

HISTORY OF THE OREGON JUDICIAL DEPARTMENT, PART 2: AFTER STATEHOOD

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This paper is the second in a two-part series on the history of the Oregon Judicial Department. The first part, written by Joe K. Stephens, Law Librarian, State of Oregon Law Library, discusses the history of Oregon's courts prior to statehood in 1859, and includes the adoption of the Oregon Constitution. This, the second part of the history, begins just after statehood, and continues through today.

1862 -- SUPREME COURT EXPANDED TO FIVE JUSTICES, AND FIFTH JUDICIAL DISTRICT CREATED

1878 -- SUPREME COURT JUSTICES SEPARATED FROM CIRCUIT COURT JUDGES, AND SUPREME COURT REDUCED TO THREE JUSTICES

Under the 1857 Constitution, the Supreme Court consisted of four justices, who also served individually as the judges of the four circuit courts.¹ (Although the Supreme Court had four members, only three would hear each case; one justice would be disqualified because he had heard the case as circuit court judge.²) Each Supreme Court justice/circuit court judge was elected by the individual district in which he served.³ As originally constituted, the first district consisted of Jackson, Josephine, and Douglas Counties; the second district, of Umpqua, Coos, Curry, Lane, and Benton Counties; the third district, of Linn, Marion, Polk, Yamhill, and Washington Counties; and the fourth district, of Clackamas, Multnomah, Wasco, Columbia, Clatsop, and Tillamook Counties.⁴

The Framers of the Oregon Constitution had an eye to the future, however. First, the Constitution authorized the Legislature to expand the number of judicial districts (and the number of Supreme Court justices) to as many as five; once certain population requirements were met, the Constitution permitted the Legislature to expand the number

¹ Or Const, Art VII (Original), §§ 2, 8; *see Cline & Newsome v. Greenwood & Smith*, 10 Or 230, 232 (1882) (so noting). The first four justices were Aaron E. Wait, Chief Justice, and Reuben P. Boise, Riley E. Stratton, and Paine P. Prim, Associate Justices. *See* 1 Or 241 (1853-62) (listing justices for first term of Oregon Supreme Court after statehood). Matthew P. Deady had been elected to the Court in 1859, but he declined to qualify for the position, instead becoming United States District Judge for the District of Oregon. Sidney Teiser, *A Pioneer Judge of Oregon: Matthew P. Deady*, 44 Or Hist Q 61, 80-81 (1943).

² Or Const, Art VII (Original), § 6; *see State v. Cochran*, 55 Or 157, 185, 104 P 419, 105 P 884 (1909) ("Section 2 provided the minimum number as four [justices], of which, under Section 6, on account of one of the number having tried the case appealed, but three justices could sit on an appeal").

³ Or Const, Art VII (Original), § 2 (justices are "to be chosen in districts by the electors thereof"); *see also Cline & Newsome*, 10 Or at 232 (1882) (noting elections by district).

⁴ Or Const, Art XVIII, § 11.

of districts (and justices) to as many as seven.⁵ Second, the Constitution authorized the Legislature to have Supreme Court justices elected separately from circuit court judges, once the state's population had reached a certain figure.⁶

In 1862, the Legislature added a fifth justice to the Supreme Court, and a fifth judicial district to the state.⁷ The new fifth district consisted of Wasco, Umatilla, and Baker Counties.⁸ Joseph Gardner Wilson was appointed as the fifth justice.⁹

The Legislature enacted legislation splitting Supreme Court justices and circuit courts judges into different classes in 1878.¹⁰ In doing so, the Legislature reduced the number of Supreme Court justices from five to three -- possibly out of concern that the Constitution mandated a three-justice Supreme Court after the split.¹¹ In splitting the classes, the Legislature also ended the election of Supreme Court justices by district.¹²

The 1878 act created what was functionally a new Supreme Court, as the Court itself would note just a few years later:

⁵ Or Const, Art VII (Original), § 2 (expansion to seven districts/justices permitted when "the white population of the state shall amount to one hundred thousand").

⁶ Or Const, Art VII (Original), § 10 (specifically, "[w]hen the white population of the state shall amount to two hundred thousand").

⁷ "An act to create a fifth judicial district, and increase the number of justices of the supreme court" dated October 11, 1862, General Laws of Oregon 89-90 (1862) (fifth district consisted of Wasco County, "together with all the counties and territory east of the summit of the Cascade mountains").

⁸ See "An act to provide the times for holding circuit and county courts" dated October 17, 1862, General Laws of Oregon 68-70 (1862) (setting terms of court for those counties in the fifth judicial district).

⁹ Justices of the Supreme Court of the State of Oregon, 2 Or (8) (1862-69).

¹⁰ "An act to provide for the election of Supreme and Circuit Judges i[n] distinct classes" dated October 17, 1878, § 1, Laws of Oregon 31-33 (1878).

¹¹ See *id.* at §§ 2, 10 (specifically providing for three justices). The constitutional provision was Article VII (Original), section 10. In authorizing the Legislature to split Supreme Court justices and circuit court judges into different classes, that provision specifically stated that "one of which classes shall consist of three justices of the Supreme Court." Please see the discussion of the 1909 expansion of the Supreme Court, discussed below, for more information.

¹² See "An act to provide for the election of Supreme and Circuit Judges i[n] distinct classes" dated October 17, 1878, § 2, Laws of Oregon 31-33 (1878) (providing for election of Supreme Court justices; no reference is made to district); *Cline & Newsome*, 10 Or at 234 (adoption of legislation necessarily ended "[t]he former system by which supreme judges were elected by districts").

