Coates' Canons Blog: That Court of Appeals Ballot

By Michael Crowell

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In July John Martin, the chief judge of the Court of Appeals, announced his retirement effective August 1st. Given the timing of his decision, state law requires an election in November to fill the seat but no primary in advance to reduce the number of candidates. It appears that everyone who has ever aspired to be an appellate judge sees this as an opportunity to catch the ring, and 19 candidates have filed. One of them will get more votes than the others, though it may not be very many, and will be elected with no run-off. Nineteen candidates, one vote, one time, most votes wins. Some people may think this is not the best way to choose a judge for an eight-year term on North Carolina's second highest court. How did we end up with such an election?

Nonpartisan elections

Let's start with North Carolina's switch from partisan to nonpartisan elections. Until the late 1990s we elected all state judges in partisan elections. Just like the governor and legislators and county commissioners, judicial candidates ran on political party labels. Each party held a primary to determine its candidates and those party nominees faced off in the general election. If a vacancy opened up too late for a primary, as with Judge Martin's seat, the executive committees of the parties would choose the candidates for the November ballot, one for each party. A nice neat ballot with no undue clutter of candidates.

Starting in 1998, though, North Carolina moved to nonpartisan election of judges. First to be converted were superior court judges in 1998, then district judges in 2002, and finally appellate judges in 2004. Democrats' and Republicans' views on the method of selecting judges tend to fluctuate over time, depending on how they think their party will fare. Several events in the 1980s and 90s, when Democrats still controlled the legislature, started the shift toward nonpartisan elections. Election of superior court judges had to be changed — remember when they were nominated in primaries in their districts but were then subject to a statewide general election? — because of two lawsuits. One was a Voting Rights Act lawsuit claiming that the system discriminated against African Americans, and the other a Republican lawsuit contending party discrimination. Add to the litigation the fact that Republicans started winning some statewide elections and the move to nonpartisan elections began.

With nonpartisan elections, of course, the political parties have no role in nominating candidates. In regularly scheduled judicial elections the November ballot is shortened to two candidates per office by having a nonpartisan primary in the spring. But when a vacancy occurs too late for the primary, as with the Martin seat, the election has to be open to any qualified candidate who wants to run.

Eight-year terms

A second change encouraging candidates to run for vacancies has been the reward of an eight-year term. Until 1995 when a vacancy arose in the middle of a term there would be an election to choose someone to fill the remainder, but only the remainder, of the unexpired term. John Martin was elected to the Court of Appeals in 2008. Under the old system the winner this November would serve only until 2016, that is, just two years, at which time there would be an election for a full eight-year term.

In the early 1990s Governor Jim Martin, taking a different view of the state constitution and statutes on vacancies, issued eight-year commissions to several appellate judges, including Bob Orr, who had been elected to fill unexpired terms. The governor's position was that constitutionally all elections had to be for eight-year terms. Superior court judge Tony Brannon disagreed and sued when the State Board of Elections did not put Orr's Court of Appeals seat on the ballot in 1992. The Supreme Court dodged the constitutional issue in *Brannon v. North Carolina State Board of Elections*, 331 N.C. 335 (1992), but interpreted the statutes to mean a vacancy election was only for an unexpired term. Brannon, thus, won

the right to run in 1992. He lost to Orr.

Both political parties — and particularly the appellate judges in both parties — decided the *Brannon* decision was bad policy, prompting the General Assembly in 1995 to declare that all appellate judicial elections are for eight-year terms, even if prompted by a vacancy. The same rule was extended to superior court vacancies in 1996 (except, for a time, vacancies in some districts that were part of the earlier voting rights litigation).

(If you are wondering, there are no elections to fill vacancies in district court judgeships, which have only four-year terms. Regardless of when the vacancy occurs during the term, the appointed replacement serves the remainder of the term.)

