The North Carolina State Constitution

Second Edition

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Foreword to First Edition by James G. Exum, Jr.
Foreword to Second Edition by Sarah Parker

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(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

Article IV

Judicial

Section 1

Judicial power. The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

Just as the legislative power is vested in the General Assembly and the executive power in the office of the governor, the judicial power is vested in courts: the Court for the Trial of Impeachments and the General Court of Justice. Impeachment is an allegation of wrongdoing by a public officer, and its punishment is limited by Section 4 of this article to removal from office and disqualification from future office holding. While an undoubted exercise of judicial power, impeachment and removal from office are far less common than criminal prosecution and civil adjudication, the province of the General Court of Justice. It was to make of the latter a "unified judicial system" (see the next section) that the judicial article of the 1868 constitution was largely rewritten by amendment in 1962; the amended article was carried over without substantial change in the 1971 constitution. The only exception to this unified system is the judicial power conferred by law on administrative agencies (see Section 3 of this article).

Although the general principle of separation of powers enshrined in Article I, Section 6 would seem to provide adequate protection for the judicial department from encroachments by the General Assembly, the principle is given particular application in the second sentence of the present section, perhaps because the judiciary is recognized to be, as Alexander Hamilton put it in *The Federalist* (No. 78), "beyond comparison the weakest of the three departments of power."[45] Judicial power is exclusively the courts': The legislature may not revise by statute a final judicial decision in a particular case (Gardner v. Gardner, 1980). Although the present section expressly forbids only the deprivation of judicial power, the underlying principle equally forbids its enlargement (Smith v. State, 1976): Jurisdiction conferred by the constitution cannot be increased by the legislature, a principle as old as *Marbury v. Madison* (1803).

Section 2

General Court of Justice. The General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division.

The desirability of a "unified judicial system" might seem self-evident—it recommended itself to the drafters of the 1868 constitution—but it was lacking in North Carolina for almost a century, after amendments adopted in 1876 restored to the General Assembly the power to determine the jurisdiction of all courts below the supreme court and to establish inferior courts as it saw fit. The resulting hodgepodge was not eliminated until 1962 when the basis of the present article was adopted. The various divisions of the General Court of Justice are the subject of later sections of this article: Section 5 (Appellate Division), Section 9 (Superior Court Division), and Section 10 (District Court Division).

Section 3

Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

Administrative agencies are bodies within the executive branch of state government; as such, they could not ordinarily be given judicial power without violating the fundamental principle of separation of powers (Article I, Section 6). This section expressly authorizes the General Assembly to confer such power on administrative agencies when it is "reasonably necessary" to their effective

[45] *The Federalist*, No. 78 (Alexander Hamilton), ed. Benjamin Fletcher Wright (Cambridge: Harvard University Press, 1966), 491.

functioning. The state supreme court has the final word on the reasonableness of any claimed necessity (In re Appeal from Civil Penalty, 1989). Appeals from administrative agencies are "to the General Court of Justice," defined in the previous section as a "unified judicial system" of trial and appellate courts; as such, appeals from agencies must begin in the lower courts. The legislature may not in general authorize appeals from agencies directly to the supreme court (State ex rel. Utilities Commission v. Old Fort Finishing Plant, 1965); only in case of appeals from the North Carolina Utilities Commission may such authority be granted and then only by virtue of a specific constitutional exception (Article IV, Section 12, Subsection 1).

It is noticeable that there is no counterpart to the present section in Article II on the legislative power; nonetheless, it has often been held that the General Assembly may delegate limited legislative power to administrative agencies. The delegated power, sometimes described as quasi-legislative, must be accompanied by standards adequate to guide administrative discretion (see Article II, Section 1).

