

## **Analysis of another effort to alter the Indiana judicial selection and retention process**

The Indiana House rules committee, in late January, voted to amend a “vehicle bill” – a bill with no content introduced as a “place saver” – by adopting a committee report inserting language changing the way Indiana appellate judges and justices are selected and retained. The changes were to take effect immediately upon passage.<sup>1</sup>

A news story the next day<sup>2</sup> reported:

Six House Republicans on Monday passed a bill that some judges likened to a political coup.

House Bill 1419 was a vehicle bill with no content until the Republican-dominated House Rules Committee amended it to include controversial language about selecting and retaining Indiana Supreme Court and Indiana Court of Appeals judges.

The same members passed the legislation on to the full House for further consideration while all four Democrats on the panel voted “no.”

Of course, the committee members could not “pass a bill” at this point. Rather, they voted 6-4 on a party-line vote to issue a report amending the new language into the bill.

Once the House committee adopts a report, it is filed with the Clerk of the House. The committee reports, whether “Do Pass” or “Do Pass Amended,” are generally approved by a voice vote when the House next convenes, and they are then eligible to move on to second reading. Normally, this vote on a committee report is automatic, with no debate.

In the case of HB 1419, however, the majority committee report was never filed. A minority committee report was filed shortly after the committee meeting adjourned on Monday, January 23<sup>rd</sup> – it simply asked “that the commission on courts study the system of the retention of appellate and supreme court judges.”

The mystery of the missing majority committee report was resolved on Thursday morning, January 26<sup>th</sup>, when a story in the Indianapolis Star<sup>3</sup> announced:

House Speaker Brian C. Bosma killed a Republican bill Wednesday that would have made unprecedented changes in the way Indiana selects and retains supreme and appellate court judges. . . .

Democrats had called the proposal, which was inserted into House Bill 1419 on Monday evening in the House Rules and Legislative Procedures Committee, a virtual coup. They charged that Republicans, who already control the executive and legislative branches, were trying to seize control of the judicial branch, as well.

The measure passed the House committee on a party-line 6-4 vote, but Bosma stopped the bill from coming to the House floor for debate and a vote.

---

<sup>1</sup> A recent failed effort, from the 2005 session, to amend Article 7 of the Indiana Constitution to require that the Governor’s nominee to an appellate court be subject to confirmation by the Senate, is described in my article: *“Voting to Retain or Reject Indiana Judges and Justices,”* 49 Res Gestae 3 (Oct. 2005), pp. 21-23.

<sup>2</sup> *“Judges bill clears House Panel”*, Fort Wayne Journal Gazette, 1/24/06 (<http://www.fortwayne.com/mld/journalgazette/news/local/13698345.htm>)

<sup>3</sup> *“Bosma kills bill on selecting and retaining judges”*, Indianapolis Star, 1/26/06 (<http://www.indystar.com/apps/pbcs.dll/article?AID=/20060126/NEWS02/601260396/1006/NEWS01>)

Because the majority committee report was never formally submitted to the House Clerk, it is not one of the documents available on the General Assembly's information page for HB 1419.<sup>4</sup> However, I obtained a copy of the language<sup>5</sup> that would have formed the committee report, from the Legislative Services Agency.

The discussion that follows will examine: (1) the content and impact of the proposed statutory amendment; (2) previous changes to the membership of the nominating commission; and (3) legal issues posed by the changes proposed in HB 1419.

## **What did the proposal say and what would it do?**

### ***Overview.***

As a state representative wrote on his blog:

What the bill (HB 1419 ...) essentially does is replace the current members of the Judicial Nominating Commission with new, partisan members. These new members would then vote on retention recommendations – and their recommendations would **actually show on a ballot** that Hoosiers would vote on.<sup>6</sup>

The proposal would have: (1) abruptly terminated the current terms of both the attorney and citizen members of the Judicial Nominating Commission; (2) changed the method of selection of the attorney members and provided for election of new attorney members, to take office July 1st; (3) required the Governor to fill the three now vacant citizen positions by the end of May; and (4) required that the reconstituted commission evaluate the judges and justices up for retention, beginning with the November 2006 election, and recommend *on the ballot* whether each appellate judge and justice up for retention should stay or go.

### ***The Constitution.***

The judicial nominating commission was established in 1970 with the adoption of the voters on November 3, 1970 of a new Judicial Article. Article 7, Section 9 provides for a seven member commission, to serve as both the judicial nominating commission and as the commission on judicial qualifications for the Supreme Court and the Court of Appeals. The Chief Justice of the State, or a Justice of the Supreme Court whom he designates, is to act as chairman.

