A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA

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Part One: Introduction

Some may say that judicial elections are not what they used to be in South Carolina. In 1940, it was not until the 71st round of balloting that Taylor Stukes received the votes needed for election to the Supreme Court of South Carolina. In 1966 and 1967, Bruce Littlejohn required only 37 ballots to be elected to the Court, but the vote spanned 344 days and the election of a new General Assembly, before Littlejohn was able to defeat Julius B. Ness, George Bell Timmerman, and Rembert Dennis. Today, a judicial election rarely progresses past a first ballot. By the time a vote occurs, candidates are often unopposed.

One key element of judicial elections has not changed, however. Since the earliest days of statehood, the General Assembly of South Carolina has elected most state judges by a majority vote of the House of Representatives and Senate sitting in joint session. Currently all statewide judicial positions, including those on the South Carolina Supreme Court, the South Carolina Court of Appeals, circuit courts, family courts, and the Administrative Law Court, are elected by the General Assembly. The Legislature typically does not elect judges of courts that are more local in nature. Even for most of those courts, however, the General Assembly has retained a significant role of advice and consent in the selection of judges.

Masters-in-Equity, for example, are appointed by the governor with the advice and consent of the General Assembly. To be appointed, a candidate must also have been found qualified after merit screening by the Judicial Merit Selection Commission.[1] Traditionally, governors have appointed the candidate nominated by the local legislative delegation. Local magistrate judges also are appointed by the governor, but upon the advice and consent of only the Senate.[2] In a manner similar to the appointment of masters-in-equity, governors traditionally appoint magistrates who have been nominated by the local Senate delegation. Municipal judges are elected by the local government's council.[3]

Today, the only judges directly elected by popular vote are probate judges.[4] Until county courts were abolished in 1979 as a part of the unification of the state court system, different statutory authorizations meant that some counties elected their county judge by popular vote,[5] while others utilized an appointment process. For example, Richland County elected its county court judge by popular vote.[6] The Act creating Charleston's county court provided, instead, that judges were to be appointed by the governor upon the recommendation of a majority of the county's legislative delegation.[7]

For those positions filled by election in the General Assembly, merit selection has modified the nomination process in recent decades. The decision-making authority, however, has been held consistently by the Legislature for nearly 250 years, since March 27, 1776, when the General Assembly elected William Henry Drayton as chief justice.

[1] S.C. Code Ann. § 14-11-20 (1976).
[2] S.C. Code Ann. § 22-2-10 (1976).
[3] S.C. Code Ann. § 14-25-15 (1976).
[4] For the historical background of probate court elections, see Part Three, text accompanying notes 13-17.
[5] S.C. Code § 15-605 (1952). More than half the counties were expressly exempted from this requirement.
[6] S.C. Code § 12-752 (1952),
[7] 1962 S.C. Acts, No. 776, at p. 1898.

A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA
Part Two: Eighteenth Century Origins of Legislative Election

Historical records are inadequate to draw with certainty a line of causation between South Carolina's colonial experience with the executive appointment of judges and its decision at the end of colonial governance to place judicial selection within the power of the legislature. However, strong disagreements only a few years earlier over the Crown's use of its judicial appointment prerogative had to be fresh in the minds of the new state's leaders following independence.

Unhappiness with the Crown's selection of judges for colonial South Carolina began with the Crown's replacement in 1752 of the well-qualified Charles Pinckney who had briefly served as chief justice after the death of the prior chief justice. Instead of Pinckney, a South Carolina lawyer, the Crown installed a placeman, essentially a political appointee from Great Britain. Historian Edward McCrady noted that the installation of a placeman "was a warning that no native-born Carolinian need aspire to the higher positions in the province."[1]

In his excellent chapter about this period in SOUTH CAROLINA LEGAL HISTORY, Carl Vipperman traced how, with the passage of the Stamp Act in 1765, circumstances heightened local animosity toward the placeman then serving as chief justice.[2] The chief justice at that time was Charles Shinner, a placeman described by contemporary Christopher Gadsden in a Report to the Commons House of Assembly in April 1767 as a "person wholly unacquainted with the common law" and "of such ignorance as to show him to be utterly unfit for a place of so much consequence."[3]

When protestors prevented any stamps from arriving in the colony, no legal business requiring document stamps could be conducted. As a result, Shinner closed the South Carolina courts in November 1765. By March 1766, Charleston lawyers persuaded Lieutenant Governor William Bull, Jr., to appoint three South Carolinians, including Rawlins Lowndes, as assistant judges.[4] Immediately, a motion for judgment was brought by the plaintiff in an existing case, without objection from the defense, for the purpose of testing whether the court would be re-opened and a judgment issued.[5] The assistant judges joined together in an opinion authored by Lowndes, over the strong dissent of the chief justice, to allow judgments to be entered without necessity of stamps, due to the impossibility of obtaining stamps.[6]

Chief Justice Shinner's resistance to the efforts of the local assistant judges to reopen the courts without stamps eventually resulted in his suspension from office by Governor Charles Montagu, at the urging of the Commons House of Assembly. Shinner died in 1768 while suspended. Lowndes, who had authored the decision reopening the courts without stamps, had gained particular prominence after Shinner's suspension. In Vipperman's view, in terms of character and legal knowledge, "it is doubtful that anyone in the colony was better qualified than Lowndes" to fill the vacancy in the office of chief justice created by Shinner's death.[7]

