REPORT OF THE COURTS COMMISSION

to the North Carolina General Assembly

1971

MEMBERSHIP OF THE COMMISSION

Voting Members Appointed by the Speaker of the House of Representatives

Term Ending June 30, 1971

Sneed High
J. D. Phillips
J. Eugene Snyder
A. A. Zollicoffer, Jr.

Term Ending June 30, 1973

W. Marcus Short
H. Horton Rountree
Herschel Harkins

Voting Members Appointed by the President of the Senate

Term Ending June 30, 1971

J. Ruffin Bailey
Herbert L. Hyde
Wilbur M. Jolly
Lindsay C. Warren, Jr.

Term Ending June 30, 1973

J. J. Harrington
(lay member)
Karl W. McGhee
James B. McMillan

Voting Member Appointed by the Speaker and the Senate President

Term Ending June 30, 1973

Kenneth C. Royall, Jr. (2d lay member)

Members Ex Officio (non-voting)

Administrative Officer of the Courts, Bert M. Montague
N. C. State Bar Representative, C. W. Teague
N. C. Bar Association Representative, Herbert H. Taylor, Jr.

State of North Carolina

COURTS COMMISSION

STATE LEGISLATIVE BUILDING
RALEIGH, N. C.

TO THE MEMBERS OF THE 1971 GENERAL ASSEMBLY

This report is submitted pursuant to General Statutes 7A-503 and Resolution 62 of the 1969 General Assembly.

The Courts Commission created by Resolution 73 of the 1963 General Assembly was superseded by the North Carolina Courts Commission July 1, 1969, by authority of Chapter 910 of the Session Laws of 1969.

The Courts Commission of 1963 submitted reports to the General Assemblies of 1965, 1967, and 1969. Since the membership and mission of the two Commissions are largely the same, we have chosen to label this the fourth biennial report.

J. RUFFIN BAILEY
Chairman

C O N T E N T S

I. INTRODUCTION

The Courts Commission's original assignment of designing a modern, efficient court organization for North Carolina was completed in December, 1970. The new District Court Division was extended to the last 17 counties of the state on December 7, and on December 31, the old 24-district solicitorial system gave way to the new 30-district structure, with full-time solicitors serving in districts which once more are coterminous with superior (and district) court judicial districts. At the same time, solicitors assumed responsibility for prosecuting the misdemeanor dockets of the district courts, replacing that four-year interim official, the prosecutor.

The Commission designed more than a new district court organization and a new solicitorial structure. It also designed a new court within the Appellate Division, the Court of Appeals; a modern, uniform and impartial system for the selection and service of jurors; a revised juvenile jurisdiction and procedure statute; an efficient Administrative Office of the Courts, to handle the nonjudicial business of the courts; an up-to-date statute concerning the representation of indigents, including a model office of public defender in two districts; and a recodification of the tangled retirement statutes affecting appellate and superior court judges.

The General Court of Justice, conceived in the constitutional amendments of 1962 and 1965, is now structurally complete and in operation throughout the state. While the new system must be observed closely, and perhaps minor adjustments must be made in it from time to time, the Courts Commission must now turn its attention to another judicial problem as large and important as reorganization itself. That problem is personnel. Without the best possible personnel to man the new machinery of justice, that machinery can function only in low gear and with many malfunctions.

In recognition of the need for obtaining and keeping the highest quality personnel in the General Court of Justice, the General Assembly of 1969, by Joint Resolution 62 (Appendix B) directed the Courts Commission to "study all phases of the methods of selection, compensation, discipline, removal, retirement entitlement, retirement compensation, and survivor benefits of all judges . . . and to report thereon . . . ." Pursuit of this mandate has been the prime objective of the Commission since it was reconstituted.

After preliminary discussions, the Commission determined that highest priority should be given to selection, discipline and removal, and retirement of judges, both trial and appellate. The bulk of this report reflects that priority.

The Commission's deliberations have led it to conclude that in each of these three areas -- selection, discipline and removal, and retirement -- major legislation would be beneficial. In each instance, a constitutional amendment is required. Although the amendments are interrelated and will reinforce each other in application, each can stand on its own. They are, therefore, presented individually, as three separate proposals.

Each of the three amendments will require implementing legislation. The amendments are designed to be effective January 1, 1973, and it would be desirable to have the implementing legislation effective at that time also. For this reason, the Commission has drafted for consideration at this session the recommended implementing legislation for each constitutional amendment. It is to be emphasized, however, that just as the three constitutional amendments can stand separately, so can each amendment stand separately from its proposed implementation. This report discusses both the proposed constitutional amendments and the proposed implementing legislation. (The text of each proposed constitutional amendment is presented in Appendices D, E, and F.)

II. SELECTION OF JUDGES

"A judge has no constituency except the unenfranchised lady with the blindfold and scales, no platform except equal and impartial justice under law."

Maurice Rosenberg, Mayor Lindsay's NYC Committee on the Judiciary, The Qualities of Justices -- Are They Strainable?, 44 Tex. L. Rev. 1063 (1966).

"When we talk about reform in judicial selection, we should first determine what it is that we are seeking. We must acknowledge, on the basis of a long history, that any system of judicial selection, no matter how bad, will, from time to time, produce many qualified judges -- and even some outstanding judges. . . . However, the election of some excellent judges does not prove that the best -- or even that a good -- method of selecting them is in operation. . . . Most of the agitation to change methods of selection comes from a desire to keep out [mediocrities]. But it is not enough for a system of judicial selection to aim at exclusions. . . . It should be affirmative and positive -- providing a means of bringing to the bench, not haphazardly or occasionally but as consistently and routinely as possible, the very best talent available and willing to serve."

Judge Samuel I. Rosenman
(Address, American Judicature Society, 1964)

"The quality of the judiciary in large measure determines the quality of justice. . . . No procedural or administrative reforms will help the courts, and no reorganizational plan will avail unless judges have the highest qualifications, are fully trained and competent, and have high standards of performance."

President's Commission on Law Enforcement & Administration of Justice, (1968) Chapter 5, The Courts, p. 146.

"Avoiding a catastrophic choice [in selecting judges] is essential, but it is not enough. A judge need not be vicious, corrupt, or witless to be a menace in office. Mediocrity can be in the long run as bad a pollutant as venality, for it dampens opposition and is more likely to be tolerated. Judicial office today demands the best possible men, not those of merely average ability who were gray and undistinguished as lawyers and who will be just as drab as judges."

Maurice Rosenberg, supra.

A. What's Wrong With the Present Method of Selection

A brief examination of the shortcomings of our present system of selecting judges is a prerequisite to evaluating alternative methods of selection. Our Constitution requires that judges be elected by the people, but vacancies in judicial ranks that occur between elections are to be filled by appointment of the Governor. In operation, this nominally elective system turns out to be primarily an appointive one, with the Governor, at his discretion, making the initial (and nearly always permanent) selection of new judges. This is because the great majority of vacancies occur not at the expiration of a term, but in mid-term, by death, resignation or retirement.* Not one of our 16 appellate judges first reached his present position by election, and over 80% of our present superior court strength was first appointed by the Governor to fill a vacancy. Nationally, the figures for elective judges are about the same; most of them are first appointed to the office, and they stay in office through election and re-election. The point is that the label of a democratically chosen judiciary serves to camouflage a predominantly appointive system -- in which the appointive official's personal judgment is legally uncontrolled and absolute. This is sometimes called "one-man judicial selection." The Governor of North Carolina has more power to appoint judges than the President of the United States, although, constitutionally, the federal system is appointive and the North Carolina system is elective.

In this system, it is inescapable that the professional qualifications of a candidate for a judicial vacancy will sometimes be subordinated to his

*The district court system, while too new to support this conclusion statistically, should, also, eventually generate a significant number of mid-term vacancies.

political appeal. Political attractiveness and professional fitness are frequently found in the same man, of course, but a selection system that realistically aims at reversing the priorities -- or, better still, that makes fitness for office the only consideration -- would strengthen the administration of justice.

