THE MERIT SELECTION DEBATE

For decades, politicians, lawyers, and political scientists have debated how to choose judges—by popular election, by direct appointment, or by a screening process that has come to be known as "merit selection." Nationally, 17 states use a form of merit selection that includes (1) a nominating commission to screen judicial candidates, (2) gubernatorial appointments of judges from a list of those nominees, sometimes with legislative confirmation, and (3) retention elections in which voters determine whether a judge serves another term.

Should North Carolina switch from its current elective system to a merit selection system? Judges in this state must run for election, but the record shows that most of our judges first get to the bench via gubernatorial appointment, and then usually win re-election. Would merit selection improve the selection of judges? Or would the state be wiser to retain its current system, with perhaps some modifications that would enhance public confidence in the judiciary?

This three-part package—an introduction describing North Carolina's system, a "pro"-merit selection article by former state Rep. Parks Helms of Charlotte, and a "con"-merit selection article by N.C. State University professors Joel Rosch and Eva R. Rubin —explores what's involved in the debate over judicial election reform.

Still Waiting in Legislative Wings

by Jack Betts

Voters in the 1974 Republican primary for Supreme Court Chief Justice had an intriguing choice of candidates from which to choose—something of an anomaly in North Carolina, where seldom is there more than one GOP candidate for a statewide post or even a Republican primary. But in that race, Republicans could choose between two candidates whose background presented a razor-sharp contrast: District Court Judge Elreta Alexander of Greensboro, a black woman and outspoken trial judge with years of courtroom experience; and James Newcombe, a fire extinguisher equipment salesman from Laurinburg who not only had no judicial experience, he didn't even have a law degree.

Guess who won? That's right—Newcombe, who took 59 percent of the vote in the primary. To his dismay, however, the Republican Party hierarchy declined to support him in the general election, and Associate Justice Susie Sharp, the Democratic nominee, handily won the race. A few years later, North Carolina voters adopted a constitutional amendment requiring that all judges be licensed to practice law in North Carolina; a direct outgrowth of the 1974 primary.[1] But ever since, the debate has waxed and waned as to whether North Carolina has the proper method of choosing its judges.

In fact, North Carolinians have been bickering since Colonial days over the way its judges have been chosen. More than 200 years ago, the British Crown appointed judges in this colony, antagonizing the Lords Proprietors who saw the Crown's influence as an abridgment of their powers granted by Royal Charter, and annoying colonists who thought they should be allowed to judge their own affairs. When that unseemly system was dispatched by the American Revolution, such weighty matters as choosing judges and governors were delegated to the North Carolina General Assembly. For nearly a century, the legislature appointed the state's judiciary to "hold their offices during good behavior," as the 1776 Constitution allowed.

Another war once again changed the way judges were chosen. In the Reconstruction aftermath of the Civil War, a new Constitution was adopted in 1868 that for the first time embraced Jacksonian democracy and gave the citizens of North Carolina the power to elect trial and appellate judges. So it has remained ever since—despite periodic calls for yet another change in the selection of District, Superior, Court of Appeals, and Supreme Court judges. This movement to alter the selection process has generally proposed instead a process known around the country as "merit selection" of judges. It refers to choosing judges by:

- Naming a bipartisan commission to screen a pool of candidates for a judicial vacancy and making a recommendation to an appointing authority, usually a governor but sometimes a legislature;
- Authorizing appointment of a qualified candidate, and sometimes requiring confirmation by a legislative body; and
- Usually requiring the judge to stand for a "retention" vote after a certain period in office. Voters are asked only whether a judge should be retained in office. If a certain percentage—sometimes a simple majority, sometimes a three-fifths majority—vote yes, the judge then serves a full term, whereupon another retention vote is taken; if the vote is no, a vacancy is declared and the nominating and appointment process begins anew.

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Scores of permutations and combinations of certain elements of these plans and of other methods—such as non-partisan statewide elections —have been debated and sometimes adopted by various states. Some use merit plans only for trial judges; others, for appellate judges only. See Table 1, p. 18, for more.

Why adopt such a change? The arguments for a merit selection plan generally include the following: The present, partisan system of election discourages qualified lawyers from running for judgeships; the cost of politicking on a statewide basis is too high and requires candidates to seek funds from lawyers who may have cases before that judge; voters already faced with an unusally long statewide ballot and a lack of information about candidates don't have the time or resources to become familiar with them and make a good choice, and merit selection has worked well in other states. Attorney and former state Rep. Parks Helms of Charlotte outlines the case *for* merit selection on page 22.

