

A City Club Report on Measure 94: Judicial Retirement Age

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Since 1960, the Oregon Constitution has required that judges retire in the year of their 75th birthday. This year, Oregon voters will decide whether to keep or do away with that requirement. With the urging of then-Secretary of State Kate Brown, the Oregon Legislature referred Senate Joint Resolution 4 (SJR 4) to the general election ballot in 2016. It appears as Measure 94. If adopted, this measure would amend the Constitution to remove mandatory judicial retirement and take away the power of the legislature to set a judicial retirement age.

Majority Summary

Your committee's majority, with members whose degree of conviction ranges from strong and certain to conflicted and modest, concludes that Measure 94 should be adopted. To reach this conclusion, your committee considered several reasons to reject Measure 94 and retain the status quo. The original impetus for adopting mandatory retirement was largely the problem of "congestion and delay" in the courts, as judges working into their later years were determined to be a factor in slowing down the justice system to an unacceptable degree. In addition, mandatory retirement theoretically increases turnover, allowing for newer, more diverse perspectives to ascend to the bench. It can also act as an accountability check in a system where existing measures to ensure judges' competency may be ineffective or work only after damage has been done.

While granting that these issues are important, the majority found that mandatory retirement has limited influence on any of them. Witnesses indicated that it is relatively rare for judges to work up to the age of 75 before retiring and that problems such as a lack of judicial diversity are better addressed by more direct methods. Simply doing away with mandatory retirement would have little impact on the composition of the bench.

On the other side, a mandatory retirement age does real harm to individuals and to society. Even if effective, it is an indiscriminate method of ensuring an effective judiciary, sweeping out the competent judges with the incompetent. While aging can bring with it diminished mental capacity, gerontological research reinforces the idea that aging affects every person differently and at a different rate. A mandatory retirement age therefore does a disservice to those who are capable and willing to continue serving the state into their later years. The year 2016 is a different time than the year 1960: not only is

“75 the new 55,” but our understanding of older adults’ place in society and the effects of ageism have also evolved.

The mandatory retirement age attempts to solve a variety of pressing issues for Oregon’s judiciary. However, it is a blunt instrument—one so blunt that the majority of your committee could not conclude that its potential benefits outweigh the damage it does to individuals and the state of Oregon.

Recommendation: The majority recommends a “Yes” vote.

Minority Summary

The minority concurs with the research and analysis presented by the majority but does not believe that evidence available provides a sufficiently compelling case to warrant amending the Constitution of Oregon. The mandatory retirement age of 75, approved by more than 82 percent of Oregon voters in 1960, was based upon two years of in-depth research on the relationship between aging and efficiency. Additional research by the City Club of Portland affirmed the research done for the Oregon Legislature and strongly endorsed the mandatory retirement age even after explicitly acknowledging that the mandatory retirement age would be unfair to those judges who are able and willing to serve beyond their 75th birthday. As much as the minority shares the hope that the mandatory retirement age could be removed without adverse impacts, in the absence of updated research or data to contradict the 1960 studies, hope alone does not constitute a sufficient enough basis to change the constitution.

Recommendation: The minority recommends a “No” vote.

City Club members will debate this report on Wednesday, Aug. 24, 2016 at the Club’s Ballot-Palooza event. Club members will vote on the report beginning Thursday, Aug. 25 and finishing Monday, Aug. 29. Until the membership votes, City Club of Portland does not have an official position on this report and Measure 94. The outcome of the vote will be reported on Aug. 30 in the City Club of Portland Bulletin Vol. 99, No. 2 and online at pdxcityclub.org.

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INTRODUCTION

Measure 94 will appear on the Nov. 8, 2016 ballot as follows:

Amends Constitution: Eliminates mandatory retirement age for state judges

RESULT OF “YES” VOTE: “Yes” vote amends constitution, state judges not required to retire from judicial office after turning 75 years old. Statutes cannot establish mandatory retirement age.

RESULT OF “NO” VOTE: “No” vote retains constitutional provisions requiring state judges to retire from judicial office after turning 75 years old, authorizing statutes establishing lesser mandatory retirement age.

