The Case For Judicial Election Reform

by H. Parks Helms

Nearly two decades ago, the President's Commission on Law Enforcement and Administration of Justice declared, "The quality of the judiciary largely determines the quality of justice . . . . No procedural or administrative reforms will help the courts and no reorganization will avail unless judges have the highest qualifications, are fully trained and competent, and have high standards of performance."[1] The passage of time has not diminished the importance of this finding, and any effort at judicial election reform—nationally and in North Carolina —should acknowledge this fact.

We are now embarked upon a course in the state of North Carolina that will determine whether we can continue to maintain the high standards of competence and judicial integrity that have marked our courts for decades. Because of recent political developments and of potential problems associated with the election of judges, *North Carolina should adopt a model merit selection system of choosing and retaining future judges.* Contested partisan elections and pending litigation in the federal courts have raised severe doubts about our ability to attract and retain the quality of judges that will sustain the credibility of our court system. The manner and method of selecting judges has long been a subject of discussion and debate, and while we have for years enjoyed a partisan election system that has resulted in a judiciary made up of competent and capable judges, the 1986 judicial elections have raised the question as to whether we can expect our good fortune to continue.

For the first time in recent memory, contested partisan elections were conducted for seats on the N.C. Supreme Court, the N.C. Court of Appeals, and for three seats on the Superior Court bench. The election opened a new chapter in judicial selection in North Carolina. For the first time, our Governor became actively involved in the campaign to place Republicans on the appellate courts in what he characterized as an effort to make our judicial branch "more conservative." Along with the Governor's strong support for the Republican nominees for these seats, a group calling itself "Citizens for a Conservative Court," chaired by a former Governor, made a concerted effort to influence the outcome of the judicial races. They focused on the race for Chief Justice of North Carolina, implying that the Democratic nominee (now Chief Justice James G. Exum) was opposed to capital punishment. The record did not support that contention, because Exum had voted to impose capital punishment in some cases.

In the midst of the politicking that took place during the months leading up to the election in November 1986, it became apparent that the traditional method of electing our Superior Court judges and our appellate judges in partisan statewide campaigns was at risk. As a practical matter, North Carolina has been dominated by one political party—the Democrats—since the early 1900s, and the overwhelming political influence of Democrats in this state has served to make partisan elections more imagined than real. Even though our judges ran in partisan elections, once they were nominated in the Democratic primary, the politicking was over and they ran without opposition—and with seldom an issue—in the general election in November.

The effect of this was to insulate the judiciary from partisan political pressures, and judges and justices were free to be fair and objective in ruling on cases without regard to litigants' personal or

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Reidsville lawyer Susie Sharp, second from right, at her swearing-in ceremony on July 1, 1949, after being appointed a Superior Court judge. Later appointed to the N.C. Supreme Court before her election as Chief Justice, she became an advocate of merit selection.

political philosophy or the public's perception of his decision. The one-party dominance of the Democratic Party also meant that, as a practical matter, most judges and justices were initially appointed by the Governor to fill unexpired terms or newly created judgeships (see Table 2, p. 20, for more). Only rarely did judges or justices run for election in the same sense that legislators, or Council of State officers in the executive branch of government, run for office.

In 1971, the original N.C. Courts Commission made a recommendation that North Carolina modify its method of judicial selection to establish a merit selection and retention system.[2] While circumstances have changed since that time, the evolving political climate in North Carolina has reinforced the validity of the findings of the President's Commission on Law Enforcement and Administration of Justice, and underscored the need to develop a procedure to ensure the quality, integrity, and independence of the judiciary.

What's Wrong With The Present System?

North Carolina's Constitution requires that judges be elected at regular intervals, but the fact is that more than half North Carolina's judges are initially appointed by the Governor—and many of those judges have never faced opposition at the polls. In practice, a system that purports to give the voters complete control over the selection of judges gives them almost no control. And it gives the Governor almost complete control over judicial selection.

In such a system, the decision of who to appoint is affected by political considerations. When any Governor is elected, he is elected to represent a point of view that some call political. In his appointments, it is unreasonable to expect the Governor to ignore political considerations, and no system could be devised that will eliminate political considerations altogether. The problem with the North Carolina system is that it does not encourage the Governor to consider other, non-political factors in making his appointments.