Lowndes, however, was passed over by the Crown's ministers, and several years of political intrigue ensued between London and South Carolina regarding the appointment of new

judges. By 1772, no South Carolinians were serving as judges, and judicial independence had become a key issue. Among those colonists who in a few years would support the American Revolution, judicial independence was perceived "as a contest between power and liberty, the power of the Crown exercised through the prerogative, and the liberty of the subject."[8] Vipperman concluded that the actions of the Crown's government to strip "the South Carolina judiciary of any pretension to independence and [turn] the courts over to a set of men whose principal qualification for office was obedience to an arbitrary ministry sent many a Carolinian down the road to Revolution."[9]

Given that experience, it is not surprising that each of South Carolina's first three constitutions after independence, adopted in 1776, 1778, and 1790, placed judicial elections where they have remained to the present, within the power of the legislature instead of the executive.[10]

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[1] Edward McCrady, THE HISTORY OF SOUTH CAROLINA UNDER THE ROYAL GOVERNMENT 1719-1776 at 281 (Russell & Russell, 1899).
[2] Carl J. Vipperman, *The Justice of Revolution: The South Carolina Judicial System 1721-1772*, in SOUTH CAROLINA LEGAL HISTORY 225-254 (Herbert A. Johnson, ed., University of South Carolina Southern Studies Program, 1980).
[3] S.C. Dep't of Archives & History, JOURNAL OF THE COMMONS HOUSE OF ASSEMBLY, No. 37, part 1, pages 358–59; McCrady, supra note 1, at 466.
[4] The characterization of Bull's action having occurred after persuasion by members of the bar is Vipperman's. Maurice Crouse suggests that the idea was Bull's, and that he was not pressured by the lawyers. *See* Maurice A. Crouse, *Cautious Rebellion: South Carolina's Opposition to the Stamp Act*, 73 The South Carolina Historical Magazine, No. 2, April, 1972, at 64 n.13. Also appointed as assistant judges were Benjamin Smith and Daniel Doyley. A fourth assistant judge was Robert Pringle, who already was on the court but rarely had appeared.
[5] Crouse, supra note 11, at 64.
[6] *Jordan v. Law* (S.C. Ct. Com. Pl. 1766) (Reprinted in John Belton O'Neall, O'NEALL'S BENCH AND BAR OF SOUTH CAROLINA, at 401-424 (S.G. Courtney & Co. 1859)).
[7] Vipperman, supra note 2, at 233.
[8] Vipperman, supra note 2, at 240.
[9] Vipperman, supra note 2, at 240.
[10] Articles XIX and XX of the Constitution of 1776 provided as follows:

> XIX. That justices of the peace shall be nominated by the general assembly and commissioned by the president and commander-in-chief, during pleasure. They shall not be entitled to fees except on prosecutions for felony, and not acting in the magistracy, they shall not be entitled to the privileges allowed to them by law.
> XX. That all other judicial officers shall be chosen by ballot, jointly by the general assembly and legislative council, and except the judges of the court of chancery, commissioned by the president and commander-in-chief, during good behavior, but shall be removed on address of the general assembly and legislative council.

This approach was retained in the Constitution of 1778:

> XXVI. That justices of the peace shall be nominated by the senate and house of representatives jointly, and commissioned by the governor and commander-in-chief during pleasure. They shall be entitled to receive the fees heretofore established by law; and not acting in the magistracy, they shall not be entitled to the privileges allowed them by law.
> XXVII. That all other judicial officers shall be chosen by ballot jointly by the senate and house of representatives, and, except the judges of the court of chancery, commissioned by the governor and

commander-in-chief during good behavior, but shall be removed on address of the senate and house of representatives.

And in the Constitution of 1790:

ARTICLE VI
SECTION 1. The judges of the superior courts, commissioners of the treasury, secretary of the State, and surveyor-general shall be elected by the joint ballot of both houses in the house of representatives. The commissioners of the treasury, secretary of this State, and surveyor general shall hold their offices for four years; but shall not be eligible again for four years after the expiration of the time for which they shall have been elected.

A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA
Part Three: The 1868 Constitution

The legislature's power to elect judges has endured, despite debate regarding its continuation on multiple occasions. One of the first significant opportunities for change came during the Constitutional Convention of 1868, when some delegates favored popular election of judges and others favored appointment by the governor. Among those who favored popular election, there was a division as to whether popular election should include supreme court justices or only judges of the lower courts. Legislative election was retained, in part because of its own merits and in part as a compromise between the other views.[1]

Delegate B.F. Randolph proposed that justices of the new supreme court be appointed to six-year terms by the governor, with the advice and consent of the Senate. Randolph believed it desirable that justices should be "dependent upon the will and pleasure of the people as little as possible."[2]

D.H. Chamberlain raised a starkly different policy perspective, advocating instead for popular election of judges. "[T]he more direct the Judges are responsible to the people, the more certain are we to have justice done.…I believe in the people."[3] Chamberlain also understood, however, that direct popular election of supreme court justices had little chance of prevailing in 1868. Thus, Chamberlain agreed to support election by the General Assembly, which he characterized as "one step from the direct action of the people." He told the convention that he was "willing to take that as a compromise," but he was unwilling to place "the whole power…in the hands of one man."[4]