SUMMARY: Article VII (Amended), section 1a, of the Oregon Constitution, requires state judges to “retire from judicial office at the end of the calendar year” in which they turn 75 years old. Section 1a(1) authorizes laws that establish a lesser age – not younger than 70 years – for mandatory retirement. Measure amends constitution to remove provision requiring mandatory retirement at age 75, as well as provision authorizing statutes requiring mandatory retirement at age 70 or older. Measure retains constitutional provision that authorizes statutes permitting retired judges to be recalled to temporary active service. Measure retains constitutional provision that authorizes laws permitting or requiring judges to retire due to a physical or mental disability or any other cause that renders them incapable of performing their judicial duties.

In 2015, the Oregon Legislature referred Senate Joint Resolution 4 (SJR 4) to the November 2016 general election ballot. It appears on the Nov. 8, 2016 ballot as Measure 94. If adopted, Oregon Constitution Article VII (Amended) section 1a will be amended to remove any mandatory retirement age for judges. Two provisions will be repealed: (1) the requirement that judges retire in the year of their 75th birthday, and (2) the authority of the legislature to set the retirement age as young as 70. Two related parts of section 1a will *not* be repealed: (1) the ability to recall retired judges of any age to temporary service, and (2) the ability to mandate retirement of judges who are found physically or mentally unable to continue service.

BACKGROUND

In 1957, the Oregon Legislature created an Interim Committee on Judicial Administration, charged broadly with studying and reporting its recommendations on 15 separate aspects of judicial administration. One of those charges was to provide “[r]ecommendations for eliminating congestion and delay in the courts and expediting the administration of justice.”¹

A subcommittee of the Interim Committee reported on retirement of judges and recommended a constitutional amendment for mandatory retirement. The subcommittee found:

- Even extremely able judges begin to slow down in working capacity with advancing age.
- In one unnamed judicial district, the business of the circuit court had come almost to a standstill for that reason.
- In another district, a judge took “inexcusably long periods” to decide cases and had on occasion “lost firm control in the conduct of trials in his court.”²
- On the Oregon Supreme Court, “illnesses of older judges have seriously impaired the court’s work.”³

The full Interim Committee adopted the recommendation in its final report. Acting on that recommendation, the 1959 Oregon Legislature sent to the 1960 general election ballot a proposed amendment to the Oregon Constitution. It provided for mandatory judicial retirement at age 75, and additionally authorized the legislature:

- To fix a lesser mandatory retirement age, not earlier than 70 years;
- To provide for recall of retired judges to active duty on the courts where they had served; and
- To authorize or require judicial retirement on account of physical or mental disability, or any other incapacity.⁴

The Oregon State Bar declared in favor of the amendment, as did City Club of Portland, adopting the unanimous recommendation of a committee charged to study the measure.⁵ The amendment, which remains in the Constitution today and which Measure 94 would repeal in part, was approved in November of 1960 with an 82 percent “yes” vote.

Since 1960, at least some judges in Oregon have served to age 75 and been forced to retire. However, the impetus for Measure 94 came not from forced retirements, but instead from a refused judicial candidacy. In 2014, St. Helens attorney Agnes M. Petersen filed for election to the Columbia County Circuit Court. Although Ms. Petersen was otherwise qualified to serve, the Oregon Secretary of State’s office informed her that because of her age (she was 75 or older), she would be ineligible to serve if elected, and under its interpretation of the constitution she was disqualified from appearing on the ballot.⁶ After Ms. Petersen’s exclusion from the ballot, Secretary of State Kate Brown requested introduction in the 2015 legislative session of a bill to remove the mandatory retirement age.⁷ The Oregon Senate approved the measure unanimously, the House by a 41-17 margin, and the proposed amendment was referred to the 2016 general election ballot.⁸

According to a 2016 report by the National Center for State Courts, 33 states presently have a retirement age for appellate or general jurisdiction court judges. In all but one of those states (Vermont, with an age limit of 90 years), the age for mandatory requirement is in the 70 to 75-year range. The NCSC report identifies some trends: The age limit has been rising, but few states with limits have abolished them. Legislatures have been more willing than voters to increase or abolish judicial

retirement age limits, and higher voter turnout in presidential election years has equated with lower probability that such measures will pass.⁹

Judicial retirement policies in Oregon affect 173 circuit court judges, 20 appellate court judges, and the Judge of the Oregon Tax Court.

