APPENDIX

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STATE COURT RESPONSIBILITY FOR MAINTAINING "REPUBLICAN GOVERNMENT": AN AMICUS CURIAE BRIEF

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Editor's Historical Note:

In 1997, the Oregon Supreme Court declined to adjudicate whether an initiative that amended the state constitution restricted legislative power by a process inconsistent with a republican form of government as the court had previously interpreted that constitutional guarantee.[1] The case involved a mandatory sentencing law that the trial judge refused to apply on other constitutional grounds, and the prosecution, being unable to appeal the sentence imposed, proceeded by a writ of mandamus against the judge in the supreme court.[2] Among many other claims, the State Public Defender pursued the argument that the initiative had departed from republican government by placing the mandatory sentencing law beyond the ordinary legislative process. The supreme court, by a 4-2 vote departing from a preceding opinion, held that *Pacific Telephone Co. v. Oregon*[3] and later decisions of the United States Supreme Court deprived state courts of authority to decide claims under the federal Guarantee Clause.[4]

The Public Defender petitioned the United States Supreme Court for a writ of certiorari to review this issue. The State at first filed no response to the petition. A brief *amicus curiae*, however, was filed by President David B. Frohnmayer of the University of Oregon, a former law professor and Oregon Attorney General, and Professor Hans A Linde, a retired judge of the Oregon Supreme Court, which supported the petition for certiorari. After the United States Supreme Court took the infrequent step of asking the State for a response, the Department of Justice responded by raising a question whether the retirement of the

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1. U.S. CONST. art. IV, § 4; Kadderly v. City of Portland, 74 P. 710 (1903). The defendant's precise claim is immaterial to the present discussion.

2. State ex rel. Huddleston v. Sawyer, 932 P.2d 1145 (Or. 1997).

3. 223 U.S. 118 (1912).

4. *Compare* State v. Montez, 789 P.2d 1352, 1377 (Or. 1990) ("[W]ithin the federal government, the enforcement of the guarantee is assigned not to the federal courts but to the political branches. . . . That does not mean that the states may not adjudicate the compatibility of state law with the guarantee clause.").

defendant judge or other events mooted the Oregon court's decision, and the Supreme Court ultimately denied the writ. It is possible that Attorney General Hardy Myers, who took office while staff counsel were litigating the appeal, later wished that the Department instead had responded that it had no objection to the requested Supreme Court review, in the hope of clarifying the question of whether the Department's advice on questions of republican government would or would not be reviewable in the state's courts.[5]

Judicial independence was not at issue in that case, but because President Frohnmayer's keynote address to the 2003 Symposium relates the need for judicial independence from electoral politics to the states' duty to maintain republican governments, the editors think it appropriate to append here his and former Justice Linde's brief supporting the state courts' authority and obligation to maintain republican institutions, which would include the protection of courts from political demands as essential to the rule of law.

5. See Hardy Myers, *The Guarantee Clause and Direct Democracy*, 34 WILLAMETTE L. REV. 659 (1998).