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December 2006

## Court Review: Volume 42, Issue 3-4 - Lessons from an Unusual Retention Election

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Goodman, Shira J. and Marks, Lynn A. , "Court Review: Volume 42, Issue 3-4 - Lessons from an Unusual Retention Election" (2006). *Court Review: The Journal of the American Judges Association*. 18.  
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# Lessons from an Unusual Retention Election

Shira J. Goodman and Lynn A. Marks

On November 8, 2005, something happened in Pennsylvania that has never happened before: an appellate judge, a supreme court justice no less, lost an uncontested retention election. Not only was the loss unprecedented, but with the exception of one retention election in 1993, appellate justices and judges in Pennsylvania routinely have won retention by margins of 70% to 30%. This year, one justice lost his retention election and another barely won with just 54% of the vote.

Retention elections have been a feature of judicial elections in Pennsylvania since the state constitution was amended in 1969. Following election to an initial 10-year term, judges may file to stand for retention in an uncontested, nonpartisan election, for successive 10-year terms until reaching the age of mandatory retirement. Retention elections, by their very nature (uncontested, nonpartisan, seemingly with foregone conclusions) traditionally have attracted little attention from the public and the media. Appellate justices and judges have not been targeted in retention elections for decisions they had rendered on the bench, and with one exception, were not identified as judges who should be “voted out.”

Two thousand five was the year this changed. Typically, judicial elections, and retention elections in particular, are low turnout elections. This year was no exception in that regard: only 18.26% of registered Pennsylvania voters voted in Justice Sandra Schultz Newman’s retention election, and only 17.87% voted in Justice Russell Nigro’s retention election.<sup>1</sup> What was different was that voters paid attention to the retention elections and were motivated to vote “no” in a way they never had before.

What accounts for this unprecedented event? It is difficult to make broad generalizations from such a low-turnout election, but it seems that the retention elections turned into a referendum on the role of the courts in our system of governance and the meaning of public service, especially as that relates to compensation and the use of public funds. In addition, this election took on special importance as a target of grass-roots activists eager to send a message that populist action can lead to tangible results. The court and the individual justices standing for retention likely would not have drawn such attention were it not for the debate roiling around recent legislative action regarding compensation for legislators, judges, and execu-

tive officials, and the lack of any other statewide races on the ballot.

Given this special set of circumstances, some may be ready to dismiss this election as an aberration. It is premature, however, to do so. History shows that judicial elections have tended to become more partisan, more expensive, and more like contests for other elected offices, not less. This first retention election of note may mark a point of departure for retention elections in Pennsylvania and may have important consequences for judicial selection in Pennsylvania going forward. Just as important, the 2005 supreme court retention elections hold significant import for the ongoing relationship between the public and the courts and point out that work needs to be done to improve that relationship.

## HISTORY OF RETENTION ELECTIONS IN PENNSYLVANIA

Pennsylvania began using retention elections as the method for determining whether a previously elected justice or judge would continue to serve on the bench following a constitutional change in 1969. To be retained, a judge must receive at least a 50% “yes” vote.<sup>2</sup> From the first appellate retention election following the constitutional amendment until 2005, no appellate justice or judge failed to win enough votes to be retained in office. In fact, in only one race did an appellate justice not receive an overwhelming majority vote in favor of retention; in 1993, Supreme Court Justice Nicholas P. Papadakos retained his seat, but only 55% of the voters voted in favor of retention.<sup>3</sup>

With the exception of 1993, retention elections in Pennsylvania have not attracted widespread interest or attention. There were no major campaigns in favor of or against statewide justices or judges standing for retention, and the jurists did not raise funds to cover campaign costs. Essentially, retention elections were non-events. Even when retention races started heating up in other states, we in Pennsylvania considered ourselves somewhat insulated from the activities that were being observed elsewhere.

## WHAT’S BEEN HAPPENING IN RETENTION ELECTIONS ACROSS THE NATION

Throughout the nation, retention elections have become more contentious as various groups have targeted judges who

### Footnotes

1. Pennsylvania Department of State, *available at* <http://www.dos.state.pa.us/bcel/site/default.asp>.
2. PA. CONST. art. V, § 15(b).
3. In 1993, Justice Papadakos was the only justice standing for retention. It was a time when the state supreme court was dogged by controversy that ultimately led to the impeachment of Justice Rolf

Larsen. Justice Papadakos was personally criticized for standing for retention when he would only be able to serve one year before reaching the mandatory age of retirement, for hiring his son as a law clerk, and for having voted to increase judges’ pensions. Katherine Seeyle, *Papadakos Victory Sets New Low in Margin of Approval by Voters*, PHILADELPHIA INQUIRER, Nov. 5, 1993.

have authored opinions or rendered decisions with which the groups have disagreed. Typically, such elections have focused on specific criminal sentencing decisions, abortion issues, and gay marriage.