Values-based analysis

In preparing to write this report, your committee discussed what it sees as the principal values the voters should weigh in deciding how to vote on the measure. They are not rigid categories, and arguments both for and against Measure 94 arise from them. These are some important values we identified:

Fairness

To what extent would Measure 94, if adopted, be fair or unfair to judges and to the public?

Accountability

Can or should judges be held accountable on any basis short of gross misconduct? How can or should the voters control judges whose capacities appear to be diminishing with age?

Effectiveness of older judges; value of new blood

What evidence do we have of the value of experience and wisdom on the bench, or on the other hand of diminished productivity beyond age 75? Does mandatory retirement materially open up judicial spots for potential addition of new judges with more contemporary and diverse outlooks?

An independent judiciary in a democracy

With judges in Oregon elected, but as a practical matter able to serve into advanced age without electoral opposition, what is the relationship between judicial independence and possible mandatory retirement?

Major assertions made in favor of Measure 94

- Judges are the only elected officials in Oregon who are subject to mandatory retirement. The voters should be allowed to decide by election whether a particular judge is too old to serve. (Fairness; Accountability; Democracy)
- Older judges, who usually have been in office the longest, have gained experience and respect, and they may be valuable mentors for other judges. (Effectiveness)
- Age-mandated retirement is arbitrary. It is unfair to assume older judges will be less competent. Recent research indicates that although some slowing of mind and body occurs with age, life experience and expertise can compensate for it.¹⁰ (Fairness; Effectiveness)

- Witness testimony and medical research indicate that persons who receive good healthcare and stay mentally active are much less susceptible than the general population to age-related mental decline.¹¹ (Effectiveness)
- A constitutional age barrier to public service, in a society increasingly sensitive to “ageism,” sends a highly visible message that is unacceptable as a matter of public policy. (Fairness; Accountability; Democracy)
- The Oregon Commission on Judicial Fitness and Disability is authorized to recommend, after a hearing, that the Supreme Court remove a grossly ineffective judge from the bench.¹² This targeted solution is more fair than a blanket retirement mandate that sweeps up all judges. It will remain in place whether or not Measure 94 is adopted by the voters. (Accountability)

Major assertions made against Measure 94

- Scientific evidence supports the finding of the 1957 Interim Committee that even capable persons’ working capacity slows down with age.¹³ (Effectiveness)
- After a thorough study of the 1960 proposed amendment, City Club voted in favor of mandatory retirement for judges.¹⁴ (Accountability; Effectiveness)
- Continued service by judges with diminished productivity and capacity, whose dockets and decisions may suffer accordingly, is unfair to the public.¹⁵ (Fairness)
- Orderly retirement of judges opens up the ranks for election or appointment of “new blood” - judges who are younger in outlook, probably more productive, and more representative of an increasingly diverse society. (Effectiveness/“New blood”)
- A minimal problem doesn’t warrant tinkering with the Oregon Constitution. Very few judges are forced to retire under the mandatory provision,^{*} and they can be and often are called back for five years of temporary service in exchange for enhanced retirement benefits.¹⁶ (Fairness; Effectiveness)
- Mandatory retirement operates to remove potentially unproductive judges *before* they present a problem. Removal after Judicial Fitness Commission proceedings, which is rare in any event, can operate only *after* the fact, when harm to criminal defendants or other litigants has already been done. (Fairness; Accountability)

* Your committee does not have comprehensive numbers on the number of judges who have been or may be forced to retire, but the witnesses with whom your committee spoke believed that the number would be small, as did witnesses in hearings before Oregon Legislature. Oregon State Supreme Court Judge David Brewer testified before the Oregon Senate Committee on the Judiciary that he did not believe that any judges on the court of appeals had served past the age of 69. See oregon.granicus.com/MediaPlayer.php?view_id=24&clip_id=8171, Feb. 17, 2015, accessed July 5, 2016.

