Retention Elections – The General Assembly Creates A New Way For North Carolinians To Elect Incumbent Justices Of The North Carolina Supreme Court

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Until now, a sitting Justice of the North Carolina Supreme Court had to run for reelection against any other person or persons who filed to run for the Justice's seat just as an elected Senator or Representative must take on all comers at each election. The winner of the vote, whether it was the sitting Justice or a newcomer to the Court, then served a full term as a Justice.

A judicial retention election, on the other hand, is a periodic process whereby voters are asked whether an incumbent judge should remain in office for another term. The judge, who does not face an opponent, is only removed from the position if a certain percentage of voters (often 50%) vote that the Justice should not be retained.

On June 11, 2015, Governor McCrory signed into law new legislation entitled "An Act Allowing Voters to Elect, and Then Retain, Justices of the North Carolina Supreme Court for Election"("Act"). The Act heralds a new day in the election of North Carolina Supreme Court Justices. Not since 1868, when the selection of Supreme Court Justices was converted from an appointment process to an electoral process, has North Carolina seen a change in the method of electing state Supreme Court justices. In 2016, for the first time in the state's history, North Carolinians exercising their constitutional right to vote will participate in a retention election for a Supreme Court Justice. The Act is the second significant judicial election reform flowing from the Republican-controlled legislature. The first was the 2013 repeal of public funding financing laws as they applied to the North Carolina Supreme Court and the Court of Appeals.

Before we delve deeper into the nuances of the Act, let's review the basic framework of the North Carolina judicial system. Pursuant to Article IV of North Carolina's Constitution, the General Court of Justice consists of three divisions: District Court, Superior Court, and Appellate. The District and Superior Courts are North Carolina's trial courts. The Appellate Division consists of the Supreme Court and the Court of Appeals. The Court of Appeals is North Carolina's intermediate appellate court. Fifteen judges hear cases in panels of three. The Court of Appeals reviews cases brought to it by litigants from the trial courts for errors of law or legal procedure.

The Supreme Court of North Carolina consists of a Chief Justice and six Associate Justices, who sit together as a single panel in Raleigh. It is the state's highest court and there is no further appeal in the state court

system. The Supreme Court considers error in legal procedures or in judicial interpretation of the law. If a Court of Appeals decision includes a dissent (meaning one of the Court of Appeals judges did not agree with the other two), the losing party has a right of appeal to the North Carolina Supreme Court; otherwise, further review of a Court of Appeals decision is limited to those cases that the Supreme Court accepts in its discretion. In 2014, legislation expanded the types of cases heard by the Supreme Court to include all appeals from decisions of the North Carolina Business Court, which is an administrative division of the General Court of Justice staffed by special Superior Court judges appointed by the Chief Justice of the North Carolina Supreme Court.

Supreme Court Justices are elected to serve an eight-year term beginning on the first day of January following the election. If a vacancy occurs at any point other than at the end of a Justice's term, the Governor appoints someone to fill the vacancy. If the newly appointed Justice desires to retain the seat, the Justice runs for election during the first election cycle for members of the General Assembly that is held more than 60 days after the vacancy occurred. The Act introduces the option of a retention election only for Supreme Court Justices who have been previously elected by a "vote of the voters." In other words, if a Justice of the Supreme Court is appointed to fill a vacancy on the Court, that Justice must successfully run in a general election before being entitled to choose the option of a retention election. Elections for Supreme Court Justices occur in even-numbered years, as Supreme Court elections are tied to the election cycle of the General Assembly. The Act does not apply to Court of Appeals judges nor does it apply to any other division of the General Court of Justice.

Once elected to office by "vote of the voters," a Supreme Court Justice may choose to be subject to a retention election during the general election immediately preceding the expiration of the Justice's current term. A Justice seeking a retention election will indicate the desire to continue in office by filing a notice to that effect with the State Board of Elections no later than noon on the first business day of July in the year prior to the general election immediately preceding the expiration of the elected term. Notice may be withdrawn at any time prior to December 15 of that year. If no retention notice is filed, or if it is filed and timely withdrawn, then a regular election will be held the next year to elect a Justice to fill the seat in accordance with Article 25 of Chapter 163 of the General Statutes. If the Justice does not select the option of participating in a retention election, it appears that the Justice could participate in the general election, along with all other candidates, although such a tactical decision seems unlikely.

For example, if Justice A's term expires on December 31, 2016, and Justice A desires to continue in office and wants to be subject to a retention election, Justice A will need to file a retention notice with the State Board of Election no later than noon on the first business day of July, 2015. If Justice A fails to file or withdraws the notice prior to December 15, 2015, then a regular election for Justice A's seat will be held in November, 2016.

If a majority of votes cast by qualified voters on the issue of the Justice's retention are "for" retention, the Justice is retained for another full eight-year term. If the majority of voters vote "against" the Justice's retention, the office is deemed vacant at the end of the term and the Governor will appoint someone to fill the vacancy. The newly-appointed Justice may run for election in the general election occurring in the next even-numbered year. If elected, the Justice will have the right to subsequently retain the seat using the retention election process.

The November 2015 ballot now will contain an entirely new question for voters. We expect that the ballot question will be substantially similar to the following:

JUSTICES OF THE SUPREME COURT

[   ] FOR   [   ] AGAINST

The retention of [name of Justice] on the North Carolina Supreme Court for a new term of eight years.

The first Justice eligible for a retention election in 2016 is Justice Robert H. "Bob" Edmunds, Jr. Justice Edmunds was first elected to the North Carolina Supreme Court in 2000. On June 22, 2015, Justice Edmunds filed the necessary paperwork to participate in a retention election, and his retention election will coincide with the 2016 election for members of the General Assembly.

Regardless of one's political ideology, voters need to be aware of, and understand, the Act prior to entering the voting booth, as it fundamentally changes the way North Carolinians will select Justices to serve on North Carolina's highest court.

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