"Although invested with the same supreme judicial power, it is not the same supreme court which existed prior to the act of the legislature. It differs in its composition, in the number of its offices and officers, their election and duties. The fact is that the offices of the former supreme court, like the officers of that court, went out in the re-organization which the act effected."¹³

The split between the Supreme Court and the circuit courts became effective with the elections in the summer of 1880.¹⁴ Nevertheless, the December 1877 term was the last in which the court consisted of five justices -- P.P. Prim, R.P. Boise, E.D. Shattuck, L.L. McArthur, and J.F. Watson.¹⁵ The three justices who ended the term of the old Supreme Court were James K. Kelly, R.P. Boise, and P.P. Prim.¹⁶ The three justices of the new Supreme Court elected in 1880 were William P. Lord, E.B. Watson, and John B. Waldo.¹⁷

1907 -- LEGISLATURE CREATED OFFICE OF COMMISSIONER TO THE SUPREME COURT

1909 -- OFFICE OF COMMISSIONER ENDED; SUPREME COURT AGAIN EXPANDED TO FIVE JUSTICES

In the very early years of the 20th Century, the three justices of the Supreme Court had become overloaded with work.¹ So the 1907 Legislature stepped in, authorizing the appointment of two Commissioners to the Supreme Court to "assist [the Court] in the performance of its duties and in the disposition of numerous causes now pending and

¹³ *Cline & Newsome*, 10 Or at 236.

¹⁴ See "An act to provide for the election of Supreme and Circuit Judges i[n] distinct classes" dated October 17, 1878, § 2, Laws of Oregon 31-33 (1878) (providing that elections would take place in 1880).

¹⁵ Justices of the Supreme Court, 6 Or at (iii) (1876-77) (through the December term, 1877). By the January term of 1879 -- the next term of the court -- there were only three justices: James K. Kelly, R.P. Boise, and P.P. Prim. Justices of the Supreme Court, 7 Or at (v) (1879).

¹⁶ Justices of the Supreme Court, 8 Or at (3) (1879-80).

¹⁷ *Id.*; see also M.C. George, *Political History of Oregon from 1876-1898 Inclusive*, 3 Or Hist Q 107, 111 (1902) (so noting).

¹ General Laws of Oregon, ch 50, § 4 (1909); General Laws of Oregon, ch 88, § 2 (1907) (both noting congestion in Court's docket).

which may hereafter be pending in said court."² The two commissioners, William R. King and Woodson T. Slater,³ were not limited to ruling on motions; my research shows 103 published opinions authored by the two commissioners, beginning with *Pickett's Will*, 49 Or 127, 89 P 377 (1907) (Slater, Commissioner), and ending with *Elwert v. Marley*, 53 Or 591, 99 P 887, 101 P 671 (1909) (Slater, Commissioner).

Even the two commissioners were not enough to solve the congested docket, however. The terms of the commissioners would expire in early 1909, but "additional cases are being filed * * * faster than three Justices, unaided, can speedily hear and determine them."⁴ So in 1909, just over 30 years after the Legislature had reduced the Supreme Court from five to three, the Legislature passed legislation again authorizing five justices on the Supreme Court.⁵ Commissioners King and Slater were appointed to the two new justiceships.⁶

It was not clear, however, whether a five-justice Supreme Court was constitutional. The provision of the Constitution that allowed Supreme Court justices to be elected separately from circuit court judges, Article VII (Original), section 10, stated that "one of which classes shall consist of *three* justices of the Supreme Court." (Emphasis added.) The issue was presented to the Supreme Court on reconsideration in *State v. Cochran*, 55 Or 157, 104 P 419, 105 P 884 (1909). The Supreme Court, dividing 3-2, had reversed a defendant's conviction for selling liquor.⁷ The state sought reconsideration, arguing that the 1909 act was unconstitutional, and so the votes of the two new justices were invalid.⁸ Because both of the new justices had been part of the three-justice majority, the state's argument would have turned its 3-2 loss into a 2-1 win.⁹ The Court rejected that argument, however, concluding that the Constitution established three as the minimum number of Supreme Court justices, while permitting the Legislature to expand the court to at least seven justices.¹⁰

² General Laws of Oregon, ch 88, § 1 (1907).

³ See Officers of the Supreme Court, 49 Or [iii] (1907) (identifying commissioners).

⁴ General Laws of Oregon, ch 50, § 4 (1909).

⁵ *Id.* § 1.

⁶ See Officers of the Supreme Court, 53 Or ii (1908-09) (so noting).

⁷ *State v. Cochran*, 55 Or 157, 160-68, 104 P 419, 105 P 84 (1909).

⁸ *Id.* at 172-73.

⁹ *Id.*

¹⁰ *Id.* at 194, 197-98. The Court did not decide whether the Legislature could expand the court beyond seven members. *Id.* at 198.

1910 -- ADOPTION OF AMENDED ARTICLE VII TO OREGON CONSTITUTION

In the November election of 1910, the voters adopted a constitutional amendment that was "a complete revision of article VII, the judiciary article of the state Constitution."¹ The amendment had been put forward by the People's Power League, a progressive organization dominated by its influential secretary, William S. U'Ren.² The object of the People's Power League, as the League itself described it, was "to perfect the direct power of the voters of Oregon over their State and local government in all its branches and officers."³

U'Ren, the charismatic leader of the People's Power League, was extraordinarily powerful in state politics at the time. A 1906 editorial went so far as to assert that: "In Oregon the state government is divided into four departments -- the executive, judicial, legislative and Mr. U'Ren."⁴

While U'Ren was a motivating force behind the proposed amendment of Article VII, "the original draft of that amendment was wholly the work of" a Supreme Court justice -- Thomas Allan McBride.⁵ McBride had been appointed as a justice of the Oregon Supreme Court on May 1, 1909, after 17 years as a circuit court judge.⁶ He would serve continuously on the court until his death in 1930.⁷

The voters pamphlet suggests that there was little interest in the amendment to Article VII: the pamphlet contained one argument for the amendment (filed by the

¹ Hall S. Lusk, *Forty-Five Years of Article VII, Section 3, Constitution of Oregon*, 35 Or L Rev 1, 1 (1955).

² Official Voters Pamphlet, General Election, November 8, 1910, at 166-77 (1910); James D. Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon* 17 (1915). See David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System,"* 67 Temple L Rev 947, 951 (1994) (noting political power of U'Ren).

³ Official Voters Pamphlet, General Election, November 8, 1910, at 168 (1910).

⁴ The Portland Oregonian, July 17, 1906, at 8, *quoted in* Schuman, 67 Temple L Rev at 951 (1994).

⁵ Remarks by W.S. U'Ren, In Memoriam: Justice Thomas Allan McBride, 133 Or xxi, xxiii-xxiv (1930).

