



After *Citizens United*: Improving Accountability in Political Finance

Hidden Money: The Need for Transparency in Political Finance

Partial Justice: The Peril of Judicial Elections

Executive Summary

CED is deeply concerned about the changes taking place in political finance. Current fundraising practices promote a pay-to-play mentality that encourages political giving as a means of influencing legislative decision-making. The demand for campaign money places pressure on those who have particular interests in government policy to make contributions and spend money in support of those seeking public office. Prospective donors, particularly members of the business community, are encouraged to pursue influence through political giving, which poses the risk of long-term national interests being sacrificed for short-term gains. Members of the business community also face “shake downs” for political contributions or feel compelled to match—or exceed—the amount given by competing interests. We believe that these problems will be exacerbated by the changes brought about by the Supreme Court’s recent decision in *Citizens United v. Federal Election Commission*, which reversed decades of campaign finance law to permit corporations—and by extension, labor unions—to use treasury funds to make expenditures in support candidates, and other regulatory developments that have made it easier for political groups to hide the sources of their funding. As a result of these changes, the demand for political contributions from the business community is intensifying.

We believe this demand for campaign dollars impairs economic development and the fiscal health of the nation by promoting behavior that is not conducive to sustained value creation. The current state of campaign fundraising entails the inherent risk that companies, labor unions, and other organizations will be drawn into a political spending arms race, with no clear end in sight. Corporate resources that might be better spent investing in an enterprise or otherwise building shareholder value would then be diverted to political activities. As CED has noted before, a vibrant and strong economy results from business competition in the economic marketplace, not in the political arena. Unrestrained corporate political spending encourages the pursuit of particular policy or regulatory benefits that may not serve the public’s broad interests, or lead

to political donations that are given with the intent of avoiding adverse consequences of legislative action. Donor influence also serves to undermine market forces by facilitating policies or regulatory requirements that diminish competition or unduly advantage particular firms or industries. Furthermore, the influence of money can sustain inefficient or outmoded businesses, thereby subverting and frustrating the creative innovation that encourages new investment, spurs business development, and keeps jobs and investment at home.

More broadly, our nation greatly depends on the strength of our democratic system of governance. But current practices are weakening the vitality of our democracy. They undermine accountability, transparency and adherence to the rule of law, all of which are essential safeguards against corruption and abuse in the political process. They also diminish the capacity of institutions to take the actions needed to address the nation’s most pressing problems and weaken public confidence in government and corporate America.



After *Citizens United*: Improving Accountability in Political Finance

The Supreme Court’s decision in *Citizens United* opened new paths for the flow of unregulated money into our elections. Corporations, whether publicly held or private, for-profit or non-profit, can now spend unlimited sums supporting or opposing candidates. So can labor unions, trade associations, political organizations and ad-hoc groups established by special interests. The effects were immediately apparent in the 2010 elections. Groups quickly organized to take

advantage of the new opportunities to raise unlimited donations from individuals, corporations, and labor unions. Election spending in support of candidates soared as a result, producing a flood of television and radio advertising. In fact, political committees and organizations reported spending \$298 million in the 2010 congressional races, or four times more than they reported spending in the 2006 elections.

In this new financial environment, corporations and their executives will face greater pressure from interest groups, trade associations, and partisan political committees to make contributions that can be used to influence elections and policy outcomes. Companies will also be encouraged to spend money directly in support of those seeking office, particularly if competing interests are doing so. These kinds of political activity expose companies to substantial reputational and legal risks that endanger enterprise and shareholder value. These risks are particularly pronounced in the case of contributions made to third party groups where the donor does not exercise control over the ways the funds will be spent.

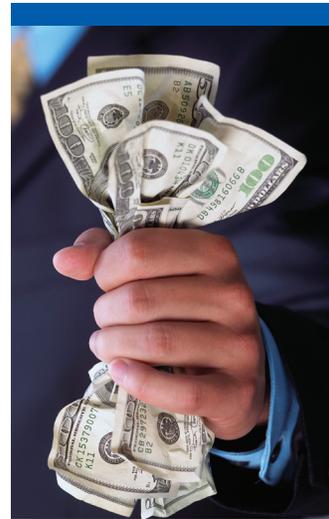
CED considers political activity to be an important matter of corporate governance. Political donations and other political expenditures constitute a use of resources that can affect the value of an enterprise and economic development. These expenditures should be subject to the requisites of due diligence and accountability that generally apply to business matters. Effective governance of political spending is an essential risk management practice that should be undertaken by all companies and organizations that engage in political activity.

