

How the Proposed Constitutional Amendment Would Change Judicial Appointments

This November, North Carolina voters will be asked to vote for or against a “Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections.” If voters approve the amendment, what will change about the way judges are selected in North Carolina?

First, let’s briefly review what the North Carolina Constitution currently has to say about the selection of judges.

Justices and judges are elected. The state constitution provides that voters elect justices of the North Carolina Supreme Court, judges of the North Carolina Court of Appeals, regular judges of the superior court, and district court judges. [N.C. Const. Art. IV](#), § 10, 16. Elected appellate justices and judges and superior court judges hold office for terms of eight years, while elected district court judges serve four-year terms. The constitutional amendment proposed in [S.L. 2018-118](#) (S 814) would not alter that system. Instead, the amendment would change how judges and justices are selected to fill vacancies that occur during a justice’s or judge’s term of office.

A word about special superior court judges. The state constitution authorizes the legislature to enact statutes governing the selection or appointment of special superior court judges not selected for a particular judicial district. N.C. Const. Art. IV, § 9(1). [G.S. 7A-45.1](#) establishes such judgeships and provides for five-year terms. G.S. 7A-45.1(a10) provides that as each such judgeship becomes vacant or the term expires, the governor must submit the name of a nominee for that judgeship to the General Assembly for confirmation by ratified joint resolution. Upon such confirmation, the governor must appoint the nominee to the judgeship. (Two special superior court judges, [Judge Athena Brooks](#) and [Judge Stanley Carmical](#), recently were appointed through this process.) If the governor does not submit the name of a nominee to the General Assembly within 90 days of the vacancy or expiration of the term, the President Pro Tem of the Senate and the Speaker of the House must jointly submit a nominee to the General Assembly. The appointment is then made by enactment of a bill. The proposed constitutional amendment does not alter the process for selecting or appointing special superior court judges.

How vacancies are currently filled. A vacancy occurs when a judge or justice is unable to complete his or her term of office. Vacancies may result from a judge or justice’s death, retirement, resignation, or removal from office. The state constitution currently provides that vacancies in the offices of justice or judge (other than the office of district court judge) are filled by appointment of the governor. N.C. Const. Art. IV, § 19. Judicial appointees hold their places until the next general election that is held more than 60 days after the vacancy occurs. *Id.*; [G.S. 163A-717](#). At that time, an election must be held to fill the office. If, however, the unexpired term in which a vacancy occurs

expires on the first day of January following the next general election, the judicial appointee fills the vacancy for the unexpired term of office.

An example may help illustrate these provisions. Suppose Judge A is elected in 2010 to an eight-year term of office as a superior court judge. Judge A retires in March 2016, creating a vacancy for a term of office that is set to expire on January 1, 2019. The next general election held more than 60 days after the vacancy occurs is in November 2016. The superior court judgeship formerly held by Judge A will appear on the ballot in that election. If the governor appoints Judge B to fill the vacancy, Judge B will serve until January 1, 2017, at which time the judge elected in the 2016 general election will begin an eight-year term of office. If Judge A had retired in October 2016 (within 60 days of the 2016 general election) and Judge B had been appointed to fill the vacancy, Judge B would serve out the remainder of Judge A's term ? until January 1, 2019 – the January following the 2018 general election.

The state constitution provides that vacancies in the office of district court judge, in contrast, are filled for the unexpired term “in a manner prescribed by law.” N.C. Const. Art. IV, § 10. [G.S. 7A-142](#) provides that a vacancy in the office of district court judge is filled for the unexpired term by appointment by the governor. The local bar of the judicial district nominates five persons for the governor's consideration, and he or she must “give due consideration to the nominees” before filling the vacancy. An appointed district court judge fills out the term of his or her predecessor.

The proposed amendment. [S.L. 2018-118](#) (S 814) proposes a constitutional amendment that would change the term of office for judicial appointees and the process for selecting and appointing judges and justices to fill vacancies.

Term of office. As noted above, the constitution currently provides that appointees to fill vacancies on the appellate and superior court bench hold their places until the next general election held more than 60 days after the vacancy occurs (subject to the exception for terms that expire the January following the next general election). The proposed amendment provides that such appointees (as well as appointees to fill vacancies on the district court bench) hold their places ***until the next election following the general election*** held after the appointment occurs. When, however, a vacancy occurs within 60 days before the next general election for a term that would expire on December 31 of that same year, an appointee's term of office is for the remainder of the existing term. (Note that the amendment refers to terms as expiring on December 31 whereas the existing constitutional and statutory provisions on judicial vacancies refers to them as expiring on the first day of January).