⁶ Officers of the Supreme Court, 53 Or (ii) (1908-09).

⁷ Resolutions of the Multnomah County Bar Association, In Memoriam: Justice Thomas Allan McBride, 133 Or xix,xix (1930).

People's Power League itself) and no arguments against.⁸ U'Ren, however, would later assert that the amendment "raised * * * a hullabaloo in the [legal] profession at that time."⁹

The purpose of the proposed amendment to Article VII, according to the People's Power League, was "to allow three-fourths of a jury to render a verdict in civil cases, and to generally simplify court procedure, especially appeals to the Supreme Court."¹⁰ Some of the changes made by Article VII (Amended) were as follows.

Section 1 of Article VII (Amended) relaxed the constitutional restrictions on the sorts of courts that could exist in the State. While the original Article VII had vested the judicial power in the Supreme Court, circuit courts, and county courts (plus justices of the peace and municipal courts), Article VII (Amended) vests the judicial power "in one supreme court and in such other courts as may from time to time be created by law."¹¹

Section 2 of Article VII (Amended) gave the Supreme Court discretion to hear original proceedings in mandamus, habeas corpus, and quo warranto.

Section 3 of Article VII (Amended) addressed judicial review. Facts decided by a jury cannot be re-examined "unless the court can affirmatively say there is no evidence to support the verdict." If there were any errors at trial, the Supreme Court nevertheless is required to affirm the judgment, if the Court concludes that the trial court's judgment "was such as should have been rendered in the case." If the trial court entered an erroneous judgment and the Supreme Court can determine what the correct judgment should have been, then the Supreme Court is authorized to enter the correct judgment "in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court."

Finally, section 5 of Article VII (Amended) authorized jury verdicts in civil cases to be rendered by a three-fourths majority, instead of being unanimous.

Interestingly, the amendments to Article VII left in place much of the original Article VII. Section 2 of Article VII (Amended) provided: "The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law." The effect was to leave effective the unrepealed provisions of original Article VII, but only as statutes, and thus

⁸ Official Voters Pamphlet, General Election, November 8, 1910, at 200-02 (1910); *see* Lusk, 35 Or L Rev at 1 (noting absence of arguments against amendment).

⁹ Remarks by W. S. U'Ren, In Memoriam: Justice Thomas Allan McBride, 133 Or xxi, xxiii-xxiv (1930).

¹⁰ Official Voters Pamphlet, General Election, November 8, 1910, at 166-67 (1910).

¹¹ Or Const, Art VII (Original), § 1; Or Const, Art VII (Amended), § 1.

subject to later change by the Legislature.¹²

In 2007, the Supreme Court considered an argument that Article VII (Amended), in its entirety, had not been adopted in the manner prescribed by the Oregon Constitution.¹³ The Court concluded that it did not need to decide that question. Article VII (Amended) itself had been amended 10 times in the 97 years since it had been originally adopted.¹⁴ Those later amendments, the Court concluded, implicitly validated Article VII (Amended) and cured any irregularities in the 1910 adoption.¹⁵

1913 -- LEGISLATURE CREATED DISTRICT COURT, FIRST NEW COURT UNDER AUTHORITY OF ARTICLE VII (AMENDED)

1913 -- SUPREME COURT EXPANDED TO SEVEN JUSTICES

When the voters had adopted Article VII (Amended) in 1910, they had relaxed constitutional restrictions on the courts that could exist in the state, vesting the judicial power "in one supreme court and in such other courts as may from time to time be created by law."¹ In 1913, the Legislature exercised that authority for the first time, creating the first district court.² The district courts were, in large part, a substitute for justice courts in urban areas, having (like justice courts) limited civil and criminal jurisdiction.³ By 1997 -

¹² See *Yeaton v. Barnhart*, 78 Or 249, 257, 150 P 742, 152 P 1192 (1915) ("Section 1 of Article VII of the fundamental law was amended November 8, 1910 (see Laws 1911, p. 7), but does not alter the clauses quoted until future legislation is had upon the subject, and, no statute for the entire state having been enacted in any of these particulars, these original provisions of the Constitution remain intact.").

¹³ *Carey v. Lincoln Loan Co.*, 342 Or 530, 157 P3d 775 (2007).

¹⁴ *Id.* at 541.

¹⁵ *Id.* at 541-42.

¹ Or Const, Art VII (Amended), § 1.

² See Or Laws 1913, ch 355, § 1 (creating a district court for "every city of 100,000 population or more," though the court was styled as the district court for that county). At the time the statute was written, it applied only to Portland (Multnomah County). See Fred Leeson, *Rose City Justice: A Legal History of Portland, Oregon* 88-89 (1998) (Portland was the only city that met the population requirement); Roland Johnson et al., *Justice Courts in Oregon*, 53 Or L Rev 411, 415 (1974) (noting that justice courts in Oregon had been superseded in urban areas, "[s]tarting in 1913 with the replacement of justice courts in Multnomah County with a district court"); Statute Revision Council, 1 *Legislative History, Reviser's Notes and Annotations for the Oregon Revised Statutes* 511 (1953) ("A district court for Multnomah County was created in 1913.").

³ Johnson, 53 Or L Rev at 415 (describing "supersession" of district courts for justice courts); see, e.g., Or Laws 1913, ch 355, §§ 2, 3, 5, 6, 12, 13, 35 (explicitly incorporating various laws applicable to justice courts, while otherwise prohibiting justice courts within qualifying cities).

- the last year in which district courts existed -- 30 of Oregon's 36 counties had district courts.⁴ (For more on the consolidation of district courts and the circuit courts, please see the discussion regarding consolidation in 1998.)

Also in 1913, the Legislature expanded the Supreme Court to its current complement of seven justices.⁵ The first two new justices were William M. Ramsey and Charles L. McNary.⁶ The number of Supreme Court justices has remained fixed at seven ever since.⁷

With the expansion of the court, the Legislature also authorized the court to hear and decide cases in departments of three justices each.⁸ But the Chief Justice alone, or any four associate justices together, could order a case to be heard "in bank" by the full court.⁹ The authority for the Supreme Court to sit in departments continues to this day, and while the Court has sat in departments at times, it does not do so at the present.¹⁰ The last decision issued by a department of the Supreme Court appears to have been *Thompson v. Department of Revenue*, 287 Or 297, 597 P2d 1250 (1979).

