

# **THE CHIEF JUSTICE'S 2008 REPORT ON JUDICIAL COMPENSATION**

**Oregon Judicial Department**

August 2008



# THE CHIEF JUSTICE'S 2008 REPORT ON JUDICIAL COMPENSATION

## I. INTRODUCTORY MESSAGE

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This nation's collective conception of constitutional democracy rests, in substantial measure, on the principle that our courts are responsible for providing both an impartial and a co-equal branch of government. The role that judicial compensation plays in giving effect to that principle of impartiality and co-equality is a significant one. Indeed it is foundational; one of the grievances listed in our Declaration of Independence was that the King "has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."<sup>1</sup> It is not surprising, therefore, that the subject of judicial compensation was part of the debates surrounding the establishment of our federal system of government. As Hamilton famously wrote in attempting to persuade the states to ratify the Constitution:

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. \* \* \* In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."<sup>2</sup>

Our founders accepted the idea that insulating a judge's compensation from political pressures not only promotes but is essential to maintaining the impartiality and co-equality of the judicial branch. That idea now has explicit recognition both in our federal constitution ("The judges \* \* \* shall \* \* \* receive for their services, a compensation, which shall not be diminished during their continuation in office.")<sup>3</sup> and in our state constitution as well ("The judges \* \* \* shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected.")<sup>4</sup> Doing so has "help[ed] to secure an independence of mind and spirit necessary if judges are 'to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.'"<sup>5</sup>

Yet the issues surrounding judicial compensation have continued to generate debate, some of it heated, both at the federal level and across the states. Just last year, for example, in only his second year-end report on the federal judiciary, United States Supreme Court Chief Justice John Roberts devoted the entirety of his discussion to the failure to raise judicial pay: "[T]he issue has been ignored far too long and has now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary."<sup>6</sup> And last year in Oregon, the Task Force for Judicial Excellence, a consortium of business lawyers and corporate counsels representing some of this state's leading economic enterprises, issued a report highlighting the fact that "[t]he chronic nature of judicial underpayment is beginning to take its toll on the Oregon court system."<sup>7</sup>

It is against that backdrop that this report is written. The facts, figures, and graphic representations that follow are compelling. Equally compelling, though, is the focus that underlies the presentation of all that data. Although it might sound counterintuitive, the issue of judicial compensation emphatically is **not** an issue about judges. Instead, it is an issue about the quality of justice that all Oregonians will receive, whether directly when they themselves walk into a courtroom or indirectly when they feel the impact of the important decisions that the public has entrusted judges to make.

Neither the question of proper focus in this context nor its answer is new. In a case nearly 90 years ago that involved the constitutional prohibition against lowering judicial pay during a judge's tenure in office, the United States Supreme Court asked the question this way:

“With what purpose does the Constitution provide that the compensation of the judges ‘shall not be diminished during their continuance in office?’ Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function?”<sup>8</sup>

The answer to that question, in the Court’s view, was “very plain”:

“[T]he primary purpose of the prohibition against diminution was not to benefit the judges, but \* \* \* to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.”<sup>9</sup>

The women and men of Oregon’s bench are more than good and competent. In Oregon, we have an excellent judiciary, one that is hard working, innovative, and dedicated to the rule of law. But we also have a judiciary that has been laboring for decades under only sporadic increases in salary, that has no mechanism to ensure the periodic adjustment of compensation to account for inflation, and that in recent decades has ranked either at or near the bottom of judicial pay across the nation. In other words, the threat that the status quo presents to our judicial system as an impartial and co-equal branch of state government is very real.

At the same time, it is important to understand that the situation in which we find ourselves is not the product of the intentional tension that is built into a system of government with separated powers. In those types of confrontations, as we all know from high school civics, the judiciary is not particularly well-equipped. As Hamilton noted in another of his more enduring Federalist Papers:

“Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>10</sup>

Instead, the situation of inadequate judicial compensation is systemic only in the sense that a prohibition against reducing a judge’s pay during tenure does not protect against the potential for judicial salaries to erode over time through inattention. Not only do courts have no sword and no purse, they also have no constituency in the traditional sense. Of course, the lack of a constituency is one of the hallmarks of impartiality. But added to that is the fact that courts administer an adversarial system of justice that produces winners and losers, and judges – no matter how hard they might try – necessarily are in the business of disappointing at least fifty percent of the people who appear before them. Taken together, those factors do not make for a branch of government that is particularly adept at representing its own interests, but they do in combination make for a body of public servants that easily can be overlooked.

Although an understanding of why we are where we are is important, at bottom, benign neglect is still neglect. During its 2007 session, however, the Legislative Assembly and Governor Kulongoski both acknowledged the serious problem that years of inattention have created for our court system and responded in two very meaningful ways. First, the legislature enacted substantial increases to the salaries paid to state

court judges.<sup>11</sup> That action has helped to ameliorate the lack of parity that exists between the salaries paid to the judges of this state and the salaries paid to judges in neighboring states and across the country. But the extent of the problem was so severe that additional efforts still are needed. Second, and perhaps even more importantly, the legislature in 2007 revitalized the Public Officials Compensation Commission as a non-partisan body charged with recommending to the legislature, based upon objective, non-politicized criteria, the salaries that should be paid to elected state public officials, including judges.<sup>12</sup>

In light of the entry of the Commission into the centuries-old debate of how appropriately to compensate judges so that the status of the judiciary as an impartial and co-equal branch of government will be preserved, this report is built roughly around the statutory criteria that the legislature has directed the Commission to consider in setting its salary recommendations.

- First, the report discusses the qualifications and skills necessary for judicial office in Oregon as well as the level of responsibility implicit in each of those judicial positions.<sup>13</sup>
- Second, the report examines judicial compensation in Oregon both presently and over time, including compensatory considerations apart from salary.<sup>14</sup>
- Third, the report compares the salaries that are paid to Oregon judges to the salaries that are paid to judges in neighboring states and across the country, as well as to the earnings of other comparable professional positions both inside and outside the legal context.<sup>15</sup>
- Fourth, and finally, the report concludes with a brief discussion regarding the ways in which lagging judicial salaries are beginning to affect Oregon's judicial branch.<sup>16</sup>

This report, however, does not address the criterion of budgetary limitations, which is something that the Commission has been directed to consider,<sup>17</sup> except to note that the entirety of the Oregon Judicial Department's 2007-09 budget – of which judicial salaries are but a small part (there are approximately 190 judges and over 1,900 judicial branch employees) – is approximately \$359.4 million. The total legislatively adopted budget for this biennium is some \$48 billion. Stated differently, the judicial branch receives less than three quarters of one percent of Oregon's state budget.

Into whomever's hands this report might fall, thank you for your consideration. The facts and discussion that follow truly do speak for themselves. It has been both my personal privilege and an honor to have been asked to lead Oregon's outstanding judicial branch into the 21st century. As a department, as a state, the challenges that we all face are considerable. In contrast, however, our opportunities are boundless. The Oregon Judicial Department has every intention of continuing to provide each Oregonian with responsive, responsible justice; to be the forum of first resort for businesses that seek to have their corporate disputes resolved; to protect children and families alike; and to enhance the safety of the public in all our communities. Please help us as we turn those stalwart intentions into realities.

Respectfully submitted,



Paul J. De Muniz  
Chief Justice

## II. THE QUALIFICATIONS AND WORK OF OREGON'S JUDGES

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### *The Office of the Judge Generally*

Socrates is credited with saying that “[f]our things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially.” Some 2,000 years later, Sir Francis Bacon had this to add: “Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue.”<sup>18</sup> And, nearly 400 years after that, Oregon’s longest serving Chief Justice, Wallace P. Carson, Jr., described the work of Oregon’s judges as follows:

“The Legislative Assembly – or the people through the initiative process – enacts the laws, and the executive and administrative departments enforce those enactments. It is in the convergence of those independent functions of enactment and enforcement that Oregon’s judges do, and have done, most of their work. Although impartial in its adjudications, the judiciary necessarily brings together all aspects of the constitutional, legislative, and regulatory actions that govern the lives of Oregonians.”<sup>19</sup>

For many Oregonians, the convergence to which Chief Justice Carson adverted comes in the form of a court appearance in front of a judge. Whether a simple matter or one of the gravest concern, that appearance – before a man or a woman in a black robe sitting behind a bench on a raised platform – is likely to constitute the most direct, tangible contact that that citizen will have with his or her government. Of the responsibility that goes along with the authority to touch so directly a person’s life, United States Chief Justice John Marshall, who wrote the decision in *Marbury v. Madison* in 1803 that established the power of judicial review, remarked at the sunset of his career:

“\* \* \* [A judge] has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties he should observe the utmost fairness. \* \* \* The judicial department comes home in its effects to every man’s fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? \* \* \* I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or a dependent judiciary.”<sup>20</sup>

### *Judicial Qualifications Generally*

In Oregon, there are less than a handful of legal qualifications that a person must possess to be a state court judge. Those statutory requirements both understate the role of a judge in our society and are reflective of the fact that they were enacted at different periods in our state’s history, which is another way of saying that they are not entirely consistent. Across the board, however, all judges in Oregon must be admitted to the practice of law in this state, which generally means graduating from a three-year juris doctor program at an accredited law school, demonstrating the requisite character and fitness, passing the bar examination, and fulfilling continuing legal education requirements.<sup>21</sup> Although there is a requirement that a person be 18 years of age to apply for admission to practice as an attorney, there is no express minimum age requirement to be a judge. There is, however, a constitutional requirement that judges must retire by the end of the year in which they reach the age of 75.<sup>22</sup>

Additional requirements specific to the different judicial offices are as follows:

- Supreme Court judges must be citizens of the United States and have been an Oregon resident for three years.<sup>23</sup>
- Court of Appeals judges must be electors of their county of residence.<sup>24</sup>
- The judge of the Tax Court must be a citizen of the United States, a resident of Oregon, and have been actively engaged in the practice of law for at least three years.<sup>25</sup>
- Judges of the Circuit Court must be citizens of the United States, residents of Oregon, and, in addition, satisfy other residence-based requirements depending upon their judicial district.<sup>26</sup>