It is generally conceded 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 private practice. But a more frequently heard reason why 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 defeat in a campaign, after four, eight, or perhaps more years on the bench, can result in the need to rebuild a private practice in middle age, at severe financial sacrifice.

In the usual political 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. As administrators of the law, judges can find it embarrassing, even unethical, for them 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. While this kind of campaigning has not been as common in North Carolina as in many states, judicial candidates in North Carolina must nevertheless closely identify themselves with, and financially support, a political party. This would be all to the good if this participation on the part of the judge succeeded in informing the voters of the

judge's qualifications for office. Studies made of the level of voter information about judicial nominees are uniformly discouraging, however. And in our own state, how many voters in last November's election were well informed as to the qualifications of the 29 judges on the state ballot? How many voters can even remember the names of the candidates -- even one of them?

B. Alternatives to Partisan Elections

There are several alternatives to the election of judges by partisan means, as is prescribed by law. Perhaps the most obvious is to eliminate vacancy appointments by the Governor, letting vacancies be filled only at the next regular election. This would make the facts fit the concept prescribed in the Constitution and statutes. But vacancies accumulating between elections could lead to intolerable backlogs, and in a district hard hit by deaths or retirements, justice might break down altogether. On the other hand, prompt filling of vacancies at special interim elections would be prohibitively expensive, and perhaps carry the concept of Jacksonian Democracy farther than even its founders intended.*

Secondly, judges in some states are appointed by the chief executive with or without confirmation by the legislative branch. In practice, North Carolina's judges are initially selected by executive appointment, without confirmation, more frequently than they are by partisan political election. For a variety of reasons we have already briefly reviewed, this combination

*Contrary to popular belief, election of judges by the people was not considered by the founding fathers of this country. The idea took hold in the 1840's, replacing the three-quarter century tradition of appointive (by executive or legislature) judges. In North Carolina, the Constitution of 1776 provided for the selection of judges by the legislature and this procedure lasted until 1868.

The United States and Russia are the only two major powers in which election of judges by popular vote is common.

of selective systems fails occasionally to place on the bench the most highly qualified possibilities for judicial office. And the appointment-by-the-executive confirmation-by-the-Senate system has not caught on in many states. Perhaps a reference to the federal system, dominated by the institution of senatorial courtesy and its frequent stalemates, is adequate explanation why.

In four states, including Virginia and South Carolina (and North Carolina prior to 1868), judges are elected by the legislature. While this system may still appeal to our neighbors, the opportunities it presents for logrolling, and the absence of direct participation by the people, outweigh any good features it might have. In a few states, a nonpartisan election system is used. This is sometimes characterized as the worst system of all, because the element of party responsibility, even though sometimes weak, is completely eliminated in favor of a wide-open popularity contest in which the candidate with the most money or the best campaign personality has an enormous advantage.

Finally, there is a system for selection of judges that combines the best features of the elective and appointive systems. Since it has been growing in popularity around the country in recent years, it merits examination in depth.

C. The Nonpartisan Merit Selection Plan

The nonpartisan merit selection plan* has three basic elements:

(1) Submission of a list of judicial nominees by a nonpartisan commission composed of professional and lay persons;

*Also known as the Kales Plan (after its originator), the American Judicature Society Plan (Prof. Kales being a founder of the Society), the American Bar Association Plan (after its endorsement by the Association in 1937), and, perhaps most widely, as the Missouri Plan (after the state of its first adoption).

A brief but up-to-date bibliography on "the plan" is found in The American Judicature Society's Report No. 7, Judicial Selection and Tenure (Aug., 1970).

(2) Selection of a judge by the Governor from the list submitted by the nominating commission;

(3) Approval or rejection by the voters of the Governor's selections in nonpartisan elections in which the judge runs unopposed on the sole question of his record in office.

The nonpartisan merit plan is now in use, in whole or in part, in at least 19 states. The plan was first adopted in 1940 in Kansas City and St. Louis, Missouri, for trial judges, and throughout the state for appellate judges. The spur to its adoption was the flagrantly corrupt Pendergast machine in Kansas City, but since its adoption, several efforts to repeal it have met with increasing margins of defeat at the polls, and as recently as August, 1970, the plan was extended by popular vote to the circuit court judges of St. Louis County, so that the plan now covers a majority of the trial judges in the state, and all the appellate judges, and over half of the population. Under existing local option arrangements, there has been no urgency to extend the plan to the rural areas of the state, although extension is an increasing possibility. No judge placed in office under this plan in Missouri since 1940 has been removed or failed of re-election, while at least three Missouri judges, elected in partisan elections, have been removed (or resigned under fire) for misconduct since 1963.

Missouri's successful experience with the nonpartisan merit plan has led a number of other jurisdictions to adopt the plan, or one or more of the basic elements of it, for their courts. They are Alabama, Alaska, California, Colorado, Florida, Georgia, Idaho, Illinois, Iowa, Louisiana, Kansas, Maryland, Nebraska, New Mexico, New York, Oklahoma, Pennsylvania, Utah, Vermont, and Puerto Rico. The voters of Indiana added their state to this list in November, 1970. The extent of the adoption of the plan in each of these states is indicated in Appendix C.

In 1968, it was reported that approximately 875 judges of state courts, including 23% of all appellate judges and 18% of all trial judges, were

covered by some elements of the plan, and all elements of the plan apply to approximately 400 judges. These figures have increased since then.

The heart of the nonpartisan merit plan lies in the first basic element -- the judicial nominating commission. It should be broadly representative of the two major groups who use the courts: the attorneys who practice there, and the public whose lives, liberties, and property are at stake there. It should also represent all major geographic regions of the state. Terms of members must be several years in length, to build up expertise, and they must overlap to preserve it. Above all, however, the Commission must be composed of persons of the highest integrity, who will sincerely and objectively try to carry out their sole duty -- to find the most highly qualified men for the judiciary. They must be prepared to seek out actively members of the bar whose personal and professional characteristics offer the most potential for becoming an outstanding judge.

This "seeking out" process can best be described by one who has had lengthy personal experience with the system. U.S. District Judge Elmo Hunter, formerly a merit plan selectee on both the Missouri trial and appellate court levels, and at one time chairman of a judicial nominating commission to select trial judges for the Kansas City circuit, describes the selection process as follows:

> Just a few months ago two of our trial judges retired because of a combination of age and illness. This created two judicial vacancies. Our judicial nominating commission issued a public statement carried by our press and other news media that the nominating commission would soon meet to consider two panels of three names each to be sent to the governor for him to select one from each panel to fill the vacancy, and that the nominating commission was open to suggestions and recommendations of names of those members of our bar best qualified to be circuit judges.
>
> It received the names of many outstanding and highly qualified lawyers who were willing to be considered by the commission because of the nonpolitical merit type of selection involved. The commission on its own surveyed all eligible lawyers in the circuit to see if it had before it the names of all those who ought to be considered. From all sources the commission ended up with fifty-seven names.

After several weeks of careful study by the commission, the list of eligibles was cut to twelve, then to nine, and finally to those six who the members of the commission sincerely believed to be the six best qualified of all. Those six names, three on each of the two panels, were sent to the governor who, after his own independent consideration of them, made his selection of one from each panel. His selections were widely acclaimed by the press and the public as excellent choices from two very outstanding panels. The commission was glad to see the governor get this accolade, but its members knew that no matter which one of the three on each panel he selected, the people of Missouri would have been assured an outstanding judge.

Students of the nonpartisan merit plan give a variety of reasons for the success of the plan and its fast-spreading appeal. Judges become politically independent, and time formerly spent campaigning can be spent attending to the urgent business of the courts. Public confidence in the individual judge -- and in the administration of justice generally -- improves. The attention of voters can be focused on a judge's record, rather than his political affiliation, so that it is easier, should the need arise, to vote an unfit judge out of office. Opportunity of minority groups for representation on the bench is increased. Even the Governor benefits -- he is relieved of the occasional embarrassment of choosing between political favorites, some of whom may be less than well qualified. At the same time, he can take credit for outstanding appointments made by him from the list furnished by the nominating commission. But the two most important reasons, amply supported by actual experience, are these:

- The plan guarantees qualified judges by screening out the obviously unfit and mediocre.
- The plan increases the available pool of qualified candidates from which nominees can be selected.

