

Memorandum

PREPARED FOR: Rep. Scharf and House Interim
Committee on Rules
DATE: November 22, 2023
BY: Melissa Leoni, LPRO Analyst
RE: Legislative History on Using Incumbent for Judges



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This memorandum responds to Rep. Scharf’s question, raised at the September 28, 2023, and November 7, 2023, meetings of the House Committee on Rules, about why incumbent is listed on the ballot for certain judges.

Summary

The statutory requirement for “incumbent” to be used on the ballot for Supreme Court, Court of Appeals, Oregon Tax Court, circuit court, district court, and justice’s court candidates originated in 1985 through amendments made to ORS 254.085, ORS 254.125, and ORS 254.135 by House Bill 2092 (1985).

Until 1983, various partisan and nonpartisan candidates had been allowed a 10- or 12- word statement of the candidate’s principles or qualifications on the primary, nominating, or general election ballot, which were known as a ballot slogan. For an elected or appointed judge of the Oregon Tax Court, the word “incumbent” had to follow the candidate’s name on the ballot if the term was used in the candidate’s nominating petition or declaration of candidacy.¹ The 1983 Legislative Assembly eliminated the use of ballot slogans and incumbent on the ballot.

In 1985, the Judicial Branch and Oregon State Bar successfully argued in testimony on HB 2092 (1985) that judges are different than other candidates in how they can campaign and raise funds and that voters should know who the incumbent is so they can vote on job performance and not on name familiarity. Opponents argued that listing incumbent on the ballot was another form of ballot slogans and that judges could use the voters’ pamphlet to let voters know about the candidate’s qualifications and incumbency.² HB 2092 (1985) required the word “incumbent” to follow the name of each candidate who seeks election for a judicial position to which the candidate had previously been elected or appointed.

Legislative History – HB 2092 (1985)

HB 2092 (1985) was requested by the Commission on Judicial Branch and co-sponsored by the Oregon State Bar (OSB). The bill’s Staff Measure Analysis problem statement noted that:

¹ [ORS 254.115, 254.125, and 254.135](#) (1981).

² Oregon State Legislature, House Committee on State and Federal Affairs, hearing and work session on House Bill 2092, 63rd Legislative Assembly (May 24, 1985), and Senate Committee on Government Operations and Elections, hearing and work session on House Bill 2092, 63rd Legislative Assembly (June 12, 13, and 14, 1985).

Existing law does not allow anyone currently holding an elected office to indicate “incumbent” on the ballot. Judges believe their situation is different from that of other elected officials when it comes to campaigning. The nature of their offices result in their working in relative obscurity and not having name familiarity. Additionally they are restricted by professional regulation from raising funds in the traditional manner – restrictions which do not apply to their opponents.³

The House Committee on State and Federal Affairs discussion focused on what other states do and name familiarity for judges. The OSB, Oregon Judicial Branch, and a circuit court judge provided testimony in favor of the measure. Proponents testified that judges have different professional regulations and limits than other candidates, they cannot raise funds themselves, and they are relatively unknown. The Judicial Branch reported that they surveyed 10 states with similar nonpartisan judicial elections and about half listed incumbent on the ballot for their judge candidates. The Judicial Branch also argued that the ability, quality, and competence of judges to apply the law are the qualities that should prevail in elections and that the risk of not including an incumbent label was that elections would be decided on name familiarity and not those qualities. OSB argued that since the Legislative Assembly eliminated ballot slogans in 1983 and media coverage tends to focus on unpopular judicial decisions, the voters should at least know who the incumbent is. No one testified in opposition.⁴

In the Senate Committee on Government Operations and Elections, members discussed whether allowing “incumbent” to appear on the ballot would give the incumbent an unfair advantage over a potential challenger. The committee initially adopted a conceptual amendment to allow the incumbent and challenger one to three words each, but one day later removed the amended language because they considered “the idea as being too close to a ballot slogan.”⁵ Senator Rod Monroe, a member of the committee, reported “that there was considerable debate in the Commission on the Judicial Branch, and the feeling was that since judges could not take stands on issues in their campaigns, about all they could do was provide a ‘resume.’”⁶

³ Staff Measure Analysis, Senate Committee on Government Operations and Elections, House Bill 2092, 63rd Legislative Assembly, 1985 Regular Session.