Section 4

Court for the Trial of Impeachments. The House of Representatives solely shall have the power of impeaching. The Court for the Trial of Impeachments shall be the Senate. When the Governor or Lieutenant Governor is impeached, the Chief Justice shall preside over the Court. A majority of the members shall be necessary to a quorum, and no person shall be convicted without the concurrence of two-thirds of the Senators present. Judgment upon conviction shall not extend beyond removal from and disqualification to hold office in this State, but the party shall be liable to indictment and punishment according to law.

Impeachment is a criminal charge (Article I, Section 22); its trial, the exercise of judicial power. Without special provision, the trial of impeachments by a legislative body would violate the principle of separation of powers (Article I, Section 6). This section confers the exclusive power of impeaching on the house of representatives, constituting it a sort of grand jury in cases of official misconduct. The senate is the judge and jury, but unlike an ordinary jury, its verdict need not be unanimous, and unlike an ordinary panel of judges, a simple majority is not sufficient: Two-thirds of the senators present must concur in a conviction. The punishment of the crime is political: removal from office and disqualification for further office holding. Criminal punishments are possible, but must be meted out after a separate proceeding in the General Court of Justice. By virtue of the express language of this section, the two rounds could not possibly constitute double jeopardy (see Article I, Section 19).

Because impeachment is a criminal proceeding, it is unsuitable for use in removing officers for physical or mental incapacity. Alternatives to impeachment are provided by the constitution for the governor (Article III, Section 3, Subsections 3 and 4), justices and judges (Article IV, Section 17, Subsections

1 and 2), and superior court clerks (Article IV, Section 17, Subsection 4). The General Assembly is directed to prescribe alternatives by statute for elective executive officers other than the governor (Article III, Section 7, Subsection 6), for magistrates (Article IV, Section 17, Subsection 3), and for sheriffs (Article VII, Section 2).

Section 5

Appellate division. The Appellate Division of the General Court of Justice shall consist of the Supreme Court and the Court of Appeals.

The Appellate Division forms the apex of the judicial pyramid. At the very top is the supreme court, first created by statute in 1818; before then, the state's highest court had been the court of conference, composed of superior court judges. As a court created directly by the constitution, the supreme court dates to the state's second constitution, that of 1868. The court of appeals, first authorized by constitutional amendment in 1965, was created by statute, effective January 1, 1967 (North Carolina General Statutes § 7A-16). Like the supreme court it now owes its existence directly to the constitution. The two courts of the Appellate Division are the subject of the next two sections: Section 6 (Supreme Court) and Section 7 (Court of Appeals). The courts of the Appellate Division are limited to hearing appeals from decisions in the lower courts; as appellate courts, they do not conduct trials.

Section 6

Supreme Court.

1. Membership. The Supreme Court shall consist of a Chief Justice and six Associate Justices, but the General Assembly may increase the number of Associate Justices to not more than eight. In the event the Chief Justice is unable, on account of absence or temporary incapacity, to perform any of the duties placed upon him, the senior Associate Justice available may discharge these duties.

2. Sessions of the Supreme Court. The sessions of the Supreme Court shall be held in the City of Raleigh unless otherwise provided by the General Assembly.

For its first half-century, from 1818 until 1868, the supreme court consisted of three judges: the chief justice and two associate justices. The 1868 constitution, the first to give the court constitutional status, increased the total to five, but the post-Reconstruction amendments of 1876 reduced it again to three. Since then, the size of the court has grown steadily: to five in 1888 by constitutional amendment; to seven in 1937 by statute authorized by constitutional amendment in 1935. Although the court remains today at an authorized membership of seven, the chief justice and six associate justices, as part of the judicial amendments effective in 1962 and carried over in the 1971 constitution, the General Assembly is empowered to add two more associate justices.