1914 -- EXAMINATIONS FOR ADMISSION TO OREGON BAR NO LONGER ADMINISTERED BY SUPREME COURT

Since 1865, new applicants seeking admission to the practice of law had been required to pass an examination administered by the Supreme Court.¹ Originally, the examination had to be conducted by the justices themselves. The exam covered:

"Pleading, evidence, contracts, real property and equity, and * * * each

⁴ Oregon Blue Book 1997-98, at 137 (1997).

⁵ Or Laws 1913, ch 167, § 1.

⁶ Officers of the Supreme Court, 65 Or (iii) (1913).

⁷ See ORS 2.010 (setting number of justices at seven).

⁸ Or Laws 1913, ch 167, § 4.

⁹ *Id.*

¹⁰ ORS 2.111 (authorizing departments). For a list of the original assignments of justices to departments, see 65 Or (iv) (1913). For an early example of a decision heard by a department of the Supreme Court, see *Jones v. National Laundry Co.*, 66 Or 218, 133 P 1178 (1913).

¹ Rule 27, Rules Adopted by the Supreme Court, 2 Or 14 (1862-69) (adopted September term, 1865). Applicants who had graduated from a law school and were entitled to practice law before the supreme court of another state were not required to undergo examination. Rule 31, Rules Adopted by the Supreme Court, 2 Or at 15.

applicant must be prepared for examination in the following books, viz.: Chitty, on Pleadings, Wharton's Criminal Law, Greenleaf on Evidence, Blackstone's Commentaries, Kent's Commentaries, Story's Equity Jurisprudence, or Willard's Equity Jurisprudence."²

By 1885, the examination had become more general:

"Applicants for admission as attorneys shall be examined by the justices of the Supreme Court, or under their direction, and only such shall be admitted as shall appear duly learned in the common law, the law merchant, the principles of equity jurisprudence, the history and the constitutional law of England prior to the Declaration of Independence, the history and constitutional law of the United States, the statute and constitutional law of this State, and the practical administration of the law."³

The justices continued to administer the bar exams into the early 20th Century, when the combination of a growing population and the press of other duties required a new system.⁴ The answer, first promulgated by Supreme Court rule in 1913, was the creation of a board of bar examiners.⁵ The examiners would examine the applicants

"as to their requisite general learning in the constitutional law, including the constitutions of the United States and the State of Oregon, equity, the law of real and personal property, evidence, decedents' estates, landlord and tenant, mortgages, contracts, partnership, corporations, crimes, torts, agency, sales, negotiable instruments, domestic relations, common law pleading and practice, state practice, conflict of law, professional ethics, the federal statutes relating to the judiciary and bankruptcy, and the development in the

² Rule 27, Rules Adopted by the Supreme Court, 2 Or 14 (1862-69) (adopted September term, 1865).

³ Rule 2, Rules of the Supreme Court, 12 Or 533 (1884-85) (adopted November 4, 1885).

⁴ Fred Leeson, *Rose City Justice: A Legal History of Portland, Oregon* 89 (1998) (noting that "the Oregon Supreme Court was still admitting lawyers by individual testing"); Report of the Committee on Legal Education and Admission to the Bar, Proceedings of the Oregon Bar Association at its Twenty-Third Annual Meeting, Appendix A, at 25 (1913) ("The vast accumulation of work * * * has made it practically impossible for the judges of our Supreme Court to longer perform the task of personally conducting the bar examinations * * *").

⁵ "In the matter of the amendment of the rules relating to admission of attorneys," 21 Supreme Court Journal 75-77 (1913-15) (adopted December 22, 1913, effective nunc pro tunc December 16, 1913).

State of Oregon of the principles of the law, as exemplified by the decisions of its supreme court and by statutory enactments."⁶

Earlier, the Committee on Legal Education and Admission to the Bar had sought legislation to establish the board of bar examiners, but it was not successful.⁷ The rule, however, seems to have met with some legislative approval. In 1917, the Legislature not only appropriated money for the board of bar examiners for 1917 and 1918, but it also appropriated money for expenses incurred in previous years -- 1914, 1915, and 1916.⁸ The Legislature would give express statutory approval for a board of bar examiners in 1935.⁹

1914 -- INTERLUDE ON JUDICIAL ELECTIONS: JUSTICE CHARLES McNARY LOSES NOMINATION BY ONE VOTE

Prior to the Depression Era, judicial department elections were partisan, and candidates for judicial office -- Supreme Court, circuit court, and district court -- were listed on the ballot by their political party.¹ Furthermore, Supreme Court justices were elected at large.² If more than one Supreme Court justice position was open, then all incumbents and challengers competed against all other incumbents and challengers for all of the open positions, with the positions going to the top vote-getters.³ One interesting example of how the election process worked occurred in 1914, when a man who would later be an important Oregon politician lost the Republican nomination to the Oregon Supreme Court by one vote.

For almost 27 years -- from 1917 to 1944 -- Charles L. McNary served as a United States Senator from Oregon, and in 1940 he was the Republican nominee for Vice

⁶ *Id.*, Rule 37.

⁷ Report of the Committee on Legal Education and Admission to the Bar, Proceedings of the Oregon Bar Association at its Twenty-Third Annual Meeting, Appendix A, at 26 (1913).

⁸ Or Laws 1917, ch 308, § 1.

⁹ Or Laws 1935, ch 28, § 11 (authorizing "committee to examine applicants"). The current statute is ORS 9.210.

¹ Sherry Smith, *An Historical Sketch of Oregon's Supreme Court*, 55 Or L Rev 85, 91-92 (1976). The legislature would end both partisan elections and "at large" elections roughly 15 years later.

² *Id.* at 96.

³ *Id.*

President.⁴ In 1914, however, he was an incumbent justice on the Oregon Supreme Court; he had been nominated by Governor Oswald West to fill one of the two new positions created the previous year, when the court had been expanded to seven justices.