Writings on the plan, in recent years, have become quite extensive. They are overwhelmingly favorable. A recent book-length study of the plan in Missouri concludes that nonpartisan merit plan judges are rated higher in overall performance than partisan-elected judges by those lawyers who practice in courts presided over by both kinds of judges; that a high percentage

of the lawyers in St. Louis and Kansas City (where all judges are plan judges) favor the plan over any other method of judicial selection; that most Missouri lawyers agree that the plan produces "better" judges than partisan elections; and that the plan weeds out very poorly qualified candidates.*

D. A Recommended Nonpartisan Merit Plan for North Carolina

States that have adopted the nonpartisan merit plan for the selection of judges have usually inserted in their constitutions a brief statement of the basic elements of the plan, and left detailed implementation of it to the legislative branch. We believe that this is the soundest approach for North Carolina, and we accordingly recommend a short revision of Article IV, Section 16 of our Constitution that (1) authorizes a judicial nominating commission to recommend to the Governor a list of qualified nominees for vacant judgeships; (2) directs the Governor to select a judge from this list; and (3) provides that the appointee must stand for re-election 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 -- are also specified.

The proposed amendment further provides that voting on retention or rejection of appellate division judges would be by the voters of the state, and that similar voting for district court judges would be by the voters of

*Watson and Downing, The Politics of the Bench and the Bar, (1969).

the judge's district. Voting on superior court judges would be by the voters of the state, or of the respective judicial divisions or judicial districts, as the General Assembly might provide. This carries forward the present constitutional provisions, except that as to the electoral units of superior court judges the General Assembly is given a third alternative -- election by judicial divisions -- from which to choose. The Commission is aware of the current challenge to the present method of selecting superior court judges; it feels, however, that the size of the electoral unit is a legislative policy matter which has no logical connection with the merits of the basic selection plan. The basic plan merits adoption no matter which of three constitutionally-authorized electoral units is eventually chosen for superior court judges.

Finally, the proposed amendment to the Constitution provides that incumbent judges continue in office for the remainder of the terms for which they were elected, and thereafter are subject to approval or rejection by the voters on a nonpartisan "yes" or "no" ballot, as described above. Since the plan is not designed to become effective until January 1, 1973, after its approval by the voters in the general election of November, 1972, many incumbent judges (there are 73 on the district court level alone) would be subject to one last election under the existing partisan election laws.

Statutory implementation of these constitutional provisions consists for the most part of creating a judicial nominating commission and outlining its functions. Since the integrity and objectivity of the nominating commission is the most important key to the end product -- high quality judges -- the composition of the commission is of critical importance. To nominate justices and judges for the Supreme Court and the Court of Appeals, a nominating commission of nine at-large members is recommended. A member of the Supreme Court, elected by the Court, would serve as chairman, but would vote

only in case of a tie. Four attorneys, each a resident of a different judicial division of the State, would be elected by the State Bar Council, the statutory governing body of the integrated bar, whose members are themselves elected by the 30 local bar districts. The Council could not elect one of its own members to the commission. Four non-lawyer citizens would be appointed by the Governor. These lay appointees would also be from separate judicial divisions, to assure proper geographic representation on the commission. To assure proper representation within divisions, no two appointees, other than the Supreme Court member, could be from the same judicial district. To assure continuity, terms of members -- fixed at four years -- would be overlapped, and to prevent possible domination of the commission by one member or group of members, no member could serve more than one full term without a lapse of two intervening years. Members, other than the chairman, would be forbidden to hold public office, or office in any political party. No member of the commission, save the chairman, would be eligible for appointment to a judgeship during his term of office and for a period of two years thereafter. Finally, members of the commission would serve without remuneration other than the per diem and expenses accorded members of state boards and commissions generally.

When vacancies on the superior or district court bench were to be filled, the nominating commission would be augmented by additional members from the four judicial divisions. Each division would be represented by two additional attorneys and two additional laymen, selected in the same fashion as at-large members who make nominations to fill appellate court vacancies. When a vacancy on the trial bench in a particular division arises, the four divisional members from that division would join the nine at-large members, so that whenever a trial judge is to be selected, half of the voting members (six of 12) of the commission would be from the division in which the vacancy exists.

The divisional members of the nominating commission would of course be subject to the same provisions concerning overlapping of terms, holding public or political office, etc., that apply to members at large. These provisions are designed to eliminate political considerations, and maximize impartiality, objectivity, experience, and balance in the exercise of the sole function entrusted to the commission -- the nomination of the most highly qualified persons for judicial office.

The nominating commission would be called upon to act each time a judicial vacancy occurred. To make nominations to fill a vacancy on the appellate bench, the nine at-large members would meet; to fill a vacancy on the trial bench, four divisional members would meet with the at-large members. The commission could meet anywhere in the state. It would be authorized to publicize judicial vacancies, and empowered to solicit declarations of availability for judicial service from highly qualified attorneys who might otherwise be unavailable. It could hold public hearings, at which interested persons could speak for or against the nomination of particular individuals. In the interest of discouraging publicity seekers and encouraging qualified persons who might not otherwise declare their availability, it could hold the names of potential nominees in confidence until such time as it transmitted its final list to the Governor, when the names of the nominees would be made public.

The commission would be required to nominate three names for each vacancy on the Supreme Court or the Court of Appeals. For a trial bench vacancy, some of which arise in districts with a very limited number of attorneys, two or three names would be required. Names of nominees must be submitted to the Governor within 60 days of the occurrence of the vacancy, and the Governor must make his selection from the names submitted within an

additional 30 days. If he failed to make a selection within the time allowed, the Chief Justice of the Supreme Court would then make the appointment.

Terms of office for appellate and superior court judges would remain as currently specified, but under the constitutional option for district court judges, it is recommended that terms of district court judges be fixed at six years. Extending the term from four to six years will make the office somewhat more attractive to a larger number of potential district court judges.

A judge selected under this plan who desired to serve successive terms would be required to file, within specified time limits, a declaration of his intention to run. The ballot at the next general election would then bear the question: "Shall Judge _____ of _____ Court be retained in office?". An affirmative vote would return the judge to office for a regular six or eight year term; a negative vote would vacate the office, and trigger the nominating process already described.

The Courts Commission has considered which of the three constitutional options it should recommend for the electoral unit of superior court judges -- state, division or district. Election of superior court judges by any one of these three electoral units is not essential to the success of the nonpartisan merit selection plan. In fact, the plan will function equally well whatever electoral unit the General Assembly should select for these judges. Accordingly, the Courts Commission recommends that superior court judges be elected by the qualified voters of the entire state. This is the present system. If this system is to be changed, the present system is the starting point; if it is in fact changed, the need for and soundness of the nonpartisan merit plan will not be affected.

To guarantee that the nonpartisan merit plan is actually operated in a nonpartisan fashion, the Courts Commission recommends that no judge, no person

who has declared his availability for nomination for a judgeship, and no nominee for a judgeship, directly or indirectly make any contribution to or hold any office in a political party or organization, or take part in any partisan political campaign between opposing candidates. This prohibition is a vital feature of the proposal without which the laudable objective of the proposed legislation might not be attainable.

E. Special Superior Court Judges

So far we have been talking about the selection of appellate judges, district court judges, and resident superior court judges. There is another kind of superior court judge, however, provided for by Article IV, Section 9(1) of the Constitution: "The General Assembly may provide . . . for the selection or appointment of special . . . Superior Court Judges not selected for a particular judicial district." Under this authority for many years the General Assembly has authorized the Governor to appoint a number of special superior court judges. Currently, the number is eight, all appointed for four-year terms. These judges may serve anywhere in the State, and do, being assigned week by week wherever the need for an additional session of superior court is greatest.