The chief justice has many administrative duties, some inherent in the office of presiding judge, some imposed directly by the constitution, and others imposed by statute. The constitutional duties are to preside over the Court for the Trial of Impeachments if the governor or lieutenant governor is impeached (Article IV, Section 4), to designate one of the district judges as the chief district judge when more than one district judge is provided for a single district (Article IV, Section 10), to supervise the assignment of district judges made by the chief district judges (Article IV, Section 11), and to assign superior court judges (Article IV, Section 11). By statute, the chief justice designates the chief judge of the court of appeals (North Carolina General Statutes § 7A-16), the chief administrative law judge (North Carolina General Statutes § 7A-752), and the director of the Administrative Office of the Courts (North Carolina General Statutes § 7A-340). Also by statute, the chief justice may transfer district judges from one district to another for temporary or specialized duty (Article IV, Section 11). In case the chief justice is unable to perform any of these duties, the senior available associate justice—that is, the one with the longest tenure on the court—shall act in the chief justice's place.

The entire court also has constitutional and statutory duties, including setting the superior court trial calendar (Article IV, Section 9, Subsection 2), promulgating appellate rules (Article IV, Section 13, Subsection 2), removing or censuring unfit judges (Article IV, Section 17, Subsection 2 and North Carolina General Statutes § 7A-376), and generally overseeing various aspects of the practice of law (North Carolina General Statutes § 7A-32(b), 84-21, 84-36).

The supreme court sits in Raleigh, the "permanent seat of government" (Article XIV, Section 1), unless the General Assembly directs otherwise. Its jurisdiction is described in Section 12, Subsection 1.

Section 7

Court of Appeals. The structure, organization, and composition of the Court of Appeals shall be determined by the General Assembly. The Court shall have not less than five members, and may be authorized to sit in divisions, or other than en banc. Sessions of the Court shall be held at such times and places as the General Assembly may prescribe.

First authorized by constitutional amendment in 1965, the court of appeals was created by statute, effective January 1, 1967 (North Carolina General Statutes § 7A-16). Like the supreme court, the court of appeals now owes its existence directly to the constitution. Although its "structure, organization, and composition" are determined by statute, the court must have no fewer than five members, called judges in contrast to the justices of the supreme court (Section 16). As presently constituted, the court of appeals has fifteen members: a chief judge selected by the chief justice of the supreme court and fourteen judges. Although the General Assembly could have authorized the court to sit in "divisions" specialized by subject matter, it did not, and the court regularly sits in

panels consisting of three members each. Unlike most multimember appellate courts, the court of appeals has no procedure for sitting all together (en banc). The decision of any one panel on a point of law is binding on all lower courts and on other panels of the court of appeals until a contrary decision of the supreme court (In re Appeal from Civil Penalty, 1989). Like its structure, organization, and composition, its jurisdiction is defined by statute (Article IV, Section 12, Subsection 2).

Section 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 or courts of the division from which he was retired. The General Assembly shall also prescribe maximum age limits for service as a Justice or Judge.

The direction to the General Assembly to provide for judicial retirement was new with the 1971 constitution. The requirement that it be done "by general law," defined in Article XIV, Section 3, is presumably intended to prevent special legislation limited to one or a few justices or judges. The authorization in the first sentence for the temporary recall of retired justices or judges was added by amendment in 1982. The second sentence, added by amendment in 1972, directs the General Assembly to set maximum age limits for judicial service—that is, to require retirement at a certain age. Discharging its duty under the second sentence, the General Assembly has prescribed retirement at age seventy-two (North Carolina General Statutes § 7A-4.20). The effect of this statute (and the second sentence of the present section that mandated it) is to terminate the service of any sitting justice or judge who reaches the maximum age (Martin v. State, 1991); otherwise, justices and judges serve terms of eight years (Article IV, Section 16).

Section 9

Superior Courts.

1. Superior Court districts. The General Assembly shall, from time to time, divide the State into a convenient number of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district. Each regular Superior Court Judge shall reside in the district for which he is elected. The General Assembly may provide by general law for the selection or appointment of special or emergency Superior Court Judges not selected for a particular judicial district.

