

# HISTORY OF NORTH CAROLINA JUDICIAL ELECTIONS

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## Before 1868

Before 1868 the constitutional courts of the state were a supreme court, superior court, and justices of the peace. Superior court had existed since colonial days and at the time of Reconstruction there were eight superior court districts with one judge each (the number had varied from six to eight), appointed by the General Assembly. Initially, the superior court judges sitting *en banc* handled appeals, then in 1818 the Supreme Court was established as a separate entity with three justices. They, too, were appointed by the legislature. Justices of the peace held court individually and joined each other to form the county court of pleas and quarter sessions, with appeals to superior court. Justices of the peace were appointed by the governor on recommendation of the General Assembly.

## The 1868 Constitution

The Constitution of 1868 introduced the election of judges and made other significant changes in court structure. The constitution provided:

- The Supreme Court was comprised of five justices elected for eight-year terms in statewide elections.
- The superior court consisted of 12 judges, one each elected from 12 districts specified in the constitution (“until altered by law”). They were elected for eight-year terms in statewide elections, but the legislature was authorized to change to district elections if it wished.
- The constitution set the jurisdiction of justices of the peace but did not specify the number of offices nor specify the method of selection.
- The legislature was authorized to establish “special courts” in cities and counties “where the same may be necessary.”

Amendments to the constitution in 1875 authorized the legislature to set the number of judicial districts. In 1950 the constitution was amended to allow more than one superior court judge per district. By the mid-1950s there were 30 superior court districts. Two districts, the 18<sup>th</sup> (Guilford) and 26<sup>th</sup> (Mecklenburg), had two judges, each of the others had a single judge.

## Rotation of superior court judges

Rotation of superior court judges through other districts began in 1790; judges stayed within districts starting in 1868, but rotation resumed in 1875. Two divisions were established for

rotation in 1915, increased to four divisions in 1955 and to eight in 1999. The number of divisions for rotation was reduced to five in 2019.

### Party primaries

Party primaries for all elected offices, including the state judgeships that then existed, were introduced by Public Laws of 1915, Chapter 101.

Superior court judges were nominated in party primaries held in districts, then elected in general elections held statewide. It is not clear when the practice of nomination in districts began, nor was there any known statutory authority for it (*see Republican Party of North Carolina v. Martin*, 980 F2d 943, 947, n. 6 (4<sup>th</sup> Cir 1992)).

(When the Court of Appeals and district court was added in the 1960s those elections also were partisan and subject to party primaries. All appellate and trial court elections remained partisan until 1998 when superior court elections were changed to nonpartisan. District court elections were made nonpartisan in 2002 and appellate elections in 2004. See below for the changes back to partisan elections for all judges.)

### Local courts

From 1868 until the 1950s the legislature created numerous local courts, including mayors courts, county courts, and recorders courts. The courts' jurisdiction varied as did the methods of selecting judges (appointment and election); terms of office ranged from one to four years. By the mid-1950s there were over 250 such courts. There also were 940 justices of the peace, about 100 of whom were full-time, either elected by township or appointed by the superior court judge.

### The Bell Commission and the 1962 constitutional amendments

The North Carolina Bar Association's Committee on Improving and Expediting the Administration of Justice in North Carolina, chaired by Spencer Bell (thus "the Bell Commission") was created in 1955 at the request of Governor Luther Hodges, and it reported in December 1958. The Bell Commission was followed by the governor's State Committee for Improved Courts, chaired by Spencer Love. Court reform legislation developed through this process failed in 1959. A new Committee on Legislation was then established by the Bar Association and it reported in January 1961, leading to the next year's constitutional amendments.

The basic framework of the present court system was established by the constitutional amendments adopted in 1962.

- The General Court of Justice was established as a uniform, statewide system, fully funded by the state (though counties would continue to be responsible for court facilities)
- The district court, with magistrates, was created to replace the various local courts and justices of the peace

- The legislature was authorized to divide the state into a “convenient number” of districts for superior and district court
- District judges were to be elected for four-year terms “in a manner provided by law”
- Superior court judges would continue to be elected for eight-year terms, with the elections either statewide or by district as decided by legislature

### Implementation of the 1962 amendments

A Bar Association committee created by Governor Terry Sanford recommended implementing legislation for the new court system in 1963, but most of the proposals were rejected. The Courts Commission then was established by the General Assembly to develop legislation to implement the new court system by 1971.

Legislation enacted in 1965 declared that district court districts would be the same as superior court districts and set out the first set of districts to be implemented that year. In 1967 all 30 districts for superior court and district court were enacted, using the districts already in place for superior court, and prosecutorial districts were added in 1969. Initially all superior court, district court, and prosecutorial districts were coterminous.

