

Spotlight on ...the Judiciary

Sometime this spring, we can expect a decision by the United States Supreme Court in the case of *Caperton v. A.T. Massey Coal Co., Inc.* That case involved an appeal to the West Virginia Supreme Court of a \$50 million verdict against Massey Coal. West Virginia, like Ohio, elects its judiciary. After the appeal was filed but before it was heard by the West Virginia Supreme Court, there was an election for West Virginia Supreme Court justices. The owner of Massey Coal spent three million dollars campaigning against the justice who was running against Brent Benjamin. Benjamin won and when the Massey case reached the West Virginia Supreme Court, Justice Benjamin was asked to step aside (recuse himself), but declined, insisting that he could be impartial. He joined two other justices in a three to two decision overturning the judgment against Massey. The United States Supreme Court in March heard arguments that due process requirements dictated recusal in these circumstances.

Whether Justice Benjamin was or was not impartial in ruling in favor of Massey Coal will never be known. It is, however, clear to most people that the circumstances created the appearance of impropriety. If the United States Supreme Court rules that recusal was not required in this case, it is hard to imagine a circumstance where recusal will be mandated. Even if the Court rules that due process required recusal, it is unlikely that the Court will establish a bright line delineating the circumstances where a judge must step aside.

The question of recusal cannot be separated from the problems associated with the huge amount of money spent in judicial campaigns in many states, including Ohio. In fact more money was spent on judicial campaigns in Ohio in 2000, 2002 and 2004 than in any other state during those years. When a judge is, or appears to be beholden to a contributor or contributors, his or her ability to render impartial justice is undermined in appearance if not in fact.

Many states avoid this problem by appointing judges rather than electing them. Most often, the judge will ultimately stand in a retention election, giving the voters the ability to get rid of judges that they believe are not doing a good job. This process is sometime been referred to as "merit selection" and has been endorsed by the League of Women Voters of Ohio. In the past, voters have rejected merit selection, preferring to retain the right to elect their judges, notwithstanding that many Ohio voters acknowledge that they know little about the judges running for office.

Another objection to merit selection is the fear that it will be equally political and will simply reflect the politics of the governor or party in power. This concern can be at least partially addressed by establishing a non partisan appointment process, which is generally regarded as fair and not favoring one party or special interests.

Another approach to solving the problem of money in judicial races is public financing. Public financing has been used with mixed success in elections for other offices and is currently being used for judges in North Carolina. The challenge is not only to identify a source of funding that will not be subject to the whim of particular executives or legislators trying to save money, but also to establish a mechanism which will enable a candidate to be competitive in the face of an expensive campaign by his or her opponent or the opponents' supporters.

There is certainly interest in reform in Ohio and the LWVO is working with other interested parties, including Chief Justice Moyer and the Ohio State Bar Association, to explore possible steps to reduce the role of money and the appearance that justice is for sale. We are reaching out to interested parties and planning a conference in November with the hope that we can reach a broad consensus as to the best route to address the problem.

In the meantime, it is important that local leagues and league members continue efforts to educate the general public about the unique role of the judiciary. Citizens who understand that the role of the judge is different than the role of other politicians are more likely to be able to consider relevant qualifications of judicial candidates and be less swayed by special interests pumping money into judicial campaigns.