2. Open at all times; sessions for trial of cases. The Superior Court shall be open at all times for the transaction of all business except the trial of issues of fact requiring a jury. Regular trial sessions of the Superior Court shall be held at times fixed pursuant to a calendar of courts promulgated by the Supreme Court. At least two sessions for the trial of jury cases shall be held annually in each county.

3. Clerks. A Clerk of the Superior Court for each county shall be elected for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. If the office of Clerk of the Superior Court becomes vacant otherwise than by the expiration of the term, or if the people fail to elect, the senior regular resident Judge of the Superior Court serving the county shall appoint to fill the vacancy until an election can be regularly held.

The General Assembly is directed to provide for the election of superior court judges and to create superior court districts, based on counties (or parts of counties), as befits the successor to the antebellum county-based system. Unless otherwise provided, seniority in time of continuous service determines the senior resident superior court judge for each superior court district (North Carolina General Statutes § 7A-41.1(b)). While these districts are not subject to the one-person one-vote requirement, statutes forming superior court districts are subject to judicial review. The standard is neither the relatively undemanding "rational basis review" nor the heightened "strict scrutiny," but "intermediate scrutiny": "Judicial districts will be sustained if the legislature's formulations advance important governmental interests unrelated to vote dilution and do not weaken voter strength substantially more than necessary to further those interests" (Blankenship v. Bartlett, 2009). The General Assembly may provide for special or emergency superior court judges but must do so, if at all, only "by general law," defined in Article XIV, Section 3, presumably to prevent special legislation limited to one or a few preferred judges.

Subsection 2, requiring the court to be "open at all times," is reminiscent of the open-courts requirement of Article I, Section 18. It does not require the court to be in round-the-clock session, but it does empower superior court judges to exercise judicial power, as needed, at any time of the day or night, the practical application of the principle that justice shall not be denied or delayed. Issues of fact must be resolved by a jury (Article IV, Section 13); at least two sessions for the trial of jury cases must be held every year in each county. In the exercise of its judicial power as the head of the General Court of Justice, the supreme court determines the schedule of superior court trial sessions. The superior court is open for "all business," as befits a court of "original general jurisdiction" (Article IV, Section 12, Subsection 3).

The clerks of the superior courts are judicial officers in their own right, with such "jurisdiction and powers" as are prescribed by law (Article IV, Section 12, Subsection 3). In case of a vacancy in the office of clerk, the senior resident superior court judge appoints a successor to serve "until an election can be regularly held," meaning until the next election for members of the General Assembly, not the next election for the regular term of clerk (Rodwell v. Rowland, 1905). As provided by the next section, the clerk nominates magistrates, who are appointed by the senior resident superior court judge.

Section 10

District Courts. The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected. For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years. The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law. Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly.

The General Assembly is directed to provide for the election of district judges and to create local court districts based on counties. A district court must sit in at least one place in each county. The District Court Division replaced the haphazard collection of recorder's courts. By statute the local district court is required to sit in the county seat and in a few designated additional seats of court (North Carolina General Statutes § 7A-130). District judges are elected for a term of four years. In case of a vacancy, the governor is empowered by statute to fill the unexpired term, but only from nominations submitted by the district bar; nominees must be of the same political party as the elected district judge if the judge was elected as the nominee of a political party (North Carolina General Statutes § 7A-142, held constitutional in *Baker v. Martin*, 1991), an arrangement similar to that for filling a vacancy in the General Assembly (see Article II, Section 10).

Magistrates, successors to the time-hallowed justices of the peace, are appointed by the senior resident superior court judge for a term of two years on the nomination of the clerk of the superior court; vacancies are filled in the same manner unless otherwise provided by statute. By amendment effective in 2005 subsequent terms are for four years.

Section 11

Assignment of Judges. The Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court and may transfer District Judges from one district to another for temporary or specialized duty. The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed. For this purpose the General Assembly may divide the State into a number of judicial divisions. Subject to the general supervision of the Chief Justice of the

Supreme Court, assignment of District Judges within each local court district shall be made by the Chief District Judge.