MAJORITY DISCUSSION & ANALYSIS

Fairness

In 1960, the American civil rights movement was not trying to remedy gender, age, or other non-race-based discrimination. Much has changed in society since then, including how aging members of society are treated, partly because of laws such as the Oregon Fair Employment Practice Act and the federal Age Discrimination in Employment Act. Today, relatively few businesses and government agencies follow fixed mandatory retirement rules, although 33 states plus the District of Columbia continue to have mandatory retirement ages for judges.¹⁷ Outside the judiciary and federal government service in the areas of national defense and foreign affairs, retirement ages are considered more in connection with risk of physical injury to the public (*e.g.*, airline pilots and police officers). Aging with dignity is considered a civil right, and society's notions of fundamental fairness extend to those who were formerly called "old."¹⁸

Among elected state officials in Oregon, only judges are subject to mandatory retirement.

Your committee read a 1996 research study that found reasoning capacity and speed of information processing generally is highest in a person's early 20s, decreases slowly into middle age, and drops sharply after about age 70.¹⁹ However, other information challenges the relevance of that study. A gerontologist affiliated with Elders in Action provided your committee with testimony and published work indicating that chronological age is a poor marker of competence; that the "peak and decline" model of aging is outmoded.²⁰ To that extent, a mandatory retirement age sends a harmful blanket message about the value of older members to society and, to use a contemporary term, is ageist.

Your committee considered fairness as it applies not only to judges, but also to the general public. The Interim Legislative Committee's 1959 report gave decreased productivity and backed-up court dockets, which waste tax dollars and delay justice, as the main reasons to require judges to retire by age 75.²¹ One witness expressed concern that an age-impaired judge might rule unfairly against criminal defendants or release dangerous criminals, either of which would harm the public and be very difficult to correct after the fact. That witness believed that mandatory retirement might avert such harm before it occurred.²²

Accountability

Judges occupy a special position in democratic constitutional government. Of the three branches, the judiciary is structured to be the least influenced by the political process. Judges are expected to apply and announce the law, whether or not their decisions are popular.

In Oregon, judges are elected to six-year terms, and except for the current mandatory retirement restriction, they have no term limits. When a seat is left open at the end of the term by a judge who does not seek re-election, multiple-candidate elections are held. More frequent, however, is judicial resignation, retirement, or death in midterm. When that occurs, the Oregon Constitution gives the

Governor full power to fill the vacancy by appointment, without a confirmation process. The appointee must stand for election at the next general election. Judges run on a nonpartisan basis, and in all elections, an incumbent judge receives the notation “Incumbent” beside his or her name on the ballot. Few incumbent judges face any opposition, and hardly any incumbents are defeated. In practice, a judge in Oregon can usually expect to remain in office as long as he or she wishes.²³

Processes exist in Oregon for suspension or removal of judges on account of physical or mental incapacitation. By authority of the Oregon Constitution, the legislature has created the Oregon Commission on Judicial Fitness and Disability. The Commission’s charge includes investigation and resolution of complaints by any member of the public about the conduct of judges. That process includes private preliminary investigations, informal discussions with and minor sanctions of the judges in question; or, after formal charge and public hearing, recommendations to the Supreme Court for sanctions that can include removal from office.²⁴ Several of the witnesses we spoke with indicated that they believe the more informal process—encouraging an incapacitated judge to retire, rather than formally forcing him or her off of the bench—is more common.²⁵

A parallel process under ORS 1.303-1.310 provides for possible involuntary retirement of a “permanently disabled” judge. Under that process, the Chief Justice, the Oregon Judicial Conference, or the State Bar requests investigation by the Judicial Fitness Commission. The Commission investigates, provides for a hearing, and may order involuntary retirement of the subject judge, with an appeal right to the Oregon Supreme Court.