In its 2003 report *Justice in Jeopardy*, the ABA Commission on the 21st Century Judiciary highlighted the threats it observed to state judges standing for retention or reelection: “[I]t is incumbents who are put at future risk of losing their tenure when they uphold unpopular laws, invalidate popular laws, or protect the rights of unpopular litigants. In such cases, it is incumbents who are thus presented with the impossible choice of sacrificing either their careers, or their independence and the rule of law.”<sup>4</sup> The ABA Commission bolstered this finding with evidence from retention elections throughout the nation:

- In 1992, Florida Justice Rosemary Barkett’s retention was opposed by the National Rifle Association and a group of prosecutors and police officers, on the grounds that she was “soft on crime.”
- In 1995, a sitting South Carolina justice was challenged for the first time in over a century, on the grounds that she was “soft on crime.”
- In 1996, the Tennessee Conservative Union and other groups successfully campaigned for the defeat of Tennessee Justice Penny White on account of a decision she joined overturning a death sentence. In the next election cycle, Justice Adolpho Birch, Jr. resisted a challenge to his retention based upon his decision in the same case.
- In the 1998 California Supreme Court elections, Chief Justice Ronald George and Justice Ming Chin withstood challenges to their retention based on their rulings in abortion cases.
- In Florida, Justice Leander Shaw’s retention was opposed on the basis of his ruling in an abortion case.
- In Ohio in 1998, opposition to Justice Paul Pfeifer focused on his decision in a school-funding case decided under the Ohio Constitution (and was an ancillary issue in the reelection battle of Resnick in 2000).<sup>5</sup>

The 2002 retention elections in Illinois and Missouri also were heated affairs. In Illinois, three circuit judges, fearing possible opposition, raised money for a planned television campaign to support their retention efforts.<sup>6</sup> In 2004, retention elections were major focal points in four states: Missouri, Arizona, Iowa, and Kansas. In Iowa, Judge Jeffrey Neary was targeted “because he granted a ‘divorce’ to a lesbian couple

who had split up after having a civil-union ceremony in Vermont. The group [targeting the judge] sees that ruling as a nod in the direction of same-sex marriages in Iowa.”<sup>7</sup> Neary did win retention, garnering just 50% of the vote.<sup>8</sup> Similarly, in Missouri, Judge Richard Teitleman was targeted because of his allegedly “liberal activism,” but he too won retention.<sup>9</sup>

In Kansas, District Court Judge Paula Martin was retained, despite a campaign against her based on her sentencing decisions.<sup>10</sup> “The campaign [against Martin] was the first time in county history a judge faced formal opposition heading into a retention election.”<sup>11</sup> In Arizona, Maricopa County Superior Court Judges Ken Fields and William Sargeant were the targets of “vote no” campaigns based on their decisions in some abortion cases.<sup>12</sup> The leader of the anti-retention effort admitted that “he couldn’t say either judge has a pattern of bad decisions. The campaign is based largely on the two abortion-related decisions.”<sup>13</sup> Despite the campaign, both Fields and Sargeant were retained.

Pennsylvanians had felt fortunate that our retention elections had not become so polarizing or politicized. Indeed, in drafting merit-selection proposals for the statewide appellate courts and even the local courts in Philadelphia, legislative sponsors and Pennsylvanians for Modern Courts (“PMC”) had always provided for a retention election following an initial term in office. PMC had hoped that retention elections in Pennsylvania would remain an opportunity for voters to weigh in on the judge’s performance on the bench, his or her fairness, his or her treatment of litigants and witnesses, and the quality of his or her work.

As will be seen below, the nature of retention elections in Pennsylvania has now changed somewhat, but not in the way many had predicted or expected. PMC, however, still believes that retention elections are an important part of the judicial selection process, whether that process remains electoral or is transformed into a merit-selection system.

## WHAT HAPPENED IN 2005 IN PENNSYLVANIA?

In light of recent retention battles in other states, we expected that any interest in retention elections in Pennsylvania would be generated by controversial decisions rendered by

**[I]nterest in the retention election and the targeting of [the justices] were not directly related to any decisions they authored or took part in . . . .**

4. ABA Comm. on the 21st Century Judiciary, *Justice in Jeopardy*, at 24-25 (2003).

5. *Id.* at 25-28.

6. Trisha L. Howard, “Three Illinois Circuit Judges Raise \$155,000 for Retention Campaigns; Amount Dwarfs Figures for Madison County in 2000,” *ST. LOUIS POST-DISPATCH*, Oct. 22, 2002.

7. Rekha Basu, “Basu: Justice Is for Judges, Too,” *DES MOINES REGISTER*, Oct. 12, 2004.

8. Margaret Ebrahim, “The Bible Bench: The Message from Fundamentalists to State Jurists Is Clear: Judge Conservatively, Lest

Ye Not Be a Judge,” *MOTHER JONES*, May 2006 at 54.

9. *Id.* See also Donna Walter, “Supporters Rally to Defense of Missouri Supreme Court Judge Richard B. Teitelman,” *DLY. REC.* (Kansas City, Mo.), Nov. 1, 2004.

10. Eric Weslander, “Embattled District Judge Stays on Bench,” *LAWRENCE (KAN.) JOURNAL-WORLD*, Nov. 3, 2004.

11. *Id.*

12. Richard Ruelas, “Judge an Unexpected Target,” *ARIZ. REPUBLIC*, Nov. 1, 2004.

13. *Id.*

**Chief Justice Cappy's request for a judicial pay raise and proposal of a new way to set judicial compensation was behavior typical of the leader of the judicial branch.**

judges during their tenure. Indeed, it appears that Justice Russell Nigro, one of the two supreme court justices up for retention in 2005, shared these concerns. In the months preceding his retention election, his campaign committee raised funds in anticipation of having to run a campaign to address negative comments about some of

his rulings.<sup>14</sup> As will be seen, however, the interest in the retention elections and the targeting of Justice Nigro (and Justice Newman) were not directly related to any decisions they authored or took part in while serving on the high court.

