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The Scheduling of Judicial Elections in Odd-Numbered Years: Has *Sprague* Resolved the Issue?

I. INTRODUCTION

In the April, 1988, primary election, the voters of Pennsylvania selected the democratic and republican party nominees for the offices of supreme court justice and superior court judge. However, none of these candidates ever assumed office because the Pennsylvania Supreme Court, in *Sprague v. Casey*,¹ cancelled the November, 1988, general election for these judicial positions. The validity of the 1988 judicial elections was questioned² because the Pennsylvania Constitution appeared to require that justices and judges, who are elected state-wide, be selected in odd-numbered years³ and not during the general elections held in even-numbered years.⁴

Richard Sprague, in his capacities as a registered voter and a taxpayer of the Commonwealth of Pennsylvania, filed an action against Pennsylvania Governor Robert Casey.⁵ The Pennsylvania

1. 550 A.2d 184 (1988).

2. The constitutional validity of the elections was originally raised in a May 23, 1988, article of the Pennsylvania Law Journal authored by Duquesne University Law Professor Bruce Ledewitz. See Ledewitz, 11 PA. L.J. RPT. No. 47, at 3-4 (May 23, 1988). Subsequently, Ledewitz's article reached the attention of the Philadelphia Inquirer which in turn published an article concerning the 1988 judicial elections. Thereafter the article was read by Richard Sprague, a Pennsylvania attorney. Justice Nicholas P. Papadakos of the Pennsylvania Supreme Court also questioned the validity of the election in a Temple Law Review article. See Justice Papadakos, *Pennsylvania Supreme Court Review*, 61 TEMPLE L. REV. ____ (1988).

3. Article V is titled "The Judiciary." Section 13(a) states: "Justices, judges and justices of the peace shall be elected at the *municipal election* next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve." PA. CONST. art. V, § 13(a) (emphasis added).

A *municipal election* is defined as "[t]he election held on the first Tuesday following the first Monday in November in each *odd-numbered year*." 46 P.S. § 601(72) (Purdon 1968) (emphasis added).

4. A *general election* is defined as "[t]he election held on the Tuesday next following the first Monday in November in each *even-numbered year*." 46 P.S. § 601(44) (Purdon 1968) (emphasis added).

5. *Sprague*, 550 A.2d at 184. Also named as defendants were James J. Haggerty, Secretary of the Commonwealth of Pennsylvania; William Boehm, Commissioner of the Bureau of Legislation, Commissions and Elections; Allen Ertel, Democratic Party nominee for the office of Justice of the Supreme Court of Pennsylvania; Anita B. Brody, Republican Party nominee for the office of Justice of the Supreme Court of Pennsylvania; Walter M. Cohen,

Supreme Court in *Sprague*⁶ held that the vacancies on the supreme and superior courts occurring as a result of resignations can not be filled by an election in an even-numbered year.⁷ Thus, the democratic and republican party nominees, who expended a significant amount of campaign funds in the 1988 primary,⁸ were denied an opportunity to capture judicial positions in the 1988 general election.

The following comment will trace the evolution of case law concerning the constitutional validity of holding judicial elections in even-numbered years. This comment will also examine the active role Chief Justice Nix played in influencing supreme court decisions which resolved judicial election issues. Finally, this comment will discuss the ramifications of the *Sprague* decision, the issues it leaves unanswered, and possible methods for resolving those outstanding questions in a manner consistent with the *Sprague* case.

II. REVIEW OF CASE LAW CONCERNING THE ABILITY OR INABILITY TO HOLD JUDICIAL ELECTIONS IN EVEN-NUMBERED YEARS

Article V, section 13(a) of the Pennsylvania Constitution, adopted as an amendment to the constitution in 1968, altered the judicial election process by requiring justices and judges to be elected in odd-numbered years.⁹ However, Article VII, section 3, added to the Pennsylvania Constitution in 1874, permits judicial elections to be held in even-numbered years.¹⁰ Not surprisingly,

Republican Party nominee for the office of Judge of the Superior Court of Pennsylvania; and Catherine Ford-Elliott, Democratic Party nominee for the office of Judge of the Superior Court of Pennsylvania. *Id.*

6. *Id.* *Sprague* instituted an action in commonwealth court; however, pursuant to the exercise of plenary jurisdiction, the Pennsylvania Supreme Court listed the case for argument. *Id.* at 186. On September 19, 1988, the court entered a *per curiam* order requiring that the candidates' names be removed from the ballot. *Id.*

7. *Id.* at 191.

8. Campaign expenditures were reported as follows: Republican Supreme Court candidate, Anita Brody \$255,331; Democratic Supreme Court candidate, Allen Ertel \$33,533; Democratic Superior Court nominee Catherine Ford-Elliott \$17,527; Republican Superior Court candidate Walter Cohen \$7,775. *See* Maher, 11 PA. L.J. RPT. 1 (Oct. 3, 1988).

9. *See supra* note 3.

10. Article VII is titled "Elections." Section 3 states:

All judges elected by the electors of the State at large may be elected at either a general or municipal election, as circumstances may require. All elections for judges of the courts for the several judicial districts, and for county, city, ward, borough, and township officers, for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto: Provided, judges for the courts

the state courts of Pennsylvania faced the problem of interpreting the 1968 amendment to the constitution in harmony with not only Article VII, section 3, but also the constitutional framers' intent and the other sections of the Judiciary Article.¹¹ One of the first cases to interpret the impact of Article V, section 13(a) was *Barbieri v. Shapp*.¹²

Pennsylvania Superior Court Judge William Cercone was elected on November 5, 1968, and took office on January 6, 1969; thus, his ten year term¹³ was scheduled to expire in January, 1979.¹⁴ In *Barbieri I*, the supreme court considered whether Judge Cercone's term should be extended one year, until 1980, so that his retention election would occur in 1979.¹⁵ Otherwise, the judge's term would conclude in an odd-numbered year and his retention election would occur in an even-numbered year, apparently in violation of Article V, section 13(a).¹⁶ The Pennsylvania Supreme Court's decision centered on the application of section 2 of the Schedule to Article V.¹⁷

Judge Cercone contended that section 2 of the Schedule to Article V applied to the superior court seat, and therefore his commis-

of the several judicial districts holding office at the present time, whose terms of office may end in an odd-numbered year, shall continue to hold their offices until the first Monday of January in the next succeeding even-numbered year.

PA. CONST. art. VII, § 3. General elections in Pennsylvania are held in even numbered years. *Id.*

11. Article V of the Pennsylvania Constitution is titled "The Judiciary" and discusses, for example, qualifications, terms, and vacancies of justices, judges and justices of the peace. *See generally* PA. CONST. art. V.

12. 470 Pa. 463, 368 A.2d 721 (1977). The plurality decision was written by Chief Justice Jones. *Id.* at 464-69, 368 A.2d at 722-25. Justice Nix filed a concurring opinion *Id.* at 470-77, 368 A.2d at 725-29. Justice Roberts filed a dissenting opinion in which Justice Pomeroy joined. *Id.* at 477-83, 368 A.2d at 729-32. For a discussion of the dissenting opinion, see *infra* note 30.

13. "The regular term of office of justices and judges shall be ten years . . ." PA. CONST. art. V, § 15(a).

14. *Barbieri I*, 470 Pa. at 465, 368 A.2d at 722.

15. *Id.*

16. *See supra* note 3. Section 13(a) requires judicial elections take place during municipal elections which are always held in odd-numbered years. *Id.*

17. PA. CONST. art. V, Schedule § 2. When the Pennsylvania Constitution was amended in 1968, it made provisions for the smooth transition from the old constitution to the new constitution by providing "schedules" to adjust the terms of elected judicial officers so that their terms would conform with the new constitution. *Barbieri I*, 470 Pa. at 465, 368 A.2d at 722. The § 2 Schedule provides that "[t]he *present* terms of all judges of the Superior Court which would otherwise expire on the first Monday of January in an odd-numbered year shall be extended to expire in the even-numbered year next following." PA. CONST. art. V, Schedule § 2 (emphasis added). The Schedule has "the same force and effect" as the constitution. PA. CONST. art. V, Schedule (1968).

sion should continue until the first Monday of January 1980.¹⁸ Any extension of the judicial term was opposed by Pennsylvania Governor Milton J. Shapp,¹⁹ and Commonwealth Secretary C. Delores Tucker,²⁰ who had previously refused to voluntarily extend Cercone's term.²¹ Shapp and Tucker asserted before the supreme court that Judge Cercone's commission was not a "present" term capable of being extended because his induction was on January 6, 1969, and the effective date for Article V, section 13(a) and section 2 of the Schedule to Article V was January 1, 1969.²²

In *Barbieri I*, the Pennsylvania Supreme Court, in a two Justice plurality opinion, held that Judge Cercone's term should be extended until the first Monday of January 1980, and that he need not run for retention until the municipal election in 1979.²³ In interpreting the word "present" for Schedule section 2, the court examined the framers' intent and concluded that "present" "is not confined to terms of superior court judges which existed or were in effect on the single day of January 1, 1969, but includes, . . . terms which commenced after the effective date of the new Constitution."²⁴ The plurality reached their conclusion by a process of elimination, rejecting retention elections in the even-numbered year of 1978 as inconsistent with the intent of the framers.²⁵

Justice Nix concurred with the plurality's decision that Judge Cercone need not run for retention until the 1979 municipal election; however, he chastised the plurality for extending their power by altering a judicial term without "express constitutional authority."²⁶ According to Justice Nix, without the authorization of sec-

18. *Barbieri I*, 470 Pa. at 466, 368 A.2d at 722-23.