A 1991 United States Supreme Court decision, in *Gregory v. Ashcroft*, upheld mandatory judicial retirement at age 70 under the Missouri Constitution. The majority opinion by Justice Sandra Day O’Connor made these observations in determining that there was a rational basis for the Missouri provision:

- States’ authority to determine the qualifications of high public officials “lies at the heart of representative government.”
- Alternatives to mandatory retirement for removal of judges may be inadequate or unwieldy.
- Election may be an inadequate check, since most voters do not observe individual judges in action or read judicial opinions, and judges’ lengthy terms [in Oregon, six years] makes them less dependent on the people’s will.²⁶

Effectiveness and “new blood”

In theory, lifting Oregon’s mandatory retirement age would make it more likely that older judges stay on the bench, leaving fewer slots for younger judges to take their place. Some argue that these younger judges are important to bringing newer ideas and different perspectives to the judiciary. For instance, one law professor describes age restrictions as “a proxy for term limits,” a way to “usher in new blood” and prevent incumbents from becoming entrenched and out of touch.²⁷

Additionally, some proponents of a mandatory retirement age point out that younger judges who take the place of retirees are likely to be more diverse in terms of race, gender identity, socioeconomic background, and other categories.²⁸ According to a report by the American Constitution Society for Law and Policy, 50 percent of state court judges in Oregon are white men, as opposed to 37 percent of the population.²⁹ Encouraging turnover by leaving the mandatory retirement age in place could play an important role in diversifying the bench, replacing older judges with a younger cohort of judges more representative of Oregon's population.

There are several reasons greater turnover on the Oregon bench could be desirable. Court cases today bring up issues and fact patterns that would have been unheard of in earlier decades, such as recent United States Supreme Court decisions about cloud computing and Fourth Amendment protections for smartphones.³⁰ Changes to society could also lead to a disconnect between an older, homogenous bench and a heterogeneous citizenry. A younger, more diverse pool of judges can bring diverse experiences and backgrounds to the bench, meaning they may be better situated to understand the experiences of the people who come before them and may be less subject to implicit bias.

For many, giving people of diverse backgrounds an equal shot at becoming a judge is a matter of fairness; it is also important for the signal it sends to society. According to the nonprofit Justice at Stake, "a judiciary that does not reflect the population it serves undermines [...] confidence [by] creating a perceived or actual bias in judicial decision making."³¹

The potential magnitude of the impact that mandatory retirement ages could have on turnover and hence "new blood" is dependent on the number of judges forced to retire by Oregon's mandatory retirement age of 75. Witnesses consistently expressed doubts that the mandatory retirement age removes numerous judges from the bench. In actual practice, the number is small for two reasons. First, judges rarely work all the way up to the age of 75. This is partially a function of how the Oregon Public Employees Retirement System ("PERS") operates for judges: benefits do not increase after a certain number of years on the bench, lessening the incentive to continue working. We were not able to procure specific data about how many judges are forced to retire each year, but judges your committee spoke to were unable to think of more than a handful of examples—suggesting that the number of "slots" opened by the judicial retirement age each year is small.³²

Second, factors other than low turnover have a larger impact on keeping the Oregon bench homogenous. About 80 percent of judges are appointed to their posts; according to witnesses, the formal appointment process can be impacted by informal professional and social connections, with the unintended consequence of making it more difficult for people of color and people from disadvantaged backgrounds, who may not have the same connections, to be appointed. Our witnesses indicated that truly diversifying the Oregon bench will require concrete action by those involved in the nominating process, in particular the Governor, to combat institutional biases.³³