Moreover, for the Supreme Court, the Court of Appeals, and each of the judicial districts in Oregon there is a presiding judicial officer. For the Supreme Court, that officer is the Chief Justice, who is chosen by a majority vote of the Supreme Court judges for a six-year term.<sup>27</sup> (Unlike the Chief Justice of the United States Supreme Court – a seat on the Court that the President nominates and the Senate confirms – the position of Chief Justice in Oregon is not one that the Governor appoints or the people fill by election.) For the Court of Appeals, the presiding judicial officer is the Chief Judge, who is chosen by the Chief Justice in accordance with a statutory procedure for a two-year period.<sup>28</sup> And, for each judicial district, there is a circuit court judge whom the Chief Justice selects to be the presiding judge for the judicial district for a two-year term, again according to a process set out by statute.<sup>29</sup> Presiding judicial officers have added administrative responsibilities and authority; however, only the Chief Justice and the Chief Judge receive additional compensation for holding those positions.<sup>30</sup>

As noted above, the statutory qualifications to be a judge in this state are not, by themselves, consistent with the amount of trust that the public has placed in the hands of a judge or collectively in a court. Those laws instead place a premium on the judgment of the Governor in filling judicial vacancies and in the electors in voting on judicial candidates to select those individuals who will best carry out the judicial function. With but a few exceptions, the executive's and the public's judgment have been sound. Currently, the average age of an Oregon judge is 56, and that person, also on average, will serve out a 20-year career on the bench. Those figures reflect two facts. First, at least to now, we have been able to attract experienced lawyers to the bench. Second, and although as discussed later in this report recent trends are troubling, the decision to forego practice as an attorney for judicial service is almost always a career decision. Serving as a judge, in other words, is usually not intended as a stepping stone towards some later calling.

Finally, it should be noted that, once a person becomes a judge, he or she is subject to the Oregon Code of Judicial Conduct. The code sets strict requirements concerning the conduct of judges on and off the bench, and is enforced by both the Commission on Judicial Fitness and Disability and the Supreme Court pursuant to constitutional mandate.<sup>31</sup> The first requirement in the Code, which is general in nature, is emblematic of the more specific directives that follow:

“A judge shall observe the high standards of conduct so that the integrity, impartiality and independence of the judiciary are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.”<sup>32</sup>

In other words, we expect – and judges by oath are obligated to provide – faithful and impartial judicial service.<sup>33</sup> But when they leave work at the end of the day, they remain judges. As such, they are expected both to be active in and leaders of their communities. Yet, at the same time, judges must conduct themselves in their private affairs so as always to promote the integrity and impartiality of the judicial branch. The judges of this state fulfill their role as community leaders by serving on countless committees and study

groups, speaking to civic groups and our children in their schools about the judicial system, and working with the policy makers at every level to improve the administration of justice in all of our neighborhoods. They provide this vital link between a community and its court while abjuring almost all political activity, while being circumscribed in the nature and extent of their affiliations, and while being unable to answer in any meaningful way criticism of their decisions.<sup>34</sup> The members of Oregon’s judiciary earn their honorific 24 hours a day under challenging, and at times trying, circumstances.

### **An Overview of the Oregon Court System**

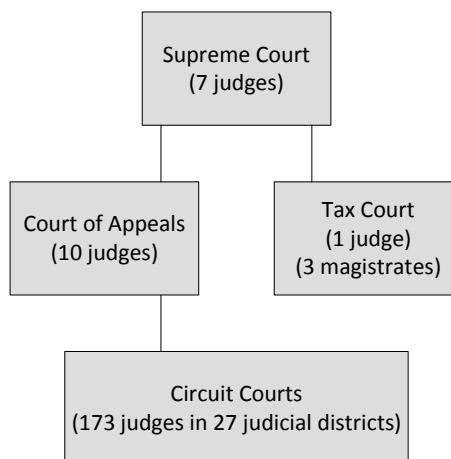
To place the work of Oregon’s judges in context, it is helpful to have a working understanding of the state’s unified judicial system. At a broad level, there are three Oregon courts that are filled by judges who are elected to six-year terms (or appointed by the Governor to fill a judicial vacancy) on either a statewide basis (the Supreme Court, Court of Appeals, and Tax Court) or on a county-wide basis (circuit court judges). (More detailed discussions of each court type and judge follow this section.)

The first level court is the Circuit Court, which is a court of general jurisdiction. The expectation is that almost all legal issues and cases will originate with proceedings before a circuit court judge; those are the courts in which a person or entity generally files her, his, or its case. There are 36 Circuit Courts in Oregon – one for each county – spread across 27 statutorily created judicial districts with less populated counties being grouped together into single districts for administrative purposes.<sup>35</sup> (Also, although in most counties the Circuit Court physically is located in the county courthouse, in a few counties (Multnomah, as an example) the Circuit Court has offices and courtrooms in more than one location.)

The second level court is the Court of Appeals, created in 1969, which is an intermediate appellate court.<sup>36</sup> There is single Court of Appeals in Oregon that is comprised of 10 judges. The Court of Appeals is charged by statute with reviewing judgments entered in circuit court cases and, as well, providing judicial review of certain administrative agency actions.<sup>37</sup> The Court of Appeals is known informally as a case-deciding, or error-correcting court. It manages a high volume docket of appellate and judicial review proceedings, and consistently ranks as one of the busiest intermediate appellate courts in the nation when considering both the number of appeals filed and the number of judges on the court.

Finally, there is Oregon’s third-level court – the state’s court of last resort – which is the Supreme Court. The Supreme Court is generally considered to be a “law-announcing” court, which means that its primary function is to preliminarily examine challenged decisions of the Court of Appeals and decide which of those cases to take up on review for further judicial proceedings. To that extent, and unlike any of Oregon’s other courts, the Supreme Court (with six judges and the Chief Justice) has a certain measure of control over the size of its docket.<sup>38</sup> At the same time, however, the Supreme Court judges also have a substantial, and increasing, number of case types for which they have either direct appellate jurisdiction or original jurisdiction (meaning that the case is first filed in the Supreme Court). Examples of original jurisdiction cases are certain mandamus (which is like an injunction) and habeas corpus proceedings as well as review of ballot titles for proposed referred or initiated measures.<sup>39</sup> Examples of direct appellate review cases are the automatic review that the Oregon Supreme Court gives to any case in which a sentence of death is imposed and judgments on appeal from the Oregon Tax Court.<sup>40</sup>

#### **Oregon Judicial Department Court Jurisdiction Structure**



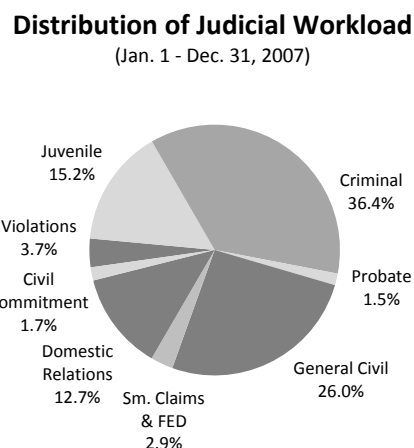
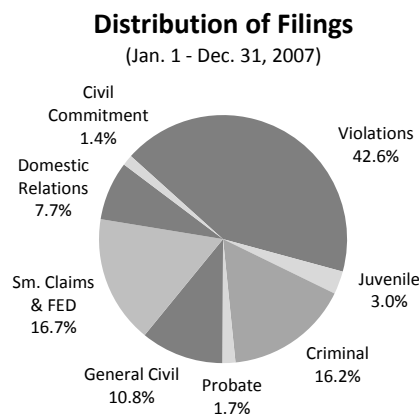
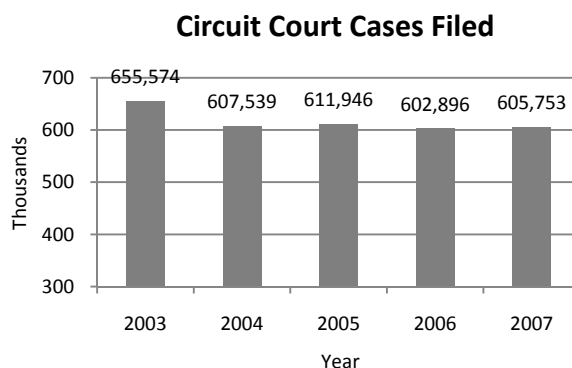
Oregon also has one court of specialized jurisdiction, and that is the Tax Court. Created by the legislature in 1961, the Tax Court is located in Salem and has exclusive jurisdiction over cases that involve Oregon tax laws.<sup>41</sup> In 1995, the legislature added a Magistrate Division to the Tax Court, which now provides the first level of tax dispute review. Following a decision from the Magistrate Division, a disappointed litigant may seek a new trial before the Tax Judge. So, in the context of tax cases, the Tax Court judge acts both like a Circuit Court judge and a one-judge appellate court. As noted, appeals from the Tax Court judge (which is called the Tax Court's Regular Division) are taken directly to the Supreme Court.<sup>42</sup>

### 1. The Work of Oregon's Circuit Court Judges

On any given day, a judge of one of Oregon's circuit courts reasonably can expect to issue rulings in criminal cases, civil cases, cases involving the commitment of individuals alleged to be mentally ill, family abuse restraining order proceedings, traffic and other violation cases, probate matters, juvenile dependency and/or delinquency proceedings, probation revocation matters, and a host of other types of cases. They construe statutes, interpret the state and federal constitutions, develop the common law, review administrative rules and municipal ordinances, judge the credibility of witnesses appearing before them, and exercise the discretion with which they have been entrusted. Circuit court judges are generalists in the truest sense of that term, and their rulings regularly must be made during the heat of trial or hearing and often without the benefit of extended consideration.

For the litigants involved in those myriad proceedings, there is often no more important decision that will be made concerning their liberty and property than the decision handed down by a circuit court judge. Those judges deal with domestic violence, the termination of a parent's rights over his or her child, whether and under what circumstances a person accused of crime will be released into the community, the number of years that a convicted felon will spend in prison, the fate of businesses, compensation for victims of personal injury, and the transfer of untold millions of dollars resulting from litigation. They make hundreds of decisions a week and thousands a year, any one of which can appear to be correct at the time and later prove to have grievous consequences.