For the 1914 election, four of the seven positions on the Supreme Court became open. The political parties, then, would each nominate four candidates for the four available positions. Eight Republican candidates competed for the four Republican nominations. In the votes cast in the Republican primary of May 15, 1914, incumbent justices Thomas A. McBride and Henry J. Bean quickly took a significant lead over the other candidates, thus securing two of the four nominations. As more returns came in, it became clear that Lawrence T. Harris had secured the third nomination.

But the fourth nomination became a neck-and-neck battle between McNary and Henry L. Benson. The lead shifted between the men as returns trickled in from around the state. On May 19, unofficial returns showed Benson leading by just 20 votes -- 31,810, against 31,790 for McNary. The next day, McNary led by two votes (32,985 to 32,983). When unofficial returns were complete on May 22, they showed Benson with a 120-vote lead (34,510 to 34,490). The official returns, however, favored McNary. On June 5, 1914, the Secretary of State announced that McNary had won the fourth nomination by 13 votes -- 34,618 to 34,605.

That might have ended the matter, but for the determination of the candidates. Investigations by both candidates discovered counting errors in the vote tabulations, and so McNary and Benson agreed to a "recount" (actually a misnomer; the official tabulations were checked for possible errors, but no ballots were recounted). The two candidates stipulated to recount only certain identified precincts.

By June 22, McNary and Benson were tied for the nomination. The recount continued through July and August, but the tie was not broken until August 24, when Benson gained one vote. The recount was not complete; although all of McNary's identified precincts had been recounted, only two of Benson's identified precincts had been. But time was running out -- the last day that a candidate could accept the nomination was September 8 -- and Benson decided to rest on his lead without completing the recount of the precincts that he had identified. He refused to enter into any further stipulations regarding the nomination.

That decision upset Governor West. News had broken that a precinct in Curry County, one not identified by either of the candidates, had located 15 ballots that had not been counted. Governor West wanted those missing votes to be counted before he issued the certificate of nomination. But without Benson's consent, the Curry County votes could not be considered -- and Benson contended that travel conditions in that part of the state meant that there was not enough time left to obtain official results on the uncounted

⁴ Except where otherwise noted, the story of the 1914 primary election is derived from George Hoffmann, *Political Arithmetic: Charles L. McNary and the 1914 Primary Election*, 66 Or Hist Q 363 (1965).

ballots in Curry County. (Benson's contention seems to have had merit; the proposed extension of time to recount the missing Curry County votes was until September 22.) On September 8, Governor West delivered the certificate of nomination with shockingly bad grace:

"While I am firm in my conviction that a complete and correct return of the votes cast at the [primary] election, or even of those precincts where errors have been reported, would have shown Judge McNary and not yourself to be the successful candidate, you have succeeded, through sharp practices and methods which would put to blush the meanest pettifogger in the land, in producing a result upon the face of the returns which leaves this office no alternative, but that of issuing you the certificate."

Benson responded, correctly, that there was no evidence McNary had received more votes than Benson. Benson also noted that he had no obligation to wait for a recount of his own identified districts.

With that, Benson became the fourth Republican nominee for the 1914 general election. In November, he won a seat on the Supreme Court. Benson would remain on the Court until his death in October of 1921.⁵

1929 -- END OF "AT LARGE" ELECTIONS TO SUPREME COURT

1931 -- END OF PARTISAN JUDICIAL ELECTIONS FOR ALL COURTS

As noted in the discussion of the 1914 election campaign, judicial department elections were partisan, and candidates for judicial office -- Supreme Court, circuit court, and district court -- were listed on the ballot by their political party.¹ Additionally, justices of the Supreme Court were elected at large, meaning that every candidate competed for every open position on the Supreme Court.² But both of those things changed in the Depression Era.

In 1929 the Legislature ended "at-large" elections for Supreme Court justice.³ The Legislature assigned position numbers to all of the sitting justices on the Supreme Court,

⁵ Officers of the Supreme Court, 100 Or (iii) (1921) (noting Benson's death).

¹ Sherry Smith, *An Historical Sketch of Oregon's Supreme Court*, 55 Or L Rev 85, 91-92 (1976).

² *Id.* at 96.

³ Or Laws 1929, ch 241; *see* Smith, 55 Or L Rev at 92 (so noting).

and all future candidates would compete only for an identified position number.⁴

The last partisan election for judge occurred in 1930, when Republican challenger James U. Campbell unseated Democratic incumbent Justice Oliver Perry Coshow for a position on the Supreme Court. Justice Coshow had been the only Democrat on the Court at the time, and his defeat left the Court entirely Republican.⁵ The very next year, the Legislature enacted a law making all judicial elections nonpartisan.⁶

Nonpartisan judicial elections, and election to the Supreme Court by position number, remain incorporated into the statutes today.⁷

1961 -- CREATION OF OREGON TAX COURT

In 1961, the Legislature created the first new type of court since authorizing district courts in 1913 -- the Oregon Tax Court.¹ The Tax Court has exclusive jurisdiction over controversies involving the "tax laws" of the state.² It also has concurrent jurisdiction with the circuit courts over cases involving the priority of tax liens, and certain real and personal property transactions.³

The Tax Court is a court of general jurisdiction, with all the powers of a circuit court.⁴ Unlike the circuit courts, however, the Tax Court has statewide jurisdiction. And while decisions of the circuit courts generally are appealed to the Court of Appeals, decisions of the Tax Court must be appealed directly to the Oregon Supreme Court.⁵

The first attempts to create what later became the Oregon Tax Court date back to

⁴ Or Laws 1929, ch 241.

⁵ Smith, 55 Or L Rev at 92.

⁶ Or Laws 1931, ch 347.

⁷ See ORS 2.040 (retaining position numbers for Supreme Court justices assigned in 1929); ORS 254.005(8) ("Nonpartisan office' means the office of judge of the Supreme Court, Court of Appeals, circuit court or the Oregon Tax Court * * *").

¹ Or Laws 1961, ch 533, § 1.

² ORS 305.410(1).

³ ORS 305.410(2).

⁴ ORS 305.405.

⁵ ORS 305.445 (authorizing Supreme Court to hear appeals from Tax Court); see ORS 2.516 (unless Oregon Constitution or statute otherwise provides, Court of Appeals has jurisdiction over appeals).

