

Editorial: Position One—Court of Appeals: “A Question of Good Government”  
Endorsement: David Hunnicutt

May, 2002

In June of this year Oregonians will celebrate the 100th anniversary of our beloved and often-used initiative and referendum system. Oregonians claimed their right to decide issues for themselves back in 1902.

In that 100 years we allocated funds to build roads and universities, irrigation districts and armories. We've granted women the right to vote, and we've instituted a statewide income tax. We've abolished the death penalty and reinstated it. We've approved prohibition; we've repealed prohibition. We've gone back and forth and back again on our gambling and liquor laws.

Okay, sometimes we're a bit indecisive, but all in all, we've done a darn good job. As “Stuart Smiley” says, we're good enough, we're smart enough, and doggone it—the initiative system is working. And in the face of gridlocked, indecisive legislatures, voters have often had little choice but to resort to the initiative process. One longtime backer of petition projects used to say, “The initiative system is our modern day replacement for muskets and swords.” It may not be perfect, but it's better than violent confrontation. It's been a way for voters to express their frustrations over issues such as taxes, free speech, crime, the environment, and most recently, private property rights.

Private property rights were the focus of Ballot Measure Seven, which voters approved in the 2000 election. Enter David Schuman, who as a deputy attorney general was asked to handle a challenge to the constitutionality of Ballot Measure Seven after it passed.

Now you might think that the job of the Attorney General's office would be to defend the laws that you and I and all Oregonians have put in place. But in this case, there were questions—questions covered only by Willamette Week and BrainstormNW in our June and October 2001 issues.

Gov. Kitzhaber was a vocal and public opponent of Measure Seven. And as a law professor Schuman had published in writing his dislike and disdain for the entire initiative process, making him an odd choice to defend this controversial measure. Meeting notes obtained by BrainstormNW raised serious questions about how aggressively Schuman pursued the interests of the people of Oregon as he defended their measure. The notes came from a meeting held when Kitzhaber and the opposing lawyers who challenged the measure met to discuss the case. Though parties representing both sides of the challenge were in the meeting, there seemed to be no disagreement about strategy, choice of judge, or legal approaches to take. Further, the notes indicate that the people's strategy may have been outlined at the meeting in a way that led to defeat. And it was laid out for the opposition to see.

Observers who supported the measure complained loudly that several obvious tactics had been overlooked in the measure's defense. But Measure Seven, which protected the private property rights of Oregonians by establishing a system of compensation, was overturned.

After his defeat in court on this issue, Schuman was appointed to the Court of Appeals by John Kitzhaber.

And now David Schuman faces David Hunnicutt for the open seat on Oregon's Court of Appeals. Not surprisingly, attorney David Hunnicutt has worked with the organization that brought Measure Seven to Oregon voters.

The original ethics complaint about the (mis)handling of the Measure Seven defense (see *BrainstormNW*, "Deep-Sixing Seven," by Bill Merritt, June 2001) was filed by Robert Swift, a Newberg lawyer with 40 years experience and a registered Democrat. Though the complaint was decided in favor of Kitzhaber and Bradbury's attorney David Schuman, some of the language of the complaint should have been a red flag alert to most citizens, and one would think more so to any potential candidates. Language such as, "The question is good government. You can't bend the rules to get the result you want." And, "...fundamental processes of our state government may have been subverted or corrupted. Even the independence of the judiciary itself...may be threatened."

Now, again, the ethics complaint was dismissed. But a new campaign was already underway. Schuman filed for the open seat on the Court of Appeals in July of 2001, immediately after his appointment to fill the vacancy. Careful attention to ethical details would seem to have been the order of the day.

The election for the seat is in this May Primary Election. Let's be clear about that—the election for the seat is in this May Primary Election—because apparently it wasn't clear to Schuman.

He failed to file a Voters Pamphlet Statement. And that would have made his chances of winning poor-to-nonexistent.

Races for judge are an enigma for most voters who usually know next to nothing about the candidates. It is fair to say that most voters rely on the Voters Pamphlet and that Schuman's mistake would have cost him the seat on the bench.

Oh well. He could join the ranks of other almost-rans such as Linda Peters, whose chances in the primary against David Wu were destroyed when she was misinformed by her staff about the deadline. Fred Neal, who works in the Secretary of State's office remembers the missed deadline. "She burst into tears when I called her," says Neal.

Neal also confirms that in this election cycle another candidate, Republican Billy Dalto missed the deadline. Dalto says that he was directed to a different line while another member of his campaign stood in the right line. But the office closed before he made it

back to rejoin her. Says Neal, “I talked to him face to face five minutes after 5:00. He was late; he came in after 5:00. He had somebody in line for him but...I told him I could not receive it.”

Linda Peters lost to David Wu. Dalto will not appear in the Voters Pamphlet. But perhaps you’ve already seen David Schuman's statement, which will appear. Why?