The arguments against merit selection generally include: Merit selection plans have not worked that well in other states; the system yanks power from its proper place—with the people—and deposits it in the hands of the select few; North Carolina has had a good judiciary under the current system; and changing to merit selection merely alters the way judicial candidates must run for office, rather than eliminating such politicking. The case *against* merit selection is prosecuted on page 28 by N.C. State Political Science Professors Joel Rosch and Eva Rubin.

These arguments have been batted back and forth for most of the 20th century following growing national dissatisfaction with the politicization of the judicial selection process, according to Keith Goehring, a staff attorney with the National Center for State Courts in Williamsburg, Va.[2] Goehring's research attributes the development of merit selection plans in the early 1900s to Albert M. Kales, a law professor at Northwestern University, and Harold Laski, an English political scientist. They developed what eventually came to be known as the Missouri Plan—not to be confused with the Missouri Compromise. Their plan was first adopted by the state of Missouri in 1940, and has been embraced in some form by at least 30 states, according to *The National Law Journal*.[3] Other states have adopted elements of the Missouri Plan for use in choosing their judges. The Missouri Plan in Missouri, by the way, applies to appellate and circuit court judges; lower court judges continue to be chosen by partisan election.

North Carolina has been toying with the notion of merit selection for 12 years. In the 1975 General Assembly, efforts were made to push for a constitutional amendment after the N.C. Courts Commission endorsed merit selection, but it ultimately failed. In part, the bill went nowhere because it lacked the support of then-Lt. Gov. James B. Hunt Jr., at the time the state's chief Democratic official, and of Chief Justice Susie Sharp. It wasn't that Sharp opposed merit selection. In fact, she supported it but objected to the 1975 legislation because she believed the nominating commission would not have adequately reflected the state's judicial districts.[4] Two years later, she endorsed another attempt, sponsored by Rep. Parks Helms, (D-Mecklenburg), that resolved her concerns.

Sharp was especially concerned over the quality of the state's lower courts. "We have many excellent district court judges," she wrote Helms in 1977. "Some are outstanding jurists. Unfortunately, however, a minority of these judges are so highly unqualified that they are damaging the image of that echelon; and if we continue to elect such judges, they will inevitably tarnish the image of the entire judiciary."

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However, the bill still lacked the support of Governor Hunt, who waited until the proposal had been killed in committee before he endorsed it—at least as a proposal worth further debate. Hunt's attitude at first was rather like that of Chicago Mayor Richard J. Daley. Under some lobbying heat to have judges appointed rather than elected, Daley is said to have asked, "What's all this fuss about merit selection? We already got it. If they have merit, we select 'em." The Governor's belief was that no such plan was needed to fill vacancies in North Carolina.

But that summer, as Hunt was about to fill several judicial vacancies created by action of the legislature, political allies warned him that some of the candidates he was about to pick might cause him embarrassment. A short time later, the Governor signed his Executive Order Number 12, setting up a merit selection plan for the selection of Superior Court judges in North Carolina.[5] Hunt used that process to fill dozens of Superior Court judgeships—though not appellate vacancies—during his administrations. Hunt demurred on extending the process to Court of Appeals and Supreme Court vacancies because, he said, he knew the

meritorious candidates well enough to make choices without a nominating commission's help.

North Carolina's Constitution, of course, requires that judgeships be filled by elections, except when vacancies occur between elections.[6] Judges of the Supreme Court, the Court of Appeals, and Superior Courts run on the statewide ballot, while District Court judges run within their judicial districts. This can make for an extremely long ballot. As many as 26 Superior Court judges and nine appellate judges can appear on the statewide ballot—35 judges in all, plus whatever District Judges are running within a voter's individual county.

But the fact of the matter is that most judgeships are *not* filled by election. In practice, most state judgeship vacancies are filled by appointment of the governor, which does not require the confirmation of the legislature. These vacancies routinely occur because of resignations, retirements, and occasionally death in office. The chief executive appoints judges to fill these posts, and the judge must stand for election for his post in the next regularly scheduled general election.

That means a lot of elections. North Carolina has 242 judgeships—not counting retired judges who may be called upon to fill in during busy court dockets. There are seven Supreme Court justices, 12 judges of the Court of Appeals, eight Special Superior Court judges (who must be appointed by the governor and who do *not* stand for election or re-election), 64 regular Superior Court judges, and 151 District Court judges. That's a total of 242 judgeships, and 234 of those are subject to regular elections. (District Court judges serve four-year terms; all others serve eight-year terms, except Special Superior Court judges, who are appointed for four-year terms.)