The need for these special superior court judges continues, but the reasons which compel re-evaluation of our method of selecting all other kinds of judges apply with equal force to special superior court judges. Logic dictates that, if the nonpartisan merit plan for choosing our other judges over the years will bring about an improvement in the quality of our judiciary generally, it will do no less for our special superior court judges. The Courts Commission therefore unhesitatingly recommends that the nonpartisan merit plan for the selection of our judges be extended to special superior

court judges also. A constitutional amendment to do this is not necessary. It can be effected at the same time as the parent bill for selection of our other judges is scheduled to go into effect -- January 1, 1973. After that date, special superior court judges, limited to two per judicial division, for a total of eight, would be selected by the Governor from a list of three nominees for each vacancy put forward by the same judicial nominating commission that makes recommendations to fill other judicial vacancies. Since special judges serve throughout the state, the same at-large commissioners that nominate appellate judges would make the nominations. Terms would be eight years, and successive terms would be subject to a "yes" or "no" retention election the same as for other judges. Incumbent special superior court judges would serve out their current terms, but could serve a succeeding term only if selected by the Governor from a list of candidates submitted by the nominating commission. Under this proposal, all special superior court judges would be products of the nonpartisan merit plan by July 1, 1975.*

* * * * *

Full implementation of the nonpartisan merit plan will take a number of years. A few recently elected incumbents will have six to eight years to serve before they face a retention election. On the other hand, the attrition rate by resignation, failure of retention, death, or retirement among a corps of 177 judges can be expected to average 15 to 20 judges per year, so that substantial impact can be expected within a couple of years. In any event, faster implementation is hardly practicable. Action at this session of the General Assembly offers the promise of personnel improvements by the mid-seventies to add luster to the structural improvements of the mid-sixties.

*One Commission member, A. A. Zollicoffer, Jr., does not concur in the recommendation of this section to amend the Constitution and "completely change the entire procedure of the selection of Justices and Judges for all the Courts of North Carolina." It is his opinion that the recommended change is "neither necessary nor in the best interest of the administration of justice in North Carolina."

III. DISCIPLINE AND REMOVAL OF JUDGES

"Once we have named a man as a judge, the quality of his performance as a judge passes almost completely outside our effective surveillance and control, unless his performance is extremely bad. . . . Any notion that the public or the bar may have any genuine control over the quality of judicial performance by judges already on the bench is simply not realistic."

Robert A. Leflar, The Quality of Judges, 35 Ind. L. J. 289, 305 (1960).

"Important as it is that people should get justice, it is even more important that they be made to feel and see that they are getting it."

Lord Herschell

". . . no man is as essential to his country's well-being as is the unstained dignity of the courts."

Charles Evans Hughes, Chief Justice

". . . the means provided by the system of organic law in America for removing a judge, who for any reason is found to be unfit for his office, is very unsatisfactory. . . . It is very certain that after the experience of nearly a century the remedy by impeachment in the case of judges, perhaps in all cases, must be pronounced utterly inadequate. There are many matters which ought to be causes for removal that are neither treason, bribery, nor high crimes and misdemeanors. Physical infirmities for which a man is not to blame, but which may wholly unfit him for judicial duty, are of the first class. Deafness, loss of sight, the decay of the faculties by reason of age, insanity, prostration by disease from which there is no hope of recovery -- these should all be reasons for removal, rather than that the administration of justice should be obstructed or indefinitely suspended."

Justice Samuel Miller (USSC, 1878)

". . . An arbitrary or disagreeable course of action by a judge arises principally from the fact that he is subject to no authority which can receive complaints against him and act upon those complaints by way of private or public criticism and correction of the judge. The best protection against arbitrary and disagreeable actions by judges is a duly constituted body of fellow judges who hold a position of superior power and authority and to whom complaints as to conduct of judges may be brought and who may investigate those complaints and exercise a corrective influence."

Albert Kales, 52 Annals of the American Academy of Political and Social Science (1914)

A. The Present System and the Need for Something Better

In North Carolina, appellate and superior court judges may be removed from office by impeachment or, if the cause be mental or physical incapacity, by "joint resolution of two-thirds of all the members of each house of the General Assembly."* District court judges cannot be impeached, but may be removed for misconduct or mental or physical incapacity as provided by law. The law (G.S. 7A-143) provides for a due process hearing before a superior court judge, with right of appeal. There is no formal means for disciplining any judge, short of removal, and impeachment is the sole means for removing an appellate or superior court judge for misconduct.

Impeachment is ill-suited for its purpose, and ineffective in fact. No judge has been removed by the impeachment route in this state since 1868.** The procedure is cumbersome, equivalent to a grand jury of 120 and a petty jury of 50, with the latter empowered to overrule the judge by majority vote. It is expensive. (In Florida, two fairly recent impeachment trials -- both unsuccessful -- cost over a quarter of a million dollars.) It is appropriate only for the most severe misconduct and, perhaps for this

*The "joint resolution" procedure is nowadays quite generally referred to as "address", although the latter term originally referred to a joint resolution addressed to the executive who was supposed to effect the removal. Many state constitutions have dropped the feature of executive participation.

**Chief Justice Furches and Associate Justice Douglas were impeached in 1901, but the Senate vote for conviction fell short of the two-thirds necessary for conviction. Clark, History of the Supreme Court in North Carolina, 177 N.C. 617, 631. The House preferred articles of impeachment against Superior Court Judge E. W. Jones in 1871, but later withdrew them. Hamilton, Reconstruction in North Carolina, (1964 reprint), pp. 561-562. No search has been made for years prior to 1868, but before that time judges were selected by joint vote of the members of the General Assembly, and it is reasonable to assume that judges selected by the General Assembly are less likely to be impeached by it than judges elected by the people.

reason, frequently fails. Finally, it is in reality a political rather than a judicial device, and frequently tainted with partisanship.

The "joint resolution" procedure, while limited to disability cases, is even less effective. It apparently has never been used in North Carolina. Its use is so unlikely that it lacks even a deterrent effect.

North Carolina has been blessed with a singularly scandal-free judiciary. Other states have been less fortunate. Scandals of major proportions in recent years have afflicted the bench in California, Florida, Illinois, Iowa, Louisiana, Missouri, Michigan, New York, Oklahoma, and other states.* It is probable that part of North Carolina's good fortune has gone unrecognized as pure luck. So recognized, the question may legitimately be asked -- how long will our favorable experience continue? Just a few years ago we had only 45 full-time state-paid judges. We now have 177.** To most observers, the need for an efficient means of disciplining or removing judges who cannot measure up to the required moral, professional, or physical standards is obvious.

The need for a truly effective mechanism for disciplining or removing judges for misconduct or disability has received increasing attention in recent years. The problem is a very sensitive one, especially to some judges, who are understandably wary that efforts to impose accountability for judicial conduct may interfere with the tradition of independence. Other judges, however, have recognized the larger public interest in the efficient and untainted administration of justice, and realized that in the long run the public's interest and their own interest is one and the same. The inadequacy of present methods of dealing with judicial misconduct leaves all questions of fitness and conduct to the conscience of the judge or the judgment -- frequently

*But no judge selected by the merit plan in any of these states has been the subject of removal proceedings.

**This is not necessarily an increase in overall members; there were many locally-paid judges prior to the coming of the district court system.

uninformed -- of the electorate. This unfortunately means that many problems of judicial fitness go unsolved. The erring tendencies of the one per cent tarnish the dedication of the ninety-nine per cent, and public esteem in the judiciary is diminished. Both the public and the judiciary suffer from lack of working machinery for discipline or removal of the small minority.

