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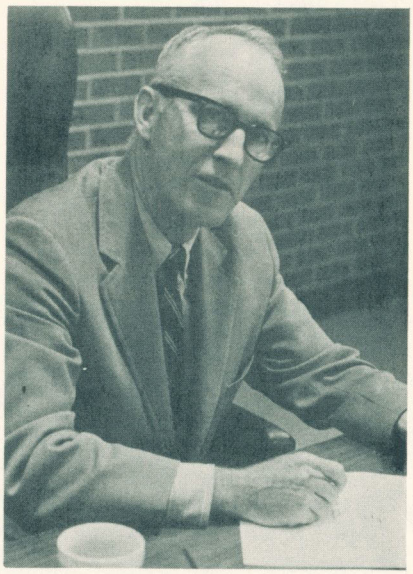
The case for appointing judges

(Editor's Note: This article is extracted from a speech by J. Dickson Phillips, Dean.)

Before 1961, North Carolina's court system included a Supreme Court, a Superior Court system, and a myriad of lower courts. The Supreme Court was the court of last resort. The 100 Superior Courts were the courts of general jurisdiction. The lower court system (actually a non-system) consisted of many courts of confusing and overlapping jurisdiction. There were justice of the peace courts, mayor's courts, "special act" courts, "general law" courts, juvenile courts, domestic relations courts, and administrative courts. In 1958 there were between fourteen to fifteen hundred of these lower courts with interlocking, overlapping and conflicting relationships.

Each of these courts was virtually a law unto itself, at least so far as administration was concerned. Each court met when it chose, heard or continued cases at will, had its individual schedule of fees and costs, its own rules of practice and procedure, and while subject to judicial review of its decisions, was not otherwise answerable to any other judicial body for the way in which it handled its business. Many of these local courts were used as revenue-producing agencies for the cities and counties, through their collection of "fees and costs." In most local courts the charges were fixed without regard to the actual cost of the services rendered. The net profit from these courts went into the local government's general fund.



J. DICKSON PHILLIPS

The basic ills of that earlier non-system were structural and they were fourfold: (1) unaccountability (2) unmanageability (3) confusion of powers and procedures as between the courts and (4) unjustifiable differences between—and uses of— costs collected from litigants.

Unified system

Today, these structural ills have been substantially removed. We have a truly unified single system of courts. Within it, all are accountable in an administrative and management way to an effectively empowered administrative head. Their costs are absolutely uniform throughout the state. Their powers and procedures are similarly uniform at all levels, and are systematically and cleanly dovetailed as between levels. A permanent Courts Commission exists to maintain continuous surveillance over their operation and to recommend changes where needed.

What then of the unfinished business? It has to do with personnel—with that most critical personnel component—the judges themselves. A superb court structure is entitled to a superb judiciary—not just a good one. A merely good judiciary must inevitably fail fully to exploit the opportunities and virtues of such a system, a poor one can utterly defeat them. What is needed to insure a superb judiciary is a procedure which maximizes the possibilities for initial selection and subsequent retention of superb judges. This is obviously an ideal. But we have measured our structural design throughout the reform effort against an ideal, and should continue to do so on this final matter on the agenda. In fact, our existing procedure for initial selection falls far short of the ideal. We are still essentially locked into the popular election of judges through the partisan political process—two or more candidates running against each other to be a judge of one of our courts.

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Judges should be appointed

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Election unjustified

Efforts to change this have been made at every legislative session since court reform was gotten underway. All aborted at varying stages of the legislative process. This obviously reflects powerful political—presumably popular—commitment to election of judges. In my judgment this is completely unjustified and rests essentially on myth and misapprehension. The myth is powerful. It supposes that election of judges is one of those ancient verities whose maintenance is necessary to keep faith with the founding fathers.

This is just not the fact. In the long sweep of the Anglo-American legal tradition, popular election of judges is a relatively late development, confined to America, and now receding here. When we started our national history, no state elected its judges. So far as I know, the political genius of that day, despite its powerful democratic ideology, never even considered that as a possibility. The reason is plain, and remains the basic argument against election.

Simply put, it is that the partisan political process is inimical to the judicial process. Whereas our legislative and executive officials ought very surely be beholden to their constituencies, it is the most important single requirement of a judge that he be beholden to no one.

Another powerful factor in the resistance to unshackling from popular election is the feeling that to do so somehow reflects upon our present judiciary or upon individual judges. Indeed, this may be the root difficulty. It involves a complete misapprehension. One could oppose partisan election as the basic procedure for initial selection while utterly convinced that at the present time it had contrived to produce the ideal judiciary.