It's no secret that some of the most highly qualified lawyers refuse to make themselves available for judicial office. One of the reasons, of course, is money. For the outstanding practitioner who would be a credit to the bench, judicial salaries are not, and perhaps never will be, as attractive as the money to be earned in a private practice (see Table 6, p. 32, for judicial salaries). But a more frequently heard reason that leaders of the bar in private practice will not consider a judicial career is the possibility of having to engage in partisan political campaigns. Campaigning can be expensive, and it requires political know-how in a degree not always present in the best qualified judicial candidates; and the specter of defeat after four or eight years on the bench—and having to rebuild a private practice in middle age at severe financial sacrifice—is hardly an incentive for otherwise well-

qualified lawyers to file for election. Even if the judge is fortunate and does not have opposition, he would be foolish not to maintain amicable relationships with party leaders in his area—ties that might raise questions about judicial independence. The result, then, is a system where judges must always remain sensitive to partisan political concerns.

If a judge is forced into a contested election, there are few, if any, public issues on which the judge can—or should—campaign. Judges are not like legislators. They do not formulate public policies. Their job is to interpret and apply the law and public policy of this state as established by the General Assembly. As administrators of the law, judges can find it embarrassing and unethical to take sides on political issues which may eventually come to litigation in their courts. Campaigning of this sort is inappropriate, to say the least, and demeans both the office and the individual. Consider the case of the judge who is challenged by an unscrupulous opponent. If a campaigner ignores or bends the rules, then the judge must choose between matching the unethical technique, or risking the loss of the election. In 1986, the Citizens for a Conservative Court conducted a campaign *in opposition to* individual candidates, and clearly crossed the bounds of judicial ethics which have marked the limited number of judicial campaigns conducted in North Carolina in recent years.[3]

Another drawback to judicial independence lies with the fact that judges must closely identify themselves with, and financially support, a political party. The vice in that process is that it does not attract, as judicial candidates, many qualified individuals, because they are unwilling to become involved in party politics to be appointed and to remain involved to stay elected.

Perhaps the most important question is whether partisan campaigns succeed in informing the voters of a judge's qualifications for office. How many voters in last November's election were well informed as to the qualifications of the judges on the statewide ballot? If they were not informed, on what basis did they vote? The fact is that most people tend to vote on party affiliation, and this raises a serious question about the effect on the judiciary as this state inexorably moves toward a two-party political state. As we progress toward political parties with roughly equal strength, two things are bound to happen:

- First, candidates or incumbents may lose or win based mostly on the party's candidate for President, or U.S. Senate, or on the unemployment or inflation rate—factors totally unrelated to a candidate's fitness or temperament for the bench.
- And second, the *possibility* of that kind of result has an undetermined but almost certainly negative effect on the quality of applicants for judicial office. It is in this context that the equally important concept of retention elections should be considered.

Arguments For the Principles of Merit Selection and Retention

Many who oppose any substantive change in the process of nominating and electing judges and justices do so out of a sense of the history of our system and how it has worked under a state dominated by the Democratic Party. With Democrats winning big in 1986, that opposition has become even stronger. The point most often made is that judges and justices need to be subject to a vote of the people as a part of the process of checks and balances in our system of government. With that in mind, the nonpartisan merit selection plans which were introduced in the legislature during the decade of the 1970s had three basic elements:

- Submission of a list of judicial nominees by a nonpartisan commission composed of professionals and lay persons;
- Selection of a judge by an appointing authority (usually the governor) from the list submitted by the nominating commission; and
- Approval or rejection by the voters of the governor's selection in nonpartisan elections in which the judge runs unopposed on the sole question of his record in office.

This plan is now in use, in whole or in part, in at least 39 states (17 states with a formal Missouri Plan, 22 more with elements of the plan, such as nonpartisan elections or gubernatorial appointment with legislative confirmation. See Table 1, p. 18 for more.) And according to separate studies conducted by the American Judicature Society and the University of Illinois' Institute of Government and Public Affairs, most jurisdictions employing the plan have relatively few judges failing in retention elections.[4] In a 1987 study, the number failing at retention elections was less than 1.2 percent, the American Judicature Society found, while the 1985 Illinois study found that about 1.5 percent failed in that state. This result is consistent with the view that a nominating commission does a good job, and refutes the contention that elections will expose good judges to defeat by single-issue voting blocs. The fact that there is a

small number who do not get retained indicates that merit selection and retention do not confer a lifetime appointment. The most recent example of such a defeat is former California Chief Justice Rose Bird, a controversial figure who was defeated in a retention vote in the 1986 election. The prospect of having to face an electorate, with the beneficial effect that has on a person's humility and conduct, is preserved by merit selection and retention. It also addresses the need for responsiveness that seems to be the concern of many people.