Two of the constitutional duties of the chief justice are to assign superior court judges and, if necessary, to transfer district judges. District judges are assigned by the chief district judge, designated by the chief justice pursuant to Section 10 of this article. As required by Sections 9 and 10, the General Assembly has divided the state into superior court districts and local court districts. In addition, as authorized by the present section, the General Assembly has created larger units known as "judicial divisions"; at present the superior court districts are arranged in eight judicial divisions (North Carolina General Statutes § 7A-41). Within a division superior court judges are rotated, keeping the judges in touch with a larger geographical area and promoting uniformity of justice.

Section 12

Jurisdiction of the General Court of Justice.

1. Supreme Court. The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts. The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.

2. Court of Appeals. The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe.

3. Superior Court. Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.

4. District Courts; Magistrates. The General Assembly shall, by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

5. Waiver. The General Assembly may by general law provide that the jurisdictional limits may be waived in civil cases.

6. Appeals. The General Assembly shall by general law provide a proper system of appeals. Appeals from Magistrates shall be heard de novo, with the right of trial by jury as defined in this Constitution and the laws of this State.

In 1868 the North Carolina Supreme Court became for the first time a constitutional court, in the sense that it owed its existence as an institution directly to the constitution and not to any statute; in 1868 it also received its first direct grant by the constitution of appellate jurisdiction. Like American appellate

courts generally, the state supreme court is largely limited to review of matters of law, as opposed to those of fact. Prior to the merger of legal and equitable jurisdictions in 1868 (Article IV, Section 13), the court had reviewed findings of fact in equitable proceedings; in equity all the evidence was in writing, and the appellate court had available to it all the information on which the lower court had based its findings. After 1868, for a few years uncertainty prevailed concerning the authority of the court to continue to review matters of fact in equitable appeals. By amendment adopted in 1876 it was made clear that the court had the same jurisdiction over equitable "questions of fact" as it had had before 1868; that rule continues in effect today. The clause obviously gives the supreme court no jurisdiction to review "issues of fact" in actions at law, the historical preserve of the jury; trial by jury is guaranteed by Article I, Sections 24 and 25.

The principal object of the revision of the judicial article in 1962 was to provide a "unified judicial system" (Article IV, Section 2). To this end, the General Assembly lost its power to multiply courts and authorize special appeals. Review of administrative agencies in their exercise of delegated judicial power must begin in the trial courts (State ex rel. Utilities Commission v. Old Fort Finishing Plant, 1965). By virtue of a constitutional amendment adopted in 1982, the North Carolina Utilities Commission was granted an exemption from this rule: The General Assembly in the case of final orders in general rate cases has authorized direct appeals as of right to the supreme court (North Carolina General Statutes § 7A-29(b)).

The appellate jurisdiction of the court of appeals is defined by statute, as authorized in Subsection 2 of the present section. The General Assembly has allowed an appeal of right to the court of appeals from final orders or decisions of certain administrative agencies, including the North Carolina Industrial Commission (North Carolina General Statutes § 7A-29(a)).

Next below the court of appeals is the superior court, a court of statewide "original general jurisdiction" (except as otherwise provided by law). Clerks of the superior courts, district courts, and magistrates have such jurisdiction as provided by "general law," a phrase defined in Article XIV, Section 3. Notably, the Clerk of Superior Court for each county is ex officio judge of probate with jurisdiction over the administration, settlement, and distribution of decedents' estates (North Carolina General Statutes § 28A-2-1). Magistrates may hear and decide cases, but appeals from their decisions must be heard de novo (anew); the appeal becomes, in other words, a new trial, complete with defendant's right to trial by jury (Article I, Section 24).

Section 13

Forms of action; rules of procedure.

1. Forms of Action. There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to

have issues of fact tried before a jury. Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof, shall be termed a criminal action.

