

A PROPOSAL FOR CHANGE

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I. INTRODUCTION

I will not repeat what has been said about the impact that politics, money and other influences have had on the selection and retention of Oregon's judiciary.¹ In my thirty-five years as a lawyer, of which I have spent twenty-five years serving as a judge at all levels of the state judiciary, I have always believed that our system has been fair and has resulted in a top-quality judiciary throughout the administrations of both republican and democratic governors. Through observation and personal experience, I have reluctantly concluded that our world has changed. Without pro-active efforts to propose means of avoiding the pressures of the changed political climate, we may be left with a system that is vulnerable to moneyed interests gaining the ability to "buy" judicial offices.

I make the following proposal in the context of my observation of state judicial elections in Oregon and elsewhere, as well as through my own experience as a candidate for the Oregon Supreme Court. During my 1998 candidacy, my principle opponent, Robert Tiernan, received the majority of his campaign funding from three conservative businessmen.² Ultimately, Tiernan spent approximately \$230,000 between both the primary and the general elections. Fortunately, my campaign coordinators anticipated that my opponent would raise a sizable amount of money. To respond it was necessary to raise about \$170,000 from approximately 600 contributors. While Tiernan was primarily supported by certain conservative "business interests," our campaign received significant amounts from the litigation bar.

In addition to fundraising, Tiernan's campaign strategy included a general attack on the Oregon judiciary. Specifically, Tiernan labeled the judiciary as an "old boys network of insiders and lawyers" elected through a "fixed" system.³ He also criticized the Oregon Supreme Court for its decision in *Oregon State Police Officers' Ass'n v. State*,⁴ which invalidated an initiative measure that Tiernan had co-sponsored.⁵ Personally, I felt that the pressures of campaign financing and Tiernan's general attacks against the judiciary detracted from reasoned consideration of qualifications and judicial ability. Although Tiernan ultimately withdrew from the 1998 general election and I ultimately won the election, I believe that the influence of Tiernan's primary supporters and the nature of his rhetoric demonstrate real dangers present in Oregon's elective system.

Beyond my own campaign, contests in Idaho, Tennessee, Ohio, Texas and elsewhere

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1. For a recent history of Oregon judicial elections, see generally Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367 (2002), and Paul J. De Muniz, *Judicial Selection in Oregon: Money, Politics, and the Initiative Process*, this issue at 1266.

2. Tiernan's primary supporters were Loren Parks, a medical equipment manufacturer; Mark Hemstreet, owner of the Shilo Inn motel chain; and Robert Randell, a real estate developer. Ashbel S. Green, *Tiernan Withdraws from Supreme Court Race*, OREGONIAN, Sept. 5, 1998, at A1.

3. Mr. Tiernan made his criticisms as part of a proposal to alter the Code of Judicial Conduct by initiative. Through his proposal, Tiernan sought fewer restrictions on expression during judicial campaigns and a repeal of Judicial Rule 4-102(D), which prohibits judicial candidates from directly soliciting campaign contributions. Bob Tiernan, *Editorial: Judging the Judges Oregon Voters Denied Real Democracy Because Lawyers Have Fixed the Game*, OREGONIAN, Feb. 13, 1998, at D13.

4. 918 P.2d 765 (1996) (ballot measure requiring set contribution to state pension program violated Contracts Clause contained in federal Constitution as well as state contract common-law principles).

5. Green, *supra* note 2, at A1.

have convinced me that a trend has developed through which special interest groups have come to dominate both the fundraising and rhetoric involved in state judicial elections. The trend in other states has moved so quickly that a number of states, including Texas, have begun considering alternatives to judicial elections. It is in this context that I now believe that elections should be replaced with some form of an appointive system.