J.D. Bell agreed with Randolph's proposal for gubernatorial appointment, preferring to place responsibility for selection in a single person over a group of legislators. "The cool and deliberate expression of opinion of the highest officer of the State is an expression not often obtained from a numerous body of men who … are often guided more by the faithfulness of their favorite candidate to the party than by his qualifications for the office."[5]

A.J. Ransier opposed appointment of judges by the governor as an idea that was already "at least fifty years behind the age" in 1868. He favored popular election of judges but tempered his support for direct election of supreme court justices at that point in South Carolina's history and ultimately favored their election by the General Assembly because "the people of this State are not, perhaps, at present in a position to use their power wisely and judiciously."[6]

Jonathan Jasper Wright, who later was elected to the court as the first African-American associate justice, argued for legislative election of supreme court justices over gubernatorial appointment to ensure that "every portion of the State of South Carolina shall have a voice" in electing justices.[7] Wright, however, favored popular election of all other judges.[8] While recognizing the argument that popular election could "be an inducement to the judiciary to cater to popular prejudices," Wright countered that the people "are a safer tribunal than the legislature,

which, however pure it may be theoretically, will necessarily yield to influences and prejudices brought to bear in favor of those who seek office at its hands."[9]

The influence of prejudice was a particular concern for convention delegates in Reconstruction South Carolina. "We want no judges who will cater to the prejudices of the people, or who will enter a political campaign and try to curry favor with the masses," argued E.W.M. Mackey, who favored legislative election of all judges. "In a majority of cases the poor people will get no justice from these men." Mackey directly addressed the practical political landscape of the state. "It so happens that in certain portions of the State the rebels have a majority." Noting that circuit judges elected in one circuit would travel to other circuits, he observed that "one of these Judges elected by rebel votes" might travel to another circuit to administer justice to a person "who will have no voice in his election." [10] To avoid that concern, he favored election of all circuit judges by the General Assembly.

A significant part of the floor debate focused on corruption of the judiciary in New York City, which various members blamed on popular elections. "How would it look to see a judge with a bottle of whiskey in one hand, and ballots in the other, begging for the votes of the people," asked B.F. Randolph. "I must admit that it would be a strange spectacle indeed for South Carolina." [11] D.H. Chamberlain responded that a "much more probable picture that presents itself to my mind, is a similar appeal made to the Legislature."[12]

Ultimately, the legislative election of supreme court justices, which Chamberlain and others had characterized as a middle-ground compromise between popular vote and gubernatorial appointment, was approved without need for a recorded vote.[13] The legislative election of circuit court judges was approved by a vote of 65 to 24.[14]

Unlike the circuit and appellate judges, local judges known as ordinaries, the predecessors to today's probate judges, had been elected by popular vote since 1815. Initially ordinaries, like the other judges, were elected by the General Assembly, and statutes of 1799[15] and 1812[16] had confirmed the practice of legislative selection. However, in 1815, the General Assembly shed its electoral responsibility regarding ordinaries, along with the election of clerks of court and other local commissioners, in favor of popular election by voters eligible to vote for members of either branch of government. In its preamble to the 1815 Act, the General Assembly noted its justification for the change, stating that

> the time of the Legislature, which might be otherwise occupied in discussing the interests of the State, is too much engrossed in holding elections for district and local officers; and their attention diverted from objects of greater to minor importance.

The General Assembly then added as a final justification a statement that "the people are the better judges of the qualifications of the candidates for their district officers."[17]

Under the Constitution of 1868, the courts of the ordinary became today's probate courts. An effort was made to return to the General Assembly the power to select judges of the new probate courts,[18] based upon the same policy arguments used in the earlier discussions regarding

the supreme court and circuit courts. Convention delegates, however, chose to retain the popular election for those judges, a practice which continues in place today.[19]

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[1] PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA (1868), at 602 (Statements of C.C. Bowen and A.J. Ransier).
[2] *Id.,* at 598.
[3] *Id.,* at 601.
[4] *Id.,* at 602.
[5] *Id.,* at 601.
[6] *Id.,* at 610.
[7] *Id.,* at 599.
[8] *Id.,* at 617.
[9] *Id.,* at 617.
[10] *Id.,* at 619.
[11] *Id.,* at 619.
[12] *Id.,* at 620.
[13] *Id.,* at 611.
[14] *Id.,* at 621.
[15] Act 1737, VII STATUTES AT LARGE OF SOUTH CAROLINA at 294 (McCord 1840)(Adopted Dec. 21, 1799).
[16] Act 2013, V STATUTES AT LARGE OF SOUTH CAROLINA at 674 (McCord 1840)(Adopted Dec. 17, 1812).
[17] Act 2085, VI STATUTES AT LARGE OF SOUTH CAROLINA at 12 (McCord 1840)(Adopted Dec. 15, 1815).
[18] PROCEEDINGS, supra note 18, at 639.
[19] For examples of other local courts in which judges are or have been selected other than by vote of the General Assembly, see Part One, text accompanying notes 1-7,

A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA
Part Four: Judicial Selection, Removal and Challenges to Judicial Independence after Reconstruction

It became clear during the period from 1876 to 1900 that, even with the formal authority to elect judges vested solely in the General Assembly, a governor with sufficient political power could dramatically influence the make-up of the state's judiciary. It also became clear that immediate changes to the composition of the judiciary could be achieved only by the removal of incumbent judges.