Despite North Carolina's electoral system, most of our judges initially are *appointed* to the bench. For instance, of the seven Supreme Court judges, only three reached the court first by election—Chief Justice Jim Exum and Associate Justices Willis Whichard and John Webb. But all three of *those* judges first got to the bench via a governor's appointment—Exum to the Superior Court by Gov. Dan K. Moore, and Webb and Whichard to the Court of Appeals by Governor Hunt. In other words, 100 percent of the Supreme Court first became judges by gubernatorial appointments.

On the Court of Appeals, only five of the 12 judges were elected to the court originally, while seven first reached the court by gubernatorial appointment—nearly 60 percent of the judges. For the appellate division as a whole, 13 of the 19 judges first reached the appellate courts thanks to gubernatorial largesse—68 percent of the appellate judiciary.

A majority of the state's trial division judges also reach the bench first through appointment, says Franklin Freeman, Administrative Officer of the Courts. "The majority of District and Superior Court judges are appointed," says Freeman. "The greater majority of these are Superior Court judges. Only fairly recently have we had a majority of District Court judges appointed, too." A 1985 study by the legislature's General Research Division found that of the 237 then-sitting judges, only one-third had reached the bench via elections, while two-thirds had been appointed. An update of that research on April 1, 1987 by the N.C. Center for Public Policy Research shows that following the 1986 election, about 59 percent of North Carolina's judiciary were appointed, and about 41 percent were elected (See Table 2, p. 20).

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Occasionally, some of North Carolina's judges have run afoul of the law themselves and have been defrocked by the state Supreme Court, which has final authority. The N.C. Judicial Standards Commission was created in 1973 to make recommendations to the N.C. Supreme Court in cases of misconduct in office. Since 1973, four N.C. judges have been removed from the bench, six more have been censured, and one censure recommendation is pending before the Supreme Court (See Table 5, p. 31, for more).

Another issue vexing North Carolina policymakers is the perennial flap over whether North Carolina's 64 regular Superior Court judges should be elected statewide. Under present law, the candidates for these judgeships are nominated within their own judicial districts, but they appear on the statewide ballot. As a consequence, say opponents, voters in other areas of the state often do not know who these judges are or how to make a choice among the candidates. Republicans particularly argue that the system works to keep both Republicans and blacks off the bench, because the measure dilutes their voting strength and assures that Democratic candidates, running statewide where the voter registration ratio is more than 2-1 Democrat-Republican, will always win. No Republicans, and only two blacks, have been elected to Superior Court judgeships in this century under

Table 1. State Systems for Regular Selection of State Judges

State	Partisan Election	Nonpartisan Election	Gubernatorial Appointment	Legislative Election	Missouri Plan
Alabama	X				
Alaska					X
Arizona		X			X
Arkansas	X				
California		X	X		
Colorado					X
Connecticut			X		
Delaware			X		
Florida		X			X
Georgia		X			
Hawaii					X
Idaho		X			
Illinois	X				
Indiana	X				X
Iowa					X
Kansas	X				X
Kentucky		X			
Louisiana		X			
Maine			X		
Maryland			X		
Massachusetts			X		
Michigan		X			
Minnesota		X			
Mississippi	X				
Missouri	X				X
Montana		X			
Nebraska					X
Nevada		X			
New Hampshire			X		
New Jersey			X		
New Mexico	X				
New York	X				X
North Carolina	X				
North Dakota		X			
Ohio		X			
Oklahoma		X			X
Oregon		X			
Pennsylvania	X				
Rhode Island			X	X	
South Carolina				X	
South Dakota		X			X
Tennessee	X				X
Texas	X				
Utah					X
Vermont					X
Virginia				X	
Washington		X			
West Virginia	X				
Wisconsin		X			
Wyoming					X
TOTALS:	**14**	**18**	**9**	**3**	**17**

Note: Many states have a mixture of judicial selection plans, and states may appear in more than one category in this list. States are classified according to the system they use for the regular selection of judges, rather than for the filling of vacancies or for staffing minor trial courts.

Sources: The Book of the States, 1986-87 edition; and Lawrence Baum, *American Courts*, Houghton Mifflin, 1986, p. 94.

Rhoda Billings was appointed by Governor Martin as the first Republican Chief Justice since 1902.

the system.