Justice Nigro's fundraising was unprecedented and controversial. Justice Nigro promised that he would only use the funds in the event he needed to respond to "an attack," and promised to return any unused funds. "If no attack occurs, he said, all of the money raised for a defensive ad campaign would be returned 'dollar for dollar' to donors."<sup>15</sup>

At the time Justice Nigro's fundraising became public, it was still widely assumed that any threat to the justices' retention bids would result from special-interest groups unhappy with particular decisions. One of the coordinators of Justice Nigro's fundraising campaign explained, "He wants to have enough in the bank so that if he has to conduct a six-to-eight-week concentrated media campaign to answer some off-the-wall out-of-state group, he will have enough money to do that."<sup>16</sup> Similarly, the Chancellor of the Philadelphia Bar Association at the time stated, "I hope that we don't have what has occurred in other states—a single issue or agenda-driven campaign."<sup>17</sup>

Instead, the retention elections became a focal point of public interest because they were the only elections for statewide office this election cycle. Public discontent surrounding late-term legislation raising the pay of state legislators, judges, and executive-branch officials was reaching a critical level. Ironically, as will be discussed, a plan initially intended to divorce judicial compensation from the political process resulted in broad legislation affecting all three branches of government, allegations of a judiciary too closely tied to the legislature, and the use of the political process to punish judges.

Ultimately, the campaign committees of both Justice Nigro and Justice Newman raised substantial funds to support their retention campaigns,<sup>18</sup> although Justice Newman did not do so until just before the election.

**THE UNEXPECTED ISSUE IN THE RETENTION ELECTIONS — THE PAY RAISE OF 2005**

In fall 2004, Pennsylvania Chief Justice Ralph Cappy began the process of seeking a pay raise for Pennsylvania's justices and judges. Excluding annual cost-of-living increases, the judiciary had not received a pay raise in 10 years. As part of this process, Chief Justice Cappy also proposed that judicial pay in Pennsylvania be pegged to compensation for members of the federal bench. As he explained:

Properly structured, such coupling would recognize the similarity in responsibilities between state judges and their federal counterparts and would make state judges' remuneration commensurate with our federal brethren. On the "front" side of the equation, this linkage would go far in attracting superior candidates to the judiciary just as it would help retain judges who had begun to consider alternative career options. Perhaps most importantly, such a plan would take politics out of the pay raise issue forever.<sup>19</sup>

Under his proposal, the judiciary would no longer be forced to come to the legislature seeking raises. Instead, when federal salaries for judges increased, state salaries would increase as well. Chief Justice Cappy's plan did not propose that appellate and trial-level state court judges receive the same salary as their counterparts on the federal district and appellate courts. Instead, state supreme court justices would receive the same salary as federal circuit court judges; intermediate appellate court judges in Pennsylvania would receive the same salary as federal district judges; and common pleas court judges would receive the same salary as federal magistrate judges.<sup>20</sup>

This plan had much to recommend it. The Pennsylvania judiciary had not regularly received pay raises; each time such a raise was sought it became tangled up with legislative pay raises. This new plan would enable the judiciary to maintain some independence from the legislative branch by eliminating the need for the judges to go "hat in hand" to the legislators. Instead, the compensation of state judges would increase on a par with that of federal judges.

14. L. Stuart Ditzen, *Judge Is Preparing for a Tough Election*, PHILADELPHIA INQUIRER, July 24, 2005.

15. *Id.* Justice Newman, the other justice standing for retention, decided not to raise any campaign funds but in the last weeks preceding the election, she changed that strategy and her campaign did raise and spend significant sums of money.

16. *Id.*

17. *Id.*

18. A complaint was filed challenging the propriety of some of the contributions as well as the Nigro campaign's compliance with reporting requirements. PA CleanSweep filed a complaint with the Department of State contending that several contributions to Justice Nigro's retention campaign violated the state's campaign-finance law.

Charles Thompson, *Group Files Complaints Over Judge's Campaign*, THE PATRIOT-NEWS, Oct. 21, 2005. (At the time of this writing, the State Department was investigating the complaint and the propriety of the challenged contributions under the applicable campaign-finance regulations).

19. Chief Justice Ralph Cappy, *A Collaborative Effort of All Three Branches of State Government Led to a Newly Enacted Compensation System that Is Right for Pennsylvania*, July 20, 2005, available at <http://www.courts.state.pa.us/index/Aopc/PressReleases/opedrjc.720.asp>.

20. *Id.*; see also Act of July 7, 2005, P.L. 201, No 44 (repealed Nov. 16, 2005, §§ 1802-1808 ("Act 44")).

Chief Justice Cappy's request for a judicial pay raise and proposal of a new way to set judicial compensation was behavior typical of the leader of the judicial branch. Just as the chief justices of the U.S. and of other state courts must act as advocates for the judges and the courts, Chief Justice Cappy asked for a raise for his colleagues and proposed a plan for avoiding such awkward requests in the future.