1949.⁶ At that time, challenges to the decisions of the state tax commission were heard by the circuit courts.⁷ The 1949 proposed legislation would not have created a new court, but an administrative tribunal to hear tax appeals, which was the favored thinking at the time.⁸ The 1949 bill was defeated in the Legislature, as were similar bills in future legislative sessions.⁹ (In 1959, the Legislature passed the bill but failed to fund the administrative board, so Governor Mark O. Hatfield vetoed it.¹⁰)

In 1961, the Legislature was presented with competing bills -- one to create an administrative board of tax appeals, and the other to create an actual court of general jurisdiction with authority to decide tax cases.¹¹ The Legislature chose to create the court of general jurisdiction.

The first judge appointed to preside over the Oregon Tax Court was Judge Peter M. Gunnar.¹² Although the legislation creating the Oregon Tax Court otherwise became effective on January 1, 1962, the Legislature specifically provided that the judge of the Tax Court could be appointed before that date, and it authorized the judge to "take any action that is necessary to enable him properly to exercise after that date the duties, functions and powers given the tax court under * * * this Act."¹³ Prior to January 1, 1962, then, Judge Gunnar was appointed to serve as a circuit court judge pro tem in several circuits, so that he could hear tax cases that had been filed too early to be heard directly by the Tax Court.¹⁴

In 1995, the Legislature effectively provided that the Tax Court would consist of two levels: the Magistrate Division and the Regular Division.¹⁵ Generally, all appeals to

⁶ *Woodburn v. Domogalla*, 1 Or Tax 292, 312-13 (1963), *rev'd*, 238 Or 401, 395 P2d 150 (1964).

⁷ Carlisle B. Roberts, *An Introduction to the Oregon Tax Court*, 9 Willamette LJ 193, 196-97 (1973).

⁸ *Woodburn*, 1 Or Tax at 313.

⁹ *Id.*

¹⁰ *Id.* at 313-14.

¹¹ *Id.* at 314-15.

¹² 1 Or Tax at [ii].

¹³ Or Laws 1961, ch 533, § 13 (authorizing early appointment of judge), § 59 (otherwise setting effective date of January 1, 1962).

¹⁴ Barbara Ashley Phillips, *The Oregon Tax Court: Some Thoughts on its First Decisions*, 42 Or L Rev 292, 292 n 1 (1963). In her article, Phillips discusses six of Judge Gunnar's decisions as a pro tem circuit court judge. *See id.* at 293 & n 5 (so noting, and listing decisions discussed).

¹⁵ Or Laws 1995, ch 650, § 2 (creating Magistrate Division).

the Tax Court must first go to the Magistrate Division; if a party is dissatisfied with the magistrate's disposition, then the party must appeal separately to the Regular Division.¹⁶

When the Tax Court was first created, the Legislature had provided for a separate small claims division.¹⁷ The 1995 legislation creating the Magistrate Division abolished the small claims division, effective September 1, 1997.¹⁸ An option to file a small claims procedure was created in the Magistrate Division effective the same date.¹⁹ From 1997 to 2005, the small claims option resulted in the magistrate's decision being final with no right of appeal.²⁰ In 2005, the Legislature eliminated the small claims procedure, and all decisions of the Magistrate Division can now be appealed to the Regular Division.²¹

1969 -- CREATION OF OREGON COURT OF APPEALS

In the 1960s, the number of appeals had risen to a level that began to overwhelm the Oregon Supreme Court, creating a substantial backlog.¹ A 1968 report estimated that the Oregon Supreme Court's workload in 1966 and 1967 required 12 justices to handle it adequately, while 15 justices would have been needed to meet the projected appellate caseload for 1972.² To address the growing number of appeals, the Judicial Council of Oregon recommended that the Legislature create a five-judge Court of Appeals.³ The new Court of Appeals, the Judicial Council recommended, should take on roughly 40 to 45% of the appeals being heard by the Supreme Court. To transfer the appropriate numbers of cases, the Judicial Council recommended that the Court of Appeals be given jurisdiction over only a limited range of appeals. As the appellate caseload expanded, the

¹⁶ ORS 305.501(1), (5); ORS 305.570.

¹⁷ Or Laws 1961, ch 533, § 26.

¹⁸ Or Laws 1995, ch 650, § 114 (repealing statutes relating to small claims division); *id.* § 116 (effective date).

¹⁹ *See id.* § 3a (noting that "the parties shall have no right to appeal the determination of the magistrate" regarding small claims procedure).

²⁰ *Id.*; ORS 305.514(2) (1997).

²¹ *See* Or Laws 2005, ch 345 § 1 (repealing ORS 305.514).

¹ Herbert M. Schwab and Robert D. Geddes, *Expediting Disposition of Criminal Appeals in Oregon*, 51 Or L Rev 650, 651 (1972); Second Biennial Report of the Judicial Council of Oregon 14-16 (December 2, 1968).

² Second Biennial Report of the Judicial Council of Oregon 16 (December 2, 1968).

³ *Id.* at 18-19.

Court of Appeals could be expanded to take on more cases.⁴

The Legislature accepted the recommendation of the Judicial Council, and in 1969 enacted the appropriate legislation.⁵ As recommended, the Legislature created a Court of Appeals of five judges, with exclusive appellate jurisdiction over a limited category of appeals.⁶ The first five judges of the Court of Appeals were Herbert Schwab (who became Chief Judge), Edward Branchfield, Robert H. Foley, William S. Fort, and Virgil H. Langtry.⁷

In 1973, the Legislature added one judge to the Court of Appeals, making the total complement six.⁸ Jacob Tanzer was the first judge appointed to the newly created position.⁹

In 1977, the Legislature expanded the court to its current complement of 10 judges.¹⁰ Appointed to fill the four new judgeships were John H. Buttler, George M. Joseph, W. Michael Gillette, and Betty Roberts.¹¹ The appointment of Betty Roberts made her the first woman appellate judge in Oregon history.¹²

Also in 1977, the Legislature ended the specific limitations on the jurisdiction of the Court of Appeals.¹³ Where previously the Court of Appeals had been given jurisdiction over a specific list of matters, the Legislature now generally granted jurisdiction over all appeals to the Court of Appeals, except when otherwise provided by Constitution or statute. That general grant of appellate jurisdiction remains substantially unchanged today.¹⁴

In 2007, the Supreme Court considered an argument that the Court of Appeals had

⁴ *Id.* at 19-20.

