

I. EXECUTIVE SUMMARY

This report examines common proposals among states to mitigate the impact of spending in judicial elections and preserve the integrity of the states' judiciaries in the wake of *Citizens United v. FEC*. The U.S. Supreme Court in *Citizens United* held that government may not restrict corporations or unions from making independent expenditures to support or oppose individual candidates in an election. In so holding, *Citizens United* magnified an already growing debate regarding the impact and propriety of spending in the 39 states that use some form of judicial election. Critics of the decision contend that spending in judicial elections threatens an elected judge's ability to remain fair and impartial, and increases the public perception that justice is for sale to the highest bidder.

Campaign Spending

Spending in judicial elections increased dramatically over the past two decades and continues to increase in the wake of *Citizens United*, with the large majority of the increased spending in 2010 and 2011 by corporations. The increase occurred in all types of judicial elections, including retention elections. In 2010 alone, twice the amount of money was spent in retention elections in four states than was raised nationally for all retention elections during the preceding decade. Nevertheless, spending did not increase in every state since *Citizens United*, with California in particular not experiencing increased spending during its 2010 retention election.

Common Proposals and Emerging Trends

This report identifies eight common post-*Citizens United* proposals by states that aim at reducing the impact of spending in judicial elections on the states' judiciaries.

➤ **Reporting/Disclosure Requirements:**

Many states' legislatures have proposed enacting reporting rules that require judges and contributors to file reports disclosing the money raised and spent in judicial elections. These rules include "paid for" designations on political communications, and disclosing of political contributions either during the time of contribution, or at the time of a court proceeding.

- **Benefit:** Stringent disclosure requirements would address potential problems related to transparency in judicial campaigns and could help voters make informed decisions during judicial elections. Proponents argue that adequate disclosures, coupled with recusal rules, will also promote fair trials before a neutral decision-maker.
- **Limitation:** Disclosure requirements do not prevent money from being contributed to judicial elections, and may do little to address the public view of judicial impartiality.
- **Constitutionality:** These requirements should not pose a constitutionality problem because *Citizens United* specifically upheld disclosure of independent expenditures and electioneering communications.
- **California:** California recently passed AB 2487 which requires that each judge disclose on the record whether he or she has received a campaign contribution from any party or counsel in a matter that is before the court. California has not seen an increase in spending in judicial elections, but it may want to consider even more stringent laws for disclosure for meaningful recusals to be available to litigants.

➤ **Recusal and Disqualification of Judges**

At least thirteen states have proposed stricter disqualification standards for judges that require a judge's recusal when a party before the court contributed a threshold amount to the judge, or require an independent third party to review recusal motions.

- **Benefits and Limitations:** Disqualification rules may reduce the risk to actual and perceived judicial impropriety. However, these rules may only address the risk posed by contributions, require strong disclosure rules to be effective, and may restrain a judge's ability to raise campaign funds.
- **Constitutionality:** Stringent disqualification rules are very likely to be found constitutional.
- **California:** California could enact mandatory disqualification rules for appellate justices and could require a neutral adjudicator to determine motions for disqualification or review denied motions.

➤ **Contribution Limits**

Eleven states have made forty proposals that would limit the amount of money a person or corporation could contribute to a judicial candidate.

- **Benefits and Limitations:** Contributions limits help avoid *quid pro quo* arrangements and enhance public perception of the judiciary. However, these rules may only address the risk posed by contributions, require strong disclosure rules to be effective, and may restrain a judge's ability to raise campaign funds.
- **Constitutionality:** Contribution limits are likely to be found constitutional, even if the limit is very low.
- **California:** California could enact contribution limits to enhance the public's perception of the judiciary.

➤ **Shareholder or Board Consent**

Three states have enacted laws requiring corporations to report and seek approval from their Boards of Directors before making political campaign contributions.

- **Benefits and Limitations:** These requirements could increase transparency, provide a check on improper corporate political spending, and ultimately help prevent the actual or perceived undermining of an independent judiciary. Political opposition might present an insurmountable barrier to shareholder consent. No state has passed such a law.
- **Constitutionality:** Thus far, the only court to consider the constitutionality of a board approval requirement since *Citizens United* upheld the law.
- **California:** While a creative and potentially effective response to *Citizens United*, implementing shareholder or board reporting and consent requirements may not be politically feasible.