Debate over judicial elections in the Constitutional Convention of 1868 had been intertwined with discussions about the appropriate terms of judges and the power to remove judges from office. In the two decades following Reconstruction, the combination of influential governors and a legislative willingness to remove many of the vestiges of Reconstruction from the judiciary resulted in a period, arguably unmatched in the state's history, of overt political interference with judicial independence.

Political response to court decisions was not unprecedented in the state. In the 1830s, the General Assembly, displeased with a decision of the South Carolina Court of Appeals,[1] which was then the state's highest court, had simply dissolved the court. The scope of political interference in the judiciary in the years immediately following Reconstruction, however, had a far broader reach, as illustrated by four events between 1876 and 1894.

Jonathan Jasper Wright, the African-American who had argued for legislative election of supreme court justices at the Constitutional Convention of 1868, was himself elected in 1870 to the court, replacing Solomon Hoge, one of the first two associate justices on the court. Wright had been re-elected by a vote of 133-12 as recently as December 1875.[2] In 1876, however, the court was confronted with a case in which it had to decide whether Wade Hampton, the Democratic challenger in the contested 1876 gubernatorial election, had legal authority to act as governor. The court's decision would effectively end a period in which both Hampton and incumbent David Chamberlain had claimed governing authority.

Because of the terminal illness and death of Chief Justice Franklin Moses, Sr., the court at this key moment had only two justices, Wright and the more senior Associate Justice Ammiel Willard. In the face of considerable opportunity for armed intimidation from Hampton supporters, Wright originally indicated agreement with Willard, upholding Hampton's authority as governor. Wright then reconsidered before a decision was made public and filed a different opinion on the issue. Wright, however, did not attend court on the day the court's decision was made public. In his absence, Willard essentially ignored Wright's attempts to change his opinion and issued a ruling recognizing Hampton's authority to act as governor.[3]

In April 1877, Hampton called the Legislature into a special session to consider the future of Justice Wright on the court. [4] A special committee of the House was convened and, on May 11, after secret deliberations, that committee presented a resolution that Wright be impeached for

drunkenness. A second committee considered the matter, and on June 6, 1877, the House voted to impeach Wright.[5] Although the impeachment charges were politically motivated and likely without merit, Wright faced almost certain conviction in the Senate and resigned from the court later in 1877.[6]

Wright had argued passionately at the 1868 convention against life tenure for judges as in the federal system. "If there is anything in the world that would induce me to assassinate a person, it would be because that person is trampling upon the liberties of the people, and that he was placed in such a position that he could not be removed in any other way."[7] He had dismissed impeachment as an ineffective means of protecting against a bad judge, noting that impeachment of a judge "does not occur once in a century."[8] Now impeachment was the tool that had been used to force his resignation. More than a century passed before another African-American was elected to the South Carolina Supreme Court.

Wright, however, was not the only judge removed from office as Reconstruction ended. Democrats moved quickly to remove six of the eight circuit court judges who had been elected by the Republicans. Since none of the six judges were at the end of their four-year elected terms in 1877, the Democrats challenged the validity of their elections, claiming that the South Carolina Constitution required a ballot and that the judges' election *viva voce* did not meet the constitutional requirement. On January 22, 1878, the South Carolina Supreme Court agreed with the Democrats by a 2-1 vote, over the dissent of Chief Justice Ammiel Willard, making the six seats vacant.[9] Two other circuit judges, who had been elected more recently by the Democrats by secret ballot, were not affected by the court's ruling. On February 14, 1878, the legislature filled the six vacancies, re-electing two of the prior judges and electing four new judges. Judge Archibald Shaw, who had been the named defendant in the lawsuit to declare the positions vacant, was one of the two judges re-elected.

Twice in three years during the late 1870s, Democratic governors strongly impacted votes to fill vacancies on the supreme court. With the death of the first chief justice, Franklin Moses, Sr., in 1877, several candidates emerged to fill his seat on the court. One of the leading candidates was General Samuel McGowan, a veteran of the Confederate Army and a Democrat strongly supported by Martin W. Gary. Gary was a strong supporter of Hampton, closely associated with tactics used to intimidate potential Republican voters during the 1876 election.[10] The other leading candidate was Willard, then the senior associate justice on the court,

Hampton threw his support to Willard, who, though a Republican, had authored the court's ruling that recognized Hampton's authority as governor. [11] After Hampton's endorsement, the Democratic caucus agreed to support unanimously whichever candidate received the support of a majority of the caucus. After seven hours of debate, the caucus, led by Hampton supporters, narrowly chose Willard,[12] who was then elected by the full General Assembly.

Two years later, Hampton had moved to the United States Senate and been replaced as governor by William Dunlap Simpson. The General Assembly asserted in 1879 that Willard had been elected only to fill the unexpired term of Moses, not to a full six-year term as chief justice

as Willard believed.[13] Willard refused to participate in the election of a new chief justice, and the General Assembly first elected Associate Justice Henry McIver to the seat.[14] When he declined the appointment, the Legislature then elected Governor Simpson to serve as chief justice.[15] Willard's legal challenge to the election of Simpson was ultimately rejected by the supreme court in an opinion authored by McIver.[16]

Supreme court election politics and judicial independence directly collided in 1893, when Associate Justice Samuel McGowan sought re-election to a new term. Despite losing his bid to become chief justice, McGowan had been elected as an associate justice in 1879 and twice re-elected. By 1890, however, Ben Tillman had gained dominance in the Democratic Party with his election as governor. In 1891, Young John Pope, a Tillman supporter, was elected to fill a vacancy on the three-justice South Carolina Supreme Court.[17] With the expiration of McGowan's term in 1894, Tillman supporters had an opportunity to gain a 2-1 majority on the court. Of particular interest to Tillman was the expectation that McGowan would join with McIver, who had become chief justice, to strike down the Dispensary Act, a law that Tillman strongly supported.

