



**North Carolina Commission on the Administration of Law and Justice
Committee on Public Trust and Confidence**

Meeting Minutes / February 16, 2016

MEETING DATE	February 16, 2016
TIME	10:30 a.m. – 2:00 p.m.
LOCATION	NCJC, 901 Corporate Center Drive, Raleigh NC, 27607

Attendees

Chair: J. Bradley Wilson

Members: Dean Martin H. Brinkley, Judge Wanda Bryant; Sheriff Earl Butler, Douglas Clark, Frank Emory; Juan Flores Jr., Frank B. Holding, Jr., John Hood, A. Dale Jenkins; Robert C. Stephens; Dean Suzanne Reynolds, Dean Michael R. Smith (Ex-Officio), and Representative Sarah Stevens (Ex-Officio).

NCCALJ Staff: Will Robinson and Emily Portner

Reporters: Jon Williams (Chief Reporter), Andrew Atkins, and Mildred Spearman.

Administrative Matters

The committee members unanimously approved the minutes from the December 15, 2015 and January 29, 2016 meetings.

Representative Ken Goodman resigned his position on the Commission due to the increased time commitment demanded by his office. His vacant position was filled by Judge Wanda Bryant of the North Carolina Court of Appeals.

Discussion

1. How North Carolina has Selected Judges, 1776-2016

Dean Martin H. Brinkley, University of North Carolina School of Law, gave a presentation providing a historical survey judicial selection in North Carolina. While judicial selection in the State initially utilized a legislative election process with life tenure, a popular election process was implemented in the 1868 Constitution. While some changes have been made over time, the popular election process is still used today. The detailed content of Dean Brinkley's presentation can be seen by accessing the presentation available on the committee website.

2. A Broader Look at Judicial Selection

Professor Charlie Geyh, Indiana School of Law, gave a presentation that focused on judicial selection in the United States. The presentation summarized the various methods of judicial selection, including both elective (partisan and nonpartisan) and appointed systems. The presentation was largely based on social science research that has been done to date, though he noted that these social scientists often do not have legal training. He noted that while there was a move to elective systems previously, the modern trend is a move to a merit selection and/or appointive system, Missouri being the first state to move in that direction. He acknowledged that all systems have flaws and that it was this committee's role to determine which system has the least flaws. He also noted that some studies have shown that the system of judicial selection may not influence the public's confidence in those systems. Nonetheless, it does appear that the judiciary, while still the most respected branch of government, is increasingly seen as being a political body.

The committee raised several questions regarding judicial efficiency. Professor Geyh noted that studies have shown that elective courts tend to produce more opinions, though he noted that does not necessarily address judicial efficiency, which would be more appropriately measured by case backlogs. Several comments were made about the impact of running for office on an incumbent judges case load, as well as a practitioner's client services when that person is running for the judiciary.

Additional content presented by Professor Geyh can be reviewed by accessing the presentation available on the committee website.

3. Judicial Campaign Finance in North Carolina

Kim Strach, Executive Director, North Carolina Board of Elections gave a presentation on the history of campaign finance in North Carolina. Ms. Strach noted regulatory changes occurring in 1973, 2002, and 2013. Ms. Strach also summarized the how contribution limits have changed over time. In general terms, there has been an increase in funding for judicial campaigns since public financing was ended.

Questions were posed regarding the effect of public financing on contestation rates and the quantification of outside expenditures. Ms. Strach plans to provide this information to the committee.

Additional content presented by Ms. Strach can be reviewed by accessing the presentation available on the committee website.

4. Attorney Perspective on Judicial Selection in North Carolina

Tony Hornthal, Bill Womble, Jr., and John Wester (the "Panel"), all from the NCBA Committee on Judicial Independence (JI Committee), described the JI Committee's proposed method of judicial selection for the State. It was noted at the outset that the independence of the State's judiciary is their driving concern and that the Bar Association has been advocating for selection reform for nearly 50 years. Fundamental to the vision of our democracy is a

judicial branch whose members will answer to our state and national Constitutions and the laws enacted thereto, in contrast to those in the executive and legislative branches, who run under the banners of the political parties sponsoring their candidacies.

The current leadership of the Association was on hand for the Panel's presentation: Shelby Benton, president; Kearns Davis, president –elect; the Association's executive director, Allan Head; and legislative counsel, Kimberly Crouch.

The Panel advocates for gubernatorial appointment of judges subject to confirmation by the Senate. The initial term would be four years, at which time the appointed judge would stand for a retention election. If the judge is retained, retention elections would follow every eight years. If not retained, the Governor would appoint a replacement judge, to be confirmed by the Senate, who would serve a four-year term, followed by a retention election and if retained, would stand for retention every eight years.

Central to the design of the proposed reform is participation by both the Executive and Legislative branches, combined with a popular "check" on the appointed judges via retention elections.

Note: legislation providing for retention elections for Supreme Court Justices is now under challenge as unconstitutional. The Bar Association's proposal of appointment with retention elections has no relation to this legislation. The proposal the Panel advanced would move through the General Assembly to be put on the ballot for a Constitutional Amendment.

The Panel noted that the NCBA and its Committee for Judicial Independence see the present as a critical time to act. Enormous time and energy have been poured into previous commissions (Bell and Medlin Commissions) evaluating our state's judiciary. Although many salutary reforms came to pass from these commission's service, no progress in reforming judicial selection has resulted. The Panel's discussion followed a highly informative presentation of the history of judicial selection in North Carolina by committee member Dean Martin Brinkley of the UNC School of Law.