As one astute observer has pointed out: "Any system of judicial selection, no matter how bad, will, from time to time, produce many qualified judges—and even some outstanding judges." That is perfectly true, and, whatever the odds, it may well at any given point in time have produced nothing but outstanding judges. But the odds are against a bad system doing this consistently. And what we are searching for is a system that will almost inevitably give us outstanding judges most of the time.

Quality not hurt

One can thus be an ardent advocate for abandoning our elective process without impugning the quality of the current judiciary one whit. As a matter of fact, it is doubtful that any state judiciary is entitled to higher marks than North Carolina's for historical freedom from any taint of corruption and, by and large, for dedicated effort. But the cause of this lies, I think, in deeper elements of the State's historic attitude toward the obligations of public service than in the specific system which produces its judges.

Furthermore, no abandonment of the present elective system need nor, indeed, could as a legal matter, deprive individual incumbents of the positions to which they have been duly elected. Hence, there simply is no legitimate ground for resistance to change on the basis that it involves repudiation or deprecation of the incumbent judiciary.

Non-lawyer judges

A further element in the resistance is resentment of the lawyer monopoly on judgeships which the elective process now constitutionally guards against. It comes as a surprise to many laymen that no judge in North Carolina, up to and including the Chief Justice, need be a lawyer. This stems directly from the fact that they are elected; that the only disqualifications for elective office are those specified in the Constitution; and that non-lawyer status is not a constitutional disqualification. As a result, we do have some elected non-lawyer judges on our district court bench.

Now there is no guarantee that a lawyer will, by reason of formal legal training, be even a minimally qualified judge. Many attributes other than formal legal education go into the make-up of the ideal judge. A lawyer may be as deficient in these as a layman. A fair consensus would certainly include: impeccable character, a sense of fairness, patience, zeal and industriousness, common sense and tact, humility and tolerance.

But without casting any personal aspersions upon any non-lawyer judge, a case for requiring formal legal training can clearly be made. In minimal terms it would run like this: while formal legal training does not insure an outstanding judgeship, its absence clearly prevents its achievement in the total sense. Put another way, while the appearance on the bench of non-lawyer judges does not insure failure of the system, it does insure that it cannot operate at full potential. We are entitled to a system which maximizes the the chances for achieving full potential.

Governor appointees

It may be well at this point to emphasize an anomolous aspect of

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the North Carolina elective model as it operates in fact. Given the vicissitudes of life, our Governor's power to fill by appointment vacancies occurring during terms has resulted in a judiciary which is very substantially initially appointed. And the Governor's appointive power with respect to vacancies is completely unshared. He is limited neither by an external nominating body nor by an shared confirmation process.

For this reason, once an appointment opportunity is created within our elective system, our Governor's prerogative in the specific choice is much more powerful than is that of the President operating within the federal appointive model. Thus, in my estimation, our present system combines all the deficiencies of the partisan elective process with those of unchecked and unshared appointment power reposed in one office holder.

In the eyes of many, lifetime appointment as in the federal model is the soundest approach because of the absolute judicial independence which it fosters. This is seen as so prime an attribute that the concomitant risk of arrogance and irresponsibility is thought acceptable, given the checks and balances operating on the initial selection. A very good case can be made on the overall record of the federal judiciary that this has been demonstrated.

But there are doubts and they are on the ascendancy today. Whether or not these rising doubts are well-founded in substance, they are in themselves a political factor which must be reckoned with. It is important that a judiciary be generally acceptable to the public it serves, in order to sustain over the long haul the integrity of its processes. A procedure which protected the judiciary against having had to make itself beholden in order to become a judiciary, but thereafter made it periodically accountable to the public for its performance has much to commend it as a compromise approach.

Merit plan

Such a model has for about sixty years existed in American political theory and, more recently, in substantial fact. It seems to me to offer the approach best calculated to produce an outstanding judiciary over the years and at the same time to be politically acceptable. This is the so-called "merit selection plan." Under this plan a broadly representative lay and lawyer commission nominates to the Governor a limited number of persons it considers best qualified for open judgeships. The Governor is limited in his appointment power to this list.

After he has appointed, his appointee serves a fixed term. Near the end of that term, if he cares to continue, he offers himself to the electorate on a non-partisan ballot which asks the simple question: "Shall Judge X serve another term of Y years?". If the vote is negative a new appointment is made by the process described above.