Tillman's lieutenant governor, Eugene Blackburn Gary, was nominated to challenge the aging McGowan. Tillman could be confident of Gary's support for the Dispensary Act, without having to seek any inappropriate commitment in advance. With Tillman's support, Gary handily defeated McGowan in December 1893. McGowan's term, however, did not end until July 1894, giving him the opportunity to vote against the Dispensary Act as Tillman had expected.[18] Tillman, however, had prepared for that likelihood by having a new bill already in the Legislature, which was then challenged and upheld as constitutional by a 2-1 vote after Gary had taken the seat.[19] McGowan remains the only sitting justice to have sought re-election and been defeated. Gary went on to serve on the court for more than 32 years, including nearly 15 years as its chief justice.

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[1] *The State* ex rel.*M'Cready v. Hunt,* 2 Hill (SC) 1 (Ct. App. 1834).
[2] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, December 16, 1875, at p. 193.
[3] Ex parte *Norris*, 8 S.C. 408 (1876).
[4] In its reporting, *The (Charleston) News and Courier* described Justice Wright in highly unflattering terms and claimed that the House investigation had begun at the behest of an African-American Republican from Richland County. *The (Charleston) News and Courier*, June 8, 1877, at p.2. An earlier effort had been made in the South Carolina House of Representatives to investigate Chief Justice Franklin Moses, Sr., for possible removal from office, but that effort had ended in late 1866 when the Senate declined to take action. JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, December 11, 1876; JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, December 11, 1876.
[5] *The (Charleston) News and Courier*, June 7, 1877, at p.1.
[6] The effective date of his resignation was December 1, 1877, but the resignation was submitted to the governor several months earlier. *The (Charleston) News and Courier*, November 29, 1877, at p.1.
[7] PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA (1868), at 599.
[8] *Id.,* at 599.
[9] *State v. Shaw*, 9 S.C. 94 (1878).
[10] South Carolina Encyclopedia (Online) at https://www.scencyclopedia.org/sce/entries/gary-martin-witherspoon/.
[11] *The (Charleston) News and Courier*, April 24, 1877, at p.1; *The (Charleston) News and Courier*, May 4, 1877, at p.2.

[12] *The (Charleston) News and Courier*, May 15, 1877, at p.1; *The (Charleston) News and Courier*, May 16, 1877, at p.2.
[13] Willard's argument that he had been elected to a full term upon his predecessor's death was reminiscent of the argument used by Governor Chamberlain in 1874 to deny judicial commissions to Franklin Moses, Jr., and W.J. Whipper. Chamberlain argued that the circuit court seats to which they had been elected were not vacant, because their predecessors had been elected to full four-year terms, not merely the last two years of unexpired terms. Benjamin Ginsberg, MOSES OF SOUTH CAROLINA at 176 (The Johns Hopkins University Press, 2010).
[14] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, December 11, 1879.
[15] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, December 18, 1879.
[16] *Simpson v. Willard*, 14 S.C. 191 (1880).
[17] As created in1868, the South Carolina Supreme Court had three justices. A fourth seat was added in 1895 and a fifth seat was added in 1911.
[18] *McCullough v. Brown*, 41 S.C. 220 (1894).
[19] *State* ex rel. *George v. City Council of Aiken***,** 42 S.C. 222 (1894).

A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA
Part Five: 1895 -- A Renewed Effort to Adopt Popular Election of Judges

By the time of the 1895 Constitutional Convention, support for popular election of judges was stronger than had been the case in 1868, and traditional legislative election of judges barely survived in the new constitution. An amendment to the proposed constitution that would have provided for direct popular election of South Carolina Supreme Court justices and circuit court judges failed by only three votes.[1]

The arguments for and against legislative elections that were voiced in 1895 have changed little over the years. The main proponent in 1895 of popular election, G.W. Ragsdale of Fairfield County noted that justices elected by the legislature must, from time to time, consider the validity of legislative enactments. *The News and Courier* summarized Ragsdale's argument made at the convention on November 22, 1895. "We have then the almost absurd position of a judge declaring the work of his superior void….In all conflicts between the Legislative and judicial departments the judges should be placed so they can feel the support of the people."[2]

G.D. Tillman of Edgefield spoke against popular election. As summarized by *The News and Courier*, Tillman argued that, with popular election, "you make the Judges of those who wish to be practical politicians….It cannot be possible to have as much politics in the Legislature as among the people."[3] D.S. Henderson of Aiken added that "Any judge who must express his opinion on the stump is not fit to be a judge….It is not proper to get anything like a judicial expression before a Judge goes on the bench."[4]

The rejection of popular election of judges at the 1895 Constitutional Convention did not put the issue entirely to rest. Only two years later, efforts began in both the House and Senate to amend the new constitution to provide for popular election of judges. Senator Ragsdale revived the issue in 1897 with a proposed amendment to the new constitution,[5] and Representative Thomas H. Rainsford offered a similar amendment in 1898 in the House.[6] *The State* newspaper in Columbia favored popular election of judges,[7] and the efforts by Ragsdale and Rainsford found some traction, but there was not sufficient support in either legislative chamber to approve a constitutional amendment, and both efforts died in January 1898.[8]

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[1] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA at 635 (1895).
[2] *The (Charleston) News and Courier*, November 23, 1895, at p.1.
[3] *Id.*
[4] *Id*.
[5] JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, January 20, 1897 at p.88.
[6] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, January 12, 1898.
[7] *The State,* January 21, 1897, at p.4.
[8] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, January 21, 1898, at p.190; JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, January 14, 1898, at p.49.

