



October 15, 2009

Clerk
Wisconsin Supreme Court
110 E. Maine Street
Madison, WI 53703

RE: Hearings on petitions 08-16 and 08-25 on 10/28/09

Dear Clerk:

These comments are regarding the upcoming hearing on October 28th responding to proposed changes to the Code of Judicial Conduct regarding judicial recusal standards and campaign contributions.

I am writing on behalf of the Center for Competitive Politics (CCP), a non-profit organization with a focus on campaign finance regulations and election law. CCP's mission is to educate the public on the actual effects of money in politics, and the positive results of a more free and competitive electoral process.

In the wake of the Supreme Court's *Caperton* decision, many states are re-evaluating their judicial recusal standards. As an *amicus* in support of the respondents in *Caperton*, CCP is aware of the issues involved and reminds the Court that independent political speech and political association through meaningful contributions are still protected activity at the core of the First Amendment.¹ These comments also address the amendments to the Code of Judicial Conduct proposed by both the Wisconsin Realtors Association and the League of Women Voters of Wisconsin Education Fund.

It is important to keep in mind that the Supreme Court has repeatedly ruled that spending money independently to advocate the election or defeat of a candidate is a core right protected by the First Amendment, and thus any effort to limit or prevent citizens from doing so is highly unlikely to pass constitutional muster. The wording in petition 08-16, however, would likely include independent expenditures under their definition of "spending money on a media campaign relating to a judicial election," as an automatic trigger for recusal. No additional rationale is provided for why this should be included as a cause for recusal when it is clear that the perceptions and definitions of contributions versus expenditures are technically and practically different.

¹ See Brief of *Amicus Curiae* Center for Competitive Politics in Support of Respondents, *Caperton v. A.T. Massey Coal Co., Inc.*, 08-22 (Feb. 4, 2009).

Direct campaign contributions to any candidate from individuals are disclosed and that information is easily available to any interested parties and the general public. Independent expenditures, also disclosed, are made in support of or opposition to a candidate by an independent individual or group and not affiliated with any candidate in any way. Not only is there no risk of corrupting influence in that instance, but attempts to equate direct contributions with independent expenditures run counter to longstanding Supreme Court precedent.

Per the League's petition, suggesting that contributions above \$1,000 received by a judicial campaign within the preceding two years also trigger recusal by a judge, it is essential for the Court to realize that this type of language, which penalizes lawful campaign contributions, has a chilling effect on political speech. Just as the Court is concerned with maintaining its integrity and a positive public image, individuals share those concerns, and the assumptions of impropriety on both the part of the individual and the judicial candidate created by this language is likely to decrease citizen engagement.

However, the interest of the Court and the petitioners in maintaining a positive public opinion of the judiciary and upholding the Court's institutional legitimacy is an understandable and important one. Research conducted after the *Caperton* decision, though, which focused on the opinion of West Virginia residents on the state Supreme Court under various scenarios mirroring the *Caperton* case suggested that "several of the assumptions of the majority in the recently decided *Caperton v. Massey* are empirically inaccurate, at least from the viewpoint of the citizens of West Virginia."³

Specifically, the report finds that under various scenarios – including direct contributions, independent expenditures, a judge refusing a contribution, and whether a judge disqualified themselves under those scenarios – that "citizens seem to be making inferences about whether the judge is actually capable of making a principled decision or not. Contributions, ipso facto, do not necessarily undermine the integrity of the judiciary."⁴

In short, the study finds that public opinion of the judiciary has little to do with recusal standards, and by extension, even less to do with any campaign finance regulations that may be embedded in those standards. In recognizing that the broad issue before the court is indeed disqualification standards in order to ensure the integrity of the judiciary, it is our hope that lawful campaign expenditures and political First Amendment rights will not be the casualty.

Reacting too strongly to the *Caperton* decision by imposing exclusive and strict guidelines on elected officials will likely have negative repercussions in the future. Regulating theoretical actions versus implementing new, stringent rules on actual campaigns and real life cases will prove extremely difficult. It will lead to calls for increasingly detailed rules that will undermine not only the rights of citizens, but also the integrity of the Court in the assumption that elected judges are no longer fit to police themselves.

³ Gibson, James L. and Gregory A. Caldiera. "Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?" Presented at the Chicago Area Political and Social Behavior Workshop, May 8, 2009, Northwestern University.

⁴ Ibid at page 30

The language offered by the Wisconsin Realtors Association would both protect the rights of the individual to make lawful contributions, and respect the integrity and aims of the Court. Judges elected by the citizens of Wisconsin are charged with not only upholding the law, but removing themselves in direct conflict of interest cases which can and often do extend beyond campaign finance issues. The amended Code offered by the Realtors Associations clarifies this and avoids further ambiguity.

The Center for Competitive Politics would be happy to provide additional commentary or research as hearings continue on the issue.

Sincerely,



Laura Renz
Research Director