2. Rules of procedure. The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.

The English legal system, inherited by the state of North Carolina, had recognized actions at law and suits in equity, the distinction being largely historical and technical. In 1868 North Carolina joined the trend of progressive states and merged the two into a single form of civil action. Implementing the guarantee of trial by jury in civil cases in Article I, Section 25, the present section guarantees the right in such actions "to have issues of fact tried before a jury." Criminal prosecutions, defined here as actions "prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof," are termed criminal, as opposed to civil, actions. Although not expressly reserved in the present section, the right to a jury trial in criminal cases is guaranteed in Article I, Section 24. Criminal punishments are listed in Article XI, Section 1.

Proper procedure is as important as proper rules in the administration of justice. Relying on the principle of separation of powers, the state supreme court a century ago asserted its power to prescribe its own rules of procedure (Herndon v. Imperial Fire Insurance Co., 1892). Subsection 2 of the present section expressly confirms that power: The supreme court alone may make rules of procedure for the Appellate Division of the General Court of Justice, defined in Section 5 of this article as the supreme court itself and the court of appeals. Although rules of procedure are the exclusive preserve of the Supreme Court, rules of evidence are made by the General Assembly. Telling the difference is not always easy (State v. Oglesby, 2007; State v. Tutt, 2005). The General Assembly may legislate rules of procedure for the trial courts (the superior and district courts) or may delegate the task to the supreme court; in fact, it has done the latter (North Carolina General Statutes § 7A-34). Because of the potential for rules of procedure to affect substantive rights, the present section expressly saves all such rights, especially the "sacred right" to trial by jury.

Section 14

Waiver of jury trial. In all issues of fact joined in any court, the parties in any civil case may waive the right to have the issues determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury.

Trial by jury in civil cases respecting property is proclaimed to be "one of the best securities of the rights of the people" (Article I, Section 25). What is technically tried before the jury are "issues of fact," that is, matters of fact put in issue by the pleadings. Trial by jury is a right, not a duty, so it may be waived. In addition to express waiver, failure by a party to appear after proper notice waives the right. If trial by jury is waived, the judge's findings of fact have the same effect as a jury verdict; that is, they are conclusive if there is any evidence to support them (Cauble v. Bell, 1959). Trial by jury in criminal cases is guaranteed by Article I, Section 24; it may be waived only by pleading guilty.

Section 15

Administration. The General Assembly shall provide for an administrative office of the courts to carry out the provisions of this Article.

Discharging its constitutional duty, the General Assembly established the Administrative Office of the Courts (North Carolina General Statutes § 7A-340). Its director, appointed by the chief justice and serving "at pleasure," is considered to be an officer of the General Court of Justice; as such, he or she is protected by judicial immunity (Fowler v. Alexander, 1973).

Section 16

Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court. Justices of the Supreme Court, Judges of the Court of Appeals, and regular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified. Justices of the Supreme Court and Judges of the Court of Appeals shall be elected by the qualified voters of the State. Regular Judges of the Superior Court may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.

Under the 1776 constitution, judges were elected by the General Assembly and served for life; the 1868 constitution first provided for direct election and eight-year terms. Judges may be removed for cause before the end of their terms, as provided in the next section. They must retire when they reach the maximum age set by statute pursuant to Section 8 of this article.

Justices of the supreme court and judges of the court of appeals must be elected in state-wide elections, but the General Assembly has chosen to have superior court judges elected in superior court districts (North Carolina General Statutes § 163-1). In case of vacancies, the governor appoints replacements pursuant to Section 19 of this article. The General Assembly may not authorize the appointment of judges to serve terms longer than allowed by the constitutional provision regarding the filling of vacancies (Pope v. Easely, 2001).