A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA
Part Six: Temporary Judges -- A New Separation of Powers Question Arises

Several questions arose in 1911 over the power to fill judgeships in the event of a temporary vacancy. One potential dispute was avoided when the governor declined to fill a supreme court vacancy. The South Carolina Constitution had been amended to add a fifth seat to the supreme court beginning on July 1, 1911, but the General Assembly failed to fill the seat before the 1911 session adjourned in February. With the General Assembly not meeting again until January 1912, speculation began as to whether the governor might make a recess appointment to fill the vacant seat. Since 1868, the South Carolina Constitution has permitted executive appointment of an acting justice in the event of a vacancy, provided the vacancy does not exceed one year. Anyone elected or appointed to fill a vacancy cannot serve beyond the term of the predecessor who vacated the office.[1]

Because the seat that was vacant in 1911 was a new seat, there was no predecessor, and lawyers debated whether executive appointment was allowed in that circumstance.[2] It is not clear whether the legislature would have opposed such an assertion of authority by the governor. However, Governor Coleman Blease ended the speculation with a statement in February 1911 that he did not believe he had the authority to appoint a justice even temporarily to fill the new seat on the court, nor did he wish to have such authority.[3]

A potentially far more serious separation of power conflict arose between the judiciary and the executive regarding the appointment of lawyers as temporary special judges. Chief Justice Ira Boyd Jones advised the governor to appoint C.P. Quattlebaum as a special judge to hold court in Horry County during the illness of Judge J.C. Klugh in February 1911. Blease refused to appoint Quattlebaum or any special judge when a "disengaged" circuit judge was available.[4]

The chief justice responded with a telegram to Blease informing the governor that "My recommendation is conclusive and stands."[5] Contemporary news accounts characterized the court's response as an assertion that the court had to be "obeyed, regardless of the opinions of the governor of South Carolina."[6] Asked what his response would be, Blease responded, "I can do nothing,"[7] taking the position that the governor's power to appoint a special judge arises only when there is no disengaged circuit judge available.[8]

Blease's second argument was that the power to appoint special judges had been given to the executive, and the judiciary could not "dictate to me who I shall appoint to the Bench."[9] On February 2, he sent a letter to the chief justice stating bluntly that he would favor friends when appointing special judges. "I do not propose to appoint my enemies to office, upon the recommendation of any body, unless it be that I cannot find a friend who is competent and worthy of the position."[10]

On March 4, the court ruled that the "Governor's duty to issue a commission to the appointee of the Supreme Court or Chief Justice is purely ministerial. He has no discretion

whatever to ignore or set aside the court's recommendation and is bound to issue the commission, precisely as he would be bound to issue the commission to a judge elected by the General Assembly." [11]

Blease essentially ignored the court's order and, by late March 1911, the issue was replicating itself in other counties where Blease refused to appoint special judges to fill temporary vacancies. In refusing to follow a bar recommendation for the appointment of Ernest Moore as a special judge in Union County, Blease declared that the supreme court had tried to tell him what to do and that the supreme court had nothing to do with him.[12]

Blease forwarded a list to the chief justice with names of lawyers acceptable to Blease to serve as special judges.[13] Ultimately the dispute seems to have been resolved by the court assigning a circuit judge when available to conduct court in an affected county. When no judge was available, the governor appointed a special judge.

In January 1912, Blease submitted a lengthy defense of his actions to the General Assembly, in which he also criticized Jones' frequent use of special judges when circuit judges elected by the legislature were available.[14] In both 1911 and 1912 he asked the Legislature to eliminate the court's role in the selection of special judges, but the law remains essentially intact still today. Jones' resignation as chief justice in January 1912, [15] followed by the election of Eugene Gary as his successor, likely eased or eliminated the political tensions that had existed between the two offices when Jones was chief justice.