At the outset we would like to make it clear that we are not referring simply to misconduct so gross as to clearly warrant removal. Such misconduct is exceptionally rare, although disproportionately publicized, and by itself does not merit the concern many states have recently given to the overall problem of which it is a small part. We are also referring to a kind of judicial misbehavior for which removal is too severe, a kind that can usually be corrected by action within the judicial system without sacrificing the judge. A flexible machinery that can handle minor cases as well as major ones is an urgent and widely felt need. It is considered by some knowledgeable observers to be the most pressing problem facing the 20th century judiciary. Such a procedure would be analogous to the censure and disbarment machinery of the organized bar -- machinery long ago recognized as essential to protect the image of the legal profession. The sort of conduct we are referring to has been reported in these examples from other states: chronic absenteeism; intemperance; abuse of litigants, witnesses, or defendants; erratic and unseemly courtroom behavior; questionable extrajudicial activities; persistent tardiness; and prolonged and excessive delays in rendering decisions. If these should occur in North Carolina, it is essential for the public good -- and the good of the judiciary -- that there be some means to deal with them.

We are also referring to another kind of judicial performance -- not misconduct, but a blameless kind occasioned by waning of physical and mental powers. This is less common in states with mandatory retirement

ages, but it exists in all states. It is almost invariably unrecognized by its victims, most of whom have served long and honorably and who are entitled to a liberal retirement allowance. A mandatory retirement age will lessen this problem, but not eliminate it. Shrinking physical vigor and mental acuity occur at different ages in different men, and an outstanding judge of diminishing vigor and long years may still be better than a young and vigorous judge of meager talents. The point remains that, at whatever age, infirmity overtakes all men, and an objective means is needed to assess those cases in which physical or mental decline prevents effective performance. In these cases, the customary solution, upon prompting, is voluntary retirement. In those rare instances in which voluntary retirement is resisted, there should be power to force retirement. Of course, entitlement to retirement compensation would be protected.

B. Judicial Qualifications Commissions

Machinery to discipline, remove, or retire the unfit or disabled judge, in addition to or in lieu of impeachment and address, has been established in at least 25 states in the past quarter of a century. The most successful system has been set up by California. It has been so widely copied that it deserves special mention.

In California, a constitutional amendment of 1960 authorized a judicial qualifications commission. The qualifications commission consists of five trial and appellate judges, two attorneys, and two public (non-lawyer) members. It is authorized to receive complaints concerning the conduct or performance of any judge in the state, and it may initiate investigation of alleged misconduct or disability on its own motion. It answers all complaints. About 90% of them involve a litigant disgruntled over a judge's decision in a particular case; these the commission terminates with an explanatory

letter.* In the small minority of complaints, an investigation is conducted. If minor misconduct is verified, it is almost always corrected by informal correspondence or an interview with the judge concerned. If major misconduct, or physical or mental disability is suspected, a formal, due process hearing may be offered the judge, at which stage, if it hasn't occurred earlier, the judge usually resigns or retires. The commission is authorized to recommend formal censure, removal, or retirement to the Supreme Court of California. Until such recommendations are made, all proceedings are confidential.

In the first four years of the commission's existence, 26 judges retired while under investigation; in the first seven years, 44 judges; in the first nine years, 50 judges.** During this period, only one judge was recommended for removal, and the supreme court rejected the recommendation. Formal censure as a means of handling misconduct not severe enough to warrant dismissal was added to the commission's powers in 1966, and has been employed successfully in two cases since then. The great majority of the resignations or retirements occasioned by the qualifications commission's operations so far have been due to mental or physical disability, including intemperance. Few have been due to specific acts of misconduct.

Leadership for adoption of the qualifications commission plan in California was furnished by Chief Justice Phil Gibson. The plan was also supported by a 364 to 34 vote of the California Conference of Judges, and

*The commission has no jurisdiction over a judge's decision in a particular case (unless bribery or outright fraud is alleged, of course), that being a matter for appeal.

**California has over 1,000 judges, or about six times as many as North Carolina. Equivalent figures for North Carolina would <u>average</u> no more than one judge per year.

adopted by a 3 to 1 vote of the people. In campaigning for the proposal, Justice Gibson said: "No honest and industrious judge who has the mental and physical capacity to perform his duties has anything to fear from" the commission method of removal. "Surely the people have the right to expect that every judge will be honest and industrious and that no judge will be permitted to remain on the bench if he suffers from physical or mental infirmity which seriously interferes with the performance of his judicial duties."

The key to the success of the qualifications commission plan lies in the operations of the qualifications commission. For complaints that appear to have some merit, the procedure has been described as follows:

> Under the California practice the letter procedure is a part of the investigatory function but it is only undertaken after careful consideration and when there is an apparently credible dereliction or condition of some significance calling for explanation.
>
> The judge's reply may be completely satisfactory in which case the confidential file will so show and be closed, or the reply or perhaps failure to reply may show the necessity for further investigation and may ultimately lead to removal proceedings.
>
> Another possibility is that the allegations while valid are not grave enough to justify taking further action and there may be reason to think that there will be an improvement. Sometimes there may be reason to accept the plea, "I didn't do it, but I'll see it doesn't happen again."
>
> Depending upon circumstances, the closing of the matter can be conditioned upon the cessation of the impropriety. If the situation warrants, and only occasionally should this be necessary, the matter can be held and then rechecked before closing.
>
> None of this is foolproof but it does provide an avenue so that discipline in a very positive way can be a factor in the improvement of the judicial machinery. To what extent a commission chooses to function in that sphere rests in the sound discretion of its members.*

Another factor in the success and acceptance of the California plan is the confidentiality of the proceedings. This is provided for in the

*Frankel, The Case for Judicial Disciplinary Measures, 49 A.B.A.J. 218, 219 (1966).

constitution. Information concerning a case cannot be made public until after a due process hearing and a recommendation for censure or removal is filed with the supreme court. This is essential to protect the good judge against unjustified public attack and it lets the disabled or unethical judge retire or resign without public disgrace that would cast unfair reflection on the bench in general. It also aids investigations by assuring potential complainants that they need not fear repercussions. Experience in California has shown that unless the judge under investigation himself chooses to make the matter public, there are no leaks. Nearly all of the states with plans similar to California's have included this confidentiality feature.

Provisions for the discipline, retirement, or removal of judges, in addition to or in substitution for traditional methods, now exist in over half of the states. The plan adopted by most jurisdictions follows that of California. These states are Alaska, Colorado, Florida, Idaho, Illinois, Louisiana, Maryland, Michigan, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, Texas, Utah, and Vermont.* To this list Arizona, Indiana, Missouri, and Virginia can be added as a result of November, 1970, elections. Puerto Rico also has such a plan, and Congress prescribed a Commission on Judicial Disabilities and Tenure for the courts of the District of Columbia in 1970. The plan is under active consideration in several more states.

The chief virtues of the judicial qualifications commission plan seem to be these:

(1) The commission offers a flexible, fair, efficient and inexpensive means of dealing with physical and mental infirmities, and with misconduct,

*A few states, typified by New York, Delaware and Oklahoma, have a court on the judiciary. The court on the judiciary works on an ad hoc basis, processes only the most serious matters, and is more formal and cumbersome. A few states also have special procedures for processing disability cases only. Information about each state's procedures is collected in the American Judicature Society's Report No. 5, Judicial Discipline and Removal (Aug., 1969). This report also contains an excellent bibliography.

whether it be aggravated or minor. The provisions for confidentiality and three of their own kind on the commission assure each judge of fairness and freedom from harrassment.

(2) The existence of the commission with its power to recommend censure, retirement, or removal, acts as a powerful deterrent to the occasional judge who might otherwise fall short of the standards expected. An easily accessible procedure for airing complaints and taking corrective action can have a salutary effect that the distant and unreal threat of impeachment never had.

(3) The commission provides a safety valve for disgruntled litigants and others who might otherwise cause serious loss of confidence in the courts. They can ventilate their grievances without unfairly harming a particular judge. A sympathetic letter of explanation from an official public agency serves to soften or dissipate the ire of many complainants.