19. Article IV, Section 19, states: "All commissions shall be in the name and by authority of the Commonwealth of Pennsylvania, and be sealed with the State seal and signed by the Governor." PA. CONST. art. IV, § 19.

20. The Secretary of the Commonwealth must "prepare and issue with the approval of the Governor," the elected officer's [judge's] Commissions. Act of April 9, 1929, P.L. 177, Art. VIII, § 809, 71 P.S. § 279 (1962).

21. *Barbieri I*, 470 Pa. at 466, 368 A.2d at 723.

22. *Id.* at 467, 368 A.2d at 723-24.

23. *Id.* at 469, 368 A.2d at 725. Article V, § 15(b) of the constitution directs when retention elections for state-wide judicial officers will be held in Pennsylvania. Section 15(b) states that "[i]f a justice or judge files a declaration [for retention], his name shall be submitted to the electors . . . at the *municipal election* immediately preceding the expiration of the term of office of the justice or judge to determine only the question whether he shall be retained in office." PA. CONST. art. V, § 15(b) (emphasis added).

24. *Barbieri I*, 470 Pa. at 467-68, 368 A.2d at 724.

25. *Id.* The court also rejected the alternative of holding the retention election in 1977, fourteen months before Judge Cercone's ten-year term was to expire. *Id.*

26. *Id.* at 470, 368 A.2d at 725. While agreeing with the result reached in the plurality

tion 2 of the Schedule to Article V, the supreme court would lack the power to extend the term of a superior court judge to conform with the judicial retention requirements of the constitution.²⁷ Justice Nix asserted that the plurality and dissenting opinions failed “to recognize the interrelationship between Section 2 and the orderly transition of this Commonwealth to the process of judicial retention.”²⁸ Further, recognizing that the framers’ intent in adopting the election Schedule was to harmonize the transition to retention elections, Justice Nix stated that the narrow purpose of Schedule, section 2 was to “extend by one year the term of office of any Superior Court judge elected to a term established under a prior constitution in order to render the judge’s term of office compatible with the new election provision established by amendments.”²⁹ Therefore, the Schedule “was intended to be no more than a stop-gap measure” for the purpose of aligning the judicial term “with the newly added constitutional requirement that they stand for an election in an odd-numbered year”³⁰

opinion, Justice Nix criticized its reasoning because “it fails to emphasize the limited scope of this Schedule provision [section 2 of Article V] and, implicitly suggests, albeit unintentionally, that this *Court* has the power, absent express constitutional authority, to extend a constitutionally mandated judicial term of office.” *Id.* (emphasis in original).

27. *Id.* at 726. Justice Nix contended that “it is clear that if we had not embraced within this jurisdiction the concept of the retention election with the adoption of the new Judiciary Article [in 1968], there would have been no pressing need for a provision such as Section 2.” *Id.*

28. *Id.* at 472, 368 A.2d at 726. Justice Nix reasoned that:

Absent some authorization to extend the term, it would be impossible to preserve the right of the incumbent jurist to an uncontested, non-partisan retention election. Section 2 thus arose from the need to make the *retention process* applicable to Superior Court Judges who were formerly elected to office in an even-numbered year.

Id. at 474, 368 A.2d at 727 (emphasis in original).

29. *Id.* Justice Nix also rebutted the dissent’s theory, *see infra* note 30, that Judge Cercone’s term was not a “present” term. *Id.* at 475, 368 A.2d at 728. Justice Nix reasoned that if the dissent’s construction had been accurate, one of the seven superior court judges would be elected in an even-numbered year. *Id.* Thus, Justice Nix concluded that the dissent’s rationale:

[D]oes not effectuate the constitutional scheme, but subverts it. If the view espoused by the dissenting justice were adopted by this Court, we would be required to disregard the express mandate of Article V, Section 13(a) and Article VII, Section 3, that all judges be elected in an odd-numbered year.

Id. at 476, 368 A.2d at 728.

30. *Id.* at 477, 368 A.2d at 729. Justice Roberts filed a dissenting opinion in *Barbieri I* which Justice Pomeroy joined. *Id.* at 477-83, 368 A.2d at 729-32. In dissent, Justice Roberts asserted that Judge Cercone’s term should not be extended, but instead his term should expire at the end of his fixed ten-year term, with a retention election in 1978. *Id.* at 478, 368 A.2d at 729. Justice Roberts reasoned that the new judiciary Article V and the schedule were effective as of January 1, 1969, but Judge Cercone’s term did not commence until January 6, 1969. *Id.* at 479, 368 A.2d at 730. Thus, Judge Cercone’s term was not in exist-

A year later, the Pennsylvania Supreme Court in *Barbieri v. Shapp*³¹ addressed the issue of whether court of common pleas judgeships should be filled either by gubernatorial appointment³² or by election when the judges reached mandatory retirement age³³ in an odd-numbered year.³⁴ In a per curiam order, the court directed that the vacancies created by the mandatory retirement age be filled by a municipal election.³⁵ Justice Roberts, writing for the majority,³⁶ concluded that the gubernatorial appointment power of Article V, section 13(b) was not intended to be utilized when vacancies are created by foreseeable events, such as mandatory retirement.³⁷ Consonant with this interpretation, the court reasoned that the intent of section 13(b) was to apply it only as a "stopgap to fill seats that unexpectedly fall vacant."³⁸ The court reasoned that an election to fill a vacancy created by a judge forced to retire could be anticipated by the public, as well as potential candidates, and all involved would have sufficient notice to prepare for an upcoming election.³⁹ To allow the governor's selections to stand, ac-

tence at the "present" as required by section 2 of the Schedule. *Id.*

Further, Justice Roberts contended that holding an "election in an even-numbered year does less violence to the constitutional framework than extending a constitutionally established term of office or holding an election more than a year before a judge's term expires." *Id.* at 482, 368 A.2d at 731. Therefore, the election should be held in an even-numbered year, since the court can "exercise the choice" mandated by Article VII, § 3 when, as here, the "circumstances may require." *Id.*

31. 476 Pa. 513, 383 A.2d 218 (1978). Justice Roberts filed the opinion for the majority. *Id.* at 517, 383 A.2d at 220. Justices Manderino and Nix dissented. *Id.* at 524, 383 A.2d at 224.

32. In accordance with Article V, § 13(b), a vacant judicial seat may be filled by gubernatorial appointment. Article V, § 13(b) states:

A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. . . . The person so appointed shall serve for a term ending on the first Monday of January following the next *municipal election more than ten months after the vacancy occurs* or for the remainder of the unexpired term whichever is less. . . .

PA. CONST. art V, § 13(b) (emphasis added).

33. Mandatory retirement age for justices, judges, and justices of the peace is 70 years of age. PA. CONST. art. V, § 16(b).

34. *Barbieri II*, 476 Pa. at 518, 383 A.2d at 220.

35. *Barbieri v. Shapp*, 474 Pa. 613, 379 A.2d 534 (1977). The supreme court per curiam order reversed a decision of the commonwealth court, *Barbieri v. Shapp*, 29 Pa. Commw. 594, 372 A.2d 939 (1977), and "directed that each of the above [court of common pleas] judicial offices be filled by election at the November 8, 1977, municipal election." 474 Pa. at 614, 379 A.2d at 535.

36. *Barbieri II*, 476 Pa. at 517, 383 A.2d at 220. Justice Roberts' opinion was issued subsequently to the per curiam order.

37. *Id.* at 521, 383 A.2d at 222.

38. *Id.*

39. *Id.* "Vacancies are to be filled by appointment only when there is insufficient time

ording to the majority, would contravene the intention of the framers of the constitution and the people of the commonwealth that judges be elected, not appointed.⁴⁰

Justice Manderino, in a dissent joined by Justice Nix, criticized the majority for ignoring the plain meaning of Article V, section 13(b).⁴¹ The dissent broadly interpreted the term "vacancy" as occurring whenever "an incumbent dies, resigns, retires, or is removed from office."⁴² As evidence of the accuracy of his interpretation of "vacancy," Justice Manderino noted that the un rebutted comments of the delegates on the floor of the Constitutional Convention paralleled his own reasoning.⁴³ Thus, Justice Manderino, with Justice Nix's support, concluded that a foreseeable event, including mandatory retirement, still creates a "vacancy" and must be filled by gubernatorial appointment pursuant to section 13(b).⁴⁴

Barbieri v. Thornburgh,⁴⁵ another case interpreting Article V, sections 13(a),⁴⁶ (b),⁴⁷ and 15(a),⁴⁸ addressed the issue of whether a judicial seat which becomes vacant in an odd-numbered year, as a

to hold an election." *Id.*

40. *Id.*

41. *Id.* at 525, 383 A.2d at 224. Justice Manderino argued that the majority was ignoring "well settled principles of constitutional interpretation" and reading "into Section 13(b) an exception [for judicial vacancies that may be anticipated by mandatory retirement] which is neither explicit nor implicit in the language of Section 13(b)." *Id.*

42. *Id.* at 525, 383 A.2d at 225.