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[1] This provision currently is found at S.C. CONST. ART. V, SEC. 18.
[2] *The Daily (Columbia) Record*, Feb. 23, 1911, at p.3.
[3] *Id*. Several other long vacancies have occurred on the supreme court. The office of chief justice was left vacant for nearly seven months after the death of Milledge Bonham in June 1943. David Gordon Baker was not elected to fill the vacancy until the Legislature returned in January 1944. In 1966, after the death of Claude Taylor in January 1966, retired justice Lionel Legge returned to the court until the election of C. Bruce Littlejohn as an associate justice in 1967.
[4] *The (Charleston) News and Courier*, February 26, 1911, at p.2.
[5] *The State*, January 26, 1911, at p.1.
[6] *Id.*
[7] *Id.*
[8] The law to which Blease referred remains in effect as S.C. Code Ann. § 14-5-170 (1976). Earlier in Richland County, Blease had appointed a special judge despite the recommendations of the local bar and the court that a different lawyer be appointed. The Richland County impasse had ended when both men retired, and another circuit judge had presided over the court. *The State*, January 26, 1911, at p.1.
[9] Message from the Governor to the General Assembly #12, JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, February 10, 1911, at 520. Blease had questioned the constitutionality of the arrangement in a prior message to the General Assembly on February 7, Message from the Governor to the General Assembly #11, JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, February 7, 1911, but the judiciary committee response rejected his constitutional concerns. JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, February 9, 1911, at 599.
[10] *The Columbia Record*, February 2, 1911, at p.1.
[11] *State v. Davis*, 70 S.E. 417, 418–19 (S.C. 1911).
[12] *The State*, March 28, 1911, at p.1.
[13] Blease refers to the list in a later message to the General Assembly. Message from the Governor to the General Assembly #17, JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, January 10, 1912, at 54. The list was also referenced in news accounts in June 1911. *The (Charleston) News and Courier*, June 12, 1911, at p.3.

[14] Message from the Governor to the General Assembly #17, JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, January 10, 1912, at 54.
[15] Jones resigned from the Court and ran unsuccessfully against Blease for governor in 1912.

A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA
Part Seven: Reform Efforts in the Mid-Twentieth Century

The issue of popular election of judges rose again in the 1930s as Governor Olin Johnston sought to reorganize state government, subjecting various offices to public election following his unsuccessful efforts to remove legislatively elected members of the Highway Department.[1]

On January 14, 1936, Governor Johnston addressed the General Assembly and urged that the legislature place a constitutional amendment on that year's ballot providing for popular election of all judges and shortening the terms of supreme court justices. Noting the "custom now prevailing…of electing judges…and of retaining them on the bench, once they are there, for life under almost any and all circumstances," Governor Johnston argued that "the public certainly has all to gain and nothing to lose by taking the matter of electing its judges directly into its own hands."[2]

The News and Courier, which, during the 1895 Constitutional Convention, had headlined its article on the defeat of popular election of judges as "a great danger avoided," began in the 1930s to express doubts about the General Assembly's increasingly common practice of electing only its members as judges.[3] In the view of an editorial writer in 1930, "Every informed and non-political lawyer knows…that the judiciary of South Carolina has steadily and greatly deteriorated in the last twenty-five or thirty years…What if the method of legislative election no longer produces the best results?" [4] The editorial noted that only a "thin wall of tradition" prevented popular election of judges. A year later the same newspaper reiterated its previous support of legislative elections but promised "it would recede from that position were no alternative offered of protecting the courts from class domination. We can think of nothing that would be more popular."[5]

Efforts followed in 1936 and 1938 to put the issue of direct popular election of judges before the voters through a referendum. A House bill to change to election of judges died in the Judiciary Committee in 1936.[6] In 1938, a voter referendum on popular election of judges was included in a joint resolution passed by the House on February 16, 1938, addressing judicial retirement.[7] The Senate, however, rejected the joint resolution on April 28 when the resolution failed to achieve the two-thirds vote needed for a constitutional amendment referendum.[8] The Senate reconsidered its vote on May 4, 1938, and approved the joint resolution only after deleting the popular vote referendum.[9] The House agreed to the Senate amendment by a 48-42 vote on May 6,[10] ending any move toward popular election of judges at that time.

In 1966, a special committee, consisting originally of nine members and later expanded to 12, was appointed under a joint legislative resolution to study the state constitution and recommend to the legislature any changes that should be made. Two-thirds of the committee members were members of the House or Senate, and the remaining members were appointed by the governor. A working paper of that Committee supported a version of the Missouri plan for

judicial selection, with a nominating commission that would present a slate of candidates to the Governor for appointment.[11] A majority of the committee, however, favored the existing system of legislative election of judges, and the reform effort appeared in the committee's final report only as a minority position that expressed concern at leaving judicial elections "wholly in the legislative branch."[12]

A similar result occurred in January 1971, when another committee of 19 judges, legislators, and leaders of the legal profession known as the Judicial Reform Committee for the Revision of Article V of the South Carolina Constitution issued its recommendations to Governor John West and the General Assembly. A majority of the committee favored the existing system of legislative election of judges but noted that a minority favored a nominating commission, with gubernatorial appointment followed by an election to confirm the appointment. [13] Other than for the confirmation election, the Report did not mention whether direct election of judges had been considered as an alternative.

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[1] Johnston had declared resistance to his efforts to remove legislatively elected highway commissioners and appoint replacements to be an insurrection and had mobilized the National Guard to take control of the Highway Department. Ultimately his declaration of a state of rebellion and insurrection had been rejected by the supreme court as exceeding the governor's constitutional authority under the circumstances. *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (S.C. 1935).

[2] *The State*, January 15, 1936, at p.9. JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, January 14, 1936. Gov. Johnston renewed his call for popular election of judges in his speech to the General Assembly in January 1937. JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, January 14, 1937.

[3] For details regarding this practice, see *"A History of Judicial Elections in South Carolina, Part Eight."*

[4] *The (Charleston) News and Courier*, November 19, 1930, at p.4.

[5] *The (Charleston) News and Courier*, September 29, 1931, at p.4.

[6] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, January 22, 1936.