Panel speakers pointed to evidence that did not obtain when previous commissions were at work in this area. First, North Carolina now ranks second in the country in spending on judicial campaigns. Second, polls by non-partisan groups identify growing public skepticism that judges can be independent of those supporting them in elections. The Panel observed that even the perception that campaign contributions influence judicial outcomes undermines the independence and integrity of the system, betraying the Founders' reliance on a balance of power among the branches as essential to our democracy.

The NCBA has formed a grassroots committee, chaired by Tony Hornthal and Matt Martin, with the goal of explaining the need for reform to citizens across the state. The NCBA holds the strongest hope that the committee and the Commission will join them as partners in this effort and a companion hope, and expectation, that the Association will be able to support the committee's ultimate recommendation for judicial selection reform. Although the Panel does not believe its proposed reform can completely

remove politics from judicial selection, it believes its proposal will reduce significantly the influence of politics.

The Panel pointed to the proposed reform as ideally applicable to all levels of our state's judicial system—from the District Courts to the Supreme Court. The principles of judicial independence reach all rungs on the ladder of the system. The Panel observed, however, that finding the best route to significant reform in 2016-17 may call for limiting reform efforts to embrace less than all of the system. Among other issues the Panel would hope to review at greater length with the committee and the Commission is “how far to go now.”

The Panel also noted a growing issue with judicial salaries, and the difficulty that present compensation presents for attracting and retaining the best judges throughout the system. Discussion also included the negative impact of rotating judges. Several committee members observed that uncertainty caused by rotating judges and/or an unpredictable judiciary (e.g., will the judge win his/her election?) discourages businesses from locating and expanding in North Carolina. Panel members noted the high national regard earned by the NC Business Court since that court began nearly a decade ago. Those judges, all chosen by an appointment / confirmation process, hold onto their cases for the life of each case. The General Assembly has recently approved expanding the Business Court's “count” to five judges. The Panel suggested that the concept and demonstrated success of the Business Court have not been “connected” to the method of choosing its members.

The Panel observed that the NCBA has evaluated and, in fact, has previously recommended, nominating commissions to propose candidates from whom the Governor would make his/her appointments. Although several members of the Committee for Judicial Independence favor such a commission, the consensus of the Committee believes that a nominating commission would block passage of the reforms in general. The leading difficulty lies in the process of populating the nominating commission (i.e. who would have a voice at the table).

The Panel noted that the NCBA is in the process of evaluating the creation of a standing committee to provide ratings of potential nominees or candidates for the appellate bench. The concept follows the federal model in force since President Eisenhower was in office. All candidates for the federal bench, trial or appellate, are vetted by the Standing Committee on the Judiciary. In contrast, the North Carolina system, as proposed, would be voluntary. No candidate—either for election or appointment ---would labor under any requirement to undergo the rating process. The Committee for Judicial Independence has prepared a full report on this concept, believing that the ratings will provide much-needed assistance to citizens who are under-informed regarding those who would seek service in our State's judiciary. Likewise, the ratings would be useful to the Governor in the selection of judges. Finally in this regard, the proposal for this evaluation relates only to the appellate division in its present format.

The committee discussed several issues related to the JI Committee proposal. The proposal did not address the current age limit for judges or a set of required qualifications. The proposal also did not assess strategies to avoid large turnover in a single year. Note: The JI Committee has not undertaken an evaluation of the current age limit for judicial service or the high turnover issue.

The Panel encouraged the committee to think about other issues that could arise. The Panel offered the NCBA as a resource to the committee as it works to make a recommendation and welcomes questions and observations between meeting session of the committee.

In response to questions from the committee members, the Panel indicated that failure to win a retention election would have no permanent adverse consequence for the judge. For example, the judge could be appointed to a judgeship after having lost the election. The Panel also indicated that while it had not specified minimum requirements for gubernatorial nominees (e.g., years in practice) , setting minimum qualifications is something the committee may want to consider.

5. Recent Legislative Efforts Regarding Judicial Selection

Representative Sarah Stevens discussed recent legislative attempts at reform. Attorneys in the legislature have had meetings to discuss the issue, and there is a general appetite for reform. However, there has been a distrust of attorneys by the large governing bodies. Even the attorney legislators have struggled to reach agreement as to the most effective methods.

In general, the main concern of the legislators is ensuring that the process selected is fair and not politically motivated. On a practical level, the legislature was surprised by the difficulty in passing a recent constitutional amendment, which many saw as noncontroversial, so there may be hesitancy to move forward again. Even then, it was suggested that if reforms requiring a constitutional amendment did move forward, that accompanying and defining legislation be presented at the same time rather than after a voter referendum.

6. General Discussion and Conclusion

The committee is moving past the information-gathering stage and moving into the stage of recommending action. The committee members were encouraged to be thinking about the best recommendations that can be made, even if they are not perfect. In this regard, the committee members were encouraged to continue thinking about a thesis statement for the green paper. A draft will be presented at the next meeting.

Next Meeting

Date: Tuesday, March 15, 2016

Time: 10:30 a.m. to 3:30 p.m.

Location: North Carolina Judicial Center, 901 Corporate Center Drive, Raleigh NC, 27607