Until 1987, superior court judges were elected under a system that provided for staggered terms in some multiseat districts. A statute adopted in that year

postponed certain judicial elections in order to secure uniformity in the beginning of terms; the effect was to lengthen the service of some incumbents beyond eight years. Using reasoning that even the supreme court justices admitted might "appear artificial at first," the court upheld the statute:

> Once the incumbent judges' terms of office expire, their service ends when their successors are elected and qualified.... Where, as here, the incumbents' terms end without successors having been elected and qualified, and new terms of office have not begun, the Constitution's "hold over" provision operates and allows the incumbents to continue serving in the interim.... The constitutional provision, not the legislative act, allows the judges to remain in office. (State ex rel. Martin v. Preston, 1989.)

Since no vacancies technically occurred, the governor was given no opportunity to make interim appointments.

Section 17

Removal of Judges, Magistrates and Clerks.

1. Removal of Judges by the General Assembly. Any Justice or Judge of the General Court of Justice may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly. Any Justice or Judge against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least 20 days before the day on which either house of the General Assembly shall act thereon. Removal from office by the General Assembly for any other cause shall be by impeachment.

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.

3. Removal of Magistrates. The General Assembly shall provide by general law for the removal of Magistrates for misconduct or mental or physical incapacity.

4. Removal of Clerks. Any Clerk of the Superior Court may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county. Any Clerk against whom proceedings are instituted shall receive written notice of the charges against him at least 10 days before the hearing upon the charges. Any Clerk so removed from office shall be entitled to an appeal as provided by law.

Without this section, the only way to remove a judicial officer would be by impeachment (Article IV, Section 4), and removal would carry with it

disqualification for further office holding (Article VI, Section 8). Because impeachment is a slow and cumbersome procedure, involving the senate and the house of representatives and necessarily taking time from legislative business, repeated efforts have been made to find simpler alternatives that nonetheless protect the judiciary from vexatious or politically motivated charges. Physical or mental incapacity was the most difficult to deal with by a system designed for the punishment of crime: Impeachment initiates a criminal prosecution (Article I, Section 22). The amendments of 1876 added the procedure in Subsection 1, removal by address—that is, "joint resolution of two-thirds of all the members of each house of the General Assembly." Special procedures for the removal of the governor in such cases are provided in Article III, Section 3, Subsections 3 and 4; other elective executive officers are covered by Article III, Section 7, Subsection 6, and sheriffs by Article VII, Section 2.

In 1972 an amendment added Subsection 2, mandating legislation to create yet another means for removal of justices or judges for mental or physical incapacity. In discharge of its duty, the General Assembly established the Judicial Standards Commission (North Carolina General Statutes § 7A-374.1, -375). Of more significance, this new system is also directed to deal with "wilful misconduct in office, wilful and persistent failure to perform [official] 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"—all offenses traditionally handled only by impeachment. The commission can issue private letters of caution or public reprimands; more serious matters are referred to the supreme court for action.

The removal of magistrates is governed by statute (North Carolina General Statutes § 7A-173): They may be removed by any regular superior court judge holding court in the county. Grounds for removal are the same as those for justices or judges.

Section 18

District Attorney and Prosecutorial Districts.

1. District Attorneys. The General Assembly shall, from time to time, divide the State into a convenient number of prosecutorial districts, for each of which a District Attorney shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a District Attorney. The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.

2. Prosecution in District Court Division. Criminal actions in the District Court Division shall be prosecuted in such manner as the General Assembly may

prescribe by general law uniformly applicable in every local court district of the State.

Section 13 of this article defines a criminal action as one "prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof." The people's lawyer in such cases is a district attorney, called a solicitor until the name was changed by constitutional amendment in 1974. Like district judges, district attorneys are elected for terms of four years (Article IV, Section 10). Although legal training was always a practical necessity, it became a legal requirement only in 1983 when the second sentence of Subsection 1 was added by constitutional amendment—the amendment that added the same requirement for the attorney general (Article III, Section 7, Subsection 7). A law license had been made a qualification for judicial office by amendment in 1980 (Article IV, Section 22).

The procedure for prosecuting criminals in District Court is prescribed by the General Assembly by "general law uniformly applicable in every local court district of the State," a limitation that prevents "any local or special act" (Article XIV, Section 3).