Accordingly, CED strongly supports appropriate board approval and oversight of political spending. Corporations should adopt policies that give directors the responsibility of reviewing and approving corporate political or public affairs budgets. This responsibility could be assigned to a committee specifically designed for this purpose or to an appropriate committee of the board. Similarly, the boards, executives, or leaders of labor unions and trade associations should adopt procedures to ensure appropriate review and approval of political budgets.

Companies should also establish policies and guidelines governing political contributions and spending. We encourage directors and executives of corporations, labor unions, and trade associations to follow the lead of a diverse and growing group of America's leading corporations and adopt governing policies on political spending that include a board or executive oversight and monitoring process. These policies should include: a general statement of principles or code of conduct with respect to political contributions or expenditures on the part of the corporation, its executives, and employees; a process for oversight, managerial decision-making and operational control of political expenditures; and a policy concerning the disclosure of any political expenditures. Labor unions and trade associations

should establish comparable policies for the political contributions and expenditures made by their organizations, leadership, and members.

We continue to hold the view that one way of improving the financing of election campaigns and promoting a healthy democracy is to provide citizens with the incentive to participate in elections, while offering candidates alternative means of funding campaigns that free them of the need to be beholden to large donors and special interests. We therefore reaffirm our support of public financing as a campaign finance alternative. Specifically, we believe that a multiple dollar public match on low-dollar donations can have a substantial leveraging effect that would provide candidates with a strong incentive to seek out large numbers of small donations. Any new program of public funding, however, should be accompanied by budget offsets that will cover the anticipated costs of the program.



Hidden Money: The Need for Transparency in Political Finance

In the 2010 elections, tens of millions of dollars of political spending was hidden from public view. Under current federal law, many of the election-related activities financed by organized groups are not subject to public disclosure. Organizations only have to disclose the amounts they spend independently on activities that expressly advocate the election or

defeat of a candidate or on broadcast ads that qualify as “electioneering communications.” Monies spent on ads that do not qualify as electioneering communications, as well as the monies spent on direct mail, telephone canvassing programs, internet communications, and voter turnout efforts, typically do not have to be reported to the public. Consequently, organized groups are able to spend millions of dollars without revealing their sources of funding or the amounts they expend.

While the problem of hidden money existed before 2010, it has been exacerbated by recent decisions that have eviscerated the efficacy of some of the laws that are on the books. In recent years, the Federal Election Commission has interpreted the disclosure rules in a way that makes it easy for groups to avoid disclosing the sources of their funding, even in those instances where they are required to report their donors and expenditures. These regulatory decisions have had a devastating effect of the efficacy of disclosure rules. In fact, close to half of the \$298 million in spending reported by organized groups in the 2010 congressional elections did not include any information about

sources of funding. Many of the top spenders reported no information at all about their donors. As a result, the amounts of undisclosed money now flowing in federal elections dwarfs the sums found in the secret funds that led to the Watergate scandal.

A well functioning democracy should not work this way. Transparency is an essential principle of free and competitive markets; it is equally important in a system of free and competitive elections. The use of hidden money in elections undermines First Amendment guarantees and is contrary to the basic values of our democracy.

CED strongly believes that disclosure and transparency are essential to the proper functioning of our democracy. Key constituents of companies, unions, and other organizations—whether they be shareholders, owners, organizational members, consumers served, or communities served—need to know how the funds in which they have a financial interest are being spent if they are to make informed political and economic decisions. Disclosure is necessary safeguard against corruption in the political process, since it helps to reduce excesses, ensures full public scrutiny of financial transactions, and facilitates enforcement of the law. Most important, disclosure promotes a more informed citizenry by providing information that allows citizens to fully assess election messages that seek to influence their decisions.