⁵ Or Laws 1969, ch 198.

⁶ *Id.* at §§ 1,4.

⁷ *Governor Appoints Five Judges to New Court of Appeals*, Oregon State Bar Bulletin, June 1969, at 10; *Judges of the Court of Appeals*, 1 Or App [ii] (1969-70).

⁸ Or Laws 1973, ch 377, § 1.

⁹ *Judges of the Court of Appeals*, 14 Or App [ii] (1973).

¹⁰ Or Laws 1977, ch 451, § 1.

¹¹ *Judges of the Court of Appeals*, 31 Or App [ii] (1977).

¹² Fred Leeson, *Rose City Justice: A Legal History of Portland, Oregon 197* (1998). Roberts went on to become the first woman justice of the Oregon Supreme Court in 1982. *Id.* at 198.

¹³ Or Laws 1977, ch 158, §§ 2, 4.

¹⁴ *See* ORS 2.516 (current jurisdictional statute).

not been lawfully created.¹⁵ A party contended that Article VII (Amended) had not been lawfully adopted, and the Legislature lacked authority to create a Court of Appeals under Article VII (Original).¹⁶ The Court rejected the argument, however, concluding that 10 subsequent amendments to Article VII (Amended) had implicitly validated any irregularities in its adoption.¹⁷

Today, the Oregon Court of Appeals is one of the nation's busiest intermediate appellate courts, whether measured by the number of appeals per capita or by number of appeals per judge.¹⁸ In 2006, the Court of Appeals had 3,518 case filings, and the ten judges of the court issued 420 written opinions.¹⁹

1981 -- UNIFICATION OF JUDICIAL DEPARTMENT

One of the major changes to the Oregon state court system occurred in 1981, although much of it was largely invisible to the public. Legislation enacted that year ended county funding of trial court operations (both circuit court and district court), replacing it with state funding. Legislation also centralized the administration of the Judicial Department in the hands of the Chief Justice of the Oregon Supreme Court.

Prior to 1981, the trial court system in Oregon had suffered from two major problems. The first related to funding. Although trial court judges were state employees, the trial courts themselves were essentially a part of county government. Counties provided the courthouses, the court staff, and the most of the cost of court operations.¹ The dependence of trial courts on county funding meant that court finances varied greatly from county to county; "[t]he levels of [financial] support are uneven and often unpredictable."² Furthermore, court costs were increasing rapidly, placing a heavy burden on county budgets.³

The second major problem afflicting the trial court system prior to 1981 was

¹⁵ *Carey v. Lincoln Loan Co.*, 342 Or 530, 157 P3d 775 (2007).

¹⁶ *Id.* at 534-35.

¹⁷ *Id.* at 541-42. See the discussion of the adoption of Article VII (Amended) in 1910, *supra*.

¹⁸ Court of Appeals 2006 Annual Report, at 5 (available online at <<http://www.publications.ojd.state.or.us/2006CARReport.pdf>>).

¹⁹ *Id.*

¹ 1980 Report of the Oregon Commission on the Judicial Branch, February 1981, at 26.

² *Id.* at 5.

³ *Id.* at 26.

inadequate judicial administration, which affected all levels of control. First, the trial court judges often had limited control over their own staff, because the staff was employed by the county.⁴ Second, the presiding judge of the county was often chosen for reasons that had nothing to do with administrative ability (for example, the presiding judge might be assigned based on seniority, or might be rotated automatically among all the trial court judges).⁵ Third, although the Oregon Supreme Court had been given general administrative authority over the trial courts, it lacked needed powers or the necessary administrative staff to do so effectively.⁶ The result was that the Judicial Department, as a whole, had "little administrative cohesion and less administrative accountability" than either the Executive or the Legislative Departments.⁷

Pressure for reform had begun building in the late 1970s.⁸ When it became clear that 1979 proposed reform legislation would die in committee, the Legislature created a Commission on the Judicial Branch, to study the existing judicial problems and make recommendations.⁹ The Commission issued its report in early 1981, and the Legislature enacted a majority of the Commission's recommendations in a 1981 special session.

One act made the state the source of funding generally for all trial court operations.¹⁰ The Chief Justice was charged with developing a personnel plan, a budgeting plan, and a property management plan for the courts of the state.¹¹ With limited exceptions, all court employees would become state employees under the personnel system created and administered by the Chief Justice.¹² Counties would remain responsible for providing courthouse facilities, however.¹³

⁴ *Id.* at 5, 26-27.

⁵ *Id.* at 14.

⁶ *Id.* at 5, 14.

⁷ *Id.* at 5.

⁸ *Id.* at 1, 26-27.

⁹ *Id.* at 1; Or Laws 1979, ch 611.

¹⁰ Or Laws 1981, ch 3 (Spec Sess).

¹¹ *Id.* § 4.

¹² *See, e.g., id.* §§ 8, 10, 12, 17 (authorizing Chief Justice to appoint trial court administrator or trial court clerk, as appropriate, and granting them powers previously held by county clerks of court or equivalent); *id.* § 142 (authorizing county trial court employees to elect to become state employees under the personnel plan); *compare id.* § 16 (permitting State Court Administrator to contract with county for services).

¹³ *Id.* § 7.

A second act gave the Chief Justice of the Supreme Court significantly more authority to function as head of the Oregon Judicial Department.¹⁴ Among other provisions, the legislation amended the statute giving the Supreme Court general administrative authority over the courts of the state to make the Chief Justice the administrative head of the Judicial Department.¹⁵ The Chief Justice was given the authority to appoint the presiding judges of the trial courts, as well as the Chief Judge of the Court of Appeals.¹⁶ That appointment power was intended to insure that presiding judges were chosen for their administrative ability, and to make the presiding judges directly responsible to the Chief Justice.¹⁷

One major proposed reform failed, however. The Commission on the Judicial Branch had proposed that the Chief Justice should be selected by the Governor, rather than elected by the justices of the Supreme Court.¹⁸ The Legislature referred the matter to the voters.¹⁹ On May 18, 1982, the voters defeated the legislation by a large margin.²⁰

The 1981 legislation regarding state funding generally did not become effective until January 1, 1983, to allow time to smooth the transition to state control.²¹ Chief Justice Berkeley Lent initially shepherded the Judicial Department through the transition and became the first Chief Justice to exercise the expanded powers of the office.²² After Justice Lent stepped down as Chief Justice in the summer of 1983, Justice Edwin J. Peterson became the Chief Justice, and assumed the difficult duties associated with the newly-expanded office.²³

¹⁴ Or Laws 1981, ch 1 (Spec Sess).