Some proponents of Measure 94 argue that that mandatory retirement's impact on turnover is in fact an argument for doing away with it. During floor debate on Measure 94, Representative Barbara Smith Warner asserted that, in contrast to "judicial congestion" caused by sickly or slow-moving octogenarian

judges that the legislative reform committee faulted in 1959, Oregon currently has trouble adequately staffing its judiciary because of low pay. She argued that removing the mandatory retirement age would help with this staffing problem, presumably by allowing existing judges to serve longer.³⁴ Rachele Altman, former Legislative Director for Secretary of State Kate Brown, testified before the Senate Rules Committee that many in the legal community know of someone barred from serving because of age.³⁵ As noted above, however, judges we interviewed did not confirm that statement. Instead, they uniformly stated that it is rare for a judge to serve to age 75.³⁶

There have been a few notable cases in recent history of mandatory retirement impacting the composition of the bench: Mercedes Deiz, the pioneering African American female judge, had to step down in 1992³⁷; and in the matter that directly brought about Measure 94, attorney Agnes Petersen was barred from appearing on the ballot because she exceeded the judicial age limit.

Your committee found no media reports of a shortage of judges, and none of the witnesses with whom your committee spoke believed that there is a general shortage of applicants for the bench, though candidates may be more difficult to find in less populous counties. To the extent that witnesses expressed concerns about the state of the judiciary, they mentioned deficient funding for the court system. No one seemed to believe that lifting the retirement age would materially affect the ability to staff courts with competent judges.³⁸

While it is probable that mandatory retirement has some effect on diversity and staffing levels on the bench at the margins, your committee found that this effect is negligible.

Democracy

Your committee has learned that judicial elections generally do not ensure accountability, since a judge who has been appointed or initially elected to office has little risk of defeat in any later elections. This may not be a bad thing, though. Judicial independence is the public's surest guarantee that the rule of law will not be compromised. In the federal judiciary, a judge serves for life on good behavior once his or her nomination has been confirmed. If judicial independence is to be honored in Oregon or elsewhere, it may mean that judges should be allowed to serve with few constraints on their tenure. This argues that barriers like mandatory retirement at 75, and the legislature's authority to lower that retirement age even for political motives, should be removed by a yes vote on Measure 94.

On the other hand, removal from office by an automatic measure such as a mandatory retirement age is less directly political than voting out a judge via a general election campaign. The judicial independence argument therefore rests on the assumption that elections too are ineffective at removing judges whose competence or effectiveness may have declined.

Whether or not judicial elections are effective mechanisms for ensuring the competence of judges, Oregon and many other states continue to empower their judges through election, and voters therefore retain the ability to decide whether or not a judge will continue to serve them. As the U.S. Supreme Court said in *Gregory v. Ashcroft*, discussed above, a state's people have the right to determine the qualifications of their elected officials, including judges. If their choice includes a mandatory retirement

age, that is an allowable exercise of popular sovereignty. Mandatory judicial retirement has existed in Oregon for over half a century with little controversy and minimal adverse effect. The principle that an unbroken system does not need repair supports a no vote on Measure 94.

Majority conclusions

Your committee's majority, with members whose degree of conviction ranges from strong and certain to conflicted and modest, concludes that Measure 94 should be adopted. We realize this is a departure from City Club's 1960 position, but we conclude that City Club and society at large have moved in 56 years toward greater inclusion and recognition of the abilities of formerly excluded groups, senior citizens among them. We believe the fairness scale tips in favor of Measure 94.

Although judges should not generally have to be accountable to voters for the legal rulings they make, an exception arises where the judge's rulings result from objective mental impairment, fairly determined, at whatever age. Provisions of the Oregon Constitution that Measure 94 does *not* repeal retain mechanisms for involuntary retirement of impaired judges. We conclude that these are necessary but incomplete solutions, however, because they operate after the fact, and the harm a judge's impairment may already have caused is difficult or impossible to undo. Mandatory retirement does operate in advance, but as a blunt and imperfect instrument. Your committee's majority concludes that elimination of mandatory retirement with the adoption of Measure 94 will not materially change the judicial accountability factor.