The district court was implemented in three phases, in 1965, 1967, 1969. With election of the last set of judges in 1969, the court was fully established statewide in 1970.

### The Court of Appeals

A constitutional amendment authorizing the General Assembly to create a court of appeals of no fewer than five members was approved in 1965. The amendment provided that the judges are to be elected statewide for eight-year terms.

The Court of Appeals was established by the General Assembly in 1967 with six members, to be increased to nine in 1969.

The legislature increased the Court of Appeals to 12 members in 1977 and to 15 members in 2000. See below for a later reduction, and then restoration, of the number of judges.

### Splitting districts

The splitting of the coterminous judicial and prosecutorial districts began in 1975 when District 27 (Gaston, Lincoln, Cleveland) was divided into 27A (Gaston) and 27B (Cleveland, Lincoln) for prosecutorial purposes.

The first split of a district for all purposes (superior court, district court, and DA) was in 1977 with the division of District 15 (Orange, Chatham, Alamance) into 15A (Alamance) and 15B (Orange, Chatham). In the same year the division of District 27 into 27A and 27B for all purposes was completed.

The first time a county was moved from one district to another was in 1987 when Hoke was moved from District 12 to 16.

The first creation of a new district from parts of two existing districts was in 1993 when District 9A (Caswell, Person) was created from Districts 9 and 17A.

The first time a district court district was subdivided into electoral subdistricts was in 1995 when Districts 9 and 9B were established in Franklin, Granville and Vance.

The first time residency districts were established for electoral purposes for district court was in 2001 when residency districts were created for Johnston, Harnett and Lee.

More than 30 legislative acts have changed districts in some manner since the 30 coterminus districts were first established in the late 1960s. Only five districts (1, 2, 23, 24 and 28) have not been changed at all.

#### 1987 voting rights case and superior court election subdistricts

In 1987 the General Assembly enacted Session Law 1987-509 to settle a federal voting rights lawsuit claiming discrimination against African Americans in the method of electing superior court judges.

- New superior court electoral districts comprised of only part of a county were created for the first time, in eight counties (Edgecombe, Wilson, Wake, Cumberland, Durham, Guilford, Forsyth, and Mecklenburg), to establish electoral districts in which minority voters could elect candidates.
- Another nine districts were either split or the counties comprising the districts rearranged, also for the purpose of enhancing the chances of minority candidates.
- In remaining districts which had more than a single judgeship the terms of the judges were rearranged to put terms of all judges in the district on the same schedule, elected together, to enhance the use of single-shot voting by minority voters.
- The rearrangement of terms was challenged and upheld in *Martin v. Preston*, 325 NC 438 (1989).

#### *Republican Party v. Martin* and district elections for superior court

In 1992 in *Republican Party of North Carolina v. Martin*, 980 F2d 943 (4<sup>th</sup> Cir 1992), the Fourth Circuit held that the statewide election of superior court judges (following party primaries held within the district) was, in effect, a political gerrymander discriminating against Republicans. As a result, superior court judges were to be elected by district rather than statewide.

## Elections to fill vacancies

In 1992 in *Brannon v. North Carolina State Board of Elections*, 331 NC 335 (1992), the North Carolina Supreme Court held that elections to fill vacancies on the Court of Appeals are only for the remainder of the unexpired term, not for a full eight-year term. In 1995 the General Assembly rewrote the law to declare that all elections for appellate judgeships, whether because of the end of a term or to fill a vacancy, are for a full eight-year term. In 1996 the legislature extended the same rule to elections for superior court vacancies (except in some districts affected by the 1987 Voting Rights Act settlement).

In 2004 when a vacancy (Bob Orr resignation) occurred on the Supreme Court too late for a primary to be held before the general election, a single plurality election was held to fill the vacancy. Eight candidates ran and Paul Newby was elected with 22 percent of the vote. (As discussed below, by 2004 judicial elections had become nonpartisan. Consequently, the political parties no longer chose candidates for late-occurring vacancies, and all interested candidates could run in the election to fill a vacancy.)

In 2006 the General Assembly enacted instant run-off voting for such vacancy elections. A voter could list their first, second and third choice, and if no candidate received a majority of first-place votes the others would be counted. The instant run-off voting procedure was first used for a 2010 vacancy election for the Court of Appeals. Thirteen candidates ran, Cressie Thigpen led but did not have a majority, and when second and third place votes were counted Doug McCollough won.

The legislature eliminated Instant run-off voting for vacancy elections in 2013.