43. *Id.* A delegate to the 1967 Constitutional Convention stated: "I think the facts should not be debatable in any way that when a judge dies a vacancy occurs, when a judge resigns, a vacancy occurs, and when he has retired, . . . the vacancy occurs at a given day." Debates of the Constitutional Convention of 1967-68, Vol. II, at 1085-86 (remarks of Delegate Barron) (emphasis added by Justice Manderino). The Barron Amendment passed by a vote of 68 yeas and 65 nays. *Id.* at 1091. As a delegate to the 1967-68 Constitutional Convention, Justice Manderino voted against the amendment. *Id.*

44. *Barbieri II*, 476 Pa. at 526, 383 A.2d at 225. The dissenters also used examples to highlight their opposition to the majority's conclusion. The dissenters stated that:

[I]f one were to reach mandatory retirement age on January 1 of 1979, or in July of 1978, or February of 1978, the next preceding municipal election would be the municipal election of 1977, just as is the case for mandatory retirements occurring in 1977. The absurdity of this interpretation is obvious: at the municipal election in 1977, the people will be electing judges some of whom will take office in 1978, some of whom will of necessity have to wait until as late as 1979 to take office. Such a result simply could not have been intended.

Id. at 528-29, 383 A.2d at 226.

45. 42 Pa. Commw. 1, 400 A.2d 653 (1979). President Judge Bowman wrote the opinion for the majority. *Id.* at 3-10, 400 A.2d at 654-57. Judge Crumlish filed a dissenting opinion. *Id.* at 10-16, 400 A.2d at 657-60.

46. See *supra* note 3.

47. See *supra* note 32.

48. Article V, § 15(a) states that "[t]he regular term of office of justices and judges shall be ten years. . . ." PA. CONST. art. V, § 15(a).

result of the official expiration of a term, should be filled by gubernatorial appointment until the next municipal election pursuant to section 13(b).⁴⁹ The Pennsylvania Commonwealth Court examined four alternative solutions for the interpretation of the 1968 Constitution,⁵⁰ and concluded that the fourth alternative, electing the new justice at the municipal election of 1981, should be adopted.⁵¹ The court ordered that the elected official should take office in January 1982, and the governor should exercise his power pursuant to Article V, section 13(b) and appoint a qualified individual to the bench during the interim period from January, 1981, the expiration of Chief Justice Eagen's term, until January, 1982.⁵²

The *Thornburgh* court reasoned that the fourth alternative of holding an election in 1981 represented a solution which would satisfy the mandate of Article V, section 13(a).⁵³ Further, the court found that its solution "would solve the problem for the future, would normalize the time span between one's election and the assumption of office, and would synchronize such election within the general framework of the election of all judges as set forth in Article V."⁵⁴ Although the court recognized that allowing a gubernatorial appointee to serve on the supreme court from January of 1981 to January of 1982 was contrary to the public policy of electing judges, the commonwealth court noted that the constitution of 1968 specifically provided for situations when the gubernatorial appointment power was operative as a result of a judicial vacancy.⁵⁵

49. *Thornburgh*, 42 Pa. Commw. at 3, 400 A.2d at 654. Chief Justice Michael J. Eagen's term, at issue in *Thornburgh*, was set to officially expire in January of 1981. Chief Justice Eagen was elected in 1959 to serve a twenty-one year term. *Id.* at 4, 400 A.2d at 655. Prior to 1968, the Pennsylvania Constitution permitted judges and justices to be elected in either general elections (even-numbered years) or municipal elections (odd-numbered years). *Id.* Subsequently, Article V, § 13 altered the language so that judicial elections occurred only during municipal elections. *Id.*

50. The Court Administrator suggested the following four alternative solutions:

- (1) Election in 1979 with the winner to take office in 1981;
- (2) Election in 1980 with the winner to take office in 1981;
- (3) Election in 1981 with the Chief Justice to hold over for a year;
- (4) Election in 1981 with the Governor's appointee filling the gap in that election year.

Id. at 6, 400 A.2d at 655.

51. *Id.* at 9, 400 A.2d at 657. The commonwealth court stated that "we conclude the fourth alternative should prevail." *Id.*

52. *Id.* at 10, 400 A.2d at 656-57.

53. *Id.* at 9, 400 A.2d at 656. The court determined that scheduling the election in 1981 would "meet the explicit constitutional mandate that the election of justices shall be held in municipal election (odd-numbered) years." *Id.*

54. *Id.* at 9, 400 A.2d at 657.

55. *Id.* The commonwealth court pointed out that "the Constitution of 1968 recognizes

The court disregarded alternatives one, two, and three for various reasons.⁵⁶ Alternative two, holding an election in 1980 with the successor to assume office in 1981, was eliminated because the solution was contrary to the specifics of Article V, section 13(a), which requires judicial elections to be held in odd-numbered years, and would perpetuate the even-numbered year problem since justices are elected to ten-year terms.⁵⁷ With little elaboration, the court stated that alternative three, holding an election in 1981 and extending the chief justice's term for an additional year, was inapplicable because such a solution "would be a judicial usurpation of power without constitutional support" and "is contrary to a long-standing principle that a court is without power to extend constitutionally fixed terms of judicial office."⁵⁸ The court found alternative one, election in 1979 with the successor to assume office in 1981, unsupported because it provided for greater than a year interim between election and assumption of office.⁵⁹ Relying on *Barbieri I*, the court articulated that such a solution contravenes the "public policy concern that such long intervals should be avoided."⁶⁰

In *Cavanaugh v. Davis*,⁶¹ the Pennsylvania Supreme Court again addressed the apparent conflict in the commonwealth's constitution between Article VII, section 3 and Article V, section 13(a).⁶² The issue before the court was whether the general election of November, 1982, presented a constitutionally permissible time to fill a seat on the state supreme court⁶³ that would become vacant at the

that vacancies in judicial office will occur under circumstances in which the election process must necessarily be conducted at some future time." *Id.*

56. *Id.* at 9, 400 A.2d at 655-57.

57. *Id.* at 8-9, 400 A.2d at 655-56. The court also noted that in *Barbieri I*, "former Chief Justice Jones (plurality opinion) concluded that Section 13(a), Article V, providing that justices and judges shall be elected in municipal election years supersedes and prevails over the provisions of Section 3, Article VII, authorizing such elections in municipal or general election years as the circumstances may require." *Id.* at 9, 400 A.2d at 656.

58. *Id.*

59. *Id.*

60. *Id.* The commonwealth court found that the *Barbieri I* decision had reasoned that "a fourteen month interval between the election and the assumption of office . . . was against public policy." *Id.*

61. 497 Pa. 351, 440 A.2d 1380 (1982). The majority opinion was written by Justice Roberts and joined by Chief Justice O'Brien and Justices Larsen, Flaherty, McDermott and Hutchinson. *Id.* at 352-58, 440 A.2d at 1381-84. A dissenting opinion was filed by Justice Nix. *Id.* at 358-66, 440 A.2d at 1384-88.

62. *Id.* at 353, 440 A.2d at 1381. The supreme court noted that Article VII, § 3 was adopted in 1874, while Article V, § 13(a) was more recently approved in 1968. *Id.*

63. Henry X. O'Brien, then Chief Justice, decided not to seek retention and was vol-

expiration of a sitting justice's twenty-one year term on January 3, 1983.⁶⁴ The court concluded that the position could be filled at the November, 1982, general election.⁶⁵

The *Cavanaugh* court construed the language of Article VII, section 3 and Article V, section 13(a) together since both sections relate to judicial elections, and reasoned that two classes of judges exist: state and locally elected judges, each of which is to be treated differently.⁶⁶ Without exception, the court noted that all "locally elected judges are to be chosen at municipal elections."⁶⁷ The court, finding an exception for judges elected state-wide, stated that ordinarily members of the bench are chosen in odd-numbered years; however, Article VII section 3 provides for election during even-numbered years "as circumstances may require."⁶⁸ Applying the exception, the court reasoned that when a term of a state-wide officer expires in an odd-numbered year, "circumstances . . . require that the succeeding justice be elected at a general election."⁶⁹ This conclusion was consistent with the constitutionally mandated preference for judicial elections rather than gubernatorial appointments.⁷⁰

The Pennsylvania Supreme Court also stated that it was unpersuaded by either the *Thornburgh* decision⁷¹ or Commonwealth

untarily retired at the expiration of his twenty-one year term. *Id.*

64. *Id.* William Davis, the Secretary of the Commonwealth, "refused to certify the seat for election in 1982, on the basis of his belief that an election for the seat may not be held until the municipal election of 1983." *Id.*

65. *Id.*

66. *Id.* at 353-54, 440 A.2d at 1381-82. Davis contended, however, that because Article VII preceded Article V, Article V's provision calling for a municipal election should supersede Article VII, which permits "either a general or municipal election, as circumstances may require." Thus, Davis "would have the seat filled from January 1983 to January 1984 by gubernatorial appointment and Senate confirmation, if it is to be filled at all." *Id.* at 353, 400 A.2d at 1381.

67. *Id.* at 354, 400 A.2d at 1382.

68. *Id.* See *supra* note 10.

69. *Cavanaugh*, 497 Pa. at 354, 440 A.2d at 1382.

70. *Id.* The court stated that the preference for election "would be defeated if a vacancy occurring at the end of a fixed term in a state-wide judicial office were to be filled by appointment simply because that vacancy, as here, occurs in an odd-numbered, rather than an even-numbered, year." *Id.* The court also found that "whenever possible, judicial officers shall be elected by a complete electoral process." *Id.* (quoting *Berardocco v. Colden*, 469 Pa. 452, 459, 366 A.2d 574, 576 (1976)). See also *Barbieri v. Shapp*, 476 Pa. 513, 520, 383 A.2d 218, 222 (1978).

