Coates' Canons Blog: Retention Elections for the State Supreme Court?

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The North Carolina General Assembly has just enacted**House Bill 222** and it now awaits the governor's signature. It would change the way we elect our state supreme court justices. After once being elected in a regular contested election, the justice thereafter would be subject only to yes/no retention votes at the end of each eight-year term. That is, after that first contested election no one else would get to file for that seat or to run against the justice. Instead, there would be only a vote on whether the justice should be retained in office.

If the governor signs the bill, the question arises: Is a retention election consistent with the North Carolina Constitution's requirement that justices be "elected" by the voters of the state?

The Missouri Plan

The North Carolina legislation is a variation on the Missouri Plan for selection of judges, long touted as an alternative to electing judges. The classic Missouri Plan starts out differently. There is never a contested election; rather, the governor appoints someone from nominees submitted by a bipartisan nominating commission. The appointed judge serves some period of time before being subject to a popular vote in the form of a yes/no ballot on whether the judge should be retained in office for another full term. If the vote is yes, the judge serves another term; if the answer is no, the selection process starts over. At least two other states, Illinois and Pennsylvania, have Missouri Plan variations similar to H222 — a judge must first win a regular contested election before having retention elections for subsequent terms.

How House Bill 222 would work

House Bill 222 originally was written to apply to the election of both supreme court justices and court of appeals judges, but as finally approved it is limited to the supreme court. The bill requires each justice to face a contested election to start a first full eight-year term, then only retention elections for subsequent terms. If a justice retires or otherwise leaves office at the end of a term, there will be a contested election for the seat, just as now. Once elected, the new justice would serve eight years and then face a retention election. If someone first got on the court by appointment to fill a vacancy in the middle of a term, that person would serve until the next statewide general election, at which time there would be a contested election for the seat. The winner of the contested election then would serve an eight-year term and be subject only to retention elections in the future.

(It appears that a sitting justice whose term is ending actually would have a choice between a retention election or a contested election. The legislation requires the incumbent to declare by July the year before the election the desire to have a retention election. If the incumbent did not so declare, a regular contested election would be scheduled for the office. It would be possible, therefore, for the incumbent to decline to file the notice a year ahead of time and then just run in the contested election the next year with all the other candidates. Perhaps there is a political scenario in which that might make sense.)

The constitutional requirement that judges be elected

"Merit selection" plans like the Missouri Plan have been proposed numerous times in North Carolina in the last 40 years or so, but almost always in the form of a constitutional amendment. Article IV, Section 16 of the State Constitution says supreme court justices, court of appeals judges, and regular superior court judges "shall be elected by the qualified voters." A separate section provides for election of district judges. It has been thought, therefore, that a constitutional amendment would be needed to use any method other than contested elections. House Bill 222 is premised on the idea, however, that a retention election satisfies the constitutional requirement. Is that right? The question seems to have arisen

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in only one other jurisdiction, and the answer was yes, but it is not clear the answer would be the same for North Carolina.

The Tennessee Plan

In the early 1970s the Tennessee legislature enacted a plan by which the governor appointed judges to the appellate courts from nominees submitted by a special commission. The appointee would serve until the next statewide general election and then face a yes/no retention vote. If retained, the judge would serve a full term with retention elections at the end of that and any subsequent term.

The Tennessee constitution at the time, like North Carolina's, said judges "shall be elected by the qualified voters." Not surprisingly, that prompted several challenges to the validity of the appointment/retention election scheme. In both *State ex rel. Higgins v. Dunn*, 496 S.W.2d 480 (Tenn. 1973), and *State ex rel. Hooker v. Thompson*, 249 S.W.3d 331 (Tenn. 1996), the Tennessee supreme court — in one instance a temporary version of the court because of recusals — upheld the use of retention elections.

The essence of the Tennessee decisions was that the word "elect" is not defined in the Tennessee constitution and is not limited in general usage to contests between opposing candidates. Citing several provisions of the state constitution that use the word "election" when referring to a yes/no referendum-type vote, the Tennessee court concluded it is within the legislature's discretion to use a yes/no retention election to satisfy the requirement that judges be elected.