Obviously, the judicial nominating commission is one of the most important parts of any merit selection plan, and in order for it to be successful, it should be created in such a way as to bring in to the judicial system those persons who are best qualified by training, experience, temperament, and character to serve as judges and justices. The judicial nominating commission can guarantee qualified judges by screening out the obviously unfit and mediocre, and can increase the available pool of qualified candidates from which nominees can be selected. It can also enable judges to be politically independent and to concentrate their time and attention on the business of the courts. Perhaps equally as important, the attention of voters can be focused on a judge's record including his legal skills and objectivity, rather than his political affiliation. Opportunity for minority group representation on the bench is increased, and the likelihood of increased confidence in the role that the courts play in our lives is enhanced.

Finally, such a plan would address the concerns which have been raised in pending litigation to abolish our system of statewide election for trial judges and to replace it with a district system to ensure that minorities would have an opportunity to be elected to the bench.[5] While judges are not "representatives" in the same sense that members of the legislative branch are, there is a genuine need for minorities to serve in the judicial branch if our courts are to maintain the confidence and respect of the public.

Other states have found, in fact, that merit plans enhance the prospect for women and minority judges. A 1986 study by the Fund for Modern Courts in New York found that women and minority lawyers are far more likely to become judges in states where they are appointed rather than elected. "The old rationale for judicial elections is that it was the only way to open things up to women and minorities," said David G. Trage, Dean of Brooklyn Law School and the chairman of the New York City Judicial Nominating Commission. In an article in *The National Law Journal,* Trage added, "This study blows that notion right out of the water."[6] Table 3, below, indicates that North Carolina runs behind the national averages in the percentage of women, Hispanics, Asians, and Indians on the state bench.

A Recommended Nonpartisan Plan

The decade of the 1970s saw dramatic changes in the makeup of the N.C. General Assembly and the economical and political status of the people of this state. The early advocates of merit selection wanted to preserve and protect the integrity, credibility, and effectiveness of the judiciary in a growing and changing state. The members of the General Assembly could not be persuaded, however, and relied on the old adage, "If it ain't broke, don't fix it." As a result of the political upheaval of the 1980s and the emergence of the two-party system in North Carolina, we now see that while "it ain't broke," it is badly in need of preventive maintenance. The likelihood of major problems in our judicial selection system are obvious for anyone who examines the system objectively. Indications are that some members of the N.C. legis-

Table 3. Percentage of Minorities in Judicial Positions

Type of Court	Total Minorities	Women	Blacks	Hispanic	Asian	Indian
Federal Courts	17.4%	7.4%	7.0%	3.1%	0.4%	0%
State Courts	12.6%	7.2%	3.8%	1.2%	0.6%	0.2%
North Carolina Courts	11.4%	5.0%	7.2%	0%	0%	0%

Source: Fund for Modern Courts, Inc., New York, 1986

lature also recognize this possibility, and bills to create a study commission on judicial selection made up of appointees of the executive, legislative, and judicial branches are now working their way through the legislature.[7] Any honest appraisal of where we have been and where we are going would indicate that the soundest approach for North Carolina would be to revise Article IV, Section 16 of the N.C. Constitution to:

- Authorize a judicial nominating commission to recommend to the Governor a list of qualified nominees for vacant judgeships;
- Direct the Governor to select a judge from this list;
- Establish a method for the General Assembly to confirm the gubernatorial appointment; and
- Provide that the appointee must stand for reelection on a nonpartisan "yes" or "no" ballot at the next general election which occurs more than one year after his initial appointment. If the voters vote "yes," the judge then serves a regular term; if the voters vote "no," the judge's office is declared vacant and the judicial nominating commission submits a new list of names to the Governor as before. Terms of judges—eight years for appellate and superior court judges, and not more than eight years at the option of the General Assembly for district court judges—should be specified.

One possibility for the makeup of the judicial nominating commission would be to name lawyers from each judicial district to constitute a nonpartisan commission with guidelines for the nominating procedure. This would ensure that those doing the nominating would have knowledge of the qualifications of the nominee as well as an understanding of the nominee's responsibilities if appointed and confirmed to the bench.

Perhaps most significantly, the plan outlined above would involve the legislature in the confirmation process and would also give the citizens of this state an important role in a retention election to ensure the necessary responsiveness without sacrificing the objectivity and independence of the judiciary.

