

“To elaborate . . .”

A monthly column by Marcia J. Oddi

Voting to Retain or Reject Indiana Appellate Judges and Justices

During the 2005 session, the Indiana Senate considered a proposal to amend Article 7 of the Indiana Constitution to require that the Governor’s nominee to an appellate court be subject to confirmation by a majority of the Senate. After ten years, under this proposal, the justice or judge again would come before the Senate for retention. A favorable vote of 40% of the members of the Senate would assure retention.

The measure passed the Senate by a roll call vote of 33 to 16, but died in House committee.

A story on March 5, 2005 by Kevin Corcoran of the Indianapolis Star reported:

The leaders of state and local bar associations are opposing a proposed constitutional change that would give the Indiana Senate, now dominated by Republicans, power to decide who serves on the state's appellate courts. The bar association officials said Friday they oppose the proposal because it would eliminate the public's right to vote to retain those jurists.

During debate Tuesday, [the proposal’s author, state Sen. R. Michael Young, R-Indianapolis] said he had proposed the measure because the current system of appointing and retaining appellate judges doesn't work. No appellate judge has been removed from the bench by voters since the system began in 1972, Young said. And few constituents know enough about the judges' rulings to make informed decisions at the ballot box, Young told senators.

Although I disagree with Senator Young’s proposed amendment, I believe there is merit in his contention that voters need information about judges’ records in order to make informed decisions. I can attest, albeit via anecdotal evidence, that this is not for lack of trying on the part of some citizens.

In last November's election, Judge John T. Sharpnack was up for another 10-year term. In the week before the election, the hits to the Indiana Law Blog *tripled*. Interested to find out why, I looked at my site's statistics. Almost all the extra hits were the result of search engine inquiries for various variations of the name "Judge Sharpnack." My interpretation: These were voters who wanted to find out more about the Judge so that they could cast intelligent votes.

My own experience is that locating information, even on when an Indiana judge or justice will be on the ballot, is time-consuming. The generally excellent Indiana Courts site has information, in the judges’ and justices’ biographies, about when they were initially appointed. But after that, people apparently are on their own.

Using information from the Secretary of State's election returns (and some phone calls), the Indiana Constitution, and Indiana statutes, I was able to put together the two tables included in this column.

Table 1 shows the five current justices of the Indiana Supreme Court and the date when they were appointed by the Governor. As Article 7, section 11 of the Constitution requires that a judge or justice "shall serve until the next general election following the expiration of two years from the date of appointment", the first "Yes" in each row shows the year in which each of the five justices was initially confirmed by the voters for a 10-year term.

Section 11 continues: "and subject to approval or rejection by the electorate, [the justice] shall continue to serve for terms of ten years, so long as he remains in office." As shown by the table, Justices Shepard and Dickson were retained for a second ten-year term in 1998 and will be up again for retention in 2008. The three remaining justices – Sullivan, Boehm, and Rucker – are in the midst of their first 10-year terms, and will be eligible again in 2006, 2008, and 2012, respectively.

How is the Chief Justice selected? Article 7, section 3 provides in part: "The Chief Justice of the State shall be selected by the judicial nominating commission from the members of the Supreme Court and he shall retain that office for a period of five years, subject to reappointment in the same manner, except that a member of the Court may resign the office of Chief Justice without resigning from the Court."

Justice Shepard initially was named Chief Justice in March of 1987, which means that he has been reappointed in 1992, 1997, and 2002. His current term ends in 2007.

In the case of a justice of the Supreme Court, the electorate of the entire state votes on the question of approval or rejection. In the case of judges of the Court of Appeals, only the electorate of the geographic district in which the judge serves shall votes on the question of approval or rejection.¹

Table 2 shows the fifteen current judges of the Indiana Court of Appeals, their districts, and the date when each judge was appointed to the bench by the Governor.²

¹ The geographic districts are set out at IC 33-25-1-2. Notably, "the entire state constitutes" districts 4 and 5.

² Under IC 33-26-2-3, the judge of the Tax Court, like the justices and judges of the Supreme Court and Court of Appeals, is up for state-wide election at the general election following the expiration of two years after his initial appointment, and every ten years thereafter. Judge Thomas G. Fisher was appointed to office on July 1, 1986, was confirmed for his first ten-year term at the 1998 general election, and confirmed again in 1998. He will be up for retention by the voters in 2008.

Right away you will notice an outlier, Judge Sullivan, who has served since January of 1969. This was prior to the adoption of the Judicial Amendment of 1970.