Schuman claims that he was misled by Fred Neal, an official of the Elections Division, into thinking that the election was in November. As he outlines events, Schuman was uncertain about the timing of the election after talking with another judge friend. So on returning from lunch with his friend, two days before the deadline, they stopped in the Capitol and ran into Neal and asked questions about the various scenarios of election of judges. And in that discussion Shuman says he was misled. Shuman also claims to have been misled again two days later in a phone conversation with an anonymous employee of the Elections Division. An anonymous employee?

There are different scenarios for filling seats, says Neal, depending on whether the seat is “to fill a vacancy” or is an “open” seat. Neal also says that candidates are given a handout at his office titled, “Offices Open, May 21 Primary Election.” This easily obtained handout clearly lists Judge of the Court of Appeals Position 1—the seat for which Schuman and Hunnicutt filed. Other positions “to fill a vacancy,” are clearly marked with an asterisk. The requirements for these positions are methodically explained for candidates in black and white. The entire document is also posted on the Worldwide Web.

Of course you would have to go to the office, or look on the Web.

Schuman apparently did neither.

In his sworn affidavit, he also says, “At approximately 4:40 on that same afternoon [March 12], I learned that an opponent had filed to run against me for Position No.1 on the Court of Appeals.”

Wasn’t that a clue to Schuman that an election was imminent?

It was left to Neal to call Schuman personally on March 18, four days after the Pamphlet deadline to tell him that, regretfully, his statement had not been, and would not be, received.

When asked about the history of the Voters Pamphlet Neal could only recall one exception in 1946 when a candidate was allowed in the Pamphlet around the rules.

Schuman would be the second. Based on his contention that he was misled by officials of the Elections Division, Democrat Secretary of State Bill Bradbury issued a declaratory ruling that he has the authority to accept the late statement, and that given the circumstances, he would do so. And he did.

The hearings officer for the ruling, by the way, was Paddy McGuire, former chairman of the Democratic Party of Oregon.

Obvious questions that come to mind, especially for a candidate for judge: Wasn't he, the candidate, responsible for determining the proper election laws for his race? Wasn't eight months enough time for him to figure out when the election he filed for would be held? Since when is "ignorance of the law" an acceptable excuse? Especially for a judge? He can't figure out election law, and he wants to be a judge?

The ruling, by the way, states that the same doctrine of law used to justify Schuman's favorable ruling has been applied "to situations in which the agency misled a party as to the place of filing a document." Hmm. Maybe someone should point this out to Dalto, who claims to have been misled in just this way, resulting in his five-minute miss on the deadline.

Other critics of Bradbury's unprecedented ruling speculate how much easier it will be, for example, for Oregon landowners to get relief if they can file a lawsuit when they buy a piece of property based on inaccurate statements from a county planner. Maybe we can even get out of traffic tickets by claiming to be directed to the incorrect window to pay.

But of course you'd have to have friends in high places willing to believe your version of the facts.

In Schuman's case his sworn affidavit was accepted as the true version of the facts.

In an interview with Fred Neal however, the elections official says their conversation, referenced in the affidavit, was about scenarios for filling vacancies and open seats. Neal states, "I didn't tell him that he would be on the November ballot per se. I said, 'If it were to fill a vacancy.'" Further, Neal says that the conversation did not take place in his office, in his official capacity. Rather, like Schuman and his friend, Neal says he was coming back from lunch and a brief nap in his office. "I was going from lunch to my station, the Voter's Pamphlet Filing Station, passing through the House Chambers. Mr. Schuman and Mr. Breithaupt stopped and asked me some questions."

Make a note not to stop and chat with friends if you work in any government capacity.

But all these missteps are now in the past. The statements are in the Voters Pamphlet (except Dalto's) and the election is upon us.

There is no question that Schuman's experience and credentials exceed those of his opponent, Hunnicutt. He rightfully touts his experience teaching law school and his years with the A.G.'s office. Schuman has earned a reputation for his thorough knowledge of Oregon's Constitution. And he is supported by respected fellow attorneys like Dave Frohnmayer.

But as he followed the predictable and often politically appointed, rather than elected, path to judgeship, what has he gained from his experience? He may know the Constitution, but how rigorously does he defend it? Just the parts he agrees with, or the entire Constitution? Schuman defended Oregon's assisted suicide law, but was not so successful with private property rights. Will he defend that century-old, integral part of our Constitution, Oregon's initiative and referendum system? Or will he advocate his own social and political views from the bench?

Schuman's own statements from the past about the initiative system, his participation in the overturning of voter-approved Measure Seven, and the political machinations surrounding his Voters Pamphlet debacle leave us with serious doubts.

Oregonians must see to it that our courts uphold the Constitution and provide equal justice under the law. Schuman's history of benefiting from political patronage raise a red flag in this regard. Hunnicutt, his opponent, is more straightforward in his approach and is clearly the better choice.

The words of that first ethics complaint against Schuman are hard to forget, and should serve as a warning—even if that complaint was dismissed: “The question is good government. You can't bend the rules to get the result you want.”

Schuman could have at least heeded the spirit of the warning. We think that the voters should.

BrainstormNW Endorsement: David Hunnicutt—Judge, Oregon Court of Appeals