Those are the parts of a circuit court judge's job that are likely to catch the attention of the media and the public generally. Of almost no mass interest are the bulk of cases that make up a circuit court judge's daily work: presiding over a small claims case between neighbors, ensuring that the defendant in a misdemeanor criminal case really understands the rights that he or she is foregoing by pleading guilty; performing a marriage during the lunch hour or issuing a search warrant at 10:00 p.m.;





listening to the full story of the dispute between a landlord and tenant in an eviction case; and the list goes on. A former judge of the Pennsylvania court of common pleas, that state's general jurisdiction court, once wrote:

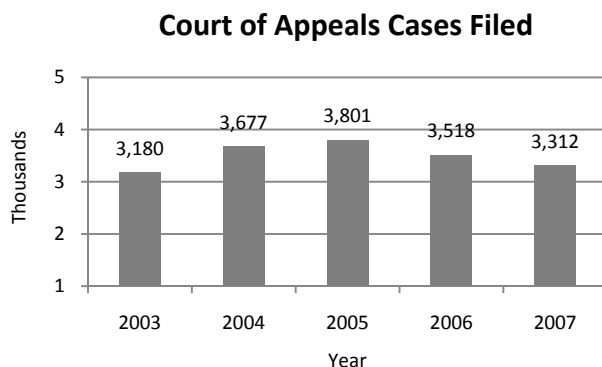
“[T]he secret of a judge’s work is that ninety-nine percent of it is with trivial matters, and that none of them will shake the cosmos very much. But they are apt to shake the litigants gravely. It is only in [a judge’s] power over people that makes them treat [the judge] as a demi-god, for government touches them more perceptibly in the courtroom than at any other point in their lives.”<sup>43</sup>

That is the work of a circuit court judge.

## 2. The Work of Oregon’s Court of Appeals Judges

Everything that a circuit court judge does, a Court of Appeals judge reviews. But there is more. The Court of Appeals considers not only appeals from the circuit courts, but as well judicial review proceedings challenging the actions of Oregon’s administrative agencies. Such challenges can be to rules that an agency has adopted or to decisions that an agency makes in a contested case.<sup>44</sup> (Administrative agencies are part of the executive branch of state government.) The judges of Oregon’s intermediate appellate court, therefore, must be expert not only in matters of civil and criminal law, but administrative law as well.

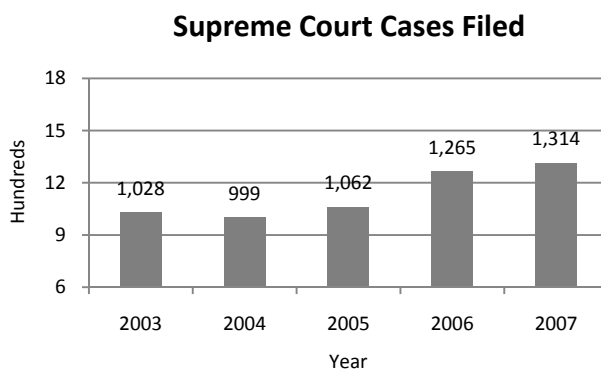
Moreover, there are other courts in Oregon that fall outside the state court system, such as municipal courts, county courts (in a few jurisdictions), and justice courts (whose judicial officers are justices of the peace). For the most part, appeals from decisions in those cases also come to the Court of Appeals. It is likely that each of the 10 Court of Appeals judges participates in the decision of over 1,000 fully briefed cases every year.



## 3. The Work of Oregon Supreme Court Judges

The Supreme Court sits at the apex of Oregon’s judicial system and, as noted above, is responsible for selecting a substantial number of the cases that it decides each year. The criteria that the court has established to guide that selection process put a premium on whether the case is “important” in the sense that it involves the legality of an important governmental action, affects many people, or is significant to the public even if the issue involved does not arise often.<sup>45</sup> The judges of the Supreme Court spend most of their time reading legal arguments, listening to oral argument, and writing judicial opinions on the most significant questions of law in the state, questions that often involve the meaning of the Oregon Constitution.

A less heralded role of the Supreme Court concerns its assignment of significant regulatory responsibilities relating to the administration of Oregon’s judicial system. The court, for example, is responsible for appointing, among other positions, pro tempore and senior judges, members of the Board of Bar Examiners (lawyer admission), and members of the Disciplinary Board (lawyer discipline).<sup>46</sup> The Supreme Court also has substantial rulemaking responsibilities. The court reviews and approves, among others, amendments to the Rules



of Professional Conduct (lawyer ethics), the Rules of Appellate Procedure, the Rules for Admission of Attorneys, the Oregon State Bar Rules of Procedure, and the rules governing Mandatory Continuing Legal Education for Oregon lawyers.<sup>47</sup>

The administrative and regulatory elements of the court's workload fall most heavily on the Chief Justice, who, in addition to managing the Supreme Court, is the administrative head of the entire Oregon unified court system. As such, the Chief Justice is responsible for appointing the Chief Judge of the Court of Appeals, the presiding judges for each of Oregon's 27 judicial districts, and the State Court Administrator. The Chief Justice also approves the unified biennial budget for the operating expenses of all the state courts.<sup>48</sup>

#### **4. The Work of Oregon's Tax Court Judge**

The Oregon Tax Court is one of only three state tax courts in the United States. As noted above, the state-wide position of Tax Court judge is something of a hybrid between a trial court and an appellate court judge. Moreover, the Tax Court judge acts as the presiding judge of the court with administrative responsibilities regarding the court's operations and its staff. Perhaps more than any other judge in Oregon, the statutory requirements for service do not adequately capture the true qualifications needed to be an effective judge in this highly specialized area of law. Oregon's current Tax Court judge, Henry Breithaupt, for example, worked for 26 years as a tax and business lawyer at one of Portland's premier law firms before taking the bench in June 2001.

### **III. JUDICIAL COMPENSATION IN OREGON**

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As noted in the introductory message accompanying this report, there is a constitutional dimension to judicial compensation in Oregon in that a judge's salary may not be reduced during his or her term of elected office.<sup>49</sup> And, although the Oregon Supreme Court has assumed – as courts in other states have held – that the judicial branch has the inherent authority to order minimum levels of funding to sustain the core functions of the judicial branch, the Oregon Supreme Court has never had occasion either to expressly adopt or to invoke that power.<sup>50</sup> In that respect, Oregon is different from states such as New York, in which there is currently ongoing litigation involving at least three separate lawsuits, including one brought by the chief judge of New York's highest state court, concerning the issue of judicial compensation.<sup>51</sup>

In Oregon, however, it remains that there exists no mechanism for the periodic adjustment of judicial salaries to keep up with inflation or otherwise. Instead, the political branches of our state government, the Legislative Assembly and Governor, are responsible for setting the salaries that judges receive. Moreover, and going back for a substantial period, those branches have acted without the benefit of a body such as the Public Officials Compensation Commission to provide recommended salaries based on objective, apolitical criteria. That system almost naturally has led to judges in this state receiving only sporadic adjustments in compensation, adjustments that almost invariably come after long periods of stagnation and that, consequently, are usually inadequate even by the time of enactment.

Set out below are two graphics. The first shows current judicial salaries following the substantial adjustments enacted in 2007 and phased in during 2007 and 2008. That chart also shows the relationship between the salaries paid to the different state judicial officers. Below that is a graphic representation of judicial salaries since 1978 as compared to inflation. Although a steep increase in pay in the mid-1980s (after a long period of nearly flat salaries) brought Oregon's judges closer to where they should have been in terms of spending power, we have been losing ground ever since. Moreover, unlike many other public employees, judges do not receive step salary increases over time. A Multnomah County Circuit Court judge completing her fourth term on the bench and with nearly a quarter century's worth of judicial experience earns the same

salary as a newly appointed judge in Lane County or a circuit court judge with 10 years on the bench in Malheur County.

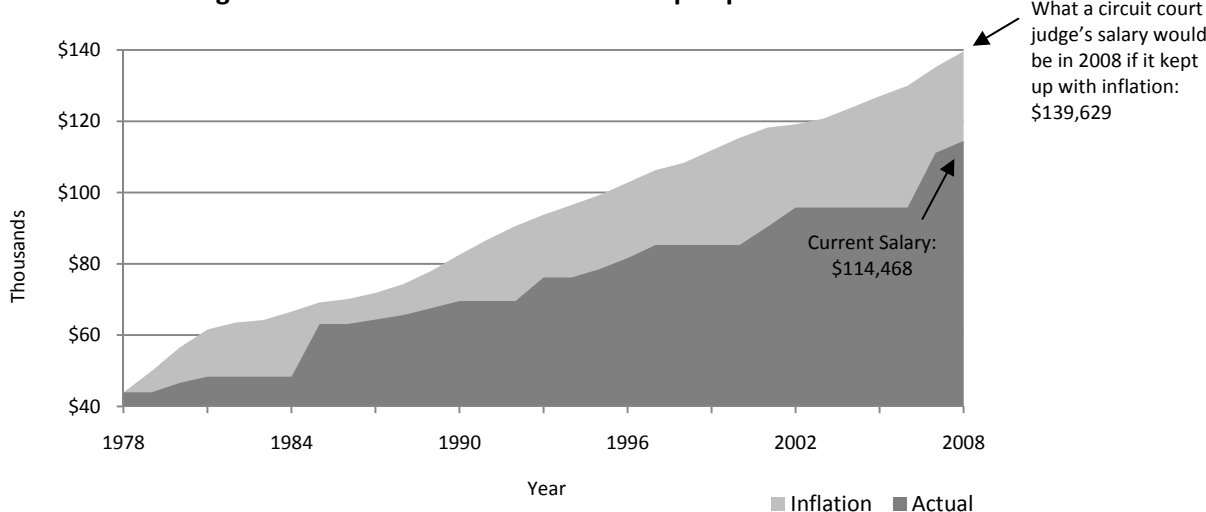
It also should be noted that, as with many other positions of employment, judges receive certain benefits in addition to their salaries. As an example, for a judge who elects to receive insurance coverage, the Oregon Judicial Department pays premiums ranging from approximately \$790 to \$1,190

per month (which includes vision coverage) on a judge’s behalf. Moreover, there also is the judges’ version of the state retirement plan. A full discussion of the plan, its requirements, and its benefits is beyond the scope of this report. Briefly, however, judges are required to contribute seven percent of their monthly salaries to the Public Employees Retirement Fund (PERS); however, by statute, the state is required to pay (or “pick up”) that contribution.<sup>52</sup> Eligible judges can retire either under Plan A, which provides a maximum pension of 65% of final average salary, or under Plan B, which provides a maximum pension of 75% of final average salary.<sup>53</sup> However, to retire under Plan B, a retired judge must provide the state with 35 days – or nearly two months – of free judicial service each year for five years after retirement.<sup>54</sup> Over the last decade, the Judicial Department’s annual contribution to the judges’ retirement fund, which is set by the PERS Board based on actuarial considerations, was as low as 10.49% of salary and as high as 25.7%. Finally, there are a few incidentals that judges indirectly receive, such as OJD payment of their Oregon State Bar dues (approximately \$480 per year), an allowance of up to \$300 annually for membership in groups relating to the judiciary (such as the American Bar Association, the American Judges Association, and the National Judges Association), and up to \$300 for the cost of a judge’s ceremonial robe together with the costs of cleaning and care.