71. *Cavanaugh*, 497 Pa. at 386, 440 A.2d at 1383. For details of the *Thornburgh* case, which held that a judicial vacancy created by a natural expiration of a judicial term should be filled by gubernatorial appointment until the next municipal election, see *supra* notes 45-60 and accompanying text. The *Cavanaugh* court stated that the *Thornburgh* decision "was never appealed to this Court, is at odds with our holding today, and is expressly disap-

Secretary Davis' contention that Article V, section 13(a) supersedes Article VII, section 3.⁷² Instead, the court relied upon the reasoning of *Barbieri II*⁷³ to conclude that when the expiration of a justice's term is easily ascertainable, and sufficient notice to prepare for the election is available, a judicial election can be held in an even-numbered year.⁷⁴

Justice Nix, in an extensive dissent, accused the majority of "an arrogant assumption of power" and a "blatant disregard" of the constitutional mandate of Article V, section 13(a), which requires that justices of the supreme court "shall be elected at municipal elections."⁷⁵ Justice Nix chastised the majority for not interpreting Article V, section 13(a) in conjunction with Article VII, section 3 so that the two provisions could exist in harmony.⁷⁶ The dissent disagreed with the majority's treatment of Article V, section 13(a) as "a general rule" that elections be held in odd-numbered years, and Article VII, section 3 as "a specific rule" that elections may be held in any year, as circumstances require.⁷⁷ Instead, Justice Nix contended that Article VII refers to "the general subject of elections of public officials," while Article V, section 13(a) specifically deals with the election of judicial officers.⁷⁸ Thus, Article V controlled judicial elections and mandated that they only occur during odd-numbered years.⁷⁹

proved." *Cavanaugh*, 497 Pa. at 356, 440 A.2d at 1383.

72. *Id.* at 356-57, 440 A.2d at 1382-83. Davis relied upon a footnote in the plurality opinion of *Barbieri I* which stated that when "read and construed together, it is clear that the more recent amendment [Article V, § 13] supersedes and prevails over the older, general provision [Article VII, § 3]." *Id.* at 355, 440 A.2d at 1382 (quoting *Barbieri v. Shapp*, 470 Pa. 463, 468 n.6, 368 A.2d 721, 724 n.6 (1977)). The *Cavanaugh* majority disagreed with Davis, and responded that the *Barbieri I* "statement is neither precedential nor persuasive authority. . . . Moreover, the observation of former Chief Justice Jones' [plurality opinion] overlooks the fact that the two constitutional provisions in dispute can be construed as compatible, and thus must be so construed." *Cavanaugh*, 497 Pa. at 355-56, 440 A.2d at 1382-83.

73. *See supra* notes 31-44 and accompanying text.

74. *Cavanaugh*, 497 Pa. at 357, 440 A.2d at 1383.

75. *Id.* at 358-59, 440 A.2d at 1384 (emphasis in original). For a quotation of the language in Article V, § 13(a), *see supra* note 3.

76. *Cavanaugh*, 497 Pa. at 359, 440 A.2d at 1384-85. "A reading of the two provisions in a proper historical prospective indicates that these provisions are in fact in harmony and attempt to achieve the same basis objective." *Id.*

77. *Id.* at 360, 440 A.2d at 1385. Justice Nix contended that "[a] characterization [by the majority] that Article V, § 13(a) provides only a 'general rule'. . . is intellectually dishonest." *Id.*

78. *Id.* The dissent claimed that "[t]he language [of Article V, § 13(a)] specifically mandated that Justices of the Supreme Court, as well as all other judges and district justices, to be elected in odd years." *Id.* (emphasis in original).

79. *Id.*

In reference to the majority's holding that the first sentence of Article VII, section 3 permits elections to be held in even-numbered years, Justice Nix responded that when Article VII, section 3 is read as a whole, it clearly reflects the public policy that judicial elections take place in odd-numbered years.⁸⁰ In addition, the dissent reasoned that Article VII does not recommend that judges *should be* elected during general elections, but only states that candidates *may be* elected, as circumstances require.⁸¹ Justice Nix traced the "circumstance" language of Article VII, section 3 back to a 1909 amendment to Article VIII, section 3 of the commonwealth's 1874 Constitution.⁸² He reasoned that the "circumstance" of section 3 was a response to the anticipated problem that twenty-one year terms might expire in an odd-numbered year and require an election in an even-numbered year.⁸³ However, in examining Article VII, section 3 in its entirety, Justice Nix claimed that a preference existed for judicial elections taking place in odd-numbered years.⁸⁴ In addition, he contended that once the justice's terms were reduced from twenty-one to ten years, the "circumstance" that provided for elections during general election years was removed.⁸⁵

To arrive at the conclusion that no tension exists between Article VII, section 3 and Article V, section 13(a), and that both support judicial elections in odd-numbered years, Justice Nix pointed to Article V, Schedule, Section 2⁸⁶ which extends by one year the terms of those superior court judges whose terms would end in an odd-numbered year.⁸⁷ He noted that the Schedule adjusted terms in the same manner as Article VII, section 3 extended the terms of judicial district judges to conform with the odd-numbered year

80. *Id.* (citing *Barbieri v. Shapp*, 470 Pa. 463, 368 A.2d 721 (1977), and *Barbieri v. Thornburgh*, 42 Pa. Commw. 1, 400 A.2d 653 (1979)).

81. *Cavanaugh*, 497 Pa. at 361, 440 A.2d at 1385 (emphasis in original).

82. *Id.* The "as circumstances may require" language of Article VII, § 3 first appeared in the 1909 Amendment to Article VIII, § 3. *Id.*

83. *Id.*

84. *Id.* at 361, 440 A.2d at 1385-86. Justice Nix also asserted that Article VII, § 3 "even provided an extension for then existing terms which would expire in odd-numbered years to avoid the further necessity of holding elections in even-numbered years." *Id.* at 361, 440 A.2d at 1386.

85. *Id.* at 362, 440 A.2d at 1386.

86. Schedule § 2 to Article V provides that the "present terms of all judges of the Superior Court which would otherwise expire on the first Monday of January in an odd-numbered year shall be extended to expire in the even-numbered year next following." PA. CONST. art. V, Schedule § 2. *See also supra* note 17.

87. *Cavanaugh*, 497 Pa. at 361-62, 440 A.2d at 1386.

election requirement.⁸⁸ The dissent criticized the majority for applying the Article VII, section 3 extension of terms for judges in the judicial districts, but not judges elected state-wide.⁸⁹

Justice Nix turned his attention to the more recently adopted Article V,⁹⁰ and in reviewing the rules of constitutional interpretation, he stated that the words should be given their plain meaning and construed in accordance with the intent of the framers.⁹¹ Utilizing this method of interpretation, the dissent found that Article VII, section 3 and Article V, section 13(a) both supported the public policy that state-wide elections of judges and justices should only take place in odd-numbered years, and that any other conclusion would be contrary to the public will.⁹²

Justice Nix found further support for his position in Article V, section 15,⁹³ which requires a justice to seek retention in "the *municipal election* immediately preceding the expiration" of the justice's term of office.⁹⁴ He reasoned that under the majority's holding, if the new justice is elected in November, 1982,⁹⁵ and assumes office in 1983, the new justice's term will expire in January, 1993.⁹⁶ Therefore, to remain consistent with Article V, section 15, the new

88. *Id.* The last part of Article VII, § 3 states: "That all judges for the courts of the several judicial districts holding office at the present time, whose terms of office may end in an odd-numbered year, shall continue to hold their offices until the first Monday of January in the next succeeding even-numbered year." PA. CONST. art. VII, § 3.

89. *Cavanaugh*, 497 Pa. at 362, 440 A.2d at 1386.

90. *Id.* at 362-63, 440 A.2d at 1386. Article V was adopted as an amendment to the Pennsylvania Constitution on April 23, 1968. *Id.* In contrast, the "as circumstances may require" language of Article VII, § 3 first appeared in 1909. *Id.* at 361, 440 A.2d at 1385.

91. *Id.* "A constitution is not to receive a technical or strained construction, but rather the words should be interpreted in popular, natural and ordinary meaning." *Id.* (quoting *Commonwealth v. Harmon*, 469 Pa. 490, 495, 366 A.2d 895, 897 (1976)). "We start with certain basic principles of constitutional interpretation. It is a fundamental rule that *the words of a constitution, where plain, must be given their common or popular meaning, for it is in that sense the voters are assumed to have understood them when they adopted the constitution.*" *Cavanaugh*, 497 Pa. at 363, 440 A.2d at 1386-87 (emphasis in original)(quoting *Walsh v. Tate*, 444 Pa. 229, 237, 282 A.2d 284, 288 (1971)).

92. *Cavanaugh*, 497 Pa. at 363-64, 440 A.2d at 1386-87. "The people of Pennsylvania, in adopting Article V, § 13(a), clearly intended from the language of that provision to elect Supreme Court Justices in the odd-numbered years." *Id.* at 363, 440 A.2d at 1387.

93. The pertinent part of Article V, § 15(b) states that "[i]f a justice or judge files a declaration [for retention], his name shall be submitted to the electors . . . at the municipal election immediately preceding the expiration of the term of office of the justice or judge." PA. CONST. art. V, § 15(b).