➤ **Banning Foreign Corporation Contributions**

President Obama brought significant attention to the decision during his 2010 State of the Union speech when he said, "I don't think American elections should be bankrolled by . . . foreign entities." Responding to such concerns, Tennessee, Iowa, and Alaska have passed laws prohibiting political campaign contributions of any kind by a corporation based outside the United States.

- **Benefits and Limitations:** Banning foreign corporations from making donations to American candidates in elections addresses perhaps the gravest threat to the perception that the judiciary could become beholden to improper interests. *Citizens United* did not overturn the portion of the McCain-Feingold Act prohibiting foreign corporations from contributing to campaigns and foreign nationals' involvement in decisions regarding political spending by U.S. subsidiaries. Therefore, a state law prohibiting foreign corporate or individual campaign contributions may prove duplicative.
- **Constitutionality:** The majority opinion in *Citizens United* noted that whether the ban on foreign contributions is justified by a compelling government interest is unclear. First Amendment scholars are unsure if the Court intends to overturn the ban.
- **California:** Should the FEC prove too lax in enforcing federal standards, a state law banning foreign corporate contributions in California judicial elections could be a useful tool against the actual and perceived influence of foreign corporate wealth on the California judiciary.

➤ **Public Financing of Election Campaigns**

Ten states and roughly a dozen cities publicly finance campaigns, and the practice is becoming increasingly popular. A state government might directly subsidize all candidates, establish a trust from which qualified candidates may fund their campaigns, or might seek to even the playing field among candidates whose personal wealth is disproportionate.

- **Benefits and Limitations:** Public financing removes or restricts the impact of private wealth in elections. Its supporters believe that the system reduces corruption and increases the public's faith in the political process. The practical concern militating against adopting public financing of election campaigns in California has to do with the budget. Without the funds to support an ambitious system, it likely has to be tabled.
- **Constitutionality:** Long presumed to be constitutional, the U.S. Supreme Court heard argument this term in a case challenging Arizona's Citizens Clean Elections Act. Commentators predict that the Court will limit at least the form of public campaign financing embodied in that act.
- **California:** The state's pressing budget limitations foreclose the possibility of implementing a system of public financing at the state level for the time being.

➤ **Merit Selection System:**

At least fifteen state legislatures have proposed legislation that would change the states' judicial selection process from an electoral system to a merit selection system. Many of these changes include creating a nonpartisan nominating commission, a judicial performance review commission, and/or moving towards retention elections.

- **Benefit:** Proponents argue that changing the system of judicial selection from popular elections to merit selection eliminates any possibility for judicial elections to threaten judicial impartiality.
- **Limitation:** Critics of merit selection argue that the problems stemming from popular elections are simply shifted into the nominating commissions, and that judges will not be held accountable for their actions because they are no longer subject to direct election.

- **Constitutionality:** Changing the method of judicial selection would not pose constitutionality problems. The majority of states currently have some aspects of a merit selection system in place at some level of their court
- **California:** Currently, appellate judges in California are nominated by the governor, and confirmed by the Commission on Judicial Appointments. This state could create a nominating committee that uses a transparent process to make a list of potential candidates for the governor to appoint. Additionally, California could abandon the nonpartisan election system for its trial court judges and adopt a merit selection system.

➤ **Legislative Resolutions Requesting U.S. Congressional Action:**

A handful of states have proposed legislative resolutions to express discontent with the *Citizens United* ruling, and/or called on the U.S. Congress to either make amendments to the U.S. Constitution or to pass federal legislation that would prevent the negative consequences of the decision.

- **Benefit:** These resolutions voice states' discontent with the decision, and request Congress to amend the U.S. Constitution or pass federal legislation to prevent unlimited corporate and union spending, effectively overturning *Citizens United*.
- **Limitation:** A state legislature expressing opposition to the decision is not affirmative action that would address potential problems to judicial impartiality — it merely creates a record of the opposition. Additionally, it is unlikely that an amendment to the U.S. Constitution will be passed and sent to the states because the process is onerous and rarely succeeds.
- **California:** In 2010, the California legislature debated Assembly Joint Resolution 3, which memorialized the legislature's disagreement with the *Citizens United* opinion and asked for the U.S. Congress to pass and send an amendment to the Constitution that would allow limits on campaign contributions. This resolution failed to pass. This report does not recommend pursuing another resolution because despite similar bills passing in other states, the protest has not proven to be effective.

