

the Variable Variable

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JUNE 2007

The Threat to the Judiciary From the 2006 Ballot Initiatives



By Floyd Ciruli

The 2006 election highlighted a new direct threat to the independence of the judiciary.

Although it is not unusual for policy advocates to use state ballot initiatives to limit or alter state and federal court decisions – from the death penalty, to abortion, to eminent domain – the number and tenor of initiatives in the 2006 election signals a growing trend. That there were three very direct challenges to judicial independence on the ballot is a sign of a new intensity in anti-judicial activism. Each was rejected after vigorous campaigns by the respective states' legal and political establishments to defeat them.

Three Voter Initiatives

Oregon conservatives dissatisfied with what they view as a liberal-dominated court lost another effort to shift from at-large to district elections for supreme and appellate judges. Their goal was to give conservatives in rural and non-metro areas more representation on the court.

In South Dakota, an amendment would have removed judicial immunity and allowed judges to be sued for their decisions by disgruntled citizens and

Citizen-Initiated Ballot Proposals Concerning Judicial Independence

State	Title	Effect	Result	
			Support	Oppose
Oregon	Measure 40	Election of appellate judges by district	44%	56%
Colorado	Amendment 40	Term limits for supreme and appellate court judges	43%	57%
South Dakota	Amendment E	Removal of judicial immunity	11%	89%

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litigants and be subject to both civil and criminal penalties. The proposed amendment to the state constitution was so hostile to the judiciary that advocates were seen as extremists and were easily marginalized by opinion leaders and the legal establishment.

Colorado's Amendment 40 applied the popular concept of term limits to judges on the state supreme and appellate courts (a maximum 10-year limit on the bench). It may have been the most creative and attractive of the initiatives to challenge the judiciary.

Colorado Judicial Term Limits

Colorado was one of the first states to apply term limits when the concept came into political vogue in the late

1980s. Colorado voters overwhelmingly approved term limits for statewide officeholders and state legislators in 1990. Colorado was the second state to adopt them after Oklahoma. In 1994, a narrow majority extended the concept to local government officials, including county, municipal and special district officials.

The 2006 Amendment 40 effort was spearheaded by John Andrews, former state senator and president of the state senate during its recent Republican dominance. The effort was bankrolled by anonymous national anti-judicial activists, raising more than \$800,000 to try to limit the so-called runaway judiciary.

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Amendment 40 – Voter Support

Although Amendment 40 ran into near universal opposition from the state’s legal, civic and political establishments, it began with considerable public support. In several polls, the proposition had more than majority support to start and only declined after major opposition surfaced and started advertising.

Support for the amendment dropped from 56 percent to 51 percent from Oct. 2 to Oct. 26 in Ciruli Associates polls. During the final 10 days, the initiative lost an additional 8 percentage points and ended losing with 43 percent support.

A review of the demographics of the support and opposition shows that partisanship and ideology were key factors. Republicans were 11 percentage points more supportive than Democrats, and there was a 13-point spread between conservatives and liberals. However, Republican support fell more significantly than Democrats during the final weeks of the campaign. Only post-college educated groups consistently offered less than majority support. College and non-college educated voters supported the amendment until the final collapse.

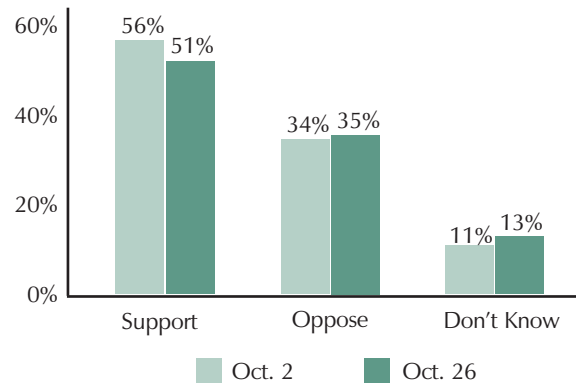
Lessons from the 2006 Election

Beyond the three anti-court initiatives, 13 eminent domain initiatives appeared on state ballots in 2006 (10 passed). These initiatives were specifically designed to limit the impact of the 2005 U.S. Supreme Court ruling in *Kelo v. City of New London*, 125 S.Ct. 2655.

The election offered several insights into the public’s sentiments regarding today’s judicial system:

- The polarization and politicization of court decisions can result in direct challenges to the independence of the judiciary. Given today’s political environment, more conflict and political action can be expected.
- National political networks are available to promote ballot issues to limit the courts.
- While the public values judicial independence, the issue is not salient or particularly well-integrated into political discussion. The courts and legal process are not well-understood and there is an element of fear and misinformation framing the discussions. Voters are slow to become aware of the implications of judicial-related proposals, especially if they initially sound attractive.

Support Declines for Amendment 40 as November Election Approaches



Ciruli Associates, N500, Oct. 2, 2006
Ciruli Associates, N501, Oct. 26, 2006

Question: Switching to ballot issues, the following proposals will be on the ballot this November in Colorado. Please tell me, as of today, if you definitely support, somewhat support, somewhat oppose or definitely oppose the proposal. If you don't have an opinion, just say so. Amendment 40 – to the Colorado Constitution that limits State Supreme and Appeals court judges to a maximum of 10 years on the bench.

States should expect further initiatives. Public education will have to be developed for new challenges and a major effort mounted by political, business and legal establishments if the independence of the judicial process is to be protected.

Ciruli Associates is a non-partisan research firm providing polling, election analysis and political commentary to Colorado and national media organizations since 1976. For more analysis of Colorado politics, visit www.ciruli.com

Floyd Ciruli has a BA from UCLA in political science and JD from Georgetown University Law Center.