94. *Cavanaugh*, 497 Pa. at 364 n.7, 440 A.2d at 1387 n.7 (emphasis in original) (quoting Article V, § 15(b)).

95. Justice Zappala, now sitting on the Pennsylvania Supreme Court, was indeed elected in the general election of November, 1982.

96. *Cavanaugh*, 497 Pa. at 364 n.7, 440 A.2d at 1387 n.7.

justice would have to seek retention in November, 1991, fourteen months before the expiration of his term.⁹⁷ Consequently, unless the majority made an "additional exception" and permitted the retention election in 1992, an even-numbered year, the majority's "anomaly would be perpetuated as long as the successful successor remained in office."⁹⁸ In light of the parameters set forth in Article V, section 15, as well as Article V, Schedule, section 2 and Article V, section 13(a), Justice Nix concluded that the majority's holding that a state-wide judicial election could occur in an even-numbered year was contrary to constitutional reality, and therefore, he dissented.⁹⁹

More recently, the Pennsylvania Supreme Court in *Sprague v. Casey*¹⁰⁰ attempted to clarify the relationship between Article V, section 13(a) and Article VII, section 3. The court initially resolved the issues of whether Sprague had standing,¹⁰¹ whether the doctrine of laches barred the suit,¹⁰² whether the candidates were

97. *Id.*

98. *Id.* (emphasis added).

99. *Id.* at 365-66, 440 A.2d at 1387-88.

100. 550 A.2d 184 (1988). The supreme court's opinion was written by Chief Justice Nix, who was joined by Justices Larsen, Flaherty, McDermott, Zappala, and Papadakos. *Id.* at 186. Justice Stout did not participate in the consideration or decision of the case. *Id.* at 195.

101. *Id.* at 186-87. The respondents contended that Sprague should be denied standing because he lacked a direct interest in the challenged action. *Id.* at 187. The court stated that typically "a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens." *Id.* (citation omitted). However, the court considered Sprague's suit to fall within the confines of the exception which permits controversies to proceed absent a "substantial, direct, and immediate" interest. *Id.* (citing Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979)). The supreme court, relying on *Biester*, held that Sprague had standing because if standing were denied, "a large body of governmental activity would be unchallenged in the courts," and that without granting standing the "election would otherwise go unchallenged because respondents are directly and beneficially affected." *Sprague*, 550 A.2d at 187.

102. *Id.* at 187-89. Addressing the respondent's preliminary objection that the equitable doctrine of laches applied, the court stated that "[l]aches bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute the action to the prejudice of another." *Id.* at 187 (citation omitted). The respondents claimed that Sprague, an attorney familiar with the Pennsylvania Constitution, received actual or constructive notice of the elections over six and one-half months before instituting his law suit. *Id.* at 188. In concluding that Sprague did in fact use reasonable diligence, the court noted that respondents, as attorneys and candidates for judicial office, were also presumed to have knowledge of the constitution. *Id.* The opinion found that respondents could not use the equitable defense of laches when they had failed to diligently raise the same legal and factual issues about the legality of the elections as presented by Sprague. *Id.* In addition, the decision placed great importance on the fact that the defense of laches should never prevent the court's consideration of a constitutional challenge. *Id.* at 188-89 (citing *Wilson v. Philadelphia School Dist.*, 328 Pa. 225, 195 A. 90 (1937) and *Commonwealth v. Gilligan*, 195 Pa.

prejudiced by Sprague's delay in filing suit,¹⁰³ and whether Justice Stout and Judge Melinson were indispensable parties.¹⁰⁴ The primary issue before the supreme court was whether judicial elections to fill the vacancies on the supreme and superior courts could be held in the general election of November, 1988, when the vacancies were created in 1987 by resignations and the seats had been temporarily filled by gubernatorial appointment.¹⁰⁵

Chief Justice Nix, writing the opinion for the court,¹⁰⁶ started his analysis by describing the *Cavanaugh* decision¹⁰⁷ as an *exception* to the "absolute mandate" of Article V, section 13(a).¹⁰⁸ The court determined that *Cavanaugh* was inapposite and should not control

504, 46 A. 124 (1900)).

103. *Sprague*, 550 A.2d at 188. The respondents contended that Sprague's delay in filing suit prejudiced the candidates who had already expended considerable time, money and effort. *Id.* The prejudice rule only applies as a defense when the complaining party relied upon the delay, not when the party takes action before the belated suit has commenced. *Id.* (citing *Leedom v. Thomas*, 473 Pa. 193, 202, 373 A.2d 1329, 1333 (1977)). Therefore, the court disregarded the respondent's prejudice claim, reasoning that the candidates committed themselves to the campaign when made aware of the election and not solely in reliance of Sprague's lack of action. *Sprague*, 550 A.2d at 188. In conclusion, the court stated that "prejudice can never be permitted to amend the Constitution." *Id.* (citing *Wilson v. Philadelphia School Dist.*, 328 Pa. 225, 195 A. 90 (1937) and *Commonwealth v. Gilligan*, 195 Pa. 504, 46 A. 124 (1900)).

104. *Sprague*, 550 A.2d at 189-90. The respondents also raised the preliminary objection that Sprague failed to join as indispensable parties Justice Juanita Kidd Stout, of the supreme court, and Judge James R. Melinson, of the superior court. *Id.* at 189. The respondents contended that Justice Stout and Judge Melinson, the individuals appointed to the judicial seats available in the contested elections, were indispensable parties with a direct interest in the controversy because if Sprague prevailed, the two judicial appointees' terms would be extended beyond the expiration date of their commission from the Governor. *Id.* The court concluded that neither Justice Stout nor Judge Melinson were indispensable parties since the controversy did not threaten to shorten the length of their judicial appointment and any extension of their terms, if Sprague prevailed on the merits, could not be considered adverse to Justice Stout's and Judge Melinson's interests. *Id.* at 189-90. In response to the question of whether the judicial appointments would remain valid, the court concluded that if Sprague "is correct on the merits, it will affect only the duration of the appointments, not the validity of the Governor's act of making them." *Id.* at 190.

105. *Id.* at 190. Governor Casey appointed Justice Stout to fill the supreme court vacancy and Judge Melinson to fill the superior court seat. *Id.*

106. *Id.* at 186. The supreme court's decision was issued subsequent to its *per curiam* order of September 27, 1988, 548 A.2d 249, granting Sprague's request for summary relief and ordering the Secretary of the Commonwealth to remove the judicial candidates from the November, 1988, general election ballot. *Sprague*, 550 A.2d at 186.

107. *See supra* notes 61-99 and accompanying text for a discussion of the *Cavanaugh* decision. The *Cavanaugh* court held that a seat on the state supreme court which would become available in the odd-numbered year of 1983 by the natural expiration of a 21 year term, could be filled in the general election of 1982, an even-numbered year. *Cavanaugh v. Davis*, 497 Pa. 351, 357-58, 440 A.2d 1380, 1383-84 (1982).

108. *Sprague*, 550 A.2d at 190 (emphasis added).

the disposition of Sprague's suit, not only because of the factual distinctions between the two cases,¹⁰⁹ but also because the application of *Cavanaugh* would amount to a total disregard of constitutional direction.¹¹⁰ In addition, the court found that the concern of *Cavanaugh*, that a term would expire in an odd-numbered year and require elections in an even-numbered year, was not legitimately present because a proper constitutional interpretation of the present case would have the new judicial terms expiring in even-numbered years.¹¹¹

The Pennsylvania Supreme Court pointed out that when a judicial vacancy arises before the expiration of a full term, the directive of Article V, section 13(b) requires that the unexpired term "shall be filled by appointment by the Governor."¹¹² Chief Justice Nix interpreted what he considered the explicit language of section 13(b) as setting the maximum length of the judicial appointee's term of office and requiring the governor to fill the judicial vacancy by appointment.¹¹³ The constitution does not give the governor the freedom to determine when judicial elections would be held or the length of time appointees would serve on the bench.¹¹⁴ Therefore, the *Sprague* court concluded that the only discretionary power the governor possessed under Article V was selecting the individual to appoint to the vacant judicial position.¹¹⁵

109. *Id.* at 191-92. *Sprague* involved vacancies created by the resignations of the elected judicial officers before the completion of their terms. *Id.* at 190. *Cavanaugh* dealt with a case where a vacancy was created by the natural expiration of the term of a sitting supreme court justice who chose not to seek retention. *Cavanaugh*, 497 Pa. at 353, 440 A.2d at 1381.

110. *Sprague*, 550 A.2d at 191. "The interjection of the *Cavanaugh* issue in the factual matrix now before us can only be accomplished by a strained interpretation of constitutional intent and a disregard of an unambiguous constitutional direction." *Id.*

111. *Id.* at 192.

112. *Id.* (quoting PA. CONST. art. V, § 13(b)). Article V, § 13(b) also provides that "[t]he person so appointed shall serve for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term, whichever is less." PA. CONST. art. V, § 13(b).

113. *Sprague*, 550 A.2d at 191. Section 13(b) requires that a governor's judicial appointee shall serve for the lesser of: the remainder of the unexpired term; or the "January following the next municipal election more than ten months after the vacancy occurs." PA. CONST. art. V, § 13(b).