It is difficult to explain exactly what happened next, because it did not happen during public hearings or open sessions of the legislature. Somehow, however, at the last moment, late at night, just before the legislature adjourned for the summer, broad legislation affecting compensation for members of all three branches of government, including the judiciary, was enacted: "The Legislature just gave itself, top state officials and judges pay raises up to 34 percent. Gov. Ed [Rendell] approved them. This was done without public review or a word of debate just after 2 a.m. on July 7."<sup>21</sup> The secretive, nonpublic nature of the passage of the pay-raise legislation generated considerable criticism among the public and the media. State Representative Greg Vitali, a vocal critic of the pay-raise legislation who later would participate as a plaintiff in a lawsuit challenging the legislation's constitutionality, characterized the passage of the legislation this way:

The pay raise bill should have been read and discussed in public on three different days in the House and again in the Senate before the vote July 7. . . . That didn't happen, as legislative leaders kept the details secret before the 2 a.m. vote was finally held. "If the Legislature had been forced to discuss the raise in public before the vote, the raise never would have happened."<sup>22</sup>

As noted above, the discussions and negotiations leading up to the drafting and amending of the bill were not public, and the extent of Chief Justice Cappy's participation in them is not clear. However, several sources have identified Chief Justice Cappy as being very involved in designing the concept of the pay raise. For example, in an op-ed piece defending his decision to sign the pay-raise legislation into law, Governor Edward G. Rendell wrote:

This legislation, particularly the concept of linking state salaries to a percentage of those paid equivalent federal officials, emanated from an idea put forth by our fine Supreme Court Chief Justice Ralph Cappy.<sup>23</sup>

Chief Justice Cappy's lawyer, in a letter to the Judicial Conduct Board made public by the Administrative Office of Pennsylvania Courts following the dismissal of a complaint

filed against Chief Justice Cappy, wrote:

As Chief Justice Cappy discussed his proposal with representatives of the sister branches of government, it became clear to him that its best chance of success would be as part of a broader reform of compensation for all three branches. He therefore developed and began to discuss scenarios that would tie pay in those branches to counterparts in the federal system.<sup>24</sup>

**The reaction to the pay-raise legislation, and the manner in which it was enacted, was sharp and immediate.**

The ultimate result of all this activity, Act 44, raised the compensation for all state judges, legislators, and many executive-branch officials. Chief Justice Cappy's plan of tying the compensation of the state judiciary to federal levels was accepted and adapted to apply to legislators as well. Members of the Pennsylvania House and Senate would receive an annual salary equal to 50% of the annual salary paid to members of the United States House of Representatives.<sup>25</sup> Legislative officers and leaders would receive a greater percentage of the federal salary, and all members would be eligible for cost-of-living adjustments.<sup>26</sup>

In addition, one portion of Act 44 raised particular attention from the media, the public, and several government watchdog groups after the fact: Although the state constitution prohibits legislators from raising their own compensation during their term,<sup>27</sup> the legislators inserted into Act 44 a provision enabling them to begin receiving the increased salary immediately in the form of "unvouchered expenses."

#### 1107. Additional Expenses

##### (a) Senate

(1) Beginning on the effective date of this subsection and ending November 30, 2008, a member of the Senate shall receive monthly, in addition to any allocation for clerical assistance and other actual expenses, an unvouchered expense allocation in the amount of 1/12 of the difference between:

##### (i) the amount specified for a member in:

(A) section 1102(a) (relating to members of the General Assembly) plus section 1104 (relating to cost of living) as appropriate;

21. John M. Baer, *Scales of Justice Are Over His Eyes*, PHILADELPHIA DAILY NEWS, July 21, 2005.

22. Tom Barnes, *Anger Over Pay Spelled Defeat for Justice Nigro*, PITTSBURGH POST-GAZETTE, Nov. 10, 2005.

23. Edward G. Rendell, *Why I Approved These Pay Raises; The Bill Creates a System for Just Pay Across Government*, PITTSBURGH POST-GAZETTE, July 9, 2005.

24. Letter of W. Thomas McGough, Jr., Esq., on behalf of Chief Justice Ralph J. Cappy, to Joseph A. Massa, Esq., Chief Counsel of the Judicial Conduct Board of Pa., Nov. 11, 2005, *available at*

<http://www.courts.state.pa.us/Index/Aopc/PressReleases/prrel06213.asp>.

25. Act 44, § 1102 (a) & (b).

26. *Id.* at §§ 1102 -1104. Act 44 also tied the salaries of executive-branch officials, including the governor, to the compensation of members of the federal executive branch.

27. "No member of either House shall during the term for which he may have been elected, receive any increase in salary, or mileage, under any law passed during such term." PA CONST. art. 11, § 8.



**New citizen groups sprang up, motivated to . . . demonstrate that business as usual could not go on any longer in Harrisburg.**

or (B) section 1103(a) (relating to legislative officers and leaders) plus section 1104 as appropriate; and

(ii) the amount calculated for that member as of the effective date of this subparagraph pursuant to the act of September 30, 1983 (P.L. 160, No. 39), known as the Public Official Compensation Law.<sup>28</sup>

Similar language granted the same payments to members of the House of Representatives.<sup>29</sup>

Years earlier, in 1986, the legislature had also used unvouchered expenses as part of their increase in compensation. This measure had been challenged, and ultimately upheld by the Pennsylvania Supreme Court in *Consumer Party of Pennsylvania v Commonwealth*.<sup>30</sup> The court drew a distinction between salary and expenses, concluding that the use of unvouchered expenses did not constitute an increase in salary.<sup>31</sup>

The reaction to the pay-raise legislation, and the manner in which it was enacted, was sharp and immediate. Many in the media were angry, and the public was roused to action. Lawsuits were filed in federal and state court challenging the pay-raise legislation.<sup>32</sup>

Like Governor Rendell, Chief Justice Cappy made public statements supporting the legislation. In a press release issued by the Administrative Office of Pennsylvania Courts, Chief Justice Cappy stated:

“Raising public officials’ salaries is never popular and there is never the ‘right time’ to do so. . . . Doing so now was an act of courage by legislators, legislative leaders and Gov. Rendell and I must acknowledge their leadership on a difficult issue.”<sup>33</sup>

Chief Justice Cappy was also widely quoted as calling public reaction to the pay raise “knee-jerk.”<sup>34</sup> A complaint was filed with the Judicial Conduct Board alleging that Justice Cappy’s role in designing and defending the legislation was improper.<sup>35</sup> The Judicial Conduct Board ultimately found the charges to be without merit and dismissed the claim.<sup>36</sup>

Following these events, there was a pervasive sentiment that the courts would not look favorably on challenges to the pay-raise legislation, given previous decisions, including *Consumer Party*, in which the Pennsylvania Supreme Court had upheld previous legislation facing similar challenges to its mode of passage and the use of unvouchered expenses.<sup>37</sup>

New citizen groups sprang up, motivated to do something to demonstrate that business as usual could not go on any longer in Harrisburg. Some called for a repeal of the legislation. One group, PACleanSweep, was founded in July 2005 with the goal of replacing every Pennsylvania legislator standing for reelection in 2006.<sup>38</sup> Others shared and still share that sentiment and goal, but in 2005, no legislators were up for reelection. Indeed, only two officials who are voted on by the entire state were on the ballot—Justices Nigro and Newman, who were standing for retention.

### ELECTION SEASON

As the summer continued and anger over the pay raises did not dissipate, but rather intensified, those calling for ouster of the politicians soon found a new target—Justices Nigro and Newman:

Anger unleashed by the legislative pay raise has given rise to a familiar refrain: Remember in November. The problem, for citizen activist groups, is that lawmakers are not up for reelection till next year.

But some activists are now saying that voters can still make their voices heard in November by removing two members of the Pennsylvania Supreme Court.

They argue that the high court, whose members will benefit from the pay raise, has allowed the General Assembly to routinely pass bills that violate the state constitution.<sup>39</sup>

Tim Potts, founder of Democracy Rising PA,<sup>40</sup> began the campaign against the justices, arguing “The governor and the legislature do what they do because the Supreme Court says it’s OK. . . . Over and over, they have given their blessing to stealth legislation.”<sup>41</sup> Potts pledged to begin an internet-based campaign to defeat the retention campaigns of Justices Nigro and Newman.<sup>42</sup> Other anti-pay-raise groups, including PACleanSweep, pledged to support Potts’ efforts.<sup>43</sup>

28. Act 44, § 1107(a).

29. *Id.* at § 1107(b).

30. 510 Pa. 158 (1986).

31. *Id.* at 184-85.

32. For a discussion of these suits, see *infra* at nn. 54-58.

33. Administrative Office of Pennsylvania Courts, *Legislation Enhances Ability to Attract and Retain Quality Judges: Chief Justice Applauds Legislature and Governor for Enacting New Salary Structure*, July 8, 2005, available at <http://www.courts.state.pa.us/Index/Aopc/IndexAOPC.asp>.

34. Mark Scolforo, *Justice Calls Voter Outrage Over Raises “Knee-Jerk,”* ASSOCIATED PRESS, July 20, 2005.

35. *Cappy Targeted for Role in Pay-Jacking*, VALLEY INDEPENDENT NEWS, Aug. 18, 2005. On February 13, 2006, the Judicial Conduct Board publicly announced: “In August 2005, the Judicial Conduct Board of Pennsylvania received allegations that Chief Justice Ralph J. Cappy

violated the Code of Judicial Conduct through his involvement with the legislative pay raise. The Board unanimously determined that the allegations were without merit and dismissed the claim.” Judicial Conduct Board, Press Release, Feb. 13, 2006.

36. *Id.*

37. Of course, as the court of last resort, the Pennsylvania Supreme Court, can reexamine the issue of unvouchered expenses and either distinguish or overrule *Consumer Party*.

38. See PACleanSweep.com, press release, Aug. 15, 2005.

39. Amy Worden, *New Target for Anger Over Raises: Judges*, THE PHILADELPHIA INQUIRER, Sept. 23, 2005.

40. See <http://www.democracyrisingpa.com>.

41. Worden, *supra* note 39.

42. *Id.*

43. *Id.*

At the time Potts announced his campaign, “[Justices] Newman and Nigro said they knew of no campaign against them and had no plans to publicly defend their records.”<sup>44</sup> Justice Newman at that point still was not planning to raise any campaign funds or campaign for retention, and Justice Nigro had not spent any of the money he had raised and would “wait and see” before mounting a responsive campaign.<sup>45</sup>

The allegations that the Pennsylvania Supreme Court was, at least partially, to blame for the legislature’s actions were not new. In the past, the court had upheld other legislation in the face of constitutional challenges to the manner in which the legislature had enacted it. (Of course, the court also had struck down much legislation in the past as well, a fact that was often forgotten during discussions about the pay-raise legislation.) The *Consumer Party* decision in 1986, decided before either Justice Nigro or Justice Newman was on the court, had upheld the use of unvouchered expenses by the legislature. This history, coupled with Chief Justice Cappy’s role in and defense of the pay-raise legislation, combined to create an impression of the court being too close to, or at least too accepting of, the legislature.<sup>46</sup>

Adding to dissatisfaction with the courts was an examination, less than two months before the election, of the reimbursement forms submitted by Pennsylvania Supreme Court justices for expenses they incurred. The *Harrisburg Patriot-News* reported that the seven justices were reimbursed for more than \$164,000 in one year.<sup>47</sup> It pointed out that these expenses were in addition to the justices’ salaries and a generous benefits package that included up to \$600 per month for a car lease.<sup>48</sup>