Curiously, the North Carolina Constitution *allows* the General Assembly to approve elections of Superior Court judges within their own districts.[7] That provision was adopted in 1875, but the legislature has never seen fit to employ it, and now the state Republican Party has sued the state in an effort to force a change in the way Superior Court judges are elected.[8] In a similar case in Mississippi, a federal judge ruled April 2, 1987 that judges are legally representatives of the people and their election is subject to the U.S. Voting Rights Act, which bans any election procedure that would make it difficult for blacks or other minorities to elect their own representatives.

Meanwhile, GOP members of the legislature, led by state Sen. Laurence Cobb (R-Mecklenburg), are pushing for legislation to require that Superior Court judges be elected within their judicial districts and not statewide. Actually, Cobb would go further, by putting Superior Court and District Court judicial elections on a *nonpartisan* basis as well as electing both within their judicial districts only. Democrats have responded by sponsoring another bill that would redistrict Superior Court judges across the state, a ploy they hope will stave off judicial intervention.[9] This new law (if passed) would eliminate the Special Superior Court judgeships appointed by the Governor and convert them to elected judgeships; create 10 Superior Court districts with black voting majorities, allowing black judges to be nominated from within those districts; and expand the number of Superior Court judges by one, to 73. Supporters of the legislation believe it will encourage the plaintiffs to withdraw their lawsuits against the state, but opponents are not so sure. And, some opponents say, the bill will have to be submitted to the U.S. Justice Department for clearing on Voting Rights Act grounds.

The merit selection movement in North Carolina was making no headway by the mid-1980s. The big push for such judicial election reform had peaked a decade earlier,[10] and though Gov. Jim Martin supports merit selection, it was not given much chance in the legislature—until the judicial campaign of 1986. In that race, Martin sought to put his imprint on the state judiciary. Chucking caution and tradition out the window when then-Chief Justice Joseph Branch announced his retirement in mid-1986, Martin elevated GOP Associate Justice Rhoda Billings over Associate Justice Exum, then the most senior associate justice, for the Chief Justice vacancy. Longtime tradition required that governors appoint the next most experienced justice as Chief Justice, and every Democratic governor in the 20th century had followed the custom when the opportunity arose. For Hunt in 1977, that had been a hard pill to swallow. Hunt had wanted to anoint his college chum, J. Phil Carlton, as the new Chief Justice. In the end, however, Hunt had gone along with tradition and chosen Branch. Now Martin, the first GOP governor in this century with a crack at picking a chief, declined to jump through the Democrats' hoop. Instead, Martin went with party loyalty despite an extraordinary public plea for the post by Exum. For a brief time—September, October and November—Billings was Chief Justice, her party's first since 1902. But the law required her to run for the unexpired portion of Branch's old term, and Exum retired from his post to campaign for it too.

Chief Justice James Exum, who won the 1986 election, has asked the N.C. Courts Commission for a study commission to examine judicial selection methods.

Table 2. Number of N.C. Judges Who First Reached Bench Via Appointment vs. Election

Court	Number of Judges	Number Appointed	% of Whole	Number Elected	% of Whole
Supreme Court	7	4	57%	3	43%
Court of Appeals	12	7	58%	5	42%
Superior Court	64	46	72%	18	28%
District Court	151	81	54%	70	46%
TOTALS	**234**	**138**	**59%**	**96**	**41%**

Source: General Research Division, N.C. General Assembly; and Governor's Appointments Office, Office of the Governor.

Note: Chart includes only active judges, not emergency, retired, or Special Superior Court judges, *all* of whom must be *appointed* by the Governor. Table refers to how a judge originally reached his current judgeship. Re-elections are not reflected in table.

The fall of 1986 witnessed what many political observers describe as the most bitter election in N.C. Supreme Court history. A group calling itself Citizens for a Conservative Court attacked Exum's record, charging that he was not sufficiently conservative because in a number of cases he had voted against upholding the state's death penalty. The committee's charges created a stink, despite the fact that the record showed a number of inconsistencies in its charges. Exum had also, it turned out, voted to uphold the death penalty in some cases, while Billings had voted against imposing the death penalty on occasion. And the chairman of Citizens for a Conservative Court was former Gov. Jim Holshouser—himself a supporter of merit selection —and who had *opposed the death penalty* when he was a member of the House of Representatives.

Rather than harm Exum's chances, the committee's attack seemed to focus attention on the race, and may have backfired by creating a backlash vote for Exum from voters concerned about politicizing the courts. In the end, Exum won the race handily (by slightly over 55 percent, polling 152,000 more votes than Billings). That was the first defeat of a sitting Chief Justice since 1902, when Democrat Walter Clark defeated Republican Chief Justice David Furches for the top spot. The 1986 election returned the high court to total Democratic domination as three Republicans lost their seats.