¹⁵ *Id.* § 3 (amending ORS 1.002).

¹⁶ *Id.* § 4.

¹⁷ 1980 Report of the Oregon Commission on the Judicial Branch, February 1981, at 14-15.

¹⁸ *Id.* at 5, 7-9; *see* ORS 2.045 (providing method for selection of Chief Justice).

¹⁹ Or Laws 1981, ch 2, § 3 (Spec Sess).

²⁰ Or Laws 1983, vol 1, at vi (showing election results for referred measures).

²¹ *See* Or Laws 1981, ch 3, § 5 (Spec Sess) (providing that effective date for specified list of sections); *id.* at § 3 (directing Chief Justice and State Court Administrator to prepare for change, and budgeting funds for that purpose).

²² *See* Fred Leeson, *Rose City Justice: A Legal History of Portland, Oregon* 209-210 (1998) (discussing transition).

²³ *Id.* at 210-11; *Among Ourselves*, Oregon State Bar Bulletin, August/September 1983, at 50.

1998 -- CONSOLIDATION OF CIRCUIT COURTS AND DISTRICT COURTS

Effective January 15, 1998, the Legislature brought to an end the system of district courts first created back in 1913.

As of January of 1997, Oregon had 63 district court judges, sitting in all but six of Oregon's 36 counties.¹ The primary difference between the district court and the circuit court was that the circuit court was a court of general jurisdiction, while the district court was a court of limited jurisdiction.² The district court had limited jurisdiction over criminal offenses, and limited jurisdiction in civil proceedings.³

Calls to consolidate Oregon's trial courts had been going on for many years. The Oregon State Bar's Judicial Administration Committee had proposed consolidation back in 1971, but the proposal did not pass the Bar Convention.⁴ And in 1972, then-Chief Justice Kenneth J. O'Connell published a law review article arguing for consolidation.⁵

In 1979, the Legislature considered consolidation, but deferred action to allow the Oregon Commission on the Judicial Branch to review the matter.⁶ The Commission concluded that consolidation would promote a higher-quality trial court, would simplify administration, and would allow the more efficient use of judges.⁷ The Legislature, however, did not make consolidation part of its 1981 unification legislation.

Consolidation legislation finally was enacted in 1995.⁸ The act abolished all district courts.⁹ The judicial authority vested in the district courts, and the cases pending in the district courts, were transferred to the circuit courts.¹⁰ The sitting district court

¹ Oregon Blue Book 1997-98, at 137 (1997).

² Oregon Judicial Department, Report of the Court Consolidation Issues Study Committee, March 1997, at 3-4 (identifying chief differences between circuit courts and district courts); *see* Or Const, Art VII (Original), § 9 (generally vesting judicial power with circuit court, unless Constitution or other law otherwise vests power with another court).

³ *See* ORS 46.040 (1993) (granting to district court limited criminal jurisdiction); ORS 46.060 (1993) (granting to district court limited civil jurisdiction)

⁴ 1980 Report of the Oregon Commission on the Judicial Branch, February 1981, at 63.

⁵ Kenneth J. O'Connell, *We Should Unify the Trial Courts in Oregon*, 51 Or L Rev 641 (1972).

⁶ 1980 Report of the Oregon Commission on the Judicial Branch, February 1981, at 63-64.

⁷ *Id.* at 64-66.

⁸ Or Laws 1995, ch 658.

⁹ *Id.* § 3.

¹⁰ *Id.* §§ 1, 2.

judges were made into circuit court judges.¹¹ The relevant provisions of the act became effective on January 15, 1998, to allow time to smooth the transition.¹²

2009 -- THE OREGON JUDICIAL DEPARTMENT TODAY

The Oregon Judicial Department has changed much since the early days of statehood, when it consisted of four circuit court judges who doubled as Supreme Court justices.

As of the end of 2007, the Judicial Department consisted of seven Supreme Court justices, 10 Court of Appeals judges, one Tax Court judge and three Tax Court magistrates, and 175 circuit court judges, with 1911 full-time employees (or equivalent).¹ The circuit courts, the workhorses of the Department, had 605,753 cases filed, while they closed 605,185 cases.²

The budget for the Oregon Judicial Department in the 2007-2009 biennium was \$359.4 million. That is less than 1% of the total statewide budget for the same period (\$48 billion).³

The future, particularly the development of technology, promises more change. The Judicial Department is currently implementing a technological initiative known as Oregon eCourt. Oregon eCourt will use the Internet to make the courts available around the clock -- allowing parties to file documents, pay fees and fines, and access public records electronically. Phase 1, now nearing completion, will provide eCourt for the appellate courts. Phase 2, scheduled to begin in April of 2009, will implement eCourt in five pilot counties.⁴

Oregon has changed much since it first became a state in 1859, and the shape of the Oregon Judicial Department has changed with it. But one thing will not change -- the commitment of the Oregon Judicial Department to providing timely, cost-effective, impartial justice for and on behalf of the people of Oregon.

¹¹ *Id.* § 3.

¹² *Id.* §§ 129, 150 (both providing same effective date); *see id.* § 149 (directing Chief Justice to prepare study regarding, among other things, "those changes that may be advisable * * * by reason of sections 1 to 128 of this Act").

¹ Oregon Judicial Department, *Oregon Courts Today and Tomorrow: Annual Report of the Oregon Judicial Department 1* (2008) (available online at <http://www.ojd.state.or.us/osca/documents/2007_OJD_Annual_Report.pdf>).

² *Id.*

³ *Id.*

⁴ *Id.* at 2.