Your committee concludes that continuation in office of several potentially impaired judges past age 75, which the 1957 Legislative Interim Committee properly identified as a concern, is no longer an important consideration. Generous PERS benefits encourage timely retirement of judges, and one provision of that system (known as "Plan B") even makes it possible for retired judges of any age—including those over 75—to continue to serve on an as-needed basis, such as during vacations or other absences by elected judges or when a temporary shortage of judges occurs.³⁹ We also acknowledge the reality of demographics; middle class attorneys, the pool from which Oregon judges of both genders and all ethnicities have always been drawn, enjoy a longer, healthier lifespan today than their predecessors did. It remains true that the productivity of most people, including most judges, diminishes with age, but the offsetting values of experience and wisdom lessen that concern. Finally, we conclude that the small number of judges freed at age 75 from mandatory retirement, in a judiciary with nearly 200 members, does not cut off the opportunity for younger and more diverse judges to join the ranks of the judiciary. We think the productivity/diversity factor, which cuts both ways here, leans in the direction of a yes vote on Measure 94.

Our final conclusion is a Hobson's choice. Does the value of a truly independent judiciary, which by definition makes it somewhat undemocratic, outweigh the voters' right to impose age restrictions on judges by democratic means? Repeal of mandatory retirement by adoption of Measure 94 will be an implicit recognition by voters that they should not place arbitrary restrictions on judicial tenure. Your committee endorses this notion. We conclude that in this instance, small "d" democracy can safely take a back seat to an independent judiciary.

Majority recommendation

The majority of your committee recommends a “Yes” vote on Measure 94.

Signatures

Respectfully submitted,

Zoe Klingmann, Chair

Jim Westwood, Lead Writer

Karen Costello

Janel Hill

Clark Porter

Joan Thompson

MINORITY ANALYSIS & CONCLUSION

The minority concurs with the research and analysis presented by the majority but does not believe that evidence available provides a sufficiently compelling case to warrant amending the Constitution of Oregon. At best, if the mandatory retirement age is repealed that *might* have a slight positive impact by allowing a very small number of judges over the age of 75 who do not wish to retire to continue serving. At worst, the approval of Measure 94 *might* have a slight negative impact by incrementally decreasing the efficiency and possibly fairness of the Oregon judiciary.

The problem that your committee faced in researching this ballot measure is that those who drafted and supported Measure 94 made no attempt to assess the overall impact of the measure on the Oregon judiciary. Instead, as noted in the majority report, and according to first-hand witness testimony, the proposed amendment was drafted in response to a request from an individual lawyer who wished to run for judge after turning 75.

Opinions from expert witnesses on this measure were divided, but irrespective of whether a witness supported or opposed the initiative, all of them prefaced their comments with the caveat that they do not have data on which to base a considered opinion. The mandatory retirement age of 75 that was approved by more than 82 percent of Oregon voters in 1960 was based upon two years of in-depth research on the relationship between aging and efficiency. Additional research by the City Club of Portland affirmed the research done for the Oregon Legislature and strongly endorsed the mandatory retirement age even after explicitly acknowledging that the mandatory retirement age would be unfair to those judges who are able and willing to serve beyond their 75th birthday.

As much as the minority shares the hope that the mandatory retirement age could be removed without adverse impacts, in the absence of updated research or data to contradict the 1960 studies, hope alone does not constitute a sufficient enough basis to change the constitution.

Minority recommendation

The minority of your committee recommends a “No” vote on Measure 94.

Signature

Respectfully submitted,

Ken Fairfax

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Byron Palmer, Research Advisor

Caroline Harris Crowne, Research Advisor

Jeannemarie Halleck, Research & Advocacy Director

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WITNESSES

Richard Barron, Circuit Court Judge, Coos County, May 16, 2016.

Agnes Petersen, Attorney, May 23, 2016.

Rep. Sal Esquivel, District 6, Medford, June 1, 2016.

Dr. Jenny Sasser, educational gerontologist, June 6, 2016.

Judge Darleen Ortega, Oregon Court of Appeals, June 15, 2016.

Judge Henry Breithaupt, Oregon Tax Court, June 20, 2016.

Rachele Altman, formerly Legislative Director, Oregon Secretary of State, June 24, 2016 (email communication).

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