(4) The public is assured of an honest, able, efficient bench, while at the same time the independence of the judiciary is fully protected. And since the system permits the judiciary to police its own ranks, with any decision to censure, remove or retire coming from the supreme court, temptation of the executive or legislative branches to involve themselves in these matters is minimized.

C. A Judicial Standards* Commission for North Carolina

Adoption of a workable method for censuring and removing unworthy or disabled judges in North Carolina requires a constitutional amendment. It is not necessary, however, to do away with traditional methods of impeachment and address for removing judges -- they can remain in the Constitution for assurance to the people of their ultimate power, acting through their

*We prefer the name Judicial Standards Commission to Judicial Qualifications Commission.

elected representatives. It is necessary only to add a provision authorizing an additional procedure for discipline and removal of judges for misconduct or disability. The Commission recommends insertion of the following language in Article IV, Section 17: "(2) Additional method of removal of Judges. The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The Courts Commission feels that the grounds for censure or removal of a judge are so fundamental that they should be imbedded in the Constitution. Other matters, such as the creation and composition of a Judicial Standards Commission and its procedures, are better left to the wisdom of the General Assembly. This general arrangement has been followed by most of the states with bodies of this type.

The Courts Commission recommends that a Judicial Standards Commission be created by statute, and that it be composed of representatives of bench, bar and the general public. The General Court of Justice should be represented by one judge from each of its divisions -- appellate, superior court, and district court. The appellate division judge should come from the Court of Appeals. (This does not overlook the Supreme Court; it participates in the removal process when it receives and reviews the recommendations of the Standards Commission.) Each of these judge-members should be appointed by the Chief Justice of the Supreme Court. The bar would be represented by two attorneys who have practiced in the courts of the State for at least

ten years, and who presumably thereby have acquired the experience and judgment vital to a proper discharge of their sensitive roles. They would be elected by the State Bar Council, the governing body of the integrated bar of the State, whose 30 members are themselves elected by the lawyers of the various judicial districts. To give the Commission balance and objectivity, two public members would be appointed by the Governor. The chairman of this seven-man commission would be the Court of Appeals judge.

To assure continuity of commission membership, members would serve overlapping terms of six years. No full-term member could succeed himself. Vacancies would be filled in the same manner as the original appointment. Members would serve without compensation other than the per diem and expenses afforded members of state boards and commissions generally.

The grounds for censure or removal of a justice or judge are those basic violations set forth in a majority of the state statutes establishing removal bodies: wilful misconduct in office, wilful and persistent failure to perform the duties of the office, habitual intemperance, and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The latter category is designed to cover wilful and persistent violations of the canons of professional ethics applicable to the judiciary, transgressions which are not necessarily covered by the earlier categories. To these grounds has been added "conviction of a crime involving moral turpitude," out of an abundance of caution and because it is arguable that such misconduct is not altogether covered by "wilful misconduct in office". A judge could also be removed for mental or physical disability of a permanent, or likely to be permanent, nature. A judge removed for mental or physical reasons, however, would be entitled to retirement compensation if he was qualified for it under any provisions of state law; a judge removed for misconduct would not be so entitled, although a judge

facing formal removal proceedings would have the options of resigning or of retiring voluntarily if he was otherwise qualified for retirement compensation.

Subject to certain fundamental safeguards, the Standards Commission would be free to establish its own procedures. Commission action would be initiated by signed complaint of any citizen, or by Commission investigation on its own motion. Complaints having some basis would be investigated, and those found to be substantiated but of a minor nature would usually be terminated by communication with the judge concerned. Major violations of judicial standards -- which experience, again, has shown to be quite rare -- would proceed through the investigatory stage to an offer of a due process hearing to the respondent judge. If the findings of the Commission supported the allegations, the Commission could recommend censure, retirement or removal to the Supreme Court.

The Commission would have authority to initiate investigations on its own motion to take care of instances of alleged misconduct of a substantial nature for which there were no complainants. Widespread and persistent rumors, for example, should be investigated for the good of the profession as well as the protection of the individual judge. An example would be newspaper reports of misconduct, which, if not investigated and acted on, might do enormous damage to the image of the judge and public respect for the administration of justice generally.

The Commission would be authorized to administer oaths and to punish for contempt and compel the attendance of witnesses and the production of documents. Its proceedings would be confidential until such time as it made its final recommendations to the Supreme Court. This provision is vital, as allegations of misconduct are frequently groundless, and judges under investigation are entitled to this protection until such time as the charges are

found to be supported. Public confidence in the integrity of the courts is also at stake here; it should not be shaken without reason. Further, confidentiality is essential to protect complainants and witnesses, many of whom would be reluctant to complain or testify for fear of publicity or reprisal. Of course, if the respondent judge chose to waive the privilege of confidentiality, he could do so. Detailed regulations in this field should be left to the Commission.

Four of the seven members of the Commission should concur in any recommendation to censure or remove any justice or judge, and a majority of all members of the Supreme Court must concur in any censure or removal order, or in an order to take no action (dismiss) the proceedings. Any justice or judge would, of course, be disqualified from acting in any case in which he was a respondent.

IV. AGE LIMIT FOR SERVICE AS JUSTICE OR JUDGE

At least 32 states, plus the United States and the District of Columbia, have age ceilings on service as a full-time judge. The majority of these -- about 22 -- require that a judge step down not later than age 70. In a few additional states, a judge who does not retire at age 70 loses a significant portion of his retirement compensation or survivor benefits. Except for the wealthy, this latter device probably achieves the same result as mandatory retirement. A handfull of states require retirement at an older age -- 72, 73 or 75. All of these statutes merely recognize for the judiciary what has long been recognized in the business world and usually in the executive branches of most states as well. Mandatory retirement at age 65 -- sometimes earlier -- is the prevailing rule in industry. Our own Teachers' and State Employees' Retirement Act requires retirement at the end of the fiscal year in which an employee reaches age 65, excepting only those few whom the employer, on a year-to-year basis, specifically requests be retained.

We feel that the principle of a mandatory retirement age is a salutary one, and that it should be extended to the judicial branch of the state government. At present, there is no mandatory retirement age for appellate judges. Superior court judges are required by G.S. 7A-51(d) to retire at the end of the term during which they reach age 70, provided they are qualified for retirement compensation. This provision can operate inequitably to permit some judges to remain in service until age 77, while others can be forced into retirement as early as age 70.* District court judges, although entitled to

*This statute, adopted in 1967, could not provide for across the board retirement at age 70 because of the constitutional provision that superior court judges are elected for eight-year terms. The proposal under discussion would remove this impediment in the case of a judge who reached mandatory retirement age.

the benefits of the Teachers' and State Employees' Retirement Act, are elected to office for specific terms, and may serve without age limit, subject to re-election every four years.

We propose that the General Assembly be authorized to require that appellate justices and judges be required to retire at age 72, and that trial judges be required to retire two years earlier, at age 70. For this two-year distinction, we think there is valid reason. Most trial judges in North Carolina, including all superior court judges, must travel extensively. In addition, trial work is by its nature physically more strenuous than appellate work. These differences are adequate justification, in our opinion, for allowing appellate judges to serve two years longer than trial judges.

At present, there are a few judges -- both trial and appellate -- who are, or will be at the time this proposed legislation becomes effective, serving beyond the recommended mandatory retirement ages. We think it only fair that these judges, some of whom have given decades of honorable and distinguished service to the state, be allowed to complete the terms for which they were elected.

Other judges, as they reach ages 70 or 72 would be retired. These judges, except, perhaps, for one or two who first came to the bench in their sixties, would be entitled to retirement compensation under various clauses of G.S. 7A-39.2, 7A-51, or the Teachers' and State Employees' Retirement Act.

Appellate and superior court judges who retire for other than physical disability are currently subject to recall from time to time for short, limited periods of service as emergency justices or judges. This is a desirable provision, used occasionally by the Supreme Court and more frequently on the superior court level, and the Commission recommends that this practice continue unchanged.