The *Patriot-News* and follow-up articles in papers throughout the state also highlighted certain expense reimbursements that seemed to many to be out of line or inappropriate. One expense that was frequently cited by the media was Justice Nigro’s request for reimbursement for at least 115 meals during which court-related business was conducted:

No one wants high-powered lawyers to be buying dinner for someone who serves the public on the supreme court, but did Justice Russell Nigro really conduct “court-related business” at 115 meals charged to the taxpayers? And those dinners that cost him \$100, \$200 and even more than \$400—are they the kind of meals at the

same posh restaurants he would have bought if he were putting it on his personal tab? Yeah, we didn’t think so. (And don’t get us started about the \$85 bottle of wine.)<sup>49</sup>

Justice Newman’s expenses didn’t draw the same attention as Justice Nigro’s, although she was criticized for the generous tips and also the seemingly inexpensive food purchases for which she sought reimbursement.<sup>50</sup> Other justices’ expenses, such as Justice Thomas Saylor’s request for reimbursement for 34 car washes,<sup>51</sup> drew attention and criticism, but it was Justice Nigro’s expenses that the media highlighted.

Thus, what started out as a seemingly routine retention election became a campaign in which Justices Nigro and Newman were fighting to retain their seats. Both resorted to media buys in the days leading up to the election, including public endorsements of Justice Newman by former Governor Ridge.<sup>52</sup> All of this activity was unprecedented in the realm of appellate court retention elections in Pennsylvania.

By the time election day arrived, Justices Nigro and Newman had spent a combined total of more than \$800,000; the bulk of the expenditures were in the two weeks leading up to election day.<sup>53</sup> As noted above, Justice Newman was retained with 54% of the vote; Justice Nigro failed to win retention, receiving only 49% of the vote. Interestingly, the local judges up for retention were not targeted for “no votes,” and all were retained.

#### POSTSCRIPT: THE PAY-RAISE REPEAL AND THE OUTCOME OF THE LITIGATION

During the fall, in response to the unrelenting attention and pressure of the media and the public uproar about the pay-raise legislation, the legislature debated repealing it. Differences over

**Adding to dissatisfaction . . . was an examination . . . of the reimbursement forms submitted by Pennsylvania Supreme Court justices for expenses they incurred.**

44. *Id.*

45. *Id.*

46. *See, e.g., id.* (“The Governor and the legislature do what they do because the Supreme Court says it’s OK,” Potts said. ‘Over and over, they have given their blessing to stealth legislation.’”); Tom Barnes, *In Furor Over Pay Raise, Sights Are Set on Judges*, PITTSBURGH POST-GAZETTE, Oct. 10, 2005 (“But leaders of grass-roots groups such as PACleanSweep, based in Lebanon County, and Democracy Rising Pa., based in Cumberland County . . . claim the Supreme Court has a tradition of upholding what critics consider to be questionable, if not unconstitutional, actions by the Legislature.”).

47. Jan Murphy, *State Justices Resort to Big Expenses*, THE PATRIOT-NEWS, Sept. 18, 2005.

48. *Id.*

49. *State of Greed/Pennsylvanians Pay for the Court’s High Life*, PITTSBURGH POST-GAZETTE, Sept. 21, 2005; *see also* Jan Murphy, *State Justices Resort to Big Expenses*, THE PATRIOT-NEWS, Sept. 18, 2005; Stu Bykofsky, *Supremes Suffer from “Robe-it is,”* PHILADELPHIA DAILY

NEWS, Nov. 3, 2005.

50. John Baer, *It’s a Feast Out There for Judges*, PHILADELPHIA DAILY NEWS, Oct. 1, 2005 (“Newman’s charges are more modest but annoying. She charges for her AOL and Comcast hookups, for her On Star service and for \$10 tips to hotel bellhops and doormen.”); *see* Bykofsky, *supra* note 49.

51. *Report: Taxpayers Footing Big Bills Racked Up by Pa. High Court Justices*, ASSOCIATED PRESS, Sept. 19, 2005.

52. Peter Jackson, *For First Time, Pa. Voters Oust a Supreme Court Justice*, ASSOCIATED PRESS, Nov. 9, 2005 (“Nigro raised more than \$400,000 for his campaign. He aired TV ads that sought to distance himself from lawmakers, stating that he had ‘voted to overturn the Legislature when they’ve been wrong.’ Newman, a Republican, took in more than \$240,000 last week alone, and sponsored ads featuring a voiceover by Tom Ridge, the former Pennsylvania governor and former national Homeland Security secretary.”).

53. Mark Scolforo, *Justices Spent Heavily in Lead-Up to Election*, ASSOCIATED PRESS, Dec. 13, 2005.

**It is difficult to draw sweeping lessons from a low-turnout election in which there was not wide polling of voters.**

whether to repeal the judges' raises as well as the legislators' raises held up passage, and no compromise was reached in advance of election day. However, the week after the election, the legislature finally resolved to repeal the pay-raise legislation. Act 72, repealing the pay-raise legislation, was passed on November 16<sup>54</sup> and signed by the Governor.

