

# Judicial Selection—An Overview

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# The Court's Job

- **Magna Carta:** *To no one will we sell, to no one deny or delay right or justice.*
- *In the 1660's the English Crown instructed the Lord Proprietors to build a system of courts 'to do equal justice to all men to the best of their skill and judgment, without corruption, favor or affection'.*
- **N C Constitution:** Right and justice shall be administered without favor, denial and delay.
- **N C Code of Judicial Conduct:** A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

# What People Tend to Agree On

- Judges should be (In addition to being competent in the law, in descending order)
  - Honest
  - Fair
  - Unbiased
  - Good Managers
  - Hardworking
  - Consistent
  - Speedy
  - *Commission on the Future of Justice And the Courts in North Carolina, 1995*

# What People Often Disagree About

- How to select judges who have those qualities
- How to weigh those various qualities
- What the role of a judge should be
- Whether the same system works for trial and appellate courts
- How to best keep judges accountable when they should be and independent when they should be

# Things to Consider in Any Selection System

- Providing appropriate candidate pool
  - Providing appropriate job security to candidates selected
- Providing appropriate safeguards to protect public from poor choices
- Providing appropriate public input

# How Others Do It

- Federal Model
  - Appointment by President, confirmed by Senate
    - Indefinite term, guaranteed salary
  - *“He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”*  
*Declaration of Independence*
- Basic methods used by States
  - Appointment by Executive
  - Appointment by Legislature
  - “Merit” Selection
  - Nonpartisan Election
  - Partisan Election

- State judicial selection is classic federalism
  - Many states combine more than one method
  - Many use different methods for different courts
- Building blocks for a system
  - Filling vacancies in mid term
  - Filling vacancies at end of term
  - Selection for full term
  - Retention

# Appointments

- Clustered in original colonies, in Northeast
  - Some have indefinite terms (“good behavior”)
  - Others has specific terms
  - Most use some form of screening, either formal or informal
  - Legislature/Senate confirms
  - No elections for subsequent terms



# Partisan Elections

- Began to appear in 1830's as part of Jacksonian democracy movement
  - Initial method for most new states and for states rethinking method during the 19<sup>th</sup> century
- Seen as creating independence from appointing authorities
- Candidates selected by parties
- Run in elections on party banners
- Currently in South and Great Lakes area (Pa., Ill., Ohio, W. Va.)
- Used more often for trial courts than appellate courts

# Nonpartisan elections

- Began to appear in early around turn of the 20<sup>th</sup> century
- Established to provide independence from political parties
- Candidates run without party designation
- Clustered in upper Midwest and Northwest
- More common in trial courts
- Some states have moved from partisan to nonpartisan in last generation

# “Merit” Selection

- First adopted in Missouri in 1940; popular in 1960's and 1970's
- Appointment by Governor for initial term from screened candidates
- Screening done by nominating commission
  - Typically bipartisan, with multiple appointing authorities
- Subsequent, full terms are usually by retention election
- Occasionally, nominee is confirmed by some other body
- Used more often in appellate courts than trial courts
- Clustered in mid-western states

# Legislative Appointment

- Used in only two states, South Carolina and Virginia
- Reflects distrust of executive power common when states were established
- Applies to both initial appointment and reappointments
- May also involve some screening by outside entity

# Some numbers

- Pure merit selection states—6
- Full-term election only states—22
- States with both merit selection and elections for full terms—11
- States with no elections—12

# Some More Numbers

- States that use elections partly or fully—33
- States that use merit selection for vacancies or for full terms—38
- Election-only states that use merit selection nominating commissions for vacancies—11
- Election-only states that don't limit appointments for vacancies—11
  - Election-only states that have EO's setting up commissions for vacancies—2

# NC's Judicial Selection

- Crown/provisional governors appointed colonial judges
- Legislature appointed judges until 1868
- Partisan elections in 1868 constitution
- Nonpartisan elections in last fifteen years
  - Superior Court, then District Court, then Appellate Courts

# Recent Efforts to Change

- Bell Commission (1958)
  - Recommended appointment of district judges, not of superior and supreme court judges
- Courts Commission (1970-85)
  - Recommended merit selection plans
- Judicial Selection Study Commission (1986-87)
  - Recommended appointment by Governor, confirmation by legislature, reconfirmation by legislature after review by Judicial Standards Commission
- Efforts since 1989 have not had formal study commission support
  - Focused on appellate judges, appointments by governor, with and without legislative confirmation and with and without nominating commission screening



# Litigation Developments

- NC voting rights litigation in 1980's
  - Led to establishment of smaller superior court districts
- Republican party litigation in 1990's
  - Led to district elections for superior court
- Republican Party of Minnesota v. White, 2002
  - Established judicial candidates right to speak on disputed legal or political issues
- Caperton v. AT Massey Coal, 2009
  - Found due process violation when major contributor to judge's election had case pending which supreme court judge cast deciding vote on

# Efforts By Some States to Provide Information to Voters

- Judicial evaluations
- Voter guides
- Recommendation from nominating commissions

# Independence and accountability

- Methods to promote independence
  - Salary guarantee
  - Terms of Office
  - More security in retention decision than in initial decision
  - Committees to defend judges

# Independence and Accountability

- Methods of holding judges accountable
  - Elections
  - Judicial Standards
  - Criminal prosecution
  - Recusal statutes
  - Appellate review
  - Public media
  - Judicial evaluation

# “There Ain’t No Good Way to Select Judges”

- Bottom line—There is a tension between accountability and independence
- States have been seeking the right balance since they were established
- They still are