114. *Id.*

115. *Id.* at 191-92. The court differentiated between the "vacancy" situation of *Sprague* and the "no vacancy" issue presented in *Cavanaugh*. *Id.* at 191. A "vacancy" occurs, as in the *Sprague* factual pattern, when a jurist resigns before the completion of his or her term. *Id.* at 190. On the other hand, a "no vacancy" situation arises when a judge serves out his entire term, but does not seek retention. *Cavanaugh v. Davis*, 497 Pa. 351, 353, 440 A.2d 1380, 1381 (1982). The *Sprague* court found that the language of Article V, § 13(b)

In determining when Article V, section 13(b) mandates that the gubernatorial appointees' terms end and the judicial seats be filled by election, Chief Justice Nix calculated that the first municipal election available, greater than ten months after the positions were prematurely vacated by resignations, was in November of 1989.¹¹⁶ Conversely, if the judicial appointees continued to hold office for the rest of the unexpired term, Judge Melinson would have served until January, 1990, and Justice Stout would have served until January, 1992.¹¹⁷ Therefore, under section 13(b)'s mandate that an appointment shall last until the *earlier of* either the next municipal election or the remainder of the unexpired term,¹¹⁸ Chief Justice Nix held that the new terms of office for both judicial positions must commence in January of 1990, and the elections to fill the seats must be conducted during the municipal elections of 1989.¹¹⁹ The *Sprague* decision also held that, as a matter of law, the governor's interim appointments of Justice Stout and Judge Melinson must be extended to the first Monday of January, 1990.¹²⁰

The *Sprague* court found it necessary to elaborate on and clarify the *sui generis* quality of the 1982 *Cavanaugh* decision.¹²¹ The court emphasized that the *Cavanaugh* decision resolved the problem created by the expiration of former Chief Justice O'Brien's twenty-one year term in 1983.¹²² However, because the 1968

applied only in those instances where a "vacancy" existed. *Sprague*, 550 A.2d at 192.

116. *Id.* Former Justice Hutchinson resigned effective October 16, 1987 and former Judge Wickersham resigned from the superior court on March 8, 1987. *Id.* at 190.

117. *Id.* at 192 n.5. Thus, an election to fill the superior court seat would have taken place in the municipal election of November, 1989 and the supreme court election would have occurred in the municipal election of November, 1991. *Id.*

118. *See supra* note 32 and accompanying text for the controlling language of Article V, § 13(b).

119. *Sprague*, 550 A.2d at 192. The court's holding would establish that the ten year terms of the jurists would begin and end in even-numbered years, and require that elections for a new term be held in odd-numbered, municipal election years, as mandated by Article V, 13(a) and (b). *Id.*

120. *Id.* The supreme court, undoubtedly aware that Justice Stout would reach the mandatory retirement age of 70 before her appointed term expired in January of 1990, stated that if the appointee could not complete the interim term, then under Article V, § 13(c) the seat would remain vacant until the new term commenced. *Id.* at 192 n.7. Article V, 13(c) provides that "[i]n the case of a vacancy occurring at the expiration of an appointive term under section 13(b), the vacancy shall be filled by election as provided in section 13(a)." PA. CONST. art. V, § 13(c).

121. *Id.* at 194. *Sui generis* is defined as "of its own kind or class; i.e., the *only one* of its own kind; peculiar." BLACK'S LAW DICTIONARY 1286 (1979) (emphasis in original).

122. *Sprague*, 550 A.2d at 194. Presently, justices and judges are elected for ten-year terms. *See* PA. CONST. art. V, § 15(a). Thus, all judicial offices can begin in an even-num-

amendment to the commonwealth's constitution changed the judicial terms from twenty-one to ten years, *Cavanaugh* presented a unique problem since Justice O'Brien's term was the only remaining twenty-one year term to end in an odd-numbered year.¹²³ Thus, the *Sprague* court clarified the *sui generis* quality of the *Cavanaugh* decision and established that all future judicial elections shall be held in odd-numbered years, as mandated by the Pennsylvania Constitution.¹²⁴

III. CHIEF JUSTICE NIX'S ACTIVE ROLE IN INTERPRETING THE ELECTION CLAUSES

Chief Justice Nix played a leadership role in the evolution of case law concerning whether state-wide judicial elections in Pennsylvania were constitutionally required to be held in odd-numbered years during municipal elections.¹²⁵ In *Barbieri I*, a plurality of the supreme court held that under section 2 of the Schedule to Article V,¹²⁶ superior court Judge Cercone's ten year term should be extended one year to allow his retention election be held in 1979, an odd-numbered year.¹²⁷ Although Justice Nix agreed with the plurality's conclusion that a one year extension was necessary, he cautioned that section 2 of the Schedule alone could not authorize the court to extend a judicial term, absent the need for an orderly transition to the recently created system of judicial retention.¹²⁸

bered year and end in an even-numbered year, with elections held in the prior odd-numbered year. See *Sprague*, 550 A.2d at 194.

123. *Id.* Under the one of a kind scenario presented by O'Brien's term, the supreme court in *Cavanaugh* decided to permit a state-wide judicial election to be held in an even-numbered year. However, the *Sprague* court held that "the *Cavanaugh* Court was not presented with a precedent setting issue but merely the adjustment of one term of office so that it would fall within the scheme clearly mandated under Article V." *Id.*

124. *Id.* The court also reiterated the policy that judicial elections be held in odd-numbered years so that the voting public could concentrate on selecting qualified candidates for judicial office, without that distractions that accompany a general election year race for governor, U.S. Senator, or President. *Id.*

125. See *Barbieri v. Shapp*, 470 Pa. 463, 470-77, 368 A.2d 721, 725-29 (1977)(Nix, J., concurring); *Barbieri v. Shapp*, 476 Pa. 513, 524-31, 383 A.2d 218, 224-27 (1978)(Manderino, J., dissenting, joined by Nix, J.); *Cavanaugh v. Davis*, 497 Pa. 351, 358-66, 440 A.2d 1380, 1384-88 (1982)(Nix, J., dissenting); and *Sprague*, 550 A.2d 184 (Nix, C.J., majority opinion).

126. See *supra* note 17 for the language of Article V, Schedule, § 2.

127. *Barbieri I*, 470 Pa. at 469, 368 A.2d at 724-25 (Jones, C.J., plurality opinion). Judge Cercone was elected to a ten year term on the Pennsylvania Superior Court in 1968 and assumed office in 1969; thus, his term would expire in 1979 and require a retention election in 1978, an even-numbered year. *Id.* at 465, 368 A.2d at 722.

128. *Id.* at 470, 368 A.2d at 725 (Nix, J., concurring). Prior to the 1968 amendments to

The Pennsylvania Constitution requires that retention elections be held "at the *municipal* election immediately preceding the expiration of the term of office of the justice or judge."¹²⁹ Justice Nix contended in *Barbieri I* that the intent of the framers of Article V, section 15(b), the judicial retention amendment, was to adjust all judicial terms to conform with the requirement that retention elections, as well as elections for vacant judicial seats, occur during the municipal elections in odd-numbered years.¹³⁰ Therefore, the plurality was correct in ordering that Judge Cercone's term should be extended one year to allow his retention election to occur during the 1979 municipal election.¹³¹ However, Justice Nix warned that the section 2 Schedule did not empower the supreme court to extend a judicial term, except when necessary to conform with the constitutional mandate that retention elections take place during municipal elections.¹³² Thus, from the court's first case reviewing the constitutional provisions controlling the state-wide election of judges, Chief Justice Nix took the position that the constitutional framers intended, and the language of the constitution supported, holding all judicial elections during odd-numbered municipal election years.

In *Barbieri II*, the majority of the supreme court held that because the constitution favored election of judges over appointments by the governor, the ten month rule of Article V, section 13(b)¹³³ would not prohibit a judicial election in a municipal year to fill a vacancy created by a foreseeable event, such as mandatory

the commonwealth's constitution, when a judge's term was expiring the judge had to compete against other candidates in a traditional election for a new term in office. *Id.* With the passage of Article V, § 15(b), a judge only has to run in a retention election where the judge may be retained for another full term if a majority of the electorate vote in favor of him or her. *See* PA. CONST. art. V, § 15(b).

129. *Id.* (emphasis added).

130. *Barbieri I*, 470 Pa. at 475-76, 368 A.2d at 728. *See also* PA. CONST. art. V, § 13(a).

131. *Id.*

132. *Id.* The court stated:

A literal reading of the language employed in the Court's opinion would suggest that any term hereinafter commencing subsequent to the effective date of the amendments is subject to modification under Section 2. It is obvious that the framers of the Schedule did not intend for this provision to authorize such sweeping judicial interference with all future terms of the Judges of the Superior Court.

Id.

