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The Error in the Politicization of Judicial Retention Votes – Ind. Justice David

This morning, I awoke and hopped onto the Pavlack Law twitter page, as I do most every morning. On the page's feed I read an article posted by @CharlesDWilson from the Greenfield Daily Reporter entitled "Critics call for 'no' vote vs. Ind. high court justice; say ruling denied 4th Amendment right." In short, the article discussed the rising movement to persuade voters to vote against the retention of Indiana Supreme Court Justice Steven David. Indiana, like many states has a procedure for judicial retention of appellate court judges/justices. The basic procedure for how a judge/justice takes office is through appointment by the Governor after a list of candidates is winnowed down to three individuals. Once a judge/justice has been appointed by the Governor, his or her retention on the bench shall be voted upon and then again every 10 years. What is currently called for, by a small but vocal group, is the removal of Justice David through this retention process.

The antagonistic views toward Justice David stem from an extremely unpopular decision in which Justice David wrote the majority opinion on behalf of the Indiana Supreme Court. That opinion, *Barnes v. Indiana*, has been

characterized as holding that a person does not have the right to resist unlawful police entry into his home. Such a holding overturns a centuries old doctrine to the contrary. Joining in David's majority opinion were then Chief Justice Randal Shepard and Associate Justice Frank Sullivan, Jr. Both Justices Shepard and Sullivan have since retired, though for entirely unrelated reasons to Justice David's current challenge. The *Barnes* decision quickly drew the attention and ire of scores of attorneys, lawmakers, and other citizens. In response to the public outcry, the Indiana General Assembly passed S.B.1 effectively mooting the *Barnes* decision.

Now, a year and a half after the opinion in *Barnes*, Justice David is under attack and is in danger of failing to be retained. Though we here at Pavlack Law traditionally withhold ourselves from entering into the greater political debate, this was an issue that cried out for a response. I do not speak to the merits of the opinion. I speak now to the merits of politicizing the office of Supreme Court Justice, and for that matter any judicial office. I call for restraint in the politicization of the judicial branch. I am not advocating for the retention of Justice David. What I am advocating for is that voters do so with a full understanding of the purpose of the judiciary and an understanding of the dangers of turning a judicial retention vote into an opportunity to bring politics into the judicial branch.

In examining some of the efforts dedicated to the removal of Justice David, one argument – really more of an out of context citation than an argument – stands out to me. The commentator wrote,

> In the words of James Madison, "then as the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers." Publius (James Madison), Federalist Paper No. 44

While I believe a look to the wisdom of James Madison and his guidance through the Federalist Papers is quite appropriate, this citation is farcical to say the least. The excerpt is taken from a paper discussing the need to curtail the powers of the states in favor of a strong federal legislative branch and the recourse for abuse of those powers by the Congress. To place some context around the quotation, I add the full sentence from which the quotation is derived in the sources section below and shall limit further discussion of it to that.

What is more important than tearing into an inappropriate quotation is to actually look to the purpose of the judicial branch. That too is outlined by the work of James Madison and Alexander Hamilton in the Federalist Papers. Without delving into the substance of each and every federalist paper individually – a task which I have performed on several occasions in my life – let us look at the general

discussions of Madison and Hamilton. The greatest fear of democracy throughout antiquity, and was most certainly the case at the formation of the Union, was the threat of majority tyranny. Majority tyranny is the concept of the majority being able to subjugate the minority. Related to this fear was the view that the majority had a propensity to change its mind dramatically and frequently. As such, the founders sought to create a system of government whereby the government was insulated from rapid mood swings by the populous. Such rapid changes in opinions, fueled by demagoguery, were the downfall of the Athenian democracy and the Roman republic.

This played out in several ways throughout each branch of government. The first way this is embodied is through the limitation on elections of officials. Note that while a 2-year cycle for electing U.S. Representatives seems short, especially if you are a Congressman in a contested district, it is a limitation nonetheless. Voters must wait at least 2-years to change a representative based upon a change in the views of the majority of voters. Your congressmen are not mere contestants on American Idol whose fate you decide through text message voting at the end of each episode. You are required to wait a decent amount of time to withdraw that person from office. However, the insulation does not stop there. The U.S. Senate has a 6-year cycle with roughly 1/3 of the Senate seats up for grabs every 2 years. Thus, even though voters could change the entire House of Representatives in only 2-years, in order to effect change upon the entire legislative branch of government through the election process, an idea would have to survive at least 4 years. This is because only after 4 years would a majority – 2/3 – of the Senate seats have been up for grabs. Indeed, there were even measures to slow this process even further. Until the passage of the 17th Amendment in 1913 the election of Senators was left to the states to decide. Many states permitted direct election by its citizens, but not all. Many other states required the Senators to be chosen by the state legislature providing yet another check on the passions of the majority.