Section 9 also provides in part:

Those admitted to the practice of law shall elect three of their number to serve as members of said commission.

All elections shall be in such manner as the General Assembly may provide.

The Governor shall appoint to the commission three citizens, not admitted to the practice of law.

The terms of office and compensation for members of a judicial nominating commission shall be fixed by the General Assembly.

---

<sup>4</sup> <http://www.ai.org/apps/lisa/session/billwatch/billinfo?year=2006&session=1&request=getBill&docno=1419>

<sup>5</sup> The proposed amendatory language is now available online via The Indiana Law Blog at: [http://indianalawblog.com/archives/2006/01/ind\\_courts\\_more\\_28.html](http://indianalawblog.com/archives/2006/01/ind_courts_more_28.html)

<sup>6</sup> Ryan Dvokak's blog of 1/24/06, at: <http://ryandvorak.com/2006/01/24/removal-of-the-judicial-branch/>

***Details of the proposed changes to the Commission membership.***

The “brut force” part of the proposed language for HB 1419 is found in SECTION 7, a non-code provision, which provides that notwithstanding the existing law, “the term of office of each elected or appointed member of the judicial nominating commission expires on June 30, 2006.”

It continues: “Not later than May 31, 2006, the governor shall appoint three new members of the judicial nominating commission ... to replace the appointed members ... whose term of office” was to be truncated by this same amendment.

SECTION 7 also provides that “Not later than March 30, 2006, the clerk of the supreme court shall begin proceedings to conduct a special election ... to replace the elected members of the judicial nominating commission whose term of office” was terminated by this same section.

***How the proposed membership changes would have affected the current law.***

Under current law<sup>7</sup>, the state is divided into three districts corresponding to the First District, the Second District, and the Third District of the court of appeals. The three attorney members are nominated by petitions of electors (attorneys in good standing admitted to practice law in Indiana) from each district. The election is conducted via ballots prepared and mailed by the clerk of the court.<sup>8</sup>

The term of each elected attorney member is presently three years, beginning on January 1<sup>st</sup> following the election. In the case of a vacancy, except when there are less than ninety days left in the term, a special election is to be held and the newly elected commissioner is to take office immediately.

Commissioners are not eligible for successive reelection or reappointment. However, an attorney commissioner or a citizen commissioner who has been elected or appointed to fill a vacancy on the commission for less than one year is eligible upon the expiration of that term, if otherwise qualified, for a succeeding term.<sup>9</sup>

HB 1419 would have amended IC 33-27-2-3 to provide that, rather than the attorney nominees being selected via petitions of the attorney-electors in each district, the nominees would be named by the Speaker of the House and the President Pro Tempore of the Senate.

The Speaker would nominate one Indiana attorney for each district (no more than two of whom to be of the same political party)<sup>10</sup>, and the Pro Tempore would do the same. In the “election” that followed, electors would chose between the House and Senate nominees. The new attorney commissioners would take office July 1, 2006.

Finally, the proposal provided that, not later than May 31, 2006, the governor would appoint three new citizen members of the judicial nominating commission to replace the appointed members of the judicial nominating commission whose terms of office had been truncated under the proposal.

***The proposed changes to the retention ballot.***

If the proposed amendment had become law, the newly constituted Judicial Nominating

---

<sup>7</sup> IC 33-27-2-2.

<sup>8</sup> IC 33-27-2-3.

<sup>9</sup> IC 33-27-2-5.

<sup>10</sup> It is not difficult to think of ways that a Speaker and Pro Tempore who were both of the same party could negate any bipartisan impact of this provision.

Commission would be up and running on July 1, 2006. In addition to its existing responsibilities, the Commission would have a new assignment that would need to be performed for the first time before August 1, 2006 for any judge or justice coming up for retention on the November 2006 ballot:

(a) If a justice or judge has filed a statement with the secretary of state under IC 33-24-2-2 or IC 33-25-2-2 that the justice or judge wishes to be retained in office, the judicial nominating commission may recommend that the judge or justice be:

- (1) approved; or
- (2) rejected.

A recommendation under this section must be filed with the secretary of state not later than noon on August 1. The affirmative votes of at least four (4) members of the judicial nominating commission are required to make a recommendation under this section. The judicial nominating commission is not required to make a recommendation.

