:30] **Speaker 2** Well, I'll just say that I agree with Rick that what you're looking for is more about who a judge is and what you learn about it from that. And the question is not the sentences. The question is what we took from the judges in their responses. You heard Judge Crawford talking about balancing the factors that the law requires. You heard Judge Schimel say, well, I do what the prosecutor and the victim want, that there's not that kind of balance. It really, it suggested to me, it was one of several moments in the debate, that suggested to me that notwithstanding Judge Schimel's rhetoric that we want an objective, fair -minded judge. that that is not necessarily what he says elsewhere, whether it's when his attorney general, he sued to try to end Obamacare, whether it's talking about being a support network for President Trump, whether it is asking Elon Musk to put in money and then saying, oh, well, I have no control over what he says. Over and over and over, Judge Schimel's record really suggests that he's not the kind of objective jurist that he correctly says is what we need on the Supreme Court.

[00:13:24] **Speaker 1** I take it back, Rick Hessenberg, you now have a final word.

[00:13:29] **Speaker 3** You know, one of the things that always strikes me in these Supreme Court races is that I know these people and I hear them described in ways that doesn't reflect who they are in reality. As I mentioned earlier, Brad Schiml often took a legal position contrary to Will, even if he agreed with our policy position. I heard him speak about it many, many times. I've known him for a long time. I think he is a fair and objective jurist. And I think that he also believes in law that he thinks it's an exercise in interpretation and construction and not simply the imposition of policy preferences. I think the current majority sees things differently, and my suspicion is that he will vote in the same way.

[00:14:18] **Speaker 1** All right, Rick Hasenberg, thanks very much. Jeff Mandel, thank you.

[00:14:40] **Speaker 7** issues.

[00:14:41] **Speaker 1** in the race, I was like, okay, well, here we are, 10 minutes, and two experts. No, you are both really good. Thank you.

[00:14:48] **Speaker 3** Well, you know, Judge Posner used to be a judge in the Seventh Circuit said, we don't elect physicists. Why wouldn't we elect? What'd you say? judge. truth in that.

[00:15:02] **Speaker 2** The whole exercise is really weird, although it feels kind of like this is the worst system possible except all the others. I'm not sure that we'd be any happier if we were appointing people. We don't seem to have come up with a good way to choose judges, in part because as you say, Rick, the consequences and the things that we as a society ask of our courts these days are just tremendous.

[00:15:28] **Speaker 3** Yeah, well, one solution, Jeff, would be not ask things, but we can talk about that some other time.

[00:15:35] **Speaker 2** Oh, I think we could each lob some of those at each other. We've each got some of those.

[00:15:40] **Speaker 1** Well, thank you both very much. Enjoy Florida.

[00:15:45] **Speaker 2** Thank you. Good to see you. Good action.