

By W. Michael Gillette

The Oregonian's recent article "Oregon PERS: Judges rule on benefits they get" (Dec. 2) deserves a response. The article includes the concern of one attorney who apparently believes that there is something either unfair or unconstitutional (or both) about the Oregon Supreme Court's decision to invoke the "rule of necessity" in considering cases about the Public Employees Retirement System.

Nothing could be further from the truth. In fact, having sitting, elected judges decide PERS cases is required by Oregon statutes, the Oregon Constitution and case law.

From a constitutional standpoint, the "rule of necessity" has centuries of history behind it. The rule basically states that when there is a court case that must be decided and there is no provision in statutory law for creating or calling in some special tribunal to decide the case, then regular judges must do their duty, set aside any personal interest that they may have, and decide the case themselves. The rule is based on the principle that litigants have a right to have their cases decided; without it, they could not get a ruling. Other appellate courts, including the U.S. Supreme Court, have invoked the rule.

From a statutory standpoint, Oregon statutes establish conditions for having temporary judges (called judges pro tempore) sit on the Supreme Court to hear cases. In general, ORS Chapter 2 requires that a majority of the justices deciding a case in the Supreme Court be sitting justices — not temporary judges. Presumably, the Legislature adopted this statutory policy to ensure that experienced and elected justices decide cases as they are sworn to do.

Moreover, even pro tempore judges who sit on cases in the Supreme Court must already be judges from another state court. ORS Chapter 1 only permits the Supreme Court to appoint sitting judges as justices pro tempore — there is no authority to appoint non-judge lawyers to sit on the court and hear cases.

There is no escape from this dilemma, either from a practical or a political perspective. Even if the Supreme Court were to disobey the statutes and appoint judges pro tempore who were not members of PERS to decide PERS cases in the Supreme Court — as the attorney suggests — those temporary judges still would have been appointed by the PERS-member justices of that court. And what should happen in other types of cases? Should the Supreme Court justices have stepped aside in ruling on the constitutionality of Oregon's beach bill because they enjoy walks on the beach? Not rule on property rights initiatives because they own property? Not decide the constitutionality of school funding because they have children in public schools? Not rule on tax cases because they pay taxes?

Judges have a duty to follow the law and to impartially hear and decide cases put before them — including cases involving PERS. Having elected justices decide PERS cases obeys statutory and constitutional principles. In deciding the cases about which Daniel Re (the lawyer quoted in the article) complains, the Oregon Supreme Court was obeying both statutory and constitutional principle, not flouting it. It demeans the debate on this important public issue to imply otherwise.

W. Michael Gillette served as an Oregon Supreme Court justice from 1986 through 2010.