The next single plurality election to fill an appellate vacancy when there was insufficient time for a primary was in 2014. With no instant run-off voting, John Tyson with 24 percent of the vote won over 18 other candidates to fill the vacancy on the Court of Appeals created by the retirement of John Martin.

## Nonpartisan elections

The General Assembly in 1996 (SL 1996-9, 2d Ex Sess) changed superior court elections from partisan to nonpartisan starting in 1998, with nonpartisan primaries to reduce the number of candidates for the general election to two. In 2001 and 2002 the legislature also converted district court (SL 2001-403) and appellate (SL 2002-158) elections to nonpartisan starting in 2002, using the same kind of nonpartisan primaries as with superior court.

See below for the subsequent return to partisan elections.

### Public funding of appellate election campaigns

As part of the switch to nonpartisan appellate court elections, the legislature in 2004 provided public funding for appellate candidates who agreed to limit the total spent on their campaigns.

Public funding was eliminated by the General Assembly in 2013.

### Blankenship v. Bartlett and superior court election districts

In 2009 the North Carolina Supreme Court held in *Blankenship v. Bartlett*, 363 NC 518 (2009), that superior court electoral districts within a judicial district are subject to one-person/one-vote and that the districts within Wake County were too far out of balance. One Wake district had four times the population of another. Following the decision, the electoral subdistricts within Wake County, which had been created in 1987 as part of the settlement of the voting rights case, were redrawn by the General Assembly. Although the *Blankenship* court held the Wake districts to be unconstitutional it did not set a specific standard for population equality for judicial electoral subdistricts.

### Confirmation of special superior court judges

Article IV, § 9(1) of the North Carolina Constitution allows the General Assembly to establish special superior court judgeships and provide for the method of their selection. The special judges have always been appointed by the governor. Session Law 2014-100, § 18B.6 requires the governor's appointees to be confirmed by the Senate.

### Retention elections for the Supreme Court

The General Assembly in 2015 enacted Session Law 2015-66 to provide for retention elections for the Supreme Court, *i.e.*, when a justice's term expired there would be a YES or NO referendum on a subsequent term rather than a contested election. The act was declared unconstitutional in 2016 in *Faires v. State Board of Elections*, 368 NC 825 (2016) — a constitutional amendment is required to change the method of selecting justices — and a regular contested election was held.

### Return to partisan elections

The General Assembly in 2015 (SL 2015-292) required that party affiliation of candidates for the Court of Appeals be listed on the ballot although the election remained nonpartisan, and then in Session Law 2016-125, § 21 all appellate elections were made partisan once again starting in 2018.

In 2017 the legislature (SL 2017-3) returned district and superior court to partisan elections as well, starting with the 2018 elections.

### Size of the Court of Appeals

The General Assembly in 2017 enacted Session Law 2017-7 to reduce the Court of Appeals from 15 to 12 judges as vacancies occur. While litigation was pending in the Supreme Court challenging the reduction, the General Assembly in 2019 reversed course and enacted Session Law 2019-2 restoring the court to 15 members.

### Elimination of judicial primaries in 2018

The General Assembly in 2017 enacted Session Law 2017-214 to eliminate primaries for all judicial elections for 2018. The act was initially enjoined by Judge Eagles of the U.S. District Court for the Middle District as to primaries for appellate judicial offices, but the injunction was vacated by the Fourth Circuit. Subsequently Judge Eagles ruled against the Democratic Party and upheld the legislation. *See North Carolina Democratic Party v. Berger*, US Dist Ct, MDNC, No. 1:17-CV-1113, 2018 WL 10323510 (June 25, 2018).

With no party primaries in 2018, erstwhile Democrat Chris Anglin switched party registration to file as a Republican candidate for the Supreme Court, creating the possibility he would siphon votes from the party's favored candidate. The General Assembly reacted in August 2018 with Session Law 2018-130 requiring a candidate to change registration at least 90 days before filing, retroactive to the 2018 filing. Anglin and another candidate obtained preliminary injunctions to keep the new law from taking effect, and legislative leaders did not appeal.

### Legislature nominate candidates for judicial vacancies

Session Law 2018-118, later replaced by Session Law 2018-132, placed on the ballot a constitutional amendment to require the governor to fill judicial vacancies from names submitted by the General Assembly. After litigation and rewording of the proposed amendment, it appeared on the ballot in November 2018 but was defeated by a two to one margin.

### Election subdistricts for district court

Session Law 2018-14 divided Mecklenburg and Wake counties into election subdistricts for electing district court judges. After a lawsuit was filed challenging the Mecklenburg districts as violating equal protection and state constitutional provisions on a uniform court system, the General Assembly in 2020 in Session Law 2020-84 restored the Mecklenburg district court elections, but not Wake, to countywide elections.