Another example. Suppose Judge C is elected in 2018 to an eight-year term of office as a superior court judge. Judge C retires in March 2024, creating a vacancy for a term of office that is set to expire on December 31, 2026. Judge D is appointed to fill the vacancy. The next general election is in November 2024. The constitutional amendment would permit Judge D to hold Judge C's judgeship “until the next election following the election for members of the General

Assembly.” If one assumes that the “election” referred to in this provision is a general election, the next election following the general election held after the appointment will occur in 2026. Thus, in this scenario, Judge D would hold the seat through December 31, 2026.

What happens if Judge C retires in December 2024 and Judge D is appointed to fill the vacancy? If Judge D were to hold the seat until the election after next (2028), that would extend beyond Judge C’s initial term. Yet, the amendment’s provision limiting an appointee’s term to the predecessor’s unexpired term applies to vacancies that occur within 60 days of the next general election. In this example, the vacancy occurs more than 60 days before the next general election. Thus, it is not entirely clear how the amendment’s language would apply in this situation.

Selection and appointment. The amendment would also change the process by which appointees are selected and the person or entity responsible for appointing them.

Short-term vacancies. For vacancies that occur within 60 days before the next general election and for terms of office that would expire on December 31 of that same year, the amendment provides that the Chief Justice of the North Carolina Supreme Court must appoint a person to fill the vacancy for the unexpired term.

Other vacancies. For other vacancies, the amendment provides that individuals must “be nominated on merit by the people of the State” to fill the vacancy.

Evaluation by commission. The nominations are to be evaluated by a nonpartisan commission, which is required to evaluate each nominee without regard to the nominee’s partisan affiliation but instead with respect to whether the nominee is qualified or not qualified.

The amendment creates the “Nonpartisan Judicial Merit Commission” that must consist of no more than nine members. The appointments are to be allocated among the chief justice, the governor, and the General Assembly, as prescribed by statute. The amendment requires the General Assembly to provide for the establishment of local merit commissions for the nomination of district and superior court judges. Appointments to local commissions are likewise allocated among the chief justice, the governor, and the General Assembly, as prescribed by statute. The amendment provides that neither the chief justice, the governor, nor the General Assembly may be allocated a majority of appointments to a commission.

The evaluation of each nominee must be forwarded to the General Assembly.

Recommendation by General Assembly. The General Assembly must recommend to the governor, for each position, at least two of the nominees deemed qualified by the state or a local commission.

Appointment by governor or by General Assembly. Within 10 days after the nominees are

presented, the governor must appoint the nominee from those recommended that the governor deems best qualified to serve. If the governor does not appoint a nominee within 10 days after nominees are presented by the General Assembly, the General Assembly must elect an appointee to fill the vacancy.

Appointment by chief justice. If the General Assembly has adjourned without setting a future date for returning or has adjourned for more than 30 days jointly, the chief justice is authorized to appoint a “qualified individual” to fill a vacant office of justice or judge if any of the following apply: (i) the vacancy occurs during the period of adjournment; (ii) the General Assembly adjourned without presenting nominees to the governor or without electing a nominee following the governor’s failure to appoint; or (iii) the governor failed to appoint a recommended nominee.

A judge or justice appointed by the chief justice to fill a vacancy serves until the first of three events occurs: (i) the governor appoints a person to fill the vacancy; (ii) the General Assembly elects a person to fill the vacancy; or (iii) the first day of January succeeding the next general election “and such election shall include the office for which the appointment was made.” It is not clear whether this last circumstance only occurs when the office in which the vacancy occurred already is slated to appear on the general election ballot or whether the office must be placed on the general election ballot as a result of the chief justice’s appointment.

No appointments by governor or General Assembly if election underway. The amendment provides that neither the governor nor the General Assembly may appoint a person to fill a judicial vacancy after an election to fill that judicial office “has commenced, as prescribed by law.”

Effective date. If a majority of votes cast are in favor of the amendment, it becomes effective upon certification and applies to vacancies occurring on or after the date of the November 2018 general election.

Your take. I’ve read and re-read proposed amendment, but, as they say, I’m only [human](#). Do you have a different view of anything I’ve said above? Did I omit an aspect of the legislation that you deem significant? Use the comment feature to share your thoughts