We also support disclosure because it offers an equitable approach to the secrecy problem that plagues our current system. In our view, any group or organization that spends money to support candidates or finances election campaign activities should be required to disclose their expenditures and sources of funding to the public. Every organization should be subject to the same rules and obligations to make their campaign finances transparent. We believe that a comprehensive public disclosure law that treats all of those who raise and spend money on election activity in the same manner offers an across-the-board corrective equally applicable to any actor in the electoral process. We urge Congress to adopt legislation that meets this objective and ends the use of hidden money in elections.

races have become more expensive and more polarized. The Supreme Court decision in *Caperton v. A.T.Massey Coal Company*, as well as recent judicial contests in Iowa and Wisconsin, offer stark examples of the influence that donors and interest groups now have in the high-stakes battles that characterize far too many judicial elections in far too many states. These problems will become even greater in the wake of *Citizens United*.

Judicial elections are increasingly arenas of conflict for competing interests who hope to elect judges whom they perceive to favor their views—or oust those who do not. Elections subject judges to political pressures. They encourage citizens to view judges not as dispassionate guardians of the law, but as politicians with robes. Selection by election threatens the independence and integrity of the judicial system, and undermines public confidence in the fairness and impartiality of the courts.

CED is deeply concerned about the effects elections have on the integrity of the courts, the impartial administration of the rule of law, and the public's confidence in the judicial process. The business community depends on the integrity and evenhandedness of the judicial system in making financial and investment decisions. An impartial judiciary is a critical element of a stable and prosperous business climate.

We continue to strongly support appointment as the basic principle that should govern judicial selection. We therefore reaffirm our policy recommendations calling for the elimination of elections as a means of selecting judges. In particular, we strongly believe:

All states should select judges through an appointment-based process. Specifically, states should adopt a commission-based appointment system. In this approach, each state would establish a nonpartisan, independent judicial nominating commission that would be responsible for recruiting, reviewing, and recommending eligible nominees for judicial office. All appointments to judicial positions would be made from the lists of candidates prepared by the commission

Any system of judicial selection must include appropriate mechanisms for holding judges accountable for their performance in office. To facilitate periodic review and evaluation of judges, we support the creation of judicial performance evaluation commissions, similar to those now found in some states.

Levels of compensation offered for judicial office can discourage highly qualified candidates from pursuing such service. State officials should review current salaries and ensure that appropriate levels of compensation are provided to judges at all levels. One method of conducting compensation reviews is through the use of official compensation committees comparable to those already used in many states to determine judicial salaries.



Partial Justice: The Peril of Judicial Elections

CED finds unrestrained spending and the use of undisclosed money to be particularly alarming when considered in the context of judicial elections. CED first began to highlight the deleterious effects of judicial elections more than a decade ago, and since that time judicial

We acknowledge that most states will find it politically impracticable to move to a commission-based appointment system in the near future. A fully appointed judiciary requires a fundamental transformation of the judiciaries in most states. For those states who do not adopt an appointive system, we prefer the use of merit selection as an alternative to selection by popular vote. We prefer merit selection systems because they have the virtue of appointing judges in the first instance. We regard appointment as the grounding principle of judicial selection.

We also recognize that those states that currently hold elections are not likely to move to appointment-based approaches soon. Accordingly, CED supports changes that will not resolve the core problem of judicial elections, but will make a major contribution towards addressing their most deleterious effects.

Public financing should be established for judicial campaigns. We believe that public financing is the best available means of protecting the judicial process from the potentially corrupting effect of private donations.

Judges should not be selected in partisan elections in which candidates run under party labels.

Judges should serve terms of office long enough to safeguard against a need to regularly seek reelection. As a general rule, the length of term for justices on the highest court in a state should be a minimum of twelve years and the term for trial and appellate court judges a minimum of eight years. Longer terms will provide a better balance between the principles of judicial independence and accountability than those commonly found in many current state systems.

States should establish judicial performance evaluation commissions, similar to those recommended for appointed judges. Commission evaluations can serve as a means of improving the information available to voters in states that hold elections.

We urge public officials, members of the business community, judges, members of the legal profession, and community leaders in the states to join in our efforts to increase public understanding of the importance of an independent judiciary and the consequences of judicial elections. We call upon these leaders to work together to initiate urgently needed reforms before the rule of law is further eroded by the perception that justice is for sale.



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