The movement toward repeal was not enough to quiet the "vote no" campaign, and it also failed to end the pay-raise controversy. Soon after the repeal became effective, several lawsuits were filed by judges across Pennsylvania challenging the constitutionality of the repeal as it related to judges.<sup>55</sup> In addition to seeking to have the pay raises for judges reinstated, the lawsuits highlighted the critical need to separate judicial compensation from the legislative process.<sup>56</sup> The suits were consolidated and were argued before the Pennsylvania Supreme Court in early April 2006, along with Gene Stilp's lawsuit challenging the original pay-raise legislation.

The judges' challenges to the repeal hinged on the provision of the Pennsylvania Constitution that prohibits reducing a judge's salary while he or she is in office: "Justices, judges and justices of the peace shall be compensated by the Commonwealth as provided by law. Their compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth." The judges' claim was based on the fact that although the repeal affected all officials who had received a raise through Act 44, some officials had not received such a raise and thus did not have their salaries reduced by the repeal.

In September 2006, the Pennsylvania Supreme Court, accepting the judges' constitutional argument, held that the repeal of the pay raises was unconstitutional as to the judges.<sup>57</sup> The court also found, however, that the unvouchered-expense portion of the legislative raises was unconstitutional. While finding Act 44 unconstitutional in part, the Court refused to apply the nonseverability clause of the pay-raise legislation. As a result, the provisions of Act 44 relating to judicial compensation were held to remain in force.

During the litigation and following the court's decision, there had been criticism that the justices were deciding a case affecting their own compensation. In response, by defenders of the court and the court itself, it was explained that under the "doctrine of necessity," there was no alternative, and that despite their own interest, the justices were required to deter-

mine the case impartially. As Judge Anne Lazarus, chairwoman of the Ethics Committee of the State Conference of Trial Judges, explained in an interview: "[The rule of necessity] holds that whenever all judges in a particular court are touched by the same conflict 'it is necessary for a judge, even if conflicted, to handle the controversy.'"<sup>58</sup> While legally correct, this further agitated the public and those calling for ousting all elected officials, including judges.

### **WHAT DOES IT ALL MEAN?**

It is difficult to draw sweeping lessons from a low-turnout election in which there was not wide polling of voters. But, judging from the tenor of the debate and the arguments being made, PMC has discerned a central theme defining the 2005 retention elections. Significantly, this theme is not new, and the sentiments it represents have not been resolved.

### **A FAILURE TO COMMUNICATE**

PMC attributes the events of 2005 to a collision of incongruous perceptions about the court system and its role in our system of government: the public and the judges (and their defenders) have very different views about the courts and our governmental system of checks and balances. In fact, when one reads what the "two sides" have to say about the situation, they seem to be talking about entirely different things. And, certainly, they are not really talking to each other. This underscores a major problem—the isolation of courts and judges from the people they serve.

All the publicity about judicial elections, federal appointments, activist judges, and high-profile cases has obscured a basic truth—the public does not really know all that much about judges and courts. A corresponding problem is that once on the bench, judges often become isolated from the public and seemingly "out of touch" with the common experience. In combination, these factors produce a condition ripe for explosive results when issues of compensation, expenditures by public officials, and political maneuvering arise.

Even now, the two sides seem miles apart in their assessment of what happened last fall. Judges and their defenders (mostly lawyers and the organized bar) seem not to understand the public outrage connected with the pay raise and why any part of it was directed at the court.

For example, one lawyer, in an effort to exhort fellow lawyers to support the courts, defended the chief justice's role in designing the pay raise and attacked the results of the retention election:

For almost six months there has been a persistent, unrelenting diatribe from many in the print media across the Commonwealth attacking our chief justice, our

54. Act of Nov. 16, 2005, P.L. 385, No. 72 ("Act 72").

55. A third lawsuit was filed challenging the entire repeal, as applied to judges, legislators, and executive-branch officials. To date, that suit has not been consolidated with the others or addressed by the Pennsylvania Supreme Court. Common Cause of Pennsylvania also filed a lawsuit in federal district court challenging the constitutionality of the pay-raise legislation. That suit was dismissed this spring, *Common Cause of Pennsylvania v. Commonwealth*, 447 F. Supp. 2d 415

(M.D. Pa. 2006), but has been appealed.

56. *Herron v. Commonwealth of Pa.*, Supreme Court of Pa. Docket No. 48-EAP-2005 (Brief of Appellant, at 1).

57. *Stilp v. Commonwealth*, 905 A.2d 918 (2006), rehearing denied (Nov. 8, 2006). Chief Justice Cappy did not participate in the decision.

58. Thompson, *supra* n. 29.



Supreme Court and our judiciary in general. The diatribe is frequently misleading, occasionally tasteless, often threatening and evidences an alarming illiteracy as to the operable provisions of the Pennsylvania constitution.<sup>59</sup>

This lawyer then criticized the vote against Justice Nigro's retention as "an irrational act, which again was the result of actions by those who would undermine confidence in our justice system."<sup>60</sup> This echoes Justice Nigro's own assessment of his electoral defeat: "What they did was an irrational thing. They sent a misguided missile."<sup>61</sup>

Furthermore, the judges and their defenders seem not to understand why their efforts to attack the pay-raise repeal and the court's ultimate decision in the case, regardless of the legal merits, were so distasteful to the public. This failure to understand, and the insistence on viewing the public's ire as misdirected and the court and judiciary as scapegoats can only lead to further alienation and confrontation.