**Current Oregon Judicial Salaries** (together with salary and percentage comparisons against next lower-paid judge position)

Judicial Position	Annual Salary	Salary Difference	% Difference
Chief Justice	\$128,556	\$2,868	2.28%
Supreme Court Justices	\$125,688	0	0%
Chief Judge	\$125,688	\$2,868	2.34%
Court of Appeals Judges	\$122,820	\$4,656	3.94%
Tax Court Judge	\$118,164	\$3,696	3.23%
Presiding Judges	\$114,468	0	0%
Circuit Court Judges	\$114,468	baseline	baseline

**If Oregon's Circuit Court Judicial Salaries Kept Up With Inflation**



Last year, the Task Force for Judicial Excellence made two recommendations. First, it recommended that the salaries paid to circuit court judges be adjusted to at least \$125,000 per year, with the judges on Oregon’s other courts receiving comparable adjustments. Second, the Task Force called for the creation of a commission with the power to recommend salaries and cost-of-living adjustments for public officials, including judges, that would become effective unless the legislature affirmatively acted to modify or abrogate them.<sup>55</sup>

Respecting the latter, the Legislative Assembly responded by reactivating and revitalizing the Public Officials Compensation Commission. Although the Commission’s recommendations are not self-executing absent legislative intervention, as the Task Force had recommended, the Oregon’s judiciary views the re-emergence of the Commission as the most significant of the legislature’s two responses. In an environment in which politics controls, the judiciary is bound to suffer or remain constantly at risk. The work of the Commission needs to be continued, its membership respected for their deliberations, and its recommendations given proper weight and acknowledgment.

Respecting the first part of the legislative response, the salaries themselves, even with the 2007 and 2008 adjustments, the compensation received by a circuit court judge today is more than \$10,000 less than the Task Force recommended a year and a half ago. Realistically, any adjustments made in the 2009 legislative session most likely would take effect sometime in January 2010. To ensure that Oregonians are able to continue to receive responsive, responsible justice in this state, the judicial branch will once again be calling for a substantial, unpopular as viewed by some, adjustment in the compensation paid to its judges. Remembering that any increase in salary likely will not commence until 2010 and that the Task Force report suggests that current judicial salaries are inadequate as of two years ago, the 2009 adjustments should be both meaningful and become effective immediately rather than phased in over the course of the next biennium. As discussed below, that level of action will do no more than to continue the effort begun last year to put Oregon’s judges on a par with the salaries paid to judges both across the country and in the western United States as well as the salaries paid to other public officials, both inside and outside the legal profession, who are charged with significant governmental responsibility.

#### **IV. ANALYTICAL COMPARISONS OF OREGON JUDICIAL SALARIES**

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##### ***Judge-to-Judge Comparisons***

##### **1. Against Judicial Compensation in Others States (a National Comparison)**

At the time that the Task Force for Judicial Excellence submitted its report on judicial compensation, approximately a year and a half ago, the salaries paid to Oregon’s judges ranked at or near the bottom when compared to judges across the nation. It is reasonable to ask where Oregon judges rank nationally today, following the legislature’s layered judicial salary increases in mid 2007 and mid 2008. The answer, as the figures set out below demonstrate, is not much better. Time marches on, not just for Oregon, but for all the states. And, as salaries were being adjusted for the first time in Oregon in a long time, so too were they being adjusted in other states. Hamilton, as it turns out was right when he suggested that, systemically, it is difficult to maintain a fully functioning judiciary when the courts’ “pecuniary resources” are dependent upon only “the occasional grants” from the legislative power.<sup>56</sup>

<b>Oregon’s Rankings (Early 2007)</b>		<b>Oregon’s Rankings (Today)</b>	
<b><i>Circuit Courts:</i></b>	50 out of 51*	<b><i>Circuit Courts:</i></b>	44 out of 51
<b><i>Tax Court:</i></b>	3 out of 3	<b><i>Tax Court:</i></b>	3 out of 3
<b><i>Court of Appeals:</i></b>	38 out of 39**	<b><i>Court of Appeals:</i></b>	36 out of 39
<b><i>Supreme Court:</i></b>	50 out of 51 <sup>57</sup>	<b><i>Supreme Court:</i></b>	43 out of 51

\*The figure includes the District of Columbia.

\*\*Only 39 states have intermediate appellate courts.

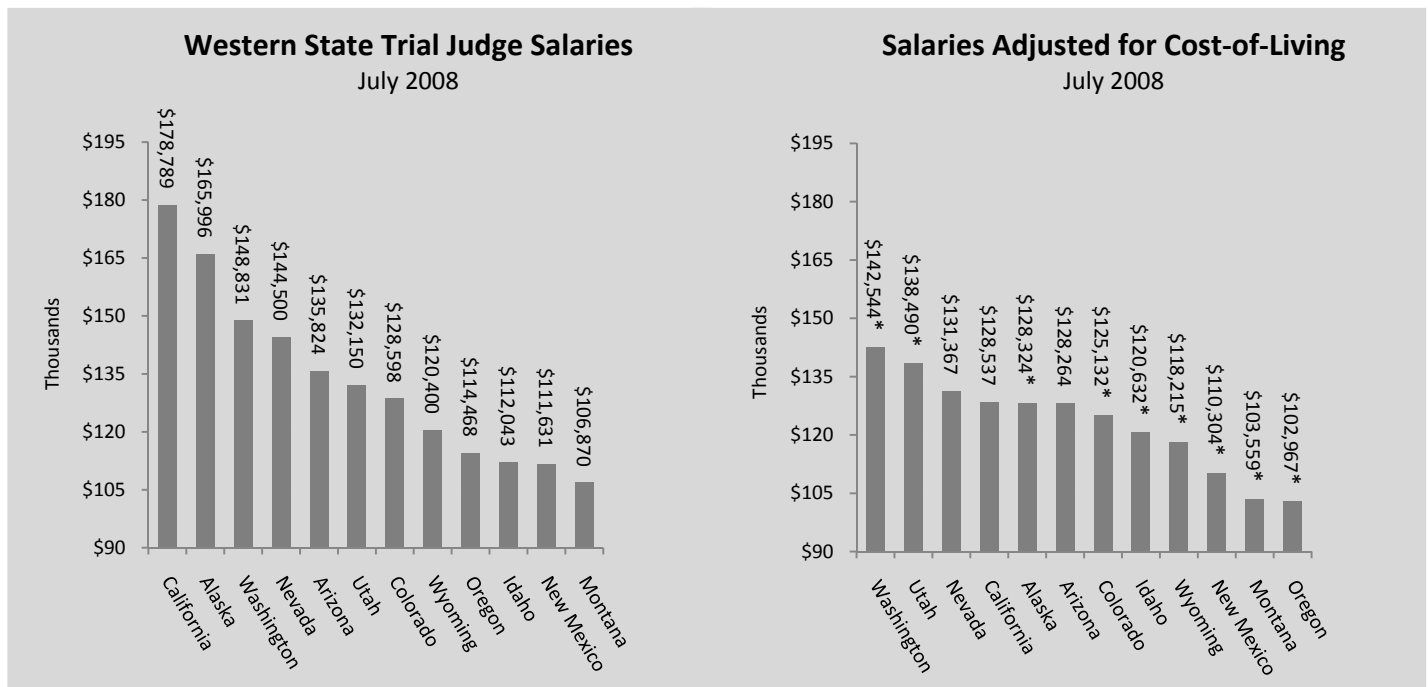
(A copy of the data used to derive Oregon’s current rankings is attached to this report as Addendum No. 1.)

## 2. Against Judicial Compensation in Other States (a Western States Comparison)

What the figures above show is that the situation that the Oregon court system faced in 2007 was a severe one. The response of the legislature and Governor was substantial, appreciated by the third branch, and necessary for all Oregonians. The effect of that response was to take the Oregon Judicial Department out of the bottom of the basement of judicial salaries and to begin to move Oregon toward a comparative ranking that reflects the size of this state, the number and complexity of its cases, and the work of its judges. Moving from 50<sup>th</sup> in the country to 43<sup>rd</sup> or 44<sup>th</sup> is a significant start, but only a start nevertheless. If the issue of judicial salaries once again is permitted to fall off the legislative radar, then it will be only a period of a few short years before Oregon once again is viewed nationally as the state that is willing to pay its judicial officers the least.

Those figures tell the story in only the broadest of terms. Just as the people of this state do not expect to pay their judges a salary commensurate with partner-level earnings at major law firms, neither would they sanction judicial salaries meant to keep pace with the salaries of many of the judges in the northeastern United States. Oregon is not New York, Pennsylvania, or Virginia. And, while that is not to say that the work of the judges in this state is any less significant than the work of the judges in those states, general salary expectations in our two regions simply are different. A more meaningful discussion about judicial compensation can be had when looking at where Oregon judicial salaries fall when compared against the salaries paid to the judges who work in our neighboring western states.

Set out below is a graphic representation of how the salary of an Oregon Circuit Court judge (chosen because circuit court judges represent by far the largest category of Oregon judge and the greatest fiscal impact with respect to salary) compares with the salaries of judges in general jurisdiction courts in the other western states. (A copy of the data showing the same information and including information about Supreme Court and Court of Appeals judges is attached as Addendum No. 2.)