(b) If the judicial nominating commission makes a recommendation under this section, the recommendation shall be placed on the ballot in accordance with IC 33-24-2-5.<sup>11</sup>

If the judicial nominating commission makes a recommendation concerning the approval or rejection of a judge or justice:

the recommendation shall be placed on the general election ballot immediately following the question described in subsection (a) and must state "The Indiana judicial nominating commission has recommended that the retention of (Justice or Judge) (insert name (as permitted under IC 3-5-7) here) be approved (be rejected)."<sup>12</sup>

In short, the new Judicial Nominating Commission would not only make nominations to the Governor to fill new or vacant seats on the Supreme Court and the Court of Appeals, it would also make recommendations directly to the voter, on the ballot, when the judges and justices were up for retention.

## **History of changes to the Judicial Nominating Commission membership.**

### ***The Judiciary Law of 1972.***

The implementary legislation for the new judicial article was the "Judiciary Law of 1972." To quote from an article written at the time:<sup>13</sup>

The burden of guarding and implementing the salient features and spirit of the new constitutional Article has been entrusted to seven individuals who constitute the Judicial Nominating Commission and Commission on Judicial Qualification. These two Commissions, consisting of the same seven constitutional officers, are created by the Article itself and become its litmus test for success or failure. ...

The implementary legislation requires that each of the three non-attorney members, who are appointed by the Governor, reside in a different Court of Appeals District in order to ensure geographic representation. The terms of these members are six years, except that the initial terms are staggered for periods of two, four, and six years, respectively. Therefore, unless a Governor or his party succeeds itself in office, no Governor other than Governor Whitcomb will be able to appoint more than two of the three non-attorneys. This provision was obviously included to ensure representation from both parties among the three non-attorney

---

<sup>11</sup> Proposed new IC 33-37-3-2.5.

<sup>12</sup> Proposed addition to IC 33-24-2-5.

<sup>13</sup> See "Creation of the First Judicial Nominating Commission" by Norman T. Funk, \_\_ Res Gestae \_\_ (Jan. 1972), pp. 8-11.

Commissioners.

The Article also requires that those admitted to the practice of law in the State elect three of their number to serve on the Commissions. Through the implementary legislation, each of the three attorneys must also reside in a different Court of Appeals District.<sup>14</sup>

At its inception, therefore, both the citizen and the attorney members of the Commission were to serve six-year terms. The citizen members, appointed by the Governor, had staggered six-year terms, while the attorney members' six-year terms all began on the same date. Vacancies were to be filled for the unexpired term.

The first elections of attorney members took place on October 1, 1971, for six-year terms commencing on January 1, 1972.<sup>15</sup> The initial citizen appointments of the Governor occurred on or before October 1, 1971, with terms also commencing on January 1, 1972. For the initial citizen appointees: one term expired December 31, 1973; another, December 31, 1975; and the third, December 31, 1977.<sup>16</sup> Citizen appointees thereafter served six-year terms.

***The current situation.***

The three attorney members on the current Commission were elected for *three years* rather than six, and their terms do *not* expire at the same time. Rather, the term of James O. McDonald, Terre Haute (First District), ends December 31, 2006; the term of James H. Young, Indianapolis (Second District), ends December 31, 2007; and the term of Sherrill Wm. Colvin, Fort Wayne (Third District), ends December 31, 2008.

The citizen members of the Commission, appointed by the Governor, also now have three-year terms rather than six-year terms. The term of Derrel E. Zellers, Tell City (First District), ends December 31, 2007; and the term of Payton Wells, Indianapolis (Second District), ends December 31, 2006.

The citizen commissioner slot for the Third District has been vacant since March 2005 when the serving commissioner resigned. That three-year term for the Third District expired December 31, 2005. The opening is now in a new cycle that runs through December 31, 2008. Although IC 33-2.1-4-1(e)<sup>17</sup> requires that "vacancies in the office of non-attorney commissioners shall be filled by the governor within sixty days after he has notice of such vacancy," the Third District spot has been unfilled now for approximately one year.

***The change in the length of commissioner terms.***

In 1986, the General Assembly reduced the six-year terms for nonattorney commissioners to three-year terms,<sup>18</sup> and reduced the six-year terms for attorney commissioners to three-year terms.<sup>19</sup>

At the time the change went into effect, the three attorney commissioners were serving terms that began on January 1, 1984, and would expire December 31, 1989. A transitional section of the law provided that the members of the judicial nominating commission "serving on April 30, 1986 shall serve the remainder of their terms."<sup>20</sup> But the attorney commissioners elected for terms to begin

---

<sup>14</sup> Supra, p. 10.

<sup>15</sup> Acts 1971, P.L. 427, SECTION 5, p. 1986; IC 33-2.1-4-2(d), now repealed.