V. SURVIVOR BENEFITS FOR SUPERIOR COURT JUDGES; RETIREMENT BENEFITS FOR DISTRICT COURT JUDGES

The foregoing recommendations concerning selection, discipline, removal, and retirement of judges, if enacted, will have a far-reaching impact on the judiciary of North Carolina in the next decade. A generally well qualified -- in some instances, exceptionally well qualified -- corps of trial and appellate judges will reach even higher standards of performance. Of equal importance, a larger number of the most highly qualified practitioners of law will be willing to volunteer for the profound responsibilities of the robe.

But the attractiveness of the bench to our most talented and successful attorneys depends to some extent on economic considerations. Judicial office must offer enough financial security during career years and in retirement to attract outstanding candidates. As to this, present laws, while adequate in most respects, are deficient in others. Two situations in particular cause concern. The first involves survivor benefits for appellate and superior court judges, and the second is retirement benefits generally for our new corps of district court judges.

Under current law, the widow and minor children of an appellate or superior court judge who dies in office receive no survivor benefits of any kind from the state, no matter how long the judge may have served. Since the compensation of judicial office is such that a judge may not be able to raise and educate a family and at the same time provide adequately for its security in the event of his untimely death, outstanding candidates for the bench are sometimes unwilling to give up a more rewarding private practice. An annuity for family survivors, based on a percentage of the judge's salary, and supported in part by contributions from the judge -- an arrangement

available to judges in most jurisdictions and to nearly all other employees of the state -- seems overdue.

District court judges who reach the bench before age 62 become members of the Teachers' and State Employees' Retirement system. This system is designed primarily to provide retirement compensation to employees who make a career of state service. District court judges, however, frequently switch to public careers in middle age, or later, and do not have the opportunity enjoyed by the typical state employee to build up, over a period of 20 to 30 or more years, a substantial equity in a retirement fund. Some of these judges will be forced into retirement with very meager benefits, although they may have given the state 10 or more of the best years of their lives. Other district court judges who become judges after reaching age 62 are ineligible to participate in the Teachers' and State Employees' Retirement system at all. For them the state provides no retirement benefits.

Precisely what to do about these two problem areas is a matter of continuing concern to the Courts Commission. The solution is not simple; detailed data must be collected; actuarial projections must be made; and the relation of proposed solutions to the compensation and retirement benefits of all judicial officers must be considered. It seems desirable that whatever solution is recommended should be a part of an integrated package of benefits uniformly available to all judges. The Commission continues to study these problems, and expects to recommend a desirable course of action not later than the next session of the General Assembly.

VI. AMENDMENTS TO THE JUDICIAL DEPARTMENT ACT OF 1965 (G.S. CHAPTER 7A)

For the past two years (four years, in 22 counties), the District Court Division of the General Court of Justice has been functioning in 83 of our 100 counties. The Court of Appeals has become fully functional on the appellate level. The Office of Public Defender is fully operational in the two districts in which it is authorized, and can safely be extended to additional districts.* Finally, the new juvenile jurisdiction and procedure statute is effective throughout the state. Each of these major new additions to the Judicial Department Act of 1965 is operating well -- so well, in fact, that no major adjustments are needed or recommended in any of the four areas of the Act.

A few technical and editorial amendments are needed at various places in the Act. These consist primarily of removal of transitional sections no longer required since all 100 counties are now governed by a uniform system, and of clarifications of existing law. The Courts Commission is extremely pleased that four years of transition have been accomplished with so little confusion and inconvenience.

*The Administrative Office of the Courts is currently collecting data on the first year's operations of the Public Defender. Preliminary figures indicate that indigents are being represented by the defender at less cost per case than assigned counsel.

VII. STATUTORY HOUSEKEEPING

Extension of the new district court system to all counties in the state in December, 1970, makes it possible at last to begin the huge task of conforming hundreds of statutes to the new court structure. This could not be undertaken sooner because the old statutes dealing with justices of the peace, local option minor courts, and the like, were still effective in some areas of the state.

This task cannot be accomplished entirely in one session of the General Assembly, but the Commission has already examined several of the most heavily affected chapters of the General Statutes, and drafted the necessary conforming amendments. It recommends their adoption at this session of the General Assembly.

Chapter 1 (Civil Procedure) now contains a number of references to obsolete procedures (attachment in justice of the peace court, and small claims in superior court, for example), and other references to "superior court" which should include "district court" as well. We recommend deletion of the former, and appropriate modification of the latter. Possible rewording of some sections having to do with the jurisdiction of the district court vis a vis the superior court, is undergoing further study.

Chapter 2 (Clerk of Superior Court) became substantially obsolete when the nonjudicial operations of the clerks' offices were subjected to the uniform regulations of the Administrative Office of the Courts. We recommend repeal of much of this chapter, and substantial revision of many of the remaining sections to conform to new uniform laws and regulations. In a few instances, statutes dealing with "clerk's law", such as investment of funds held by the clerk, and administration by the clerk of funds received by him

for the benefit of minors and disabled adults, were noted to be in need of modernization. This too has been recommended, in the interest of seeing that the remaining sections of the chapter are both internally consistent and up to date. Since a subchapter of Chapter 7A deals with the Superior Court Division (including specifically the office of the clerk) of the General Court of Justice, it is recommended that the viable remainder of Chapter 2 be transferred there. All offices and officials of the General Court of Justice will then be referenced in the same chapter, and Chapter 2 will become a vacant title.

Much of what has been said about Chapter 2 applies to Chapter 6 (Costs) as well. Many sections dealing with the obsolete costs system, with its reliance on fee-compensated officials and county support, are recommended for outright repeal. Other sections, which deal with the liability for costs (as opposed to the amount and collection of costs) have not been affected by the new uniform costs structure, and accordingly they have not been touched for fear of disturbing settled rules heavily relied on by bench and bar alike.

Chapter 7 (Courts), now totally superseded by Chapter 7A, contains a number of articles dealing with no-longer-existing minor courts and with the abolished office of justice of the peace. We recommend complete repeal of the remnants of this chapter. Thus, Chapter 7 also becomes a vacant title.

References to recorders' courts, justices of the peace, and procedures of a defunct lower court system still exist here and there throughout the general statutes. For the most part they do no harm, but they should be eliminated as fast as time permits.

Several small areas of the law, part substantive, part procedural, now stand out as being out of conformity with the small claims procedures established by Article 19 of Subchapter IV of Chapter 7A. We have in mind particularly

the claim and delivery procedures of Chapter 1 and the summary ejectment procedures of Chapter 42. After examining these statutes, we have concluded that substance and procedure are inextricably interwoven, but that the problem is predominantly one of substantive law. As such it is beyond the jurisdiction of the Courts Commission and should be undertaken by another body specifically entrusted with modernization of the substantive law involved.

APPENDIX A

Extract From General Statutes, Chapter 7A

Article 40.

North Carolina Courts Commission.

G.S. 7A-500. Creation; members; terms; qualifications; vacancies.-- The North Carolina Courts Commission is hereby created. It shall consist of fifteen regular members, seven of whom shall be appointed by the President of the Senate, seven by the Speaker of the House, and one by the President of the Senate and the Speaker of the House jointly. At least eight of the appointees shall be members or former members of the North Carolina General Assembly. Two of the appointees shall be laymen. Four of the appointees of the President of the Senate shall serve for two years, and three for four years. Four of the appointees of the Speaker of the House shall serve for two years, and three for four years. The joint appointee shall serve for four years. All initial terms shall begin July 1, 1969. Subsequent terms shall begin July 1 of odd-numbered years. A vacancy in Commission membership shall be filled by the remaining members of the Commission to serve for the remainder of the term vacated. A member whose term expires may be reappointed.

G.S. 7A-501. Ex officio members.-- The following additional members shall serve ex officio: The Administrative Officer of the Courts; a representative of the North Carolina State Bar appointed by the Council thereof; and a representative of the North Carolina Bar Association appointed by the Board of Governors thereof. Ex officio members shall have no vote.