\*The cost-of-living adjustments were provided by the National Center for State Court's 2008 Survey of Judicial Salaries (Vol. 33, No. 1). Since that publication, nine of the states have enacted judicial salary increases: Alaska, Colorado, Idaho, Montana (effective July 1, 2009), New Mexico, Oregon, Utah, Washington (effective September 1, 2008), and Wyoming. The above charts include those increases. New cost-of-living adjustments were calculated by applying the percentage adjustments used in the 2008 Survey of Judicial Salaries to the increased judicial salaries.

When compared against the same information collected by the Task Force for Judicial Excellence in early 2007, it is apparent that Oregon’s movement on the scale of judicial compensation in the western United States has been limited. Whereas in 2007 Oregon was ranked second from last based on salary alone, today it ranks fourth from last. And whereas Oregon was 12<sup>th</sup> on a list of 12 when considering the cost of living in this state, it remains in last place today.<sup>58</sup> (Note that the graphic above does not include Hawaii as one of the western states. Including Hawaii would put Oregon at 10<sup>th</sup> out of 13 states based solely on salary and 13<sup>th</sup> out of 13 states when accounting for cost of living. See Addendum No. 2 (containing Hawaii judicial salary information).)

Finally, there is the matter of comparing states when retirement systems are taken into account. Even a cursory analysis of Oregon’s public employee and judicial retirement systems is a complicated endeavor. Multiplying that analysis comparatively across a dozen other jurisdictions is exponentially more difficult. To cut through those difficulties, let us take the issue at its most basic, least-informative, and least-favorable level: simply adding the seven-percent state pick-up to the salary of an Oregon circuit court judge. (Such an analysis neither accounts for what other states provide for their judges nor gives any value to the 175 days of judicial service that Oregon’s Plan B senior judges provide while, at the same time, fails to capture the total obligation of the Oregon Judicial Department to contribute to PERS on behalf of its judges.) Even under a rudimentary comparison, adding seven percent to the compensation that the judge of an Oregon Circuit Court receives would yield an adjusted salary of \$122,481, which would move Oregon up only one position – slightly above Wyoming and well under Colorado.

### 3. Against Judicial Compensation for United States Judges (a Federal Comparison)

To complete the comparison of Oregon judicial salaries against those of other judges, mention should be made of the compensation that judges in the United States judicial system receive. More important than actual compensation – notwithstanding that all judicial work is important work, there seems little dispute but that federal judges properly should receive the highest judicial salaries – is that for at least the last eight years federal judges have been receiving modest but fairly regular salary increases.

#### Salaries for Federal Judicial Branch Officers<sup>59</sup>

Year	2001	2002	2008	2004	2005	2006	2007	2008
Chief Justice	\$186,300	\$192,600	\$198,600	\$203,000	\$208,100	\$212,100	\$212,100	\$217,400
Associate Justices	\$178,300	\$184,400	\$190,100	\$194,300	\$199,200	\$203,000	\$203,000	\$208,100
US Courts of Appeals Judges	\$153,900	\$159,100	\$164,000	\$167,600	\$171,800	\$175,100	\$175,100	\$179,500
Federal District Judges	\$145,100	\$150,000	\$154,700	\$158,100	\$162,100	\$165,200	\$165,200	\$169,300

Nevertheless, and as noted above with respect to Chief Justice Robert’s 2006 Year-End Report on the Federal Judiciary, the issue of the erosion of federal judicial pay continues to be a serious one. And the consequences of the resolution of that issue to United States citizens in the federal courts are the same as those facing Oregonians in our state courts. As in Oregon (discussed later in this report, *infra* at 17 - 18), there has begun an exodus from the bench. The late Chief Justice William Rehnquist noted in testimony before the National Commission on the Public Service in 2002 that more than 70 federal judges had retired or resigned from judicial service in the 12 years between 1990 and 2002 whereas only a handful of judges had left the bench during the 1960s.<sup>60</sup> Similarly to Oregon as well has been a shift in the prior experience of our federal judges. At the federal level during the 1950s, the balance was struck at roughly 65% - 35% in favor of prior private sector versus prior public sector employment experience. Now, however, the federal ratio is 60% public sector versus 40% private sector.<sup>61</sup> (The balance in Oregon is more uneven than that. See *infra* at 18.) And, finally, federal judicial pay today is only about half of what is paid to the deans and top faculty at our nations leading law schools; in 1969, a federal district judge was paid 21% more than those deans and 43% more than senior faculty.<sup>62</sup> (See *infra* at 15 - 16 for similar data in Oregon.)

In its January 2003 report on federal public official compensation, the National Commission on the Public Service reported that the average salary of a dean at one of the top 25 law schools in the nation was at that time \$301,639. The average base salary for a full professor at those schools was \$209,571, excluding summer stipends of as much as \$80,000.<sup>63</sup> At that time, federal judicial pay was \$150,000 annually. Having noted that “[j]udicial salaries are the most egregious example of the failure of federal compensation policies,” the Commission went on to conclude that

“[t]he lag in judicial salaries has gone on too long, and the potential for diminished quality in American jurisprudence is now too large. Too many of America’s best lawyers have declined judicial appointments. Too many senior judges have sought private sector employment – and compensation – rather than making the important contributions we have long received from judges in senior status.

“Unless this is revised soon, the American people will pay a high price for the low salaries we impose on the men and women in whom we invest responsibility for the dispensation of justice. We are not suggesting that we should pay judges at levels comparable to those of the partners at our nation’s most prestigious law firms. Most judges take special satisfaction in their work and in public service. The more reasonable comparisons are with the leading academic centers and non-for-profit institutions. But even those comparisons now indicate a significant shortfall in real judicial compensation that requires immediate correction.”<sup>64</sup>

### ***Judge-to-Attorney/Public Official Comparisons***

As the foregoing discussion suggests, even though at first blush it may appear as though comparing the salaries of judges in Oregon to the salaries of judges elsewhere is to weigh apples against apples, the inquiry is a complex one. Removing that a step further by comparing judicial compensation across other legal professions and other positions of high-level public employment becomes even more difficult. The well-used anecdote about the man who drowned while crossing a stream with an average depth of six inches, a favorite of former Chief Justice Carson’s, may be appropriate to keep in mind in considering the data that follows:

For example, it is the case that some of the best and brightest of Oregon’s **first-year** lawyers are earning private sector salaries that either exceed or are close to what circuit court judges in this state are paid. We, however, want our best and brightest **veteran** lawyers taking the bench. And it is also the case that our best and brightest veteran private sector lawyers -- partners in law firms, successful solo practicing attorneys, and in-house corporate counsels -- make on average substantially more than any judge in this state receives as a salary. The bench, however, has been, and always should remain, a calling. Finally, there is the compensation received by experienced public lawyers and by other state and local public officials charged with significant societal responsibilities, which perhaps provides a more accurate indicator of the true public value of judges in our system of government.

Starting with the relatively poor analog of first-year associate salaries, there now are at least nine law firms in Oregon (all in the Portland area) that pay their first-year lawyers more than \$100,000 per year. The highest of those salaries is \$125,000 – or more than \$10,000 per year than a circuit court judge in this state presently earns – the lowest is \$105,000.<sup>65</sup> The average annual salary currently being paid by those firms to its new lawyers of promise approaches \$113,000, or just slightly less than what Oregon pays its general jurisdiction court judges.

Moving to the earnings of more senior lawyers in private practice, the quality of the data becomes much less reliable. While a large law firm hoping to compete nationally or regionally for the most eligible law school graduates will be willing if not eager to publicize its first-year associate salaries, partner earnings are

largely proprietary. Nevertheless, a Philadelphia-based legal management firm reported in August 2007, based on data collected for 2006, that median profits-per-partner were \$307,740 in 2006 with non-equity partners at the firms surveyed earning \$200,135 in total compensation.<sup>66</sup> Those earnings were the product of billing rates, the median of which was \$375 per hour for firms with more than 150 lawyers and \$250 per hour for firms with 9-20 lawyers.<sup>67</sup>

In Oregon, a 2007 study commissioned by the Oregon State Bar reported that the average 2006 salary of a lawyer at a Tri-County law firm of more than 60 lawyers was \$212,932, with the 95<sup>th</sup> percentile of that group at \$675,000 and the 75<sup>th</sup> percentile at \$277,500 annually; the median was \$167,500.<sup>68</sup> However, simply because an attorney is a top earner at one of the Portland area's largest law firms does not mean that he or she is well-suited for the bench. The inquiry is more complicated than that, and, for that reason among others, caution should be exercised before attempting to read too much into self-reported data. Nevertheless, that is the best data available, and additional extracts from the Oregon State Bar's survey are set out below.

Those numbers tell us what everyone assumes to be the case. Experienced lawyers in private practice in this state – particularly those who are litigators, which is the career path that most often leads to a judicial position working in a courtroom setting – earn well in excess

of the salaries paid to Oregon's judges. That will always be the case. What is more striking is that whether fresh out of law school or with 30 years' experience; whether practicing on the coast, along the I-5 corridor, or in central or eastern Oregon; whether in private, non-profit, or government service; and whether working alone, in a small partnership, or in a large firm – the average Oregon lawyer makes several more thousand dollars a year than we are willing to pay our circuit court judges. The foregoing notwithstanding, the public should become concerned, and policy makers should begin to act, when the gap between private sector earnings and public pay becomes so pronounced that our top experienced lawyers are foregoing judicial service because they cannot afford it either for themselves or for their families. As discussed later in this report, that now appears to be the case in Oregon.