<sup>16</sup> Acts 1971, P.L. 427, SECTION 5, p. 1985; IC 33-2.1-4-2(a), now repealed.

<sup>17</sup> Title 33 was recodified in the 2005 session. This section is now cited as \_\_\_\_\_.

<sup>18</sup> P.L. 184-1986, SECTION 1.

<sup>19</sup> P.L. 184-1986, SECTION 2.

<sup>20</sup> P.L. 184-1986, SECTION 7(b).

on January 1, 1990 had terms of one, two, and three years, under the transitional language.<sup>21</sup> Thereafter, the terms were three-years.

The citizen members whose terms would begin on January 1 of 1988 (Third District), 1990 (First District), and 1992 (Second District), were to be appointed for three-year terms, rather than six years, as under the prior law.

The result is that under current law, one citizen commissioner and one attorney commissioner change every year. This is much different from the commission setup prior to the 1986 changes, where the three attorney commissioners served together for six years, and one citizen commissioner changed every two years.

#### ***How the HB 1419 proposal would have affected the schedule.***

The proposed changes to HB 1419 took a more abrupt approach. The terms of serving commissioners would have been cut off. The terms of new attorney commissioners and citizen commissioners would not be staggered, they would all be elected or appointed for three-year terms to commence July 1, 2006.<sup>22</sup> Presumably, on July 1, 2009, all six positions would have turned over again.

#### **Legal Issues Occasioned by the Proposed Changes.**

Had HB 1419 been adopted into law, it doubtless would have faced challenge. On what grounds might a challenge have been brought? This will not be an exhaustive analysis, but will point to some issues that might have been raised.

#### ***The reconstituted Commission.***

The membership of the Judicial Nominating Commission is set out in Article 7, Section 9 of the Constitution. The commissioners are constitutional officers, officers of the judicial branch of government.

Although Article 7, Section 9 states that "The terms of office and compensation for members of a judicial nominating commission shall be fixed by the General Assembly," one might question whether that language would permit the General Assembly to reduce the term of a sitting member. Recall that this result was carefully avoided in the 1986 amendment.

In *State v. Monfort* (Ind. Sup. Ct. 2000), the Court held that because of the separation of powers, an action of the legislature to abolish a court of general jurisdiction could not be effective until the expiration of the term of the sitting judge. Further:

"The true interpretation of this [separation of powers] is, that any one department of the government may not be controlled or even embarrassed by another department, unless so ordained in the Constitution." *In re Judicial Interpretation of 1975 Senate Enrolled Act No. 441*, 263 Ind. 350, 352, 332 N.E.2d 97, 98 (1975) (quoting *State v. Shumaker*, 200 Ind. 716, 721, 164 N.E. 408, 409 (1928)).<sup>23</sup>

Section 9 also states that "Those admitted to the practice of law shall elect three of their number to serve as members of said commission." and continues "All elections shall be *in such manner* as the General Assembly may provide."

---

<sup>21</sup> For the Third District, the First District, and the Second District, respectively. See P.L. 184-1986, SECTION 7(c)(2), (c)(4) and (c)(6).

<sup>22</sup> SECTION 7 of the proposed amendment to HB 1419.

<sup>23</sup> *Monfort*, p. \_\_\_.

HB 1419 would have limited that constitutional language by restricting the nominees the electors could vote upon in each race to two individuals designated by the Speaker of the House and the President Pro Tempore of the Senate. Rather than establishing the *manner of election*, under this scenario the legislative branch of government is dictating electoral outcomes by effectively naming the officers.<sup>24</sup>

In particular, it has been held in a variety of contexts that the legislature cannot interfere with the discharge of judicial duties, or attempt to control judicial functions, or otherwise dictate how the judiciary conducts its order of business. See *[long list of citations deleted]* *State ex rel. Hovey v. Noble*, 118 Ind. 350, 371, 21 N.E. 244, 252 (1889) (legislature cannot appoint ministers and assistants for the court).<sup>25</sup>

Further, recall that the Constitution states that “Those admitted to the practice of law shall elect three of their number to serve as members of said commission” rather than “shall elect three of their number *who have been approved by the legislative leadership*.” The Indiana Court has held on a number of occasions that where the Constitution defines the qualifications of voters, they cannot be changed nor added to by statute.<sup>26</sup>

### **The ballot instruction.**

The newly-configured Judicial Nominating Commission proposed in HB 1419 would not only, as in the past, make nominations to the Governor to fill new or vacant seats on the Supreme Court and the Court of Appeals, but it would also make recommendations directly to the voter, on the ballot, when the judges and justices were up for retention.

