



LEAGUE OF WOMEN VOTERS®
OF TEXAS

TESTIMONY

House Committee on Elections and House Committee on Judiciary & Civil Jurisprudence
Interim Charge #6
August 26, 2010

The League of Women Voters of Texas (LWV-TX) believes that the Supreme Court case *Caperton v. Massey* is one more indication that too much special interest money is being poured into state judicial elections. What happened in West Virginia could happen here in Texas.

The League also believes that citizens have every right to expect due process, and are entitled to expect that judicial independence will not be compromised for political gain. In order to assure that higher-court judges are selected in a manner that truly serves the citizens of Texas, the League has long supported a fair, impartial, non-partisan merit selection/voter retention system. We have also supported the creation of a system of funding judicial races that makes it possible for candidates to run for office without soliciting large direct contributions from special interests. We hope to persuade the members of this committee that these are the only viable remedies to the growing problem of special-interest-controlled judicial races.

Every American's right to equality under the law must be protected, as should the public **perception** of a fair judiciary. Retired Supreme Court Justice Sandra Day O'Connor has stated that "the perception that justice is for sale will undermine the rule of law that courts are supposed to uphold. We all expect judges to be accountable to the law rather than political supporters or special interests. But elected judges in many states are compelled to solicit money for their election campaigns, sometimes from lawyers and parties appearing before them. Whether or not those contributions actually tilt the scales of justice, [polls show that] three out of four Americans believe that campaign contributions affect courtroom decisions."

Ted Olson, former Solicitor General of the United States and counsel of record for the Petitioners in *Caperton v. Massey*, said: "The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge."

In *Caperton v. Massey*, the U.S. Supreme Court considered the influence of state judicial campaign spending and asked if public perception of judicial independence could be affected by \$3 million of independent campaign expenditures. The answer from the Court was, "Yes, it could."

It is important to note that the Supreme Court made no claim that the judge in question, Brent Benjamin, had done anything wrong. No quid pro quo was suggested or even implied. It is also important to note that voters had no way of knowing, until just before the election, that \$3 million worth of attack ads against Warren McGraw (Brent Benjamin's opponent) were in fact paid for by Don Blankenship, an individual who had a

vested interest in installing Brent Benjamin as a state Supreme Court judge whom he believed would rule in his favor.

Current campaign finance law in Texas does not preclude us from enduring a scandal like the one chronicled in *Caperton v Massey*. The current laws make Texas vulnerable not only to an abrogation of justice, but also to increased levels of voter outrage at the ever-growing problem of money-in-politics.

Americans have expressed in numerous polls that the judiciary, to an extent even greater than the other branches of government, **must be immune from partisan and special interest influence**.

The League of Women Voters of Texas strongly supports a legislative response to *Caperton v. Massey*. One such response, which is being considered in other states, is statutory control of judiciary recusal rules, but the League believes that the best and most workable approach is to change the way we select judges. Whether this is a system of merit selection/voter retention or a voluntary system of campaign finance that frees candidates from the rigors of incessant fundraising, it is imperative that we take action **before** another huge scandal erupts.

State legislators must take steps to protect the Judicial Branch from disintegrating into a circus of personalities chosen by sound bites from powerful interests. We are convinced that most judicial candidates would welcome a wholesale change in the way Texas selects its judges. Consider the comment of Paul Pfeifer, an Ohio Supreme Court justice, who said, "I never felt so much like a hooker down by the bus station ... as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote."

LWV-TX also believes that the *Caperton v Massey* Supreme Court decision has provided a public service to all state legislatures across the country. By providing an example of the worst-case-scenario-come-true, this case has reminded voters everywhere about the risks of uncontrolled judicial campaign spending. With this case as a backdrop, we urge Texas legislators to seize the opportunity to take a pre-emptive strike against the kind of scandal that has rocked West Virginia. Certainly not all, but many voters across the state will be grateful for legislators who step up to ensure a fair and impartial state judiciary.

LWV-TX is a nonpartisan, political organization with 29 local Leagues across the state and approximately 3000 members statewide. On behalf of the League, I thank you for the opportunity to present our views on this very important matter.

Addendum: Details on public financing and merit selection

Public Financing: North Carolina was the first state to implement an alternative campaign finance system for judicial candidates, having offered voluntary funding to qualified candidates for its Supreme Court and Court of Appeals since 2004. The North Carolina program is a documented success: in 2004, 14 of 16 candidates enrolled in the state's trial run of the program and in 2008, 11 of 12 high court candidates opted into the system. With the public financing system in place, candidates collected smaller contributions from more donors and 53% of all donations came from public funds or contributions of less than \$100. The program has also been a success with the public: a 2005 poll found that 74% of North Carolina voters approved continuing the public financing system. In 2007, New Mexico became the second state to provide full public financing for judicial elections, Wisconsin began a similar system just this year.

Merit Selection. In many states, reform advocates have sought to move away from partisan, contested elections altogether in favor of appointment-based or "merit-selection" systems. Under a merit-selection system, a nominating commission evaluates judicial applicants and sends the names of the best-qualified candidates to the state governor. The governor then appoints one of the nominees submitted by the commission; in some states, the state senate confirms the nominated judges, and, in most systems, these appointed judges will eventually stand for a retention election. Several states already use a merit-based selection process exclusively, and many states use some mix of an appointment system and elections. The League of Women Voters of Texas continues to support a merit system as an alternative to conventional partisan election of judges.