G.S. 7A-502. Commission supersedes temporary commission of same name.-- The Commission shall succeed to the records and research in progress of the temporary Courts Commission established by Resolution 73 of the 1963 General Assembly.

G.S. 7A-503. Duties.--It shall be the duty of the Commission to make continuing studies of the structure, organization, jurisdiction, procedures and personnel of the Judicial Department and of the General Court of Justice and to make recommendations to the General Assembly for such changes therein as will facilitate the administration of justice.

G.S. 7A-504. Chairman; meetings; compensation of members.--The Commission shall elect its own chairman, and shall meet at such times and places as the chairman shall designate. The facilities of the State Legislative Building shall be available to the Commission. The members of the Commission shall receive the same per diem and allowances as members of State boards and commissions generally.

G.S. 7A-505. Supporting services.--The Commission is authorized to contract for such professional and clerical services as is necessary in the proper performance of its duties.

APPENDIX B

GENERAL ASSEMBLY OF 1969

RESOLUTION 62

A JOINT RESOLUTION DIRECTING THE NORTH CAROLINA COURTS COMMISSION TO STUDY THE LAWS CONCERNING THE SELECTION, COMPENSATION, DISCIPLINE, REMOVAL, RETIREMENT AND RETIREMENT BENEFITS OF JUDGES AND SOLICITORS OF THE GENERAL COURT OF JUSTICE, AND TO REPORT TO THE 1971 GENERAL ASSEMBLY.

WHEREAS, the Judicial Department of North Carolina is undergoing a major re-organization; and

WHEREAS, the number of full-time judges on both the trial and appellate levels of the General Court of Justice has been greatly increased in recent years, and the number of solicitors is being increased; and

WHEREAS, a comprehensive study of the selection, compensation and retirement of all levels of judges and of the solicitors of the General Court of Justice is needed;

Now, therefore, be it resolved by the Senate, the House of Representatives concurring:

Section 1. The North Carolina Courts Commission is directed to study all phases of the methods of selection, compensation, discipline, removal, retirement entitlement, retirement compensation and survivor benefits of all judges and of the solicitors of the General Court of Justice, and to report thereon, with such recommendations for change as it deems appropriate, to the 1971 General Assembly.

Sec. 2. This Resolution shall become effective on its adoption.

In the General Assembly read three times and ratified, this the 26th day of May, 1969.

APPENDIX C - EXTENT OF ADOPTION OF NONPARTISAN MERIT PLAN*

State	Year	Features of Merit Plan			Courts Involved			Authority			
		Selection		Tenure							
		Nomination	Appointment	Non-Competitive Election	Appellate	Gen. Trial	Lim. & Special Jur.	Const.	Stat.	Charter	Exec. Action
California	1934			x	x			x			
California	1967	x	x		x	x	x				x
Missouri	1940	x	x	x	x	x	x	x			
Missouri	1966	x	x	x			x			x	
Maryland	1940	x		x	x	x	x	x			x
Alabama	1950	x	x			x		x			
Louisiana	1952	x	x				x		x		
Georgia	1956	x	x	x			x		x		
Georgia	1965	x	x	x			x		x		
Alaska	1958	x	x	x	x	x		x			
Alaska	1968	x	x				x		x		
Kansas	1958	x	x	x	x			x			
Iowa	1962	x	x	x	x	x		x			
Nebraska	1962	x	x	x	x	x		x			
Nebraska	1963	x	x	x			x		x		
Nebraska	1965	x	x	x			x		x		
Nebraska	1967	x	x	x			x		x		
Illinois	1962			x	x	x		x			
New York	1962	x	x				x				x
Florida	1963	x	x	x			x			x	
Colorado	1964	x	x	x			x			x	
Colorado	1966	x	x	x	x	x	x	x			
New Mexico	1965	x	x		x	x					x
Puerto Rico	1965	x	x			x	x				x
Oklahoma	1967	x	x	x	x			x			
Oklahoma	1967	x	x			x	x		x		
Vermont	1967	x	x	x	x	x	x		x		
Idaho	1968	x	x		x	x		x	x		
Utah	1965	x	x				x		x		
Utah	1968	x	x		x	x		x	x		
Penn.	1968			x	x	x		x			
Indiana**	1970	x	x	x	x			x			

*From Report No. 18, American Judicature Society (May, 1970). Footnotes omitted.
**As of November, 1970.

APPENDIX D

Extract From

A BILL TO BE ENTITLED AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA, AS AMENDED EFFECTIVE JULY 1, 1971, TO PROVIDE FOR NONPARTISAN MERIT SELECTION OF JUSTICES AND JUDGES OF THE GENERAL COURT OF JUSTICE.

". . . Article IV, Section 16 of the Constitution of North Carolina, as amended effective July 1, 1971, is rewritten to read as follows:

'Section 16. Judicial Nominating Commission; appointment and tenure of Judges. The General Assembly shall provide for a judicial nominating commission to recommend to the Governor the names of qualified nominees for judgeships of the General Court of Justice.

When a vacancy occurs in the office of Justice or Judge of the General Court of Justice, the Governor shall fill the vacancy by appointment from a list of nominees submitted by the judicial nominating commission. If the Governor fails to appoint within 30 days, the Chief Justice or the senior Associate Justice acting in his stead shall make the appointment from the same list of nominees. Appointments are valid until December 31 after the next general election which occurs more than one year subsequent to the appointment. At such general election, appointees who desire to continue in office are subject to approval or rejection for a regular term. If the voters reject a Judge for retention in office, the office becomes vacant at the end of the Judge's appointed term, and it shall be filled by appointment as prescribed in this Section.

The regular term of office of a Justice or Judge of the Appellate Division, or a Judge of the Superior Court Division, is eight years. The regular term of office of a Judge of the District Court Division shall be fixed by the General Assembly, but shall not exceed eight years.

Voting on retention of Appellate Division Justices or Judges is by the qualified voters of the State; voting on retention of District Court Division Judges is by the qualified voters of the respective judicial districts; and voting on retention of Superior Court Division Judges is by the qualified voters of the State or of the respective judicial divisions or judicial districts, as the General Assembly may provide.

A Justice or Judge who is in office on the date this Section becomes effective may continue to serve for the remainder of the term for which he was elected. Continuance in office for succeeding regular terms is subject to approval of the voters, as provided in this Section for Judges appointed by the Governor.'"

APPENDIX E

Extract From

A BILL TO BE ENTITLED AN ACT TO AMEND ARTICLE IV OF THE CONSTITUTION OF NORTH CAROLINA, AS AMENDED EFFECTIVE JULY 1, 1971, TO AUTHORIZE THE GENERAL ASSEMBLY TO PRESCRIBE PROCEDURES FOR THE CENSURE AND REMOVAL OF JUSTICES AND JUDGES OF THE GENERAL COURT OF JUSTICE.

". . . Article IV, Section 17 of the Constitution of North Carolina, as amended effective July 1, 1971, is rewritten to read as follows:

. . . .

'(2) Additional method of removal of judges. The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.'

. . . ."

APPENDIX F

Extract From

A BILL TO BE ENTITLED AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA, AS AMENDED EFFECTIVE JULY 1, 1971, TO REQUIRE THE GENERAL ASSEMBLY TO PRESCRIBE MAXIMUM AGE LIMITS FOR SERVICE AS A JUSTICE OR JUDGE.

". . . Article IV, Section 8 of the Constitution of North Carolina, as amended effective July 1, 1971, is rewritten to read as follows:

'Sec. 8. Retirement of Justices and Judges. The General Assembly shall provide by general law for the retirement of Justices and Judges of the General Court of Justice, and may provide for the temporary recall of any retired Justice or Judge to serve on the court from which he was retired. The General Assembly shall also prescribe maximum age limits for service as a Justice or Judge.'"

Note: The first sentence of Section 8, above, is currently in the Constitution; only the second sentence is new.