Finally for comparison are the salaries paid to high-level public lawyers in the executive and legislative branches of government as well as public officials in the executive branch with substantial authority and responsibilities. In that regard, the Task Force for Judicial Excellence in its 2007 report listed the salaries (or average or top salaries) for 25 public lawyers and officials in Oregon. At that time, all those lawyers and civil servants earned more than the then-current circuit court judge salary of \$95,800.<sup>69</sup> Today, a year and half later, even using those early 2007 salaries, 19 of those 25 positions still earned more than circuit court judges currently earn now:

### Selections from the OSB's 2007 Economic Survey

	<i>Average</i>	<i>Median</i>
All Lawyers	\$116,727	\$90,000
All Private, Full-Time Lawyers	\$139,558	\$105,000
All Corporate In-House Counsel	\$145,154	\$120,000
All Plaintiffs' Personal Injury Lawyers	\$163,169	\$120,000
All Civil Litigators (but not insurance defense)	\$169,528	\$140,000
All Business/Corporate Litigators	\$181,583	\$145,000
All Portland Lawyers with 16-20 Years' Oregon Experience	\$179,449	\$125,000
All Portland Lawyers with 21-30 Years' Experience	\$203,616	\$150,000
Business/Corporate Litigators in Portland	\$210,292	\$165,000

### Comparison of Salaries Among Oregon's Public Attorneys and Officials<sup>70</sup>

<i>Selected Department of Justice Officials (top pay)</i>	<i>Early 2007 Salary</i>
Deputy Attorney General	\$120,192
Associate Attorney General	\$109,128
Division Administrators	\$109,128
Special Counsel	\$109,128
<i>Selected District Attorneys and Deputy District Attorneys</i>	
Multnomah County District Attorney	\$139,500
Multnomah County Deputy District Attorney	\$132,257 (top pay)



Clackamas County Deputy District Attorney	\$116,892 (top pay)
Douglas County District Attorney	\$116,217
Deschutes County District Attorney	\$115,977
Marion County District Attorney	\$114,303
Clackamas County District Attorney	\$110,364
<b>Other Selected Public Lawyers</b>	
University of Oregon General Counsel	\$156,000
Oregon State University General Counsel	\$137,568
Multnomah County Counsel	\$135,099 (top pay)
Oregon State Bar Disciplinary Counsel	\$125,985 (top pay)
Legislative Counsel	\$122,424 (top pay)
Port of Portland Assistant General Counsel	\$119,853 (average)
City of Portland Chief Deputy City Attorney	\$112,528 (average)
<b>Selected Public Officials</b>	
President of Portland Community College	\$182,988
President of Chemeketa Community College	\$166,000
Executive Director of the Oregon State Bar	\$159,000
President of Central Oregon Community College	\$156,019
President of Clackamas Community College	\$152,988
Administrator of Clackamas County	\$144,744
Administrator of Legislative Assembly	\$122,424 (top pay)
<b>CURRENT Circuit Court Judge (as of July 1, 2008)</b>	<b>\$114,468</b>

There are currently well over one hundred county and municipal employees in this state – from Beaverton to Medford and from Salem to Bend – who earn more than \$115,000 annually. Looking, as the National Commission on the Public Service has suggested, to our leading academic centers only underscores that the important work of Oregon’s judges has become undervalued. In addition to the data set out above, The Oregonian recently reported that the following will be the salaries of the presidents of some of our state universities:

<b>Academic Institution</b>	<b>President’s Salary</b>
<i>University of Oregon</i>	\$444,960
<i>Oregon State University</i>	\$425,700
<i>Portland State University</i>	\$350,000
<i>Eastern Oregon University</i>	\$192,000
<i>Western Oregon University</i>	\$190,020
<i>Southern Oregon University</i>	\$185,430 <sup>71</sup>

Moreover, the dean of Oregon’s only public law school, the University of Oregon School of Law, has a salary of \$233,372. The highest paid law professor at that school makes \$168,988 for a nine month appointment. (By contrast, the current salary of the Chief Justice of the Oregon Supreme Court is \$128,556. As noted, the Chief Justice is not only the presiding judge of the Supreme Court, but also the administrative head of the Oregon Judicial Department overseeing more than 1,900 employees and a \$359.4 million budget. The Chief Justice’s salary is only 55% of the dean’s salary at the University of Oregon School of Law.)

Educating our young adults is of vital importance to the growth and vitality of this state. But so is ensuring that our communities are safe, that the economic engines that employ our citizenry have a reliable and speedy forum for the resolution of their disputes, that families and children are protected, and that the constitutional and statutory rights of those who come against the government are respected. Presumably the state university system pays its presidents and deans only those salaries that are necessary to attract capable leaders. Too little, and the people will know; too much, and the people will know. The same should hold true for our less visible judiciary. As set out below, the indicators are now suggesting that the judicial system is losing its alignment.

## V. THE EFFECTS OF INADEQUATE JUDICIAL COMPENSATION

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To repeat what has been stated earlier, Oregon has a strong judicial system that is comprised of capable, hard-working judges. But the challenges that the information age is presenting to courts across the county cannot be ignored. Litigation is becoming more complex because society is becoming more complex. We need not only today, but tomorrow as well, the best and brightest lawyers with a wide spectrum of experiences to assume – and to maintain – positions of judicial responsibility. No judge reasonably can or should expect to receive compensation that will match what can be earned in the private sector or even by a university president. At the same time, however, and for its own benefit, the public should be prepared to pay judges a salary commensurate with the important work that they perform and that will help to ensure that the individuals we want deciding society’s important questions go on, and stay on, the bench. In Oregon, issues on both of those fronts are beginning to arise.

### *The Loss of Experienced Judges*

There is the familiar adage that “with age comes wisdom.” For many people, the classic conception of a judge is someone both bespectacled and gray-haired. And there can be no doubt that, as with almost every professional calling other than perhaps sports, judges become “better” with experience. The law is a mosaic, and the more tiles that a judge can add to the background over time, the clearer the representation becomes. Almost no judge when first taking the bench, no matter the breadth of his or her prior experience, has a full and complete understanding of the entire range of legal subjects upon which that judge will be asked to rule. With judges routinely being required to decide the fates of people’s lives, their businesses, their children, Oregonians have a right to expect that, on the day of the decision in their case, the judge’s view of the legal mosaic will be clear and fully developed.

In Oregon, however, an alarming trend has begun to appear. Judges in this state are leaving the bench well in advance of our constitution’s mandatory retirement age of 75. In fact, and in significant numbers, they are beginning to retire or resign from judicial service even before reaching 65, the generally accepted age for retirement. Many are now changing careers – often for the lucrative business of private dispute resolution and mediation – in their late 50s. Although judges in Oregon, unlike their federal counterparts, do not have lifetime tenure, the decision to transition from law practice to a judicial career is generally just that: a career-focused decision. In light of the benefit that experience provides, the 15 years between age 60 and mandatory retirement often prove to be the most valuable period that a judge serves. We want, and Oregonians should be able to reasonably expect, that it is veteran judges who will be deciding the most difficult questions that come before the courts.

The data set out below provides two snapshots: a three and one-half year period beginning in 1995 and the same period beginning in 2005. As an initial matter, there were 15 more retirements during the period from this decade than the period during the 1990s (38 versus 23). More significantly, however, is the substantial increase in the number of judges who are retiring or resigning before age 60. During the 1990s, a period that most likely also reflects what had been occurring before then, judges very seldom left judicial service before reaching their 60th year. Indeed, even the number provided below for 1995 through mid 1998 – five judges – should be clarified to note that two of those judges resigned their state court judgeships to accept federal judicial positions: Judge Ann Aiken, to become a judge on the United States District Court for the District of Oregon (February 4, 1998); and Judge Susan Graber, to become a

#### **Trends in Judicial Retirements in Oregon**

<i>Period</i>	<i>Age 60 or Under</i>	<i>Age 61 - 65</i>	<i>Age 65 or Over</i>	<i>Total</i>
2005 to 5/30/2008	20	9	9	38
1995 to 5/30/1998	5	7	11	23

judge on the United States Court of Appeals for the Ninth Circuit (March 19, 1998). The average age of retirement for an Oregon judge is now 62.

Knowing that judges are leaving the bench earlier does not answer the question of why they are doing so. Individual circumstances, of course, vary. It remains, however, that work as a judge is demanding intellectually, psychologically, and in terms of the hours kept; that judicial salaries in Oregon have not kept up with inflation, salaries paid to state court judges across the country, or judicial salaries in neighboring states; that alternative dispute resolution (both mediation and arbitration) has grown dramatically in the past decade; and that, from the mediator's or arbitrator's standpoint, the work is lucrative (It is not uncommon for lawyers acting as mediators or arbitrators to charge their regular hourly rate. According to the Oregon State Bar, the average hourly rate for an Oregon lawyer in 2007 was \$213; the average billing rate for a Portland-based business/corporate litigator was \$283.<sup>72</sup> An arbitrator devoting only 20 hours a week at \$200 per hour would need to work only 30 weeks a year to eclipse by over \$5,000 the current annual salary of a circuit court judge.). It would be difficult to maintain that no nexus exists between judicial salaries and what is becoming an exodus from the bench.

### ***The Loss of Part of the Judicial Applicant Pool***

Just as the diversity of our state is reflected in the myriad parties and cases that come before the courts, so too should a diversity of background and experiences be reflected in the judges deciding those cases. Salary impacts that consideration. In addressing the problem of judicial compensation at the federal level, United States Supreme Court Chief Justice John Roberts recently noted that courts will not be able to fulfill their constitutional role if judgeships realistically are available to only those lawyers who either are independently wealthy or for whom the judicial salary represents a pay increase.<sup>73</sup> He also noted that, today, some 60 percent of federal judges come from the public sector whereas, during the 1950's, only 35 percent of new judges were leaving government employment for the federal bench.<sup>74</sup> In other words, fewer lawyers in private practice are willing to commit to judicial service.

That problem, and it is a problem, appears to be more pronounced in Oregon. At the Oregon Judicial Department's annual new judge orientation in 2007, 19 of the 20 new judges in attendance came from prior careers in government service (from a district attorney's office or from a public defense service provider). At this year's orientation, six of the seven new judges came from the public sector. In contrast, for the 16 judges who took the bench during 1986 to 1988, nine were from the private sector and only seven from the public sector. That present lack of balance deserves attention.

The foregoing is not to suggest that careers in public service fail to well prepare an attorney for further public service as a judge. To the contrary. Our new judges are more than capable, more than competent. But what we are beginning to lack is a diversity of experience on our courts. Missing from the applicant pool are significant numbers of lawyers from private firms that provide civil litigation services, lawyers who, on average, are at the higher end of the earnings scale. As the immediate past president of Oregon's largest private bar association recently wrote in a message to its membership, we need to "continu[e] to try and obtain appropriate courthouses and judicial compensation and staffing to attract more experienced civil trial lawyers to seek judicial appointment or election."<sup>75</sup> The resolution of civil disputes, whether personal or corporate, constitutes an important component of the work that Oregon's courts perform. Just as we want to ensure that courts have judges with prior experience in criminal matters, probate cases, and family law issues, so too should the membership of the bench reflect experience with civil litigation.