⁴ Oregon State Legislature, House Committee on State and Federal Affairs, hearing and work session on House Bill 2092, 63rd Legislative Assembly (May 24, 1985).

⁵ Staff Measure Analysis, Senate Committee on Government Operations and Elections, House Bill 2092, 63rd Legislative Assembly, 1985 Regular Session.

⁶ Committee Minutes (June 12, 1985), Senate Committee on Government Operations and Elections, House Bill 2092, 63rd Legislative Assembly, 1985 Regular Session.



The OSB and two judges testified in support of the measure in the Senate Committee. OSB testified that judges are spending an increasing amount of time on reelection campaigns because “incumbent” could not be used on the ballot. One circuit court judge testified:

that the nature of a judge’s position makes it difficult for a judge to be involved in the election process, that there is a general feeling that the process of retaining judges should probably be somewhat different than the process of retaining other political officeholders, that the public wanted a judge to remain relatively anonymous, and that the designation of incumbency would have a positive effect of shifting the focus of judicial elections from name familiarity to how well the present judge had performed their work.⁷

Common Cause and the Secretary of State’s office opposed adding incumbent to the ballot, asserting that it was a return to ballot slogans and that the voters’ pamphlet is available for all candidates to provide more information and communicate with voters.⁸

HB 2092 (1985) passed the House with 41 ayes and 18 nays. It passed the Senate with 22 ayes and 8 nays. It became effective on September 20, 1985.⁹

Ballot Slogans in Statute

Until 1983, certain partisan and nonpartisan candidates had been allowed to have a 10- or 12-word statement of the candidate’s principles or qualifications on the ballot. The following sections of ORS Chapter 254 were removed by the Legislative Assembly in 1983.

ORS 254.115 Official primary election ballot. (4) There shall be added opposite the name of each candidate on the ballot the statement of 12 words or less of any measure or principles the candidate especially advocates or of the candidate’s qualifications for office contained in the nominating petition or declaration of candidacy.

ORS 254.125 Nominating ballot for candidates to nonpartisan office. (2) On the ballot following the name of the candidate for a nonpartisan office other than Superintendent of Public Instruction or judge of the Oregon Tax Court shall be the statement of the candidate’s qualifications and experience included in the nominating petition or declaration of candidacy. On the ballot following the name of a candidate for nonpartisan

⁷ *Id.*

⁸ *Id.*

⁹ House Journal, 63rd Legislative Assembly, 1985 Regular Session.



county office shall be the statement of 12 words or less of any measure or principles the candidate especially advocated or of the candidate's qualifications for office, if the statement is contained in the candidate's nominating petition or declaration of candidacy.

(3) If the word " incumbent" was contained in the candidate's nominating petition or declaration of candidacy, the word shall follow the name of the candidate on the nominating ballot or ballot label who is the regularly elected or appointed judge of the Oregon Tax Court.

ORS 254.135 Official general or special election ballots; manner of indicating vote. (3)...Opposite the name of each candidate for a nonpartisan county office shall be added the statement of 12 words or less of any measure or principles the candidate especially advocates or of the candidate's qualifications for office, if the statement is contained in the candidate's nominating petition or declaration of candidacy. Opposite the name of each candidate for nonpartisan office other than Superintendent of Public Instruction or district attorney shall be added the statement of not more than 10 words of the candidate's qualifications and experience, if the statement is contained in the candidate's nominating petition or declaration of candidacy.¹⁰

¹⁰ [ORS 254.115, 254.135, and 254.125](#) (1981).