The insulation of government from the fluctuation in views of the populous does not end with the legislature. The ultimate check upon the sudden passions of the people is the judicial branch. It was designed to be extremely well insulated and to act as the ultimate check on majority tyranny. It is the last line of defense against the majority being able to subjugate the minority. It is for this reason that the federal government provides lifetime appointments to its justices and only permits removal from office through impeachment. Now, consider for a moment the alternative. We have created a system in which judges/justices are placed in a position to inhibit the will of the majority. In essence, the court has the role of preventing mob rule. In order to carryout this absolutely vital role, the Court must make unpopular decisions without regard for whether they will be removed from

office for that decision. They must make decisions for the greater good. Of course there are more intricate aspects to this argument, but it is a reasonable summary to say that justices and judges **must** be free to make unpopular decisions to prevent majority tyranny.

Let us return, for a moment to the quotation from Federalist Paper No. 44. Think for a minute what you have just read about the role of the judicial branch and consider this rhetorical question: is it reasonable to view a judge as a "representative?" I would answer that the role of the judge is many things, but representative of the people is not one. The role of the judge is as gatekeeper and last defender of the rights of the individual. A judge is to be wise, not representative. A judge is not to be appointed, elected, or retained because you agree with individual decisions. He or she is to be placed in that position because you trust that person's judgment and believe that he or she will fairly adjudicate the decisions before him/her.

Now I will gladly concede that a discussion of the Federalist Papers is arguably inappropriate when discussing the functions of a state judiciary as the Federalist Papers deal with the formation of the federal government. Nevertheless, in Indiana, like the federal government, we have a constitution of enumerated rights and a judiciary charged with the defense of those rights. The rationales of the Federalist Papers, I contend, are as applicable to Indiana as they are to the federal government. The judiciary must be free to protect the rights of the individual from the passions of the majority.

Let us return to Justice David's retention for a moment. The arguments against his retention, though couched as opposition to his judgment, are highly political in nature. Let us examine the timing of the opposition to his retention. Do you think it to be a coincidence that the rallying cry for the removal of Justice David have begun in the past few weeks? Where were these cries throughout the summer and earlier? We have been inundated by political ads for almost the entirety of 2012 and yet the opposition, stemming from a 2011 decision, only now becomes particularly vocal. I garnered some insight into this tactic when I had the opportunity to attend the Indiana Law Review Symposium on the topic of merit-based selection of judges. Included in the symposium was a panel discussion on "Retention Elections after Iowa 2010." In the 2010 Iowa retention elections, then Iowa Chief Justice Marsha Ternus found herself ousted by a contentious retention battle stemming from an unpopular decision in favor of same-sex rights. The panel discussion included Justice Ternus, retired Indiana Justice Theodore Boehm, Bert Brandenburg of Justice at Stake, and Justice Penny White the only person to lose a retention vote for the Tennessee Supreme Court. One very enlightening fact from the discussion is the strategy employed by political action groups to oust judges is

that they wait until a month or so prior to the election and launch into a campaign against the justice/judge. The purpose for this is quite clear and quite sinister. Judges have limitations on their ability to both campaign and, more importantly, to raise campaign funds. Political action groups do not have these same limitations. Thus, they are able to build war chests and wait for their moment to strike. The judge under attack is faced with the unimaginable task of creating an effective campaign in only a matter of weeks.

I ask, is it merely a contention against a man's judgment when groups utilize such tactics? I think not. I think this is an example of the basest political motives that our nation has to offer. It deprives the public from a fair and honest discussion on the merits of the retention of a man such as Justice David by such underhanded tactics. If Justice David ought to be removed from the bench, and perhaps he ought to, then let the discussion be one that is open and honest. This politicization of the judiciary through such tactics is not only disrespectful to the men and women who serve our state but to the voters as well. It is a pure and unadulterated attempt to manipulate voters by depriving the opposition a reasonable opportunity to respond.

I do not advocate for the retention of Justice David. It is for each individual voter to decide whether, on balance, his judgment is so deficient as to make him unworthy of the office of Associate Justice for the Indiana Supreme Court. There may well be merit to opinions seeking his withdrawal. However, do not confuse an adverse decision for a deficiency in judgment. I also strongly advocate that, since this vote turns in its entirety upon a single decision, you read the decision before you vote. If you seek guidance in understanding the legal details of the opinion, email me at *Colin@PavlackLawFirm.com* and I will either help you work through it or find someone else who is willing to do so. But, whatever you do, do not go into the ballot and decide to cast a vote against a man whose opinion you know no more about than mere political rhetoric.

Sources

- *Barnes v. State*, 946 N.E.2d 572 (Ind. 2011).

- Wilson, Charles, "Critics call for 'no' vote vs. Ind. high court justice; say ruling denied 4th Amendment right" *Greenfield Daily Reporter* (Oct. 11, 2012).

- The Federalist Papers
  If it be asked what is to be the consequence, in case the Congress shall

misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them; as if the general power had been reduced to particulars, and any one of these were to be violated; the same, in short, as if the State legislatures should violate the irrespective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people who can, by the election of more faithful representatives, annul the acts of the usurpers. ~ The Federalist 44

<u>Other Resources</u>

- Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 Mo. L. Rev. 635 (2009).

- *The New Politics of Judicial Elections 2009-10*, Brennan Center for Justice.

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