The 2004 election

By 2004, then, the law provided that judicial elections were nonpartisan and that elections to fill vacancies were for full eight-year terms. And under general state law, if a vacancy occurred too late for a primary there would be a single winner-take-all election, most votes wins. When Bob Orr, by this time on the Supreme Court, resigned his seat in the middle of 2004, eight candidates signed up for the November vacancy election. Paul Newby led with 583,000 votes out of almost 2.6 million cast and got a full eight-year term. He had received about 22 percent of the votes.

To some the 2004 result did not seem quite right, that someone should be elected to a full eight years on the state's highest court with less than a quarter of the votes in a hurry-up election. Consequently the legislature was convinced in 2006 to make a drastic change in voting for such elections.

Instant run-off voting

Instant run-off voting is one of those schemes that delights political scientists but puzzles the average person in the street. As enacted in 2006, if there was a late judicial vacancy there would still be a single election in November open to all qualified candidates. When voters went to the polls, though, they would do something more than just check the name of a single candidate. A voter could place a 1, 2 or 3 next to their top three choices. If no candidate got a majority of 1 votes, the 2s and 3s would be counted in some fashion to figure out who really had the most overall support. The idea of instant run-off voting is to show who might prevail in a run-off without really having a second election. Don't ask me to explain further.

In 2010 we got to see instant run-off voting in action. When a vacancy arose late for the Court of Appeals, 13 candidates filed. Cressie Thigpen led with 395,000 of the nearly two million votes cast, 100,000 votes ahead of second-place Doug McCullough, but Thigpen was far short of a majority. Consequently, the counting of 2s and 3s kicked in. McCullough ended up the winner, and maybe a few people understood the math.

The 2013 General Assembly

The General Assembly's recent reworking of election laws included two significant changes in judicial elections. First, the legislature eliminated public funding of appellate judicial elections. Started at the same time as the switch to nonpartisan elections in 2004, public funding allowed appellate candidates who demonstrated a certain level of statewide support through their own fundraising to receive a set amount of public funding — generally just a couple of hundred thousand dollars — in exchange for agreeing not to accept political contributions. The intent was to reduce the influence of special interest groups in judicial elections.

Public funding proved popular with candidates but not with the Republican majority that gained control of the legislature in 2013. The idea of using public funds to pay for individual candidates' campaigns had always been controversial, and it was repealed.

The second change that was enacted was to eliminate the use of instant run-off voting. There isn't any clear record why it was dropped. Maybe it just seemed too odd.

The 2014 ballot

For 2014, therefore, we are back to where we were before 2006. We have a reprise of 2004 with a mighty host of

candidates competing in a single plurality election for an eight-year appellate term. With 19 people in the field — including two former Court of Appeals judges, one ex-superior court judge, at least one sitting district court judge, a former State Board of Elections member, a prominent ex-legislative staffer, and lots of others — it's unlikely anyone will come close to a majority.

Given the number of candidates, the short time for campaigning, the low attention paid to judicial races, and the drop-off in voting for judgeships, someone is likely to win with a small percentage of votes. In 2012 about 4.5 million North Carolinians voted for president, and over 4.3 million for superintendent of public instruction, but by the time voters got down the ballot to the Supreme Court only 3.5 million were still voting. The number was lower for the Court of Appeals seats. Those were simple one-on-one judicial elections, fairly easy choices. How many voters will skip the Court of Appeals vacancy when they see 19 unfamiliar names? And what percentage of the total votes will any one candidate get?

There is another possibility for the November election, maybe more worrisome. Because of the large field of candidates and the minimal attention the election will receive, it might take only a modest investment by a special interest group to sway the outcome. With no public funding, candidates must resort to traditional fund raising, and some interest groups may see an opportunity. Furthermore, with restrictions lifted on independent organizations' spending on campaigns, and corporations allowed to contribute to those efforts, an interest group operating essentially anonymously under a vague name — say, North Carolinians For Real Justice — could put a few hundred thousand dollars into the campaign at the last minute in favor of a single candidate, tipping the race and realizing an outsized dose of influence.

North Carolina has struggled for decades to figure out the best way to elect judges. The 2014 Court of Appeals vacancy may prompt additional debate on the subject.