The principal argument on the other side is: If election means a retention election, couldn't legislators enact retention elections for the governor? Or for themselves? The logic of the Tennessee decisions is, yes, the legislature could do that, but the further response has been that it is too far-fetched an idea to take seriously.

It appears that Tennessee is the only jurisdiction to have had to address this "what is an election" issue, and the Tennessee reasoning has been questioned. There have been numerous other lawsuits about various aspects of the Tennessee plan. For a long while the legislation applied only to the court of appeals and not the supreme court. The nominating commission was allowed to sunset. And voters once rejected a constitutional amendment embodying the use of retention elections. In 2014, however, Tennessee voters approved a constitutional amendment explicitly allowing the use of retention elections for appellate judges. The governor will make the initial appointment, without the involvement of a nominating commission, subject to confirmation by the legislature. A yes/no retention election will be held at the end of each term.

Would North Carolina follow Tennessee precedent?

The Tennessee opinions appear to be of limited use in analyzing the constitutionality of H222 in North Carolina. They rely heavily on the fact that the Tennessee constitution uses the word "elect" in connection with yes/no referenda on other issues. And there has been no convincing response to the frightening prospect that the same reasoning could be used to allow retention elections for governor and legislators and other offices.

By contrast, the North Carolina Constitution appears to use "elect" or "election" only when referring to traditional contested races for office. Nor does the wording of the constitutional provisions about election of judges seem different enough from from the wording about the election of other offices to suggest any logical reason why judges might be elected differently than the governor, council of state and legislators. On the other hand, H222 at least provides for an initial contested election, something missing in Tennessee.

A separate, significant legal problem is North Carolina's constitutional provision about qualifications for office. Article VI, Section 6 sets out the qualifications for election to office. It has been interpreted consistently to be an exclusive list, barring the General Assembly from adding any other requirements to run for any office. See, for example, *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1 (1992), which overturned a statute requiring a candidate to resign from a first office before running for a second. If a retention election could be thought to satisfy the requirement of an "election" for the office, it could then be thought that the General Assembly has unconstitutionally added a qualification for being a candidate for that office — to be on the ballot one has to be the incumbent, having been previously elected to the seat.

Who would decide the case?

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One difficulty that arose in the Tennessee litigation was who would hear the challenges to retention elections. Because of the interest of sitting justices in the outcome, the 1996 decision was rendered by a “special supreme court” appointed by the governor after all the justices recused themselves. A discussion of the disqualification issue is found in the later opinion in *Hooker v. Haslam*, 393 S.W.3d 156 (Tenn. 2012).

What would happen in North Carolina if the governor signs H222, it becomes law, and it is challenged? Presumably the lawsuit would be a facial challenge to its constitutionality, meaning that under G.S. 1-267.1 enacted in 2014 it would be heard first by a three-judge panel of superior court judges designated by the chief justice. If the panel found the law unconstitutional, there would be a direct appeal to the supreme court where the recusal question would have to be faced.

Under G.S. 7A-10 four of the seven justices on the state supreme court are needed to conduct business. If too many justices recused themselves from the case, there is nothing in North Carolina law comparable to the Tennessee constitutional provision allowing the governor to appoint an entire temporary court. Our statutes provide only for retired justices to be recalled to serve when a sitting justice is incapacitated (G.S. 7A-39.13) or for the appointment of a single retired justice to replace a sitting justice who is temporarily unable to perform the duties of the office (G.S. 7A-39.14). Given the unusual circumstances, the supreme court might apply the principle of necessity that a judge who should disqualify from a case may go ahead and hear it if there is no one else to take it. Or perhaps the court might send the case to the court of appeals to decide or might rely upon inherent authority to appoint retired justices or judges to sit temporarily for this one case.

If the three-judge panel of superior court judges found that H222 is constitutional, any appeal would go to the court of appeals, not to the supreme court, and there would not be a disqualification issue because the legislation applies only to the supreme court. Maybe a decision of the court of appeals, whatever its outcome, would be the end of the case. Maybe.

Links

- www.ncleg.net/Sessions/2015/Bills/House/PDF/H222v5.pdf

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