The Judicial Retention Imbroglio
October 31, 2005

by Dr. G. Terry Madonna and Dr. Michael Young

Pennsylvania’s bizarre judicial selection process reflects an underlying schizoid attitude toward judges and elections--we make judges run for a first term (ten years), but thereafter require that judges seeking additional terms stand for "retention" to another term--without an opponent. Voters are simply asked, yes or no, if they want to retain Justice Watchamacallit in office.

Typically, these retention elections are less than compelling dramas. Not once in state history have the voters denied an appellate jurist retention. Nor is there usually any public interest in the outcome.

But the looming November 8 election may change this: voters get to say yes or no to another ten-year term for Justices Russell Nigro and Sandra Newman. For the first time, a serious and co-coordinated effort is being made to deny two Supreme Court Justices another ten-year term.

Until now, state jurists--with a single exception--have routinely stood for retention, without breaking as much as a sweat. But that exception may forecast much about the impending 2005 race. In 1993, a Supreme Court justice was involved in a close retention election. That justice was Nicholas Papadakos, and, though no great public campaign was orchestrated to deny him retention, he managed only 54 percent in his retention vote that year.

That the 1993 retention vote was close without a significant statewide campaign tells us how vulnerable jurists can be, given the right political circumstances. It also raises the possibility of a close retention vote this year, because of the particular forces and conditions now in play in state politics, notably a coalition of strange bedfellows from the political left and right that have organized to remove the Supreme Court Justices--motivated mainly by retaliation for last summer’s controversial pay hike.

At first blush, it’s difficult to see the relationship between the pay hike vote and the retention denial effort. The two Justices up for retention do not seem personally to have played any overt role in the pay hike, though some guilt by association may be claimed: the Chief Justice of the High Court, Ralph Cappy, conceived the legal framework for the pay hike, privately helped pass it, and publicly encouraged and defended it.

The judicial critics argue, however, that the pay raise is only one specific instance of a disturbing pattern in which the Supreme Court has been increasingly deferential to the legislature on constitutional and separation of power issues. They view the justices as part of the state government establishment that has conducted itself arrogantly, secretly, and too often in its own self-interest. Consequently, the two Justices should be turned out of office.

Whether this effort will succeed remains unclear. The movement to remove Newman and Nigro seems modest, but does have the support of many talk radio hosts, bloggers and some folks previously active in third party movements. But mainstream media support is not apparent. Some of the leading state newspapers are
editorializing in favor of retaining both--arguing that this is the wrong fight and that Nigro and Newman are more than qualified for retention.

Similarly, voters seem unmoved so far by arguments linking the pay raise to a retention vote. At least one public poll released recently, shows no groundswell to dump the Justices, although a majority of Pennsylvanians are unaware or undecided on the retention vote.

Nor are the parallels with 1993 particularly strong. When Papadakos stood for retention, the Supreme Court was in the throes of a major crisis. A statewide grand jury was investigating accusations made by then-Chief Justice Rolf Larsen (himself later impeached) that two of his colleagues on the Court had engaged in criminal misconduct.

The Court itself had become a national disgrace, the ready subject of negative stories, and rising contempt. Newspaper editorials and news reports regularly highlighted its excesses, and the poor quality of its membership. It was even reported that the personal feuds on the Court were so bitter that some justices had not spoken to each other in 20 years; three nasty appellate court races set new lows for judicial decorum, compounding this perfect storm of judicial delinquency.

Papadakos himself collected his share of criticism. He was castigated for office rent and expenses exceeding $9000 per month, for hiring his son as his legal clerk in violation of ethical canons, and for his handling of the Philadelphia Traffic Court. His derelictions were substantial enough that the Republican State Committee and the Patriot Party State Committee opposed his retention for the first time in Pennsylvania history.

All of this suggests that the close retention vote in 1993 can be partly attributed to the Court’s many difficulties at that time. The current Court by comparison is much better than it was in 1993--more competent, if not distinguished. Nor do Justices Newman and Nigro have any of the personal problems associated with earlier Court members in trouble.

Nevertheless, Justices Newman and Nigro could yet be destined to become the first appellate judges in history to be rejected by the voters. Certainly signs of voter angst are not hard to find: anger over the pay raise is continuing; meanwhile, many remain upset with the legislature over other matters as well--the Medicaid cuts, the failure to do property tax reductions, increased spending, and more. Moreover, the Court itself still is under assault for rubber stamping what the legislature does and, therefore, not upholding the constitution. These are all clearly issues that resonate with some voters.

Ultimately voter turnout may be the most critical factor of all. With no Philadelphia mayoral election and the Pittsburgh mayoral election largely wrapped up, the turnout in the urban centers will be low in an off-year election. Central Pennsylvania and Southwest Pennsylvania will weigh in heavily, and these two regions harbor festering anger over the pay raise.

Election Night forecast: a closer than expected election--and possibly a nail-biter-- that reveals less about the candidates on the ballot than about the voters' state of mind heading into the crucial gubernatorial and legislative elections next year. If one or both Supreme Court Justices do lose, Pennsylvania, beyond doubt, has embarked on a new age of populist protest that may permeate state politics for years to come.