133. "A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment of the Governor." PA. CONST. art. V, § 13(b). "The person so appointed shall serve for a term ending on the first Monday of January following the next municipal election *more than ten months after the vacancy occurs.* . . ." *Id.* (emphasis added).

retirement.¹³⁴ Justice Nix joined Justice Manderino's dissenting opinion which took issue with the majority's attempt to distinguish between vacancies created by mandatory retirement and those which arise from death, resignation, or voluntary retirement.¹³⁵ The dissent argued that the plain meaning of the word "vacancy" in section 13(b) encompassed all judicial seats that were vacated before the natural expiration of a ten year term on the first Monday in January.¹³⁶ Thus, under the interpretation of Justices Manderino and Nix, all vacancies must be filled by gubernatorial appointment, and the appointees are required under section 13(b) to serve until "the next municipal election more than ten months after the vacancy occurs."¹³⁷ Throughout the dissenting opinion, the analysis which Justice Nix endorsed was conducted under the assumption that the election to fill a judicial vacancy had to occur during a municipal election year, and elections during a general election year were not a constitutionally available option.¹³⁸

Justice Nix, in his lone dissent in *Cavanaugh*, contended that the majority was in error for attempting to justify a state-wide judicial election during the general election of 1982.¹³⁹ He inter-

134. *Barbieri v. Shapp*, 476 Pa. 513, 383 A.2d 218, 222 (1978). The majority reasoned that the gubernatorial appointment power of Article V, § 13(b) was intended to be utilized only when a judicial seat unexpectedly fell vacant. *Id.* The majority labeled mandatory retirement an anticipated event creating a fixed term of office, similar to the expected completion of a judge's elected term, which readily allowed preparation to fill the seat through the electoral process. *Id.*

135. *Id.* at 524-27, 383 A.2d at 224-25.

136. *Id.* at 525-26, 383 A.2d at 225. "The fact that the retirement date may be calculated with certainty does not change the character of the opening thereby created. It remains a *vacancy* to be filled pursuant to Section 13(b)." *Id.* (emphasis in original).

137. *Id.* at 529, 383 A.2d at 226 (quoting PA. CONST. art. V, § 13(b)). If less than ten months exists between the date of resignation and the next municipal election, the governor may still appoint someone to the bench, but that appointee's term will continue beyond the current municipal election, and henceforth, two more years until the January following the next municipal election. *Id.*

138. *Id.* at 524-31, 383 A.2d at 224-27. The dissent considered the majority's holding that foreseeable vacancies could be filled by election and speculated on the practical impact of the court's decision. *Id.* at 529-30, 383 A.2d at 226.

For example, because 1977 is a 'municipal election' year, and because the next 'municipal election' year does not occur until 1979 (1978 being a '*general election*' year) see Pa. Const. Art. 7, Sections 2 and 3, all 'vacancies' that are certain to occur between now [February of 1978] and ten months before the municipal election in 1979 are to be filled at the 'next preceding municipal election.' Elections would have to be held in 1977, not only for foreseeable vacancies which will occur during 1978, but also for those which will occur in 1979 more than ten months prior to the municipal election of that year.

Id. (emphasis added).

139. *Cavanaugh v. Davis*, 497 Pa. 351, 440 A.2d 1380, 1384-88 (1982). The majority in

preted Article VII, section 3¹⁴⁰ as a general provision addressing the election of public official, and argued that the language of the more recently passed Article V, section 13(a) "*specifically mandated* that justices of the Supreme Court . . . *be elected* in odd years."¹⁴¹ Thus, Justice Nix took the position that a clear constitutional mandate existed from the 1968 changes to the Pennsylvania Constitution which required that all judicial elections take place in odd-numbered years during municipal elections.¹⁴²

The importance of Chief Justice Nix's role in formulating a constitutional interpretation of judicial elections culminated in his majority opinion in *Sprague*.¹⁴³ There, Chief Justice Nix concluded that the explicit language of Article V, section 13(b) created a clear constitutional mandate that the new judicial terms, necessitated by resignations, must begin in January of an even-numbered year, following the municipal election in an odd-numbered year.¹⁴⁴ In addition, the decision stated unequivocally that "[h]enceforth, all judicial elections shall be held during the municipal election as prescribed by Article V, section 13(b), of our Constitution."¹⁴⁵ Finally, Chief Justice Nix went to great lengths to explain why the *Cavanaugh* decision did not control the issue at hand,¹⁴⁶ and further limited any future reliance on that case by discussing it *sui generis* quality.¹⁴⁷

Chief Justice Nix has played an important and consistent role in the supreme court's interpretation of judicial elections under the commonwealth's constitution.¹⁴⁸ His position on the election issues has exhibited an attempt to hold in the highest regard the intention of the framers of the judiciary amendments to the 1968 Con-

Cavanaugh held that the seat of Chief Justice O'Brien, whose 21 year term was ending in January of 1983, could be filled by the general election of 1982. *Id* at 357, 440 A.2d at 1383.

140. See *supra* note 10 for the specific language of Article VII, § 3.

141. *Cavanaugh*, 497 Pa. at 360, 440 A.2d at 1385 (emphasis in original).

142. *Id.* at 365-66, 440 A.2d at 1387-88. "To ignore Article V, § 13(a) in favor of an inferred exception stemming from Article VII, § 3 would ignore fundamental precepts that the specific must have preference over the general and that a later pronouncement is given priority over earlier pronouncements." *Id.*

143. *Sprague v. Casey*, 550 A.2d 184, 186 (1988). For a listing of the justices joining Chief Justice Nix's opinion, see *supra* note 100.

144. *Id.* at 192. Thus, the victors in the municipal election of 1989 would assume their judicial posts in January of 1990. *Id.* The supreme court had previously entered a *per curiam* order removing the offices of supreme court justice and superior court judge from the 1988 general election ballot. 548 A.2d 249.

145. *Sprague*, 550 A.2d at 194.

146. *Id.* at 190-91, 192-93.

147. *Id.* at 194.

148. See *supra* note 125.

stitution.¹⁴⁹ In examining the supreme court's ability to alter judicial terms and election schedules, he has cautioned that the court's power must be strictly confined within the parameters set forth by the constitution.¹⁵⁰ The position of Chief Justice Nix has also been unwavering that Article V, sections 13 and 15 create a clear constitutional "mandate" requiring all state-wide judicial elections, regardless of the circumstances, to be held in odd-numbered years during municipal elections.¹⁵¹

From authoring the lone dissent in *Cavanaugh*,¹⁵² Chief Justice Nix wrote an essentially unanimous opinion for the court in *Sprague*.¹⁵³ There, the chief justice convinced his brethren that the framers of Article V, section 13(b) intended, and its language required, that all state-wide judicial elections be held during the municipal elections in odd-numbered years.¹⁵⁴ By essentially turning his dissenting opinion in *Cavanaugh* into the majority opinion in *Sprague*, Chief Justice Nix was undoubtedly tempted to overrule *Cavanaugh* outright, but instead was satisfied to completely distinguish the case by discussing its *sui generis* quality.¹⁵⁵ The *Sprague* opinion specified that the *Cavanaugh* decision resolved a unique problem created by a supreme court justice's twenty-one year term ending in an odd-numbered year, and because all twenty-one year judicial terms had now expired, the *Cavanaugh* decision "provides

149. *Barbieri v. Shapp*, 470 Pa. 463, 368 A.2d 721, 728 (1977) (the court's extension of a superior court judge's term by one year was consistent with the framer's intent that all superior court judges seek retention only at municipal elections in odd-numbered years); *Cavanaugh v. Davis*, 497 Pa. 351, 440 A.2d 1380, 1387 (1982) (in approving Article V, § 13(a), the citizens of Pennsylvania clearly intended that all judicial elections take place in odd-numbered years). See also *Barbieri v. Shapp*, 476 Pa. 513, 383 A.2d 218, 225, 227 (1978) (quoting the statements of delegates to the Constitutional Convention of 1967-68).

150. See *Barbieri I*, 470 Pa. at 471-72, 368 A.2d at 726 (the court would not have the authority to extend any judicial terms under Article V, Schedule § 2, but for the fact that an extension was necessary to conform with the concept of judicial retention under Article V, § 15(b)); *Barbieri II*, 476 Pa. at 529-31, 383 A.2d at 226-27 (the court lacks the power to order judicial elections for vacancies created by mandatory retirement when the language of Article V, § 13(a) clearly requires that all vacancies must be filled by judicial appointment); *Cavanaugh*, 497 Pa. at 358-59, 440 A.2d at 1384 (the majority lacked the authority to approve a judicial election in an even-numbered year when the constitution clearly mandated that the election of judges only occur in odd-numbered years).

151. *Cavanaugh*, 497 Pa. at 358-59, 440 A.2d at 1384-85. For a detailed discussion of Justice Nix's lone dissent in *Cavanaugh*, see *supra* notes 75-99 and accompanying text.

152. *Cavanaugh*, 440 A.2d at 1384-88.

153. See *supra* note 100.

154. *Sprague v. Casey*, 550 A.2d 184, 194 (1988). See *supra* note 145 and accompanying text.

155. *Sprague*, 550 A.2d at 191, 194.

no authority beyond the holding in that specific case."¹⁵⁶

IV. ISSUES UNRESOLVED AFTER *Sprague*

The most obvious issue to consider in light of the *Sprague* opinion is whether Governor Casey may appoint someone to complete Justice Stout's term after she reaches the mandatory retirement age of 70 in March of 1989, when in fact Justice Stout herself was appointed to the supreme court after Justice Hutchinson resigned from his elected position.¹⁵⁷ The language of Article V, section 13(c) indicates that if a vacancy occurs at the "expiration of an appointive term" the vacancy would be filled at the next municipal election.¹⁵⁸ Presuming that mandatory retirement falls within the term "expiration," Justice Stout's seat would remain vacant until the victor of the 1989 judicial election assumes office in January of 1990. This conclusion appears consistent with Chief Justice Nix's opinion in *Sprague* which warned that if some "impediment" developed to prevent an appointee from completing an interim term, the seat would remain vacant until the new term commenced.¹⁵⁹ Although Chief Justice Nix avoided mentioning Justice Stout by name, a strong indication exists from the *Sprague* opinion that a plain reading of the Pennsylvania Constitution prevents Governor Casey from appointing anyone to complete Justice Stout's interim term.¹⁶⁰ Thus, the seat will be vacant from March of 1989 until the candidate selected by the voters in the 1989 municipal election can assume office in January of 1990.¹⁶¹

Another critical issue left unresolved by the *Sprague* decision

156. *Id.*

157. Justice Stout's seat on the court was to be filled by the winner of the cancelled 1988 general election, and her term was automatically extended until January, 1990 by the *Sprague* decision. *Id.* at 192.

