

# Activist judge?

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**Marty Trillhaase/Lewiston Tribune**

JEERS ... to Idaho Supreme Court Justice Daniel Eismann. Remember when he ran for office as a strict constructionist? How times have changed.

Eismann authored a 4-1 majority opinion that upheld Gov. C.L. "Butch" Otter's veto of a budget-buster - the Legislature's decision to lift the state's sales tax from grocery purchases.

Otter correctly argued the measure would strip about \$80 million from a state budget still struggling to repair the harm inflicted on public education during the Great Recession-era budget cuts.

But the governor dithered too long. He vetoed the bill on April 11 - nine days after lawmakers presented it to him on March 31. That's good enough under a 1978 Idaho Supreme Court precedent, which said the clock started ticking when Otter received the bill.

But the state Constitution plainly says Otter had 10 days after the Legislature adjourned on March 29, which lapsed on April 10.

Eismann's opinion found the 1978 court ruling in error but gave Otter the benefit of the doubt for having relied on it.

So far, so good.

"The (1978 decision) did not interpret the Constitution; it purported to rewrite an unambiguous phrase in order to obtain a desired result," Eismann wrote.

But where in the state Constitution did Eismann and his colleagues come up with this idea: From now on, lawmakers must submit all bills to the governor before adjourning for the year?

How is that not replacing a prior court's tweaking of the Constitution for his own court's maneuver? Shouldn't the courts defer to the Legislature and the voters to pass an amendment, if that's what they choose?

Justice Warren Jones thinks so.

"The Constitution should be applied as it is written and not modified according to what the court believes the framers intended," Jones wrote in his dissent. "This court does not have the authority to amend the Constitution, and I do not see how the majority's 'interpretation' differs from an amendment."

So Eismann is a judicial activist after all. Who knew?

CHEERS ... to Idaho Secretary of State Lawrence Denney. He's been impeccable in his handling of President Donald Trump's Advisory Commission on Election Integrity.

That's the outfit launched in response to Trump's ludicrous assertion that he would have won the popular vote - instead of falling almost 3 million behind Democrat Hillary Clinton - but for all the illegal ballots cast.

When the commission fanned out across the 50 states and asked for voter information, Denney played fair: If what the commission sought was covered by the state's public records act - including such information as voter names and addresses - he would release it. Private information remained off limits.

By the time state Democratic Party Chairman Bert Marley filed suit to stop Denney, the issue was already moot. On July 10, the Electronic Privacy Information Center filed a request for a temporary restraining order against the commission in the U.S. District Court for the District of Columbia.

"Until the judge rules on the TRO, we request that you hold on submitting any data," advisory commission officer Andrew Kossack wrote Denney.

But Denney went ahead and negotiated a settlement with the Democrats anyway. If and when Trump's commission renews its request, the secretary of state will wait 10 days to give Democrats time to launch another court challenge.

Good for Denney.

JEERS ... to Whitman County Auditor Eunice Coker. As the Tribune's Josh Babcock noted Thursday, Coker's office bungled another election.

Some 812 voters in Pullman Ward 3 got a Ward 1 ballot featuring a city council race among incumbent Al Sorensen, Hannah Krauss and Eric Fejeran.

That's not as big a deal as leaving a contest off the ballot, which would require mailing out new ballots. In this case, Coker's staff can merely set aside the ineligible votes.

But it is a red flag. After all, Babcock notes, this is the third consecutive Pullman City Council election that's been marred by a ballot error. And it's the sixth time in four years that Coker's office has had problems.

That's a lot - when you consider that in any given year only two or three election errors occur among all 39 Washington counties, according to Secretary of State Kim Wyman's office.

CHEERS ... to Rep. Ilana Rubel, D-Boise. When she opposed a bill to strengthen the state's noncompete laws in 2016, the House assistant Democratic leader was a voice in the wilderness.

Last week's New York Times story headlined "Quit your job for a better one? Not if you live in Idaho" validated Rubel's warnings.

Noncompete clauses are designed to stop high-level employees from taking trade secrets with them when they transfer to a competing firm.

But Idaho's Legislature not only stretched non-compete clauses to many other employees, it also puts the burden of proof on the worker, not his boss.

All of which makes Idaho an outlier at a time when other states - notably Utah - are relaxing their noncompete laws.

For good reason: Such laws stifle innovation. They impede the recruitment of intellectual talent and economic development. And by interfering with the job market, these laws depress wages.

A Harvard law graduate, Rubel predicted all of that. Now that she's drafting a bill to repeal it, perhaps her colleagues will pay a little more attention.

DJEERS .. to Legislative District 30 GOP Chairman Doyle Beck of Idaho Falls and former state Rep. Janice McGeachin, R-Idaho Falls, who is now a candidate for lieutenant governor. They are behind a ploy to restore their party's loyalty oath.

Their mischief will come up at the state GOP's leadership conclave today at Coeur d'Alene.

This assault on freedom of thought first emerged during the Idaho GOP's civil war of 2014, when hardliners sought to intimidate conventional Republican candidates with the specter of being publicly outed for not supporting the state party platform 100 percent.

And what's in that platform?

How about repealing direct election of U.S. senators?

Or placing Idaho on the path toward insurrection by nullifying any federal laws it disagrees with?

The GOP regained its sanity last year when it dumped the idea.

Sanity, however, is not necessarily something that restrains Beck or McGeachin. - M.T.