A judge selected under this plan who desired to serve a successive term would be required to file, within specified time limits, a declaration of his intention to stay in office. The ballot at the next general election would then bear the question:

"Shall Judge _____ of _____ Court be retained in office?"

An affirmative vote by a majority of voters would return the judge to office, and a negative vote would vacate the office and trigger the nominating process described above to fill the vacancy.

A Time For Change

North Carolina has been fortunate in the quality of the judiciary that has served the state in both the trial and appellate courts. Our system of partisan elections has served us well in the past, and few judges have abused the trust of the people. It is clear, however, that the changing economic, political, and social makeup of this state is placing excessive pressures on our judicial system— pressures not envisioned when the framers of our Constitution created the partisan election process by which we are now governed. Partisanship has its proper place in the executive and legislative branches of government, but the role of the judiciary in our system of government transcends any political considerations. A changing political climate and an activist federal court, coupled with a changing citizenry, has brought about the need for fundamental changes in the method of North Carolina's judicial selection. More importantly, the concepts of merit selection are absolutely essential if a stable, independent, and objective judiciary is to be preserved. Ultimately, the choice must be made as to whether our system for the election of judges and justices will be changed by the federal courts or by the General Assembly and the people of North Carolina. The far better choice as we enter an era of two-party politics is for the legislature and the populace to act—and produce a far better method of choosing North Carolina's justices and judges.

FOOTNOTES

[1]"The Courts," Chapter 5 of the President's Commission on Law Enforcement and Administration of Justice, 1968, p. 146.

[2]"A Recommended Nonpartisan Merit Selection Plan for North Carolina," *Report of the Courts Commission to the North Carolina General Assembly,* 1971, pp. 11-15.

[3]Canon 7, "A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office," Code of Judicial Conduct, adopted by N.C. Supreme Court for N.C. Judiciary as a guide to the meaning of N.C.G.S. 7A-376, "Grounds for censure or removal," adopted by the General Assembly as Chapter 590, Section 1, of the 1971 Session Laws.

[4]William K. Hall and Larry T. Aspin, "What twenty years of judicial retention elections have told us," *Judicature* magazine, American Judicature Society, April-May 1987; and William K. Hall, "Judicial Retention Elections: Do Bar Association Polls Increase Voter Awareness?", Institute of Government and Public Affairs, University of Illinois, September 1985, p. 16.

[5]*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.

[6]Alexander Stille, "The Judiciary's New Look—Election v. Appointment: Who Wins?," *The National Law Journal,* Dec. 30, 1985-Jan. 6, 1986, pp. 1-4.

[7]Senate Bill 31, "Judicial Selection Study," introduced Feb. 12, 1987, by Sen. Charles Hipps. Also see Senate Bill 214, "Nonpartisan Trial Judge Election," introduced March 24, 1987, by Sen. Laurence Cobb.

Table 4. Arguments For and Against Merit Selection of Judges

For Merit Selection	Against Merit Selection
It takes politics out of the judicial selection process.	Shifts politics from elections decisions by voters to political decisions by nominating committee in the appointment process.
Judges will be selected on a meritorious basis.	Judges still will be selected on the basis of political alliances with those in power.
Merit selection will attract qualified candidates who do not now seek election to judicial office.	Merit selection does not produce more qualified judges than the electoral process does.
Merit selection will prohibit judicial candidates from having to seek campaign funds from lawyers who later must appear before those judges.	Judicial candidates will still have to drum up pledges of support from judicial nominating committee members.
Merit selection will produce a more independent judiciary without ties to party, politicians, or lawyers who appear before judges.	Few problems stem from judicial ties to political parties, and merit selection cannot eradicate party alliances or beliefs.
A judicial nominating committee will be able to make a better choice than voters because it will have access to better information on the candidates' actual performance in the legal profession.	As North Carolina increasingly becomes a two-party state, more contested judicial elections will mean that more information is available to voters.
Merit selection will eliminate bitter political campaigns such as the race for N.C. Supreme Court Chief Justice in the fall of 1986, when judges were attacked for being soft on capital punishment.	Such "campaigns" can still exist because voter groups can oppose a judge who is up for a retention vote under a merit selection system, as happened in California in 1986.
Merit selection will shorten N.C.'s "long ballot" and relieve voters of the burden of having to vote for scores of judges they do not know.	Merit selection would remove choice of judges from the electorate, where it belongs, and place that choice in the hands of the select few.
Merit selection will produce better judges in North Carolina, where some judges have been removed or censured for misconduct in office.	Judges in North Carolina are already good ones, and merit selection in other states has not produced better judges.