

## ELECTION OF STATE APPELLATE JUDGES: THE DEMISE OF DEMOCRATIC PREMISES

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In this very distinguished company today are people who are among Oregon's and the nation's finest thinkers on the topic of judicial independence and the issues of appellate judicial election and appointment. This symposium subject is of growing importance, and it has highly contemporary relevance.

The subject was the focus not only of a major United States Supreme Court case just last term,<sup>1</sup> but also of two Oregon ballot measures in November 2002,<sup>2</sup> which, from my standpoint, proposed to embark toward exactly the opposite destination of where responsible electorates should travel. Compared to my first entry into electoral politics in this state nearly thirty years ago, judicial elections and all statewide elections are much more *political* today, in the most derogatory sense of the word.

A keynote speaker can only set the stage; raise questions, propose premises, and identify trends that are worrisome. Perhaps my role, then, is reminiscent of former German scientist Wernher von Braun, who is said to have remarked: "Once the rockets are up, who cares where they come down? That's not my department."<sup>3</sup> But in this case, I *do* care where the missiles land and, to anticipate just a bit, I suggest some targets, both intended and unintended.

I did vote in 1977 for legislative referral of a measure that was broadly characterized as a Missouri Plan for Oregon.<sup>4</sup> It was soundly defeated in the 1978 general election,<sup>5</sup> but I

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<sup>1</sup> Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

<sup>2</sup> See OFFICIAL 2002 GENERAL ELECTION ONLINE VOTERS GUIDE (Nov. 5, 2002), available at <http://www.sos.state.or.us/elections/nov52002/2002genmea.htm> (last visited Jun. 28, 2003). Ballot Measure 21 proposed amending the Oregon Constitution to require "none of the above" as an official judicial candidate, as well as revising the process by which judicial vacancies during a term of office are filled. *Id.* at <http://www.sos.state.or.us/elections/nov52002/guide/measures/m21es.htm>. Ballot Measure 22 proposed amending the Oregon Constitution to require Oregon Supreme Court and Oregon Court of Appeals judges to be elected by judicial district, instead of on a statewide basis. *Id.* at <http://www.sos.state.or.us/elections/nov52002/guide/measures/m22es.htm>.

<sup>3</sup> Words attributed to von Braun by satirical songwriter and musician, Tom Lehrer. Tom Lehrer, *Wernher von Braun, on THAT WAS THE YEAR THAT WAS* (Reprise Records 1965).

<sup>4</sup> S.J. Res. 6, 59th Leg., Reg. Sess., 1977 OR. LAWS 1190.

stand by the reasons that persuaded me to vote for referral at the time. Moreover, I have grown to believe that the general direction set by the 1962 Oregon Commission for Constitutional Revision<sup>6</sup>—ill-fated because its proposals failed to gain referral to the people by one vote in the legislature—was nonetheless a wise course. It urged a carefully devised appointive system for appellate judges in Oregon. It had a muscular system of accountability built into it. That’s one possible historical point of departure for today’s symposium. But the reason that I come to this symposium with a particular energy and sense of urgency really begins with this story.

Last spring, as was true this morning, I was driving north from Eugene to Salem on Interstate Five. It was a beautiful, sunny day. I was captivated by the bucolic scenery of pastures, mountains, and blooming flowers—as only the Willamette Valley can display in such variety—when my thoughts were rudely interrupted by a snarling, sarcastic and vicious radio ad. It attacked the Oregon Court of Appeals; it specifically criticized the ruling of a federal judge in a controversy over water allocation in the Klamath Basin, suggesting that a judge’s actions had imperiled the lives of Oregon farmers; and it pointed to the irresponsible behavior of a state trial judge in releasing a rapacious convicted criminal out to our public—or that’s what I remember. And the point of this story is *that is* what I remember. The text of the ad may not actually have included all of those things, but political ads are designed to put things in your mind and that’s what was put in my mind, and what I still retain. I want to identify six things about that radio advertisement that are relevant to what we discuss today.

It was highly inflammatory. It was the product of a political action committee (the disclaimer was from an agriculture-related PAC). It was not the kind of sponsor you would ordinarily expect to be involved in appellate judicial elections. It was obviously purchased through an “independent expenditure,” so the challenger, whose candidacy it was patently designed to favor, escaped accountability under our increasingly out-of-control campaign finance system. It was very expensive, or it at least was part of an expensive campaign. It was clearly the creative product of a political campaign consultant, who was equally cynically indifferent to the institutional consequences of his message for the judicial process generally and, more specifically, for public understanding of the functions of the Oregon Court of Appeals. And finally, it had *nothing* to do at all with the particular contested appellate judicial position or its newly-appointed incumbent.

Now, what’s new with this? Does it matter? Is my indignation and surprise just the newly-found righteousness of a recovering politician who has ascended to the eleventh step? I confess that I am offended. But in some senses this irresponsible electioneering is not new. As Supreme Court Judge Paul De Muniz—who is here in this audience—and others have pointed out, we elected judges on a partisan ballot in Oregon from statehood in 1859, until 1931.<sup>7</sup> Appellate elections for judges were part of a partisan and very undemocratic machine system at that point. We actually amended our constitution in 1976 to try to protect greater judicial independence by authorizing disciplinary rules for judicial campaigns. In 1990 our Supreme Court, although significantly divided, sustained

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<sup>5</sup>. Ballot Measure 1 was rejected by voters in the November 7, 1978 General Election by a vote of 449,132 to 358,504. See OREGON ELECTION HISTORY: INITIATIVE, REFERENDUM, AND RECALL 1972-1978, available at <http://bluebook.state.or.us/state/elections/elections19.htm> (last visited June 28, 2003).

<sup>6</sup>. THE COMMISSION FOR CONSTITUTIONAL REVISION, A NEW CONSTITUTION FOR OREGON: A REPORT TO THE GOVERNOR AND THE 52D LEGISLATIVE ASSEMBLY (1962), reprinted in *A New Constitution for Oregon*, 67 OR. L. REV. 127 (1988).

<sup>7</sup>. Paul De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 376 (2002).

limits on the manner by which judicial candidates can engage in personal fundraising activity.<sup>8</sup>

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<sup>8</sup>. *See generally* In re Fadeley, 802 P.2d 31 (Or. 1990).