The table does not go back that far, to do so would require the addition of eight more columns -- 1970 to 1984. At the other extreme, Judge Crone, just appointed in March of 2004, will not be up for confirmation to his first ten-year term until the general election in 2006.³

One thing the tables do not show, because that information does not appear to be readily available, is the age of each justice and judge. This is relevant because Article 7, section 11 includes this provision: "Every such justice or judge shall retire at the age specified by statute in effect at the commencement of his current term."

The age currently specified by statute (IC 33-38-13-8) is seventy-five:

(a) Every justice of the supreme court and judge of the court of appeals shall retire at seventy-five (75) years of age.

(b) Notwithstanding subsection (a), the supreme court may authorize retired justices and judges to perform temporary judicial duties in any state court.

Back to the question of how is a voter to acquire information to help in deciding whether a judge or justice should be retained? Without such information, all would agree, the retention process is meaningless.

Before the 2004 general election, several newspapers ran editorials about Judge Sharpnack. The Fort Wayne News-Sentinel published an editorial brief on Oct. 21, 2004 that read:

The lawyers' verdict is in. When you examine this year's general-election ballot, you'll see a yes-or-no vote on retaining Judge John T. Sharpnack of the Indiana Court of Appeals. Now those among us most likely to know what kind of job he's done have spoken: Keep him, they say.

The Indiana State Bar Association sent surveys to all its in-state members, asking about Sharpnack, among other questions. Of those who returned surveys, 90 percent said he ought to be retained.

The Elkhart Truth wrote on Oct. 16, 2004:

³ IC 33-24-2-2 provides: "A justice who wishes to be retained in office shall file a statement with the secretary of state, not later than noon July 15 of the year in which the question of retention of the justice is to be placed on the general election ballot, indicating that the justice wishes to have the question of the justice's retention placed on the ballot."

Finally, there is one question about retention of judges: "Shall Judge John T. Sharpnack be retained in office?" Sharpnack represents the Fifth District on the Indiana Court of Appeals. The district includes Elkhart, LaGrange and St. Joseph counties.

It's difficult to make a recommendation on judicial retention questions because judges can't campaign for the seat. All we can tell you his Sharpnack's background.

He is from Columbus and has been a member of the court since 1991. He is a graduate of the University of Cincinnati Colleges of Arts and Sciences and Law, where he was editor-in-chief of the law review. Sharpnack was in the U.S. Army, Order of the Coif., from 1955 to 1957. He worked in the antitrust division of the U.S. Department of Justice from 1960-1963. He was in private practice in Columbus from 1963-1990. He served as chief judge from 1992-2001.

Another place to look would be the Annual Reports of the Supreme Court and the Court of Appeals. These are available online and give bare statistics on the number of arguments heard, majority opinions issued, etc.

As shown in the tables, in 2006 one Supreme Court justice and five Courts of Appeals judges will be up for retention, should they so choose. In 2008, as the facts stand now, the Tax Court judge, one Court of Appeals judge and three Supreme Court justices may be on the ballot. It is up to the state and local bar associations, the media, and the League of Women Voters and similar civic groups, to start now to assure that the citizenry will have the information they need to make their votes on retention meaningful.

Justice	Appointed	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004	2006	2008	2010	2012
Randall T. Shepard	09/1985		Yes					Yes					Up		
Brent E. Dickson	01/1986		Yes					Yes					Up		
Frank Sullivan, Jr.	11/1993						Yes					Up			
Theodore R. Boehm	08/1996							Yes					Up		
Robert D. Rucker	10/1999								Yes						Up

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Judge	District	Appointed	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004	2006	2008	2010	2012
Patrick D. Sullivan	2nd	01/1969				Yes					Yes					Up
John G. Baker	1st	06/1989				Yes					Yes					Up
John T. Sharpnack	5th	01/1991					Yes					Yes				
Edward W. Najam, Jr.	1st	12/1992						Yes					Up			
Ezra H. Friedlander	2nd	01/1993						Yes					Up			
Patricia A. Riley	4th	01/1994						Yes					Up			
James S. Kirsch	2nd	03/1994						Yes					Up			
Carr L. Darden	4th	12/1994							Yes					Up		
L. Mark Bailey	1st	01/1998								Yes					Up	
Melissa S. Mattingly/May	4th	04/1998								Yes					Up	
Margret G. Robb	5th	07/1998								Yes					Up	
Nancy H. Vaidik	5th	02/2000									Yes					Up
Paul D. Mathias	3rd	03/2000									Yes					Up
Michael P. Barnes	3rd	05/2000									Yes					Up
Terry Crone	3rd	03/2004											Up			