## VI. CONCLUSION

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The make-up of our courts is public property that belongs to all Oregonians. Whether it be ensuring an adequate number of judges to decide the growing number of cases, offering safe and appropriate facilities for the resolution of disputes and the meting out of justice, or providing a level of judicial compensation that will help to ensure that the most qualified attorneys both seek appointment or election to the bench and stay there once they arrive – all of those things are for the public, through its elected government, to decide. And all of those things speak to the core of the judiciary as an impartial, co-equal branch of Oregon’s government.

This report addresses only the latter consideration, judicial compensation, and hopefully has provided, in candid fashion, information that will be deemed useful to those who have been entrusted to make that decision on the public’s behalf. It should go without saying that the judges and staff of the Oregon Judicial Department stand ready to provide any other information or assistance that will advance the inquiry.

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<sup>1</sup> *The Declaration of Independence* ¶ 11 (July 4, 1776), reprinted in Charles C. Tansill, *Documents Illustrative of the Formation of the Union of the American States* 22, 23 (Spencer Judd 1984) (internal capitalization omitted).

<sup>2</sup> Alexander Hamilton, *Federalist No. 79* (June 18, 1788), reprinted in Henry Cabot Lodge, *The Federalist, A Commentary on the Constitution of the United States* 491 (G.P. Putnam’s Sons 1888) (internal italics omitted).

<sup>3</sup> The Constitution of the United States, Article III, Section 1, reprinted in Tansill, *supra* n 1 at 989, 998 (internal capitalization omitted).

<sup>4</sup> The Oregon Constitution, Article VII (Amended), Section 1. The people adopted Article VII (Amended) on November 8, 1910, on an initiative petition filed July 7, 1910. See generally Charles Henry Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* 446 (Oregon Historical Society 1926).

<sup>5</sup> *United States v. Hatter*, 532 US 557, 568, 121 S Ct 1782, 149 L Ed 2d 820 (2001), quoting from Woodrow Wilson, *Constitutional Government in the United States* 143 (Columbia University Press 1911).

<sup>6</sup> Hon. John G. Roberts, Jr., *2006 Year-End Report on the Federal Judiciary* 1 (Embargoed for Release Jan. 1, 2007).

<sup>7</sup> Paul Hurd (Chair), The Task Force for Judicial Excellence, *Judicial Compensation in Oregon: The Need for Reform* 3 (2007).

<sup>8</sup> *Evans v. Gore*, 253 US 245, 248, 40 S Ct 550, 64 L Ed 887 (1920) (Opinion of Van Devanter, J.).

<sup>9</sup> *Id.* at 253.

<sup>10</sup> Alexander Hamilton, *Federalist No. 78* (June 14, 1788), reprinted in Henry Cabot Lodge, *supra* n 2 at 482, 483 (capitalization in original).

<sup>11</sup> Or Laws 2007, ch 911, §§ 10-13; codified at ORS 292.405, 292.410, 292.415, and 292.425.

<sup>12</sup> Or Laws 2007, ch 901; codified at ORS 292.907 et seq.

<sup>13</sup> ORS 292.912(2)(b), (c).

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- <sup>14</sup> ORS 292.912(2)(d), (e).
- <sup>15</sup> ORS 292.912(2)(a).
- <sup>16</sup> ORS 292.912(2)(g) (setting out for POCC consideration “[a]ny other factors the commission may consider to be reasonable, appropriate, and in the public interest”).
- <sup>17</sup> ORS 292.912(2)(f).
- <sup>18</sup> Sir Francis Bacon, *Of Judicature* (1612), reprinted in Henry Morley, *The Essays; or, Counsels, Civil and Moral of Francis Bacon* 261 (A.L. Burt 1883).
- <sup>19</sup> Wallace P. Carson, Jr., *Dedication*, 1 Oregon Appellate Almanac 11, 12-13 (Oregon State Bar 2006).
- <sup>20</sup> *Evans, supra* n 8, at 250 (citing to the Debates of the Virginia Convention, pp 616, 619 (1829-31)).
- <sup>21</sup> *See generally* ORS 9.220 (setting out general requirements for admission to practice of law); ORS 9.112 (directing the Oregon State Bar’s Board of Governors to establish minimum continuing legal education requirements).
- <sup>22</sup> Or Const, Art VII (Amended), § 1(a) (adopted by the people on November 8, 1960, on referral from the Legislative Assembly (SJR 3 (1959))); ORS 238.525.
- <sup>23</sup> ORS 2.020(1).
- <sup>24</sup> ORS 2.540(2).
- <sup>25</sup> ORS 305.455(1).
- <sup>26</sup> ORS 3.041.
- <sup>27</sup> ORS 2.045.
- <sup>28</sup> ORS 1.003(1)(a), (2).
- <sup>29</sup> ORS 1.003(1)(b), (2).
- <sup>30</sup> *Compare* ORS 292.405(1) and 292.410(1) *with* ORS 292.415.
- <sup>31</sup> *See* Or Const, Art VII (Amended), § 8 (outlining the removal, suspension, or censure of judges); ORS 1.410 *et seq.* (establishing and setting the powers and duties of the Commission on Judicial Fitness and Disability).
- <sup>32</sup> JR 1-101(A).
- <sup>33</sup> Or Const, Art VII (Amended), § 7; ORS 1.212.
- <sup>34</sup> JR 3 (rules relating to extra-judicial activities); JR 4 (rules relating to political activity by a judge).
- <sup>35</sup> ORS 3.012.
- <sup>36</sup> Or Laws 1969, ch 198; ORS 2.510.
- <sup>37</sup> ORS 2.510, 2.516, and 2.540.

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<sup>38</sup> ORS 2.010 *et seq.*

<sup>39</sup> Or Const, Art VII (Amended), § 2; ORS 250.085.

<sup>40</sup> ORS 138.012(1); ORS 305.445.

<sup>41</sup> Or Laws 1961, ch 533; ORS 305.405 *et seq.*

<sup>42</sup> *See generally* ORS 305.404 *et seq.*

<sup>43</sup> William Curtis Bok, *I, Too, Nicodemus* 4 (Alfred A. Knopf 1946), reprinted in *Handbook for Judges* 66 (American Judicature Society 1961).

<sup>44</sup> ORS 183.400, 183.410, 183.482.

<sup>45</sup> ORAP 9.07(1).

<sup>46</sup> ORS 1.300, 1.600 *et seq.*, 9.210, and 9.534.

<sup>47</sup> ORS 2.120, 2.130, 9.005(8), 9.112, and 9.490(1).

<sup>48</sup> *See generally* ORS 1.002 and 2.045.

<sup>49</sup> Or Const, Art VII (Amended), § 6.

<sup>50</sup> *State ex rel. Metropolitan Public Defender Services, Inc. v. Courtney*, 335 Or 236, 238-39 and n 1, 242, 64 P3d 1138 (2003) (citing decisions from other states; holding that, although “the budgetary crisis currently faced by state government and, in particular, the judicial branch, is severe and that the consequences to the judiciary are unprecedented and regrettable [including the temporary closure of courts one day each week and the unavailability of appointed counsel for indigent persons charged with certain categories of offenses,] \* \* \* the budgetary reductions forced on the judicial branch \* \* \* have not and will not prevent the judicial branch from carrying out its core functions until the end of the biennium”).

<sup>51</sup> *See Larabee v. Governor of State of New York*, \_\_\_ NYS2d \_\_\_, 2008 WL 2357881 \* 7 (NY County June 1, 2008) (holding that judge plaintiffs in that case “have demonstrated that in denying them and the entire judicial branch of government a pay adjustment for almost a decade \* \* \*, the political branches of our State government have used the issue of judicial pay as a pawn in dealing with the unresolved political issue of legislative compensation, and that this linkage is an abuse of power by defendants and constitutes an unconstitutional interference upon the independence of the judiciary”); *Kaye v. Silver* Case No. 40076/08 (NY County 2008; filed by Chief Judge Judith S. Kaye, the presiding judge of the New York Court of Appeals and Chief Judicial Officer of the New York State Unified Court System); and *Maron v. Silver*, Case No. 4108/07 (Alb County 2007).

<sup>52</sup> ORS 238.515(b).

<sup>53</sup> ORS 238.535(a), (b).

<sup>54</sup> ORS 238.535(c).

<sup>55</sup> *Judicial Compensation in Oregon*, *supra* n 7 at 4-5.

<sup>56</sup> *Federalist No. 79*, *supra* n 2.

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<sup>57</sup> *Judicial Compensation in Oregon*, *supra* n 7 at 2.

<sup>58</sup> *Compare with Judicial Compensation in Oregon*, *supra* n 7 at 2.

<sup>59</sup> Barbara L. Schwemle, *Legislative, Executive, and Judicial Official: Process for Adjusting Pay and Current Salaries* (CRS Report for Congress) 5 (Congressional Research Service June 13, 2008); The Capitol.Net, *Pay and Perquisites of Members of Congress 2* (<http://www.thecapitol.net/FAQ/payandperqs.htm>. 2008).

<sup>60</sup> See National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* 23 (January 2003); see also John G. Roberts, Jr., *supra*, n 6 at 6 (noting, as of January 1, 2007, that 38 federal judges had resigned or retired in the past six years, including 17 in the last two years).

<sup>61</sup> John G. Roberts, Jr., *supra* n 6 at 3-4.

<sup>62</sup> *Id.* at 1-2; see also *id.* at 3 (noting that, while the average U.S. worker's wages have risen by 17.8% in real terms since 1969, federal judicial pay has declined over that same period by 23.9%).

<sup>63</sup> National Commission on the Public Service, *supra* n 60 at 23.

<sup>64</sup> *Id.* at 22, 23; see also *id.* at 24 (noting that executive pay at think tanks, labor unions, public interest groups, community foundations, public foundations, private family foundations, and private independent foundations all exceeded on average the then-existing \$150,000 federal district court judge salary).

<sup>65</sup> National Association for Law Placement Directory of Legal Employers, <http://nalp.org/context/index.php?pid=29>.

<sup>66</sup> Altman Weil, Inc., *2007 Survey of Law Firm Economics* (News Release Dated Aug 2, 2007), <http://www.altmanweil.com/>.