158. PA. CONST. art. V, § 13(c). For a quotation of the applicable § 13(c) language, see *supra* note 120.

159. *Sprague*, 550 A.2d at 192 n.7. The *Sprague* court specifically stated that the appointees' terms, which were to be filled by the cancelled 1988 elections, would be extended, by operation of law, until January of 1990. *Id.* at 192.

160. Chief Justice Nix specifically stated that "[i]f some impediment arises during the appointed term that would prevent the appointee from completing that term, it is to be noted that the balance of the interim term *must remain vacant* until the new term commences." *Id.* at 192 n.7 (emphasis added). A plain reading of this language strongly indicates that an "impediment" would include mandatory retirement.

161. Professor Ledewitz reached the opposite conclusion when he stated, without elaboration, that: "I presume that [Justice Stout's] retirement will create another vacancy, to be filled by another interim appointment, which still will run until January 1990." Ledewitz, *Judicial Election Questions Left Unanswered By Justices*, 11 PA. L.J. RPTR. No. 46 at 3-4 (Dec. 5, 1988) [hereinafter Ledewitz].

concerns whether Justice Stephen Zappala's seat will require a judicial election to be held in the general election year of 1992, since he was elected in 1982 to a ten year term which commenced in 1983.¹⁶² Because the *Sprague* opinion has limited the *Cavanaugh* case's applicability to judicial terms of twenty-one years, the *Cavanaugh* holding appears unavailable to justify allowing a ten year judicial term to be renewed or filled in an even-numbered year.¹⁶³ In addition, Chief Justice Nix has apparently established an absolute rule that "[h]enceforth, all judicial elections shall be held during the municipal election."¹⁶⁴ Therefore, the *Sprague* opinion appears to preclude a state-wide judicial election in 1992 to determine the fate of Justice Zappala's seat.

Presuming the constitution requires both retention elections¹⁶⁵ and new judicial elections¹⁶⁶ to take place in an odd-numbered year, the issue becomes whether Justice Zappala's retention election should be held a year early, in 1991, or a year later, in 1993.¹⁶⁷ The supreme court could choose to shorten Justice Zappala's term by one year and hold the election for his seat in 1991, with the new term commencing in 1992. This would forever break the cycle of an even-numbered year election and require all future elections for the Zappala seat to occur during municipal elections, as mandated by the constitution.¹⁶⁸ The supreme court, however, appears unable to shorten the ten year term of a duly elected member of the state supreme court without a constitutional justification, and none appears available.¹⁶⁹ Consequently, scheduling an election in 1991,

162. Justice Zappala was the victor of the 1982 election which was authorized by the *Cavanaugh* decision.

163. See *Sprague*, 550 A.2d at 194. "Notwithstanding the language of the majority opinion in *Cavanaugh*, its *sui generis* quality must be recognized and therefore that decision provides no authority beyond the holding in that specific case." *Id.*

164. *Id.* (emphasis added).

165. Article V, § 15(b) provides that the name of a justice seeking retention shall be submitted to the electorate for approval by the majority "at the municipal election *immediately preceding* the expiration of the term of office." PA. CONST. art. V, § 15(b) (emphasis added).

166. Article V, § 13(a) requires that new justices "shall be elected at the municipal election *next preceding* the commencement of their respective terms of office." PA. CONST. art. V, § 13(a) (emphasis added).

167. The same issue would exist if Justice Zappala retired in 1993, at the end of his ten year term, and an election was scheduled to select his successor.

168. See Article V, § 13(a) and § 15(b).

169. See *Barbieri v. Shapp*, 470 Pa. 463, 368 A.2d 721, 728-29 (1977) (Nix, J., concurring). Justice Nix implied that constitutional authority was required before the court may shorten the length of a judicial term when he stated that "[a] constitutional provision establishing a fixed term of office encompasses an implied prohibition against extending the term,

with a new term for Justice Zappala's seat commencing in 1992, does not seem to be a viable alternative.

A second alternative would be for the supreme court to leave Justice Zappala's term at ten years, but still order a retention election, or a new election if retention is not sought, in 1991. The language of Article V, section 13(a) and section 15(b) states that the election should occur in the municipal election "preceding" the conclusion of the term of office.¹⁷⁰ Therefore, a constitutional ground exists for scheduling the election in 1991, preceding the completion of Justice Zappala's term in January of 1993.¹⁷¹ However, the court has questioned whether public policy prohibits holding an election over fourteen months before the term commences and the victor can assume office.¹⁷² In addition, scheduling a premature election does not resolve the problem that the Zappala seat would continue to end in an odd-numbered year.¹⁷³ For public policy reasons and in an effort to end the perpetuation of the odd-numbered year judicial term, the supreme court should not hold a retention election in 1991. Instead, the court should bring the Zappala seat's term into line with the framers' intention that judicial terms begin and end in even-numbered years and elections take place during the preceding municipal election.

To honor the constitution's mandate that judicial elections be held in odd-numbered years and eliminate the problem of a supreme court term ending in an odd-numbered year, consideration should be given to extending Justice Zappala's term by one year, to

and absent specific constitutional authority, no court has the power to increase the constitutionally mandated judicial term of office." *Id.*

170. See *supra* note 168.

171. This was the result anticipated by Chief Justice Nix in the *Cavanaugh* decision when he criticized the majority for permitting the election to be held in 1982. See *Cavanaugh v. Davis*, 497 Pa. 351, 364 n.7, 440 A.2d 1380, 1387 n.7 (1982).

172. See *Barbieri I*, 470 Pa. at 468, 368 A.2d at 724 (citing *Commonwealth ex rel. Barratt v. McAfee*, 232 Pa. 36, 45, 81 A. 85, 88 (1911)) ("This extended hiatus [of fourteen months] between election and assumption of office is contrary to the public policy of Pennsylvania.").

173. The supreme court should not expect the perpetuation of this problem to resolve itself when Justice Zappala reaches the mandatory retirement age of 70. Justice Zappala was born September 26, 1932. Assuming he successfully seeks retention, his new ten year term would expire in January of 2003; however, he would be forced to retire on September 26, 2002. Under Article V, § 13(b), a gubernatorial appointee would serve out the remainder of the term, but the new term would still commence in 2003, an odd-numbered year. Consequently, as in the 1980's and the 1990's, the supreme court of the twenty-first century would again face the issue of whether either an election should be held in 2001 with the victor taking office in 2003, or an appointee should continue in office until 2004, or the seat should remain vacant from 2003 to 2004.

January of 1994, and scheduling the election for 1993.¹⁷⁴ This solution appears consistent with the *Sprague* decision, where Chief Justice Nix indicated that Article VII, section 3 could have been utilized by the *Cavanaugh* court to extend Chief Justice O'Brien's term one year so that it ended in an even-numbered year and the election for his seat could be filled at the municipal election.¹⁷⁵ An extension of Justice Zappala's term by one year appears consistent with the intention of the constitution's framers and the understanding of the citizens of Pennsylvania in adopting the 1968 Constitution.

Specifically, Article VII, section 3¹⁷⁶ and Article V, Schedule, section 2¹⁷⁷ both make allowances for an extension of a judicial term to end in an even-numbered year, presumably to conform with the requirement that judicial elections be held in odd-numbered years. Although section 3 is directed to judges of the judicial districts and Schedule section 2 applies to superior court judges, a strong inference may be drawn that an extension of a supreme court justice's term to end in an even-numbered year would be consistent with the intentions of the constitutional framers and the overall scheme of the commonwealth's constitution. Thus, it can be anticipated that sometime before 1992, the Pennsylvania Supreme Court will extend Justice Zappala's term until 1994 and order his retention election, or an election for his successor, to occur during the municipal election of 1993.¹⁷⁸

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174. Professor Ledewitz also reached the conclusion that Justice Zappala's term should be extended. See Ledewitz, *supra* note 161, at 4.

175. *Sprague*, 550 A.2d at 194. "Rather than attempting to perpetuate the issue, the *Cavanaugh* Court could have employed the vehicle provided for in article VII, section 3 by holding that the term of Chief Justice O'Brien could have been extended to the 'next succeeding even-numbered year.'" *Id.* (citing PA. CONST. art. VII, § 3).

176. See *supra* note 10.

177. See *supra* note 17. For cases applying Schedule § 2, see *Barbieri v. Shapp*, 470 Pa. 463, 368 A.2d 721 (1977). See also *Cavanaugh v. Davis*, 497 Pa. 351, 440 A.2d 1380, 1384-88 (1982)(Nix, J., dissenting).

178. As Chief Justice Nix succinctly stated: "Henceforth, all judicial elections shall be held during the municipal election as prescribed by Article V, section 13(b), of our Constitution." *Sprague*, 550 A.2d at 194.