Section 19

Vacancies. Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

The governor fills vacancies in the judicial branch, "unless otherwise provided in this Article"; senatorial consent is not mentioned, so none is required. The appointee serves until the next election for members of the General Assembly with three exceptions. First, if the vacancy occurs sixty or fewer days before the next election for members of the General Assembly, then the appointee serves until the following election for members of the General Assembly; that is, the appointee may serve as long as two years plus sixty days. Second, if an election for that office was already scheduled for the next election—that is, if the vacancy occurs in an office for which the term was about to expire—then the appointee serves only until January 1 after the next election for members of the General Assembly, when the term of the newly elected officer commences. Third, an

appointed district court judge serves the remainder of the unexpired term (North Carolina General Statutes §§ 7A-142, 163-9(d)).

The sixty-day period is presumably designed to enable ballots to be printed and distributed; it was lengthened to sixty from thirty days by constitutional amendment in 1986, but still seems unduly short. When elected after a vacancy, a judge serves a full term. Newly created judgeships are considered to be "vacancies," giving the governor the opportunity for appointment (Pope v. Easley, 2001). The appointment must, of course, still comply with this section.

The governor's unfettered power of appointment does not extend to vacancies in the office of clerk of superior court, which are filled by the senior resident superior court judge for the county (Article IV, Section 9, Subsection 3); in the office of district judge, which are filled as prescribed by statute (Article IV, Section 10); or in the office of magistrate, which are "filled for the unexpired term in the manner provided for original appointment to office"—that is, by the senior resident superior court judge for the county from nominations by the clerk of superior court—"unless otherwise provided by the General Assembly" (Article IV, Section 10).

Section 20

Revenues and expenses of the judicial department. The General Assembly shall provide for the establishment of a schedule of court fees and costs which shall be uniform throughout the State within each division of the General Court of Justice. The operating expenses of the judicial department, other than compensation to process servers and other locally paid non-judicial officers, shall be paid from State funds.

Justice is the responsibility of government, so the operating expenses of the judicial branch are borne by the state, although court fees and costs may be charged to individual litigants.

Section 21

Fees, salaries and emoluments. The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this Article, but the salaries of Judges shall not be diminished during their continuance in office. In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs.

The General Assembly sets the compensation of all officers in the judicial branch. To preserve judicial independence, the salaries of judges (including justices) may not be reduced during their service, a protection they share with the governor, lieutenant governor, and members of the council of state (Article III, Section 9). The distinction between "all officers," on the one hand, and "Judges," on the other, is significant: Officers who are not judges may suffer salary cuts. Judicial compensation may not be made dependent on the outcome of cases; neither judge nor magistrate, for instance, may be paid a percentage of fines. Once used

as a means of keeping the costs of government low, "payment by results" is now viewed as a breach of due process guaranteed by the U.S. Constitution (Tumey v. Ohio, 1927); it has long been viewed as a violation of natural law because rewarding judges for conviction gives them an interest in the outcome, making each in a sense a "judge in his own case" (Dr. Bonham's Case, 1610).

Section 22

Qualification of Justices and Judges. Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of District Court. This section shall not apply to persons elected to or serving in such capacities on or before January 1, 1981.

As a practical matter, the vast majority of North Carolina judges have been licensed to practice law in this state, but until this section was added by amendment in 1980, it was not a formal qualification for office. In 1983 another amendment added the same qualification for service as attorney general (Article III, Section 7, Subsection 7) and district attorney (Article IV, Section 18, Subsection 1). The second sentence of the present section is a "grandfather clause," exempting any nonlawyers serving as judges prior to the effective date. The attorney general has issued a formal opinion that one who had been a judge at the relevant time, even though he or she resigned or did not seek immediate reelection, may still qualify for judicial office; that is, the exemption conferred by the second sentence can last a lifetime (Opinion of Attorney General to Hon. Arnold O. Jones, 1981).