Exum, himself a long supporter of merit selection, is using the unseemly specter of the 1986 election as evidence that North Carolina should devise a better way of choosing its judges. In January 1987, the Chief Justice asked the N.C. Courts Commission to name a special study commission to examine North Carolina's judicial selection methods. Exum said the state's Democratic leadership would have to be persuaded that a change should be undertaken, and that a study commission might help attract support for a merit selection plan. "I have no illusions about the difficulty of devising this kind of mechanism," Exum said.

Not everyone is satisfied with that strategy, of course. C. Allen Foster, a Republican activist from Greensboro who has filed two lawsuits against the state challenging judicial selection methods, said the Courts Commission should have urged swift action. "This matter has been studied to death," said Foster. "My clients are not willing to let another election pass."

He and his clients may have to wait, unless

the courts act first. State Sen. Charles Hipps (D-Haywood) has introduced legislation to create a commission of 20 members to research the various methods of judicial selection in the United States, devise a new plan for North Carolina, and make a final report to the 1989 General Assembly.[11] The bill has the backing of Lt. Gov. Robert B. Jordan III, who is not committed to any one particular plan but who hopes to build consensus for a change. That means it may be two years before the legislature can make a decision on judicial election reform—and two years in which Governor Martin can help make the case for merit selection of judges.

The Governor has campaigned for merit selection since he took office in 1985. In June 1986, Martin told the N.C. Bar Association that the current system "is a perk of partisanship. It is the outmoded legacy of single-party dominance in our state, to a large extent institutionalized by law. It is a holdover patronage system cloaked in constitutional respectability." Martin said he did not know which merit system would be best for North Carolina, "But I do know that the present system is outmoded and wrong and is unfair and is against the best interests of our people."[12]

Martin promised the group that he would appoint "in the near future" a special nonpartisan commission to develop a merit system to recommend to the people "a system by which the members of our judiciary may be selected in a fair, understandable, and nonpartisan manner."

Nearly a year later, the Governor has *not yet* appointed that commission—nor has he followed in Governor Hunt's footsteps by issuing an executive order setting up a voluntary merit system even for Superior Court judges. Without a stronger gubernatorial commitment to merit selection, legislators may be reluctant to rush pell-mell into the merit-selection thicket.

Martin insists he's still committed to merit selection but says his efforts have been frustrated by a series of events. He said he had planned to set up his merit-selection study in the summer of 1986, but, "It got bogged down by the election campaign and because I appointed Republicans to the Supreme Court." Following the campaign, he said he met opposition to his plan from the bar and from legislative leaders. He added ruefully, "Right now, I don't know how we'll get out of this jam."

FOOTNOTES

[1]Article IV, Section 22, N.C. Constitution, first passed by the legislature as Chapter 638 of the 1979 Session Laws, and then approved by the voters November 4, 1980.

[2]Keith Goehring, "Judicial Selection Procedures," memorandum prepared for the National Center for State Courts, Williamsburg, Va., June 28, 1985, p 2.

[3]Paul Wenske, "Dissension Rocks Missouri Justices," *The National Law Journal*, May 27, 1985, p. 26.

[4]Correspondence from Chief Justice Susie Sharp to the Hon. H. Parks Helms, March 9, 1977, p. 2.

[5]Executive Order Number 12, by James B. Hunt Jr., Governor of North Carolina, July 28, 1977.

[6]Article IV, Section 19, N.C. Constitution.

[7]Article IV, Section 16, N.C. Constitution.

[8]*Haith v. Hunt*, 84-1319-CIV-5, U.S. Eastern District N.C.; *Alexander v. Martin*, 86-1048-CIV-5, U.S. Eastern District N.C. See also *N.C. v. U.S.A.*, Civil Action 86-1490, District of Columbia Circuit Court of Appeals.

[9]Senate Bill 214, "Nonpartisan Trial Judge Election," introduced March 24, 1987, by Sen. Laurence A. Cobb (R-Mecklenburg); and Senate Bill 287, "Superior Court Elections," introduced April 3, 1987 by Sen. R.C. Soles (D-Columbus) *et al.*

[10]Goehring, p. 2.

[11]Senate Bill 31, "Judicial Selection Study," introduced Feb. 12, 1987, by Sen. Charles Hipps.

[12]Address by Gov. James G. Martin, General Session, N.C. Bar Association Meeting, Myrtle Beach, S.C., June 21, 1986.

"A candidate, including an incumbent judge, for a judicial office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact."

— Canon 7, Section B, Paragraph 1(c), the Code of Judicial Conduct