<sup>67</sup> *Id.*

<sup>68</sup> Oregon State Bar, *2007 Economic Survey* 24 (Oregon State Bar 2007)

<sup>69</sup> *Judicial Compensation in Oregon*, *supra* n 7 at 3.

<sup>70</sup> *Id.*

<sup>71</sup> Bill Graves, *State University Leaders to Get Raises* (The Oregonian July 12, 2008).

<sup>72</sup> *2007 Economic Survey*, *supra* n 68 at 27, 29; see also Arbitration Service of Portland, Inc. at <http://arbserve.com/pages/costsfees.htm> (stating that arbitrator fees will not exceed \$200 per hour).

<sup>73</sup> John G. Roberts, Jr., *supra* n 6 at 7.

<sup>74</sup> *Id.* at 3.

<sup>75</sup> Thomas W. Brown, *The Vanishing Civil Jury Trial and Experienced Judge*, 54 Multnomah Lawyer 1 (February 2008).

## Addendum No. 1

Office of the Oregon State Court Administrator  
**National Judicial Salary (only) Comparison**  
 (Data from National Center for State Courts website)

### Supreme Court Justice Salaries

Comparison Ranking  
 Updated 08/01/08

State	Highest Court	Rank
California	\$ 218,237	1
Illinois	\$ 189,135	2
Delaware	\$ 185,050	3
Pennsylvania	\$ 181,371	4
Alaska	\$ 179,520	5
District of Columbia	\$ 179,500	6
New Jersey	\$ 176,488	7
Alabama	\$ 175,440	8
Georgia	\$ 167,210	9
Virginia	\$ 166,999	10
Michigan	\$ 164,610	11
Washington*	\$ 164,230	12
Iowa	\$ 163,200	13
Connecticut	\$ 162,520	14
Maryland	\$ 162,352	15
Florida	\$ 161,200	16
Hawaii	\$ 159,072	17
Tennessee	\$ 154,800	18
Rhode Island	\$ 152,403	19
Indiana	\$ 151,328	20
New York	\$ 151,200	21
Texas	\$ 150,000	22
Massachusetts	\$ 145,984	23
Minnesota	\$ 145,981	24
Utah	\$ 145,350	25
Arizona	\$ 142,341	26
Ohio	\$ 141,600	27
Wisconsin	\$ 140,163	28
Nevada	\$ 140,000	29
Arkansas	\$ 139,821	30
Colorado	\$ 139,660	31
New Hampshire	\$ 139,258	32
South Carolina	\$ 137,171	33
Louisiana	\$ 136,967	34
Kansas	\$ 135,905	35
Nebraska	\$ 135,881	36
North Carolina	\$ 133,576	37
Missouri	\$ 133,043	38
Kentucky	\$ 132,812	39
Oklahoma	\$ 131,100	40
Vermont	\$ 129,245	41
Wyoming**	\$ 126,500	42
Oregon	\$ 125,688	43
New Mexico	\$ 123,691	44
West Virginia	\$ 121,000	45
Idaho	\$ 119,506	46
South Dakota	\$ 118,173	47
North Dakota	\$ 118,121	48
Maine	\$ 114,992	49
Montana***	\$ 113,964	50
Mississippi	\$ 112,530	51

Mean (Average) \$ 147,763  
 Median \$ 142,341

Oregon SC Percent of Average  
 85.06%

Oregon SC Percent Below Median  
 -11.70%

### Court of Appeals Judge Salaries

Comparison Ranking  
 Updated 08/01/08

State	Intermediate Appellate Court	Rank
California	\$ 204,599	1
Illinois	\$ 178,011	2
Alabama	\$ 174,315	3
Pennsylvania	\$ 171,131	4
Alaska	\$ 169,608	5
New Jersey	\$ 167,023	6
Georgia	\$ 166,186	7
Virginia	\$ 158,650	8
Washington*	\$ 156,328	9
Florida	\$ 153,140	10
Connecticut	\$ 152,637	11
Michigan	\$ 151,441	12
Tennessee	\$ 149,640	13
Maryland	\$ 149,552	14
Iowa	\$ 147,900	15
Hawaii	\$ 147,288	16
Indiana	\$ 147,103	17
New York	\$ 144,000	18
Texas	\$ 141,250	19
Arizona	\$ 139,388	20
Utah	\$ 138,750	21
Minnesota	\$ 137,552	22
Arkansas	\$ 135,515	23
Massachusetts	\$ 135,087	24
Colorado	\$ 134,128	25
South Carolina	\$ 133,741	26
Wisconsin	\$ 132,229	27
Ohio	\$ 132,000	28
Kansas	\$ 131,518	29
Louisiana	\$ 130,194	30
Nebraska	\$ 129,087	31
North Carolina	\$ 128,011	32
Kentucky	\$ 127,472	33
Missouri	\$ 124,473	34
Oklahoma	\$ 124,200	35
Oregon	\$ 122,820	36
Idaho	\$ 118,506	37
New Mexico	\$ 117,506	38
Mississippi	\$ 105,050	39
Delaware		40
District of Columbia		41
Maine		42
Montana		43
Nevada		44
New Hampshire		45
North Dakota		46
Rhode Island		47
South Dakota		48
Vermont		49
West Virginia		50
Wyoming		51

Mean (Average) \$ 143,770  
 Median \$ 139,388

Oregon COA Percent of Average  
 85.43%

Oregon COA Percent Below Median  
 -11.89%

### Circuit Court Judge Salaries

Comparison Ranking  
 Updated 08/01/08

State	General Trial Court	Rank
California	\$ 178,789	1
District of Columbia	\$ 169,300	2
Delaware	\$ 168,850	3
Alaska	\$ 165,996	4
Illinois	\$ 163,348	5
Pennsylvania	\$ 157,441	6
New Jersey	\$ 157,000	7
Virginia	\$ 155,033	8
Washington*	\$ 148,381	9
Connecticut	\$ 146,780	10
Florida	\$ 145,080	11
Nevada	\$ 144,500	12
Tennessee	\$ 144,480	13
Hawaii	\$ 143,292	14
Maryland	\$ 140,352	15
Michigan	\$ 139,919	16
Iowa	\$ 137,700	17
Rhode Island	\$ 137,212	18
New York	\$ 136,700	19
Arizona	\$ 135,824	20
Texas	\$ 132,500	21
Utah	\$ 132,150	22
Arkansas	\$ 131,206	23
New Hampshire	\$ 130,620	24
Alabama	\$ 130,379	25
South Carolina	\$ 130,312	26
Massachusetts	\$ 129,694	27
Minnesota	\$ 129,124	28
Colorado	\$ 128,598	29
Nebraska	\$ 125,690	30
Indiana	\$ 125,647	31
Wisconsin	\$ 124,744	32
Louisiana	\$ 124,085	33
Vermont	\$ 122,867	34
Kentucky	\$ 122,144	35
Ohio	\$ 121,350	36
North Carolina	\$ 121,053	37
Wyoming**	\$ 120,400	38
Georgia	\$ 120,252	39
Kansas	\$ 120,037	40
Oklahoma	\$ 118,450	41
Missouri	\$ 116,975	42
West Virginia	\$ 116,000	43
Oregon	\$ 114,468	44
Idaho	\$ 112,043	45
New Mexico	\$ 111,631	46
South Dakota	\$ 110,377	47
North Dakota	\$ 108,236	48
Maine	\$ 107,816	49
Montana***	\$ 106,870	50
Mississippi	\$ 104,170	51

Mean (Average) \$ 132,664  
 Median \$ 130,312

Oregon Circuit Court Percent of Average  
 86.28%

Oregon Circuit Court Percent Below Median  
 -12.16%

\*Washington salaries effective 09/01/08

\*\*Wyoming salaries effective 08/01/08

\*\*\*Montana salaries effective 07/01/09



## Addendum No. 2

Office of the Oregon State Court Administrator

### Judicial Salary (only) Data

#### Thirteen Western States - Including Oregon

Information Current as of 08/01/08 (includes known increases up to July 2009)

#### Supreme Court Justice Salaries

Comparison Ranking

State	Highest Court	Rank
California	\$ 218,237	1
Alaska	\$ 179,520	2
Washington*	\$ 164,230	3
Hawaii	\$ 159,072	4
Utah	\$ 145,350	5
Arizona	\$ 142,341	6
Nevada	\$ 140,000	7
Colorado	\$ 139,660	8
Wyoming**	\$ 126,500	9
Oregon	\$ 125,688	10
New Mexico	\$ 123,691	11
Idaho	\$ 119,506	12
Montana***	\$ 113,964	13

Mean (Average) \$ 145,981

Median \$ 140,000

OR SC Percent of Average  
86.10%

OR SC Percent Below Median  
-10.22%

#### Court of Appeals Judge Salaries

Comparison Ranking

State	Intermediate Appellate Court	Rank
California	\$ 204,599	1
Alaska	\$ 169,608	2
Washington*	\$ 156,328	3
Hawaii	\$ 147,288	4
Arizona	\$ 139,388	5
Utah	\$ 138,750	6
Colorado	\$ 134,128	7
Oregon	\$ 122,820	8
Idaho	\$ 118,506	9
New Mexico	\$ 117,506	10
Nevada		11
Montana***		12
Wyoming		13

Mean (Average) \$ 144,892

Median \$ 139,069

OR COA Percent of Average  
84.77%

OR COA Percent Below Median  
-11.68%

#### Circuit Court Judge Salaries

Comparison Ranking

State	General Trial Court	Rank
California	\$ 178,789	1
Alaska	\$ 165,996	2
Washington*	\$ 148,831	3
Nevada	\$ 144,500	4
Hawaii	\$ 143,292	5
Arizona	\$ 135,824	6
Utah	\$ 132,150	7
Colorado	\$ 128,598	8
Wyoming**	\$ 120,400	9
Oregon	\$ 114,468	10
Idaho	\$ 112,043	11
New Mexico	\$ 111,631	12
Montana***	\$ 106,870	13

Mean (Average) \$ 134,107

Median \$ 132,150

OR Circuit Ct Percent of Average  
85.36%

OR Circuit Ct Percent Below Median  
-13.38%

\*Washington salaries effective 09/01/08

\*\*Wyoming salaries effective 08/01/08

\*\*\*Montana salaries effective 07/01/09