Under the current language of IC 33-24-2-5, the ballot question to the voter is:

“Shall Justice [or Judge] (insert name (as permitted under IC 3-5-7) here) be retained in office?”

Under the proposed revision, *if the Commission arrives at a recommendation* concerning the approval or rejection of a judge or justice, the recommendation would be placed directly on the ballot “immediately following” the above question, and would state:

“The Indiana judicial nominating commission has recommended that the retention of (Justice or Judge) (insert name (as permitted under IC 3-5-7) here) be approved (be rejected).”

Nowhere else in the Indiana statutes is such a “voter recommendation” envisioned.<sup>27</sup>

---

<sup>24</sup> Although Art. 7, sec. 9 provides that the Governor shall *appoint* three citizen commissioners, it does not grant equivalent appointing authority to the General Assembly; rather, it provides that the three attorney commissioners are to be *elected* by those admitted to the practice of law.

<sup>25</sup> *State v. Monfort*, p. \_\_\_.

<sup>26</sup> *Fritch v. State*, 199 Ind. 89, 155 NE 257 (1927): “When the Constitution defines the qualifications of voters such qualifications cannot be changed nor added to by statute.” *Morris v. Powell* (1890), [125 Ind. 281](#), 25 N. E. 221; *State v. Shanks* (1912), [178 Ind. 330](#), 99 N. E. 481.

<sup>27</sup> The parenthetical reference to “as permitted under IC 3-5-7” cited in both the current statute and the proposed revision relates to “candidate designations on the ballot.” A “designation,” as defined by IC 3-5-7-2, “refers to a name, a nickname, an initial, an abbreviation, or a number used to identify an individual.”

IC 3-8-7-11(b) permits political parties in Indiana to use “any appropriate symbol” on ballots as their party “device.” In *Doris A. Sadler, et al. v. State of Indiana, et al.* (Ind. Ct.App. 7/19/04) the issue was whether the Marion County Republican party could include “The A Team” within a ballot device used to designate candidates of the Marion County Republican Party. It was argued that this was equivalent to putting campaign material on the ballot – a recommendation or endorsement; and that “A Team” was an electioneering slogan rather than a symbol. (From the brief of William R. Groth, an attorney for appellees.).

In an Idaho Supreme Court case from December, 2000, a statute called for a statement, termed a “ballot legend,” indicating whether a candidate signed or “broke” the term limits pledge on the ballot. The Court wrote that:

[A]llowing a state official to place a particular political message on the ballot, and to determine the circumstances under which such message should be placed, appears to be in conflict with Article 1, sec. 19 of the Idaho Constitution.

Idaho’s Article 1, sec. 19 is a prohibition against interference with the “free and lawful exercise of the right of suffrage.” Indiana has a terse, but similar provision, at Article 2 of the Indiana Constitution:

Sec. 1. All elections shall be free and equal.

In a term limits case from Missouri, *Cook v. Gralike*, that was decided by the U.S. Supreme Court a few months after the Idaho Supreme Court decision, the State of Missouri had adopted a constitutional amendment requiring similar information on the ballot as to whether a congressional candidate had “disregarded voters’ instructions” on term limits or “declined to pledge to support term limits”. Gralike, a nonincumbent House candidate, sued to enjoin petitioner from implementing Article VIII on the ground it violated the Federal Constitution. The U.S. Supreme Court held Article VIII of the Idaho Constitution to be unconstitutional.

Justice Stevens concluded in the majority opinion that:

[I]t seems clear that the adverse labels handicap candidates "at the most crucial stage in the election process--the instant before the vote is cast." ... Thus, far from regulating the procedural mechanisms of elections, Article VIII attempts to "dictate electoral outcomes."<sup>28</sup>

Chief Justice Rehnquist’s concurrence, in which Justice O’Connor joined, began:

I would affirm the judgment of the Court of Appeals, but on the ground that Missouri’s Article VIII violates the First Amendment to the United States Constitution. Specifically, I believe that Article VIII violates the First Amendment right of a political candidate, once lawfully on the ballot, to have his name appear unaccompanied by pejorative language required by the State.<sup>29</sup>

---

<sup>28</sup> *Cooke v. Gralike*, p. \_\_.

<sup>29</sup> *Cooke v. Gralike*, p. \_\_. The Rehnquist concurrence cited *Anderson v. Martin*, 375 U.S. 300 (1964), where the Supreme Court reversed a three-judge District Court opinion upholding a Louisiana statute requiring that in all primary, general or special elections, the nomination papers and ballots designate the race of the candidates.