On the other side, the public seems not to understand, or at least to have lost faith in, the courts' role in the system of checks and balances. The public seems unable to grasp that judges are deserving of a pay raise and that Chief Justice Cappy's request for such a raise was reasonable and part of his duties. The real problem, which has been lost in the controversy, is that judges are beholden to the other branches of government for their compensation. Rather than respect this bind and act responsibly to ensure that our judges are fairly compensated, the legislature traditionally has piggy-backed its own raises onto the bills related to judges' compensation. As a result, lost in the pay-raise, retention, and repeal controversies were Chief Justice Cappy's reasonable plan to end this cycle of long periods without pay raises followed by turmoil over any ultimate legislation increasing compensation.

Essentially, this is a classic failure to communicate. The courts are perceived as having lost touch with the people they serve, and the people found the retention election was the only way to effectively communicate their lack of faith in the system. Another way must be found. Targeting judges for "no" votes when they stand for retention because of frustration about the courts, or about government in general, in the long run deprives Pennsylvania of good judges with solid experience. It may be part of our tradition, but it should not remain part of our future.

### THE FUTURE OF RETENTION ELECTIONS

Retention elections, however, should remain part of Pennsylvania's judicial selection system, whether electoral or merit selection. Retention elections guarantee a role for the public in the critically important judicial selection process. While retention elections certainly can provide the opportunity for misguided attacks, they also offer a voice to the people and a real way to pass on a judge's performance as a judge.

Retention elections should not be referenda on hot-button issues or a way to attack the only official up for election; but if the right information gets out, if voters can be educated, it could be a true assessment of how the judge is doing his or her job. Does she treat all fairly and with respect—litigants, witnesses, jurors, court personnel? Is the judge efficient in adjudicating cases? Is the judge respected by the lawyers who practice before her, even when she rules against them? How often is the judge overturned on appeal? How is the courtroom run—efficiently, with respect to the parties involved, or simply to serve the judge's schedule? Has the judge made efforts to be out in the community—to educate and help the public learn about courts and judges?

Perhaps the best way to look at retention elections is as an opportunity for judges and the public to educate each other. The public can educate the judge about its concerns for fair and impartial courts, for strong courts that will ensure that the constitutional system of checks and balances works, for efficient and effective courts. And the judge can educate the public about what he or she does on the bench, how she views her role, what she has learned during the preceding term. This type of education, and communication, is sorely needed. But not only during retention time. There should be an ongoing conversation between the public and the judiciary, not about specific cases and controversial issues, but about systemic issues and the role of the courts in our system of government.

If we have these conversations, perhaps retention elections can begin to fill the role they were always meant to play—neither a non-event rubberstamp for another 10 years in office, nor a targeted campaign based on specific decisions or more general discontent with government. Instead, retention elections can fill a void in our system—providing information so that the public and the judiciary no longer hold incongruous views of the courts and their role in our system of government.

### CONCLUSION

Real issues must be addressed if Pennsylvania is to have strong courts that have the confidence of the public. Two items should be examined as part of this effort. First is the potential use of judicial evaluation committees. Second, in the wake of ambiguity in the court's decision about the permanence of the mechanism of tying state judicial salaries to federal levels as well as recent proclamations by state legislators that they will essentially "undo" the effect of the court's decision and find a way to bring judicial salaries back to pre-pay-raise levels, there is a need to discuss a new means of setting judicial compensation. PMC is eager to explore both of these concepts, which have been employed successfully in other jurisdictions.

The first, judicial evaluation committees, would be formal committees established by law and charged with evaluating judges' standing for retention. Evaluations would be based on the factors described above, including experience on the bench, efficiency, demeanor, and the opinions of fellow jurists and

59. Edward W. Madeira, Jr., *Chief Justice, Courts Deserve More Support from Legal Community*, THE LEGAL INTELLIGENCER, Jan. 30, 2006.

60. *Id.*

61. L. Stuart Ditzen, *Nigro Calls Vote to Oust Him "An Irrational Thing,"* PHILADELPHIA INQUIRER, Nov. 10, 2005.

practicing lawyers. The ratings and recommendations would be shared with the public, so that voters would be educated and informed when entering the voting booth during retention elections.

The second concept, finding a new way to set judicial compensation, would seek to divorce permanently the process of setting judicial compensation from the state legislature. This, in effect, would achieve what Chief Justice Cappy originally intended, eliminating for all time the need for the courts to go asking for raises from the legislature. Possible solutions include setting up an independent judicial compensation commission, tying judicial salaries to some outside index, or even implementing Chief Justice Cappy's proposal to tie judicial salaries to those paid to members of the federal judiciary. The point is that the judicial compensation process we have now is not working. There needs to be a change.

The public needs to have confidence in our courts. This is a big challenge, particularly in the wake of the Pennsylvania Supreme Court's decision in the pay-raise case. But the work of repairing the damaged relationship can and should begin now. We need and welcome willing partners in the judiciary and the public. We know that many within the judiciary and the court system are interested in having this dialogue, as are members of local and statewide bar associations. We hope we can broaden the conversation and work together to ensure that we have strong courts in Pennsylvania.



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2007 Midyear Meeting  
April 19-21, 2007  
Hotel Viking  
\$169 single/double

### **Vancouver, British Columbia**

2007 Annual Conference  
September 25-30, 2007  
Sheraton Vancouver Wall Centre  
\$229 Canadian single/double

### **Amelia Island, Florida**

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\$159 single/double standard room  
\$169 single/double deluxe room

### **Maui, Hawaii**

2008 Annual Conference  
September 7-12, 2008  
Westin Maui  
\$190 single/double

### **Sanibel Island, Florida**

2009 Midyear Meeting  
May 14-16, 2009  
Sundial Beach Resort  
\$145 single/double