[7] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, February 16, 1938.

[8] JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, April 28, 1938.

[9] JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, May 4, 1938.

[10] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, May 6, 1938.

[11] Book IV, Proceedings of the Committee to Make a Study of the Constitution of South Carolina (1895) August 25, 1966-December 29, 1967 (Working Paper #8 at p.13).

[12] Final Report of the Committee to Make a Study of the Constitution of South Carolina (1895) August 25, 1966-December 29, 1967, at 10 (June 1969).

[13] RECOMMENDATIONS BY THE JUDICIAL REFORM COMMITTEE FOR THE REVISION OF ARTICLE V OF THE SOUTH CAROLINA CONSTITUTION OF 1895 (Inst. of Jud. Admin. January 1971), at 8.

A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA

Part Eight: Merit Selection

Through much of the Twentieth Century, legislative election of judges resulted in a statewide judiciary composed largely of former legislators, many of whom were serving in the legislature at the time of their election to the bench. For many years, supreme court justices had little or no prior judicial experience. When Daniel Edward Hydrick was elected to the court as an associate justice in 1909, filling the seat of Ira Jones, who had become chief justice, he was the first sitting circuit judge elected to the court. Two of the next three justices, Richard Cannon Watts and George W. Gage, were also elevated from the circuit court bench. Between Gage's election to the court in 1914 and J. Rodney Moss' election in 1956, however, only Milledge Bonham and G. Dewey Oxner were elected to the supreme court from the circuit court. In that 42-year period, ten other associate justices were elected to the court. Of that ten, nine were members of the House or Senate at the time of their election to the court, and one was a former member of both chambers.

Beginning with Moss, 20 of the last 22 associate justices have had experience on the circuit court bench. Associate Justice Kaye Gorenflo Hearn was never a circuit court judge, but had served on the family court bench and as chief judge of the South Carolina Court of Appeals. Only Chief Justice Jean Hoefer Toal had not served on the bench prior to her election to the South Carolina Supreme Court in 1988.

By 1975, the newly unified South Carolina Bar began to advocate for some form of merit screening of judicial candidates. Toward that goal, the Bar in May 1975 created a Judicial Merit Selection Committee, which had no formal role in the process of judicial selection but was intended to make three nominations for each seat, with those recommendations to be forwarded to the General Assembly. The committee had 17 members, including nine non-lawyers selected by the governor, one from each of the state's six congressional districts at the time and three at-large. The lawyers were selected by the president of the Bar. Two of the Bar appointees were a member from each of the Senate and House Judiciary Committees.[1]

The first of several significant, and binding, changes in the legislative election of judges came on April 23, 1975, with passage of a law to create a joint legislative committee to review the qualifications of judicial candidates.[2] The Committee to Investigate Candidates for the Judiciary consisted of four members from each of the Senate and the House. It was required to conduct public hearings on every judicial candidate, unless a candidate was unopposed and the committee found no other reason to have a hearing.

Even after creation of a screening committee, concerns continued that candidates could obtain pledges of support, including from members of the committee, prior to the committee's consideration of the candidates. In 1990, therefore, the legislature banned the practice of a judicial candidate soliciting, or a legislator offering, a pledge of support prior to the judicial screening committee completing its evaluation of candidate qualifications.[3]

Given the frequency with which legislators were elected to the bench, pressure continued even after these initial changes for a greater commitment to merit selection. From 1930 through 1980, the General Assembly elected 63 different circuit court judges. Of that number, according to historian Barry E. Hambright,[4] only nine had no prior service in the Legislature, and one of those nine had served as governor. Of the 54 with legislative service, 44 were current legislators at the time of their election to the circuit court.

From 1981 through 1996, the frequency of elections of current or former legislators to the circuit court bench diminished, but the practice remained common. In that time period, 15 of the 50 new circuit court judges elected were sitting legislators at the time of their elections, and another nine were former members of either the House or Senate. Of the nine who were former members when elected to the circuit court, one was a judge of the family court who had been elected to that position while serving in the legislature.

In April 1995, Governor David Beasley, along with the Speaker of the House of Representatives, David Wilkins, South Carolina Attorney General Charlie Condon, and other Republican legislators proposed a plan for gubernatorial appointment of judges similar to the "Missouri Plan." The governor argued that reform was needed given judicial elections in early 1995 that he described as evidence of a "failed system." [5] All of the judicial candidates elected in 1995 had been unanimously found to be qualified by the Joint Legislative Committee for Judicial Screening. The committee, however, had expressed concerns about the legal knowledge and ability of one candidate who was elected and about the trial experience of another.

Beasley's proposal set in motion a year-long legislative negotiation that led ultimately to creation of the current system of merit selection, but which left the election power unchanged in the General Assembly. Speaker Wilkins and 36 co-sponsors initially introduced a bill to provide for gubernatorial appointment of judges.[6] As first proposed, House Bill 3961would have created an 11-member commission to nominate five candidates to the governor. The governor would have been required to appoint a judge from that list of nominees or ask for a new list. Incumbent judges would have been reappointed unless at least eight of the 11 members of the commission opposed their reappointment.

In response to the push for gubernatorial appointment, House Democrats led by Jim Hodges, proposed a compromise merit selection commission designed to eliminate unqualified candidates but which would leave the vote with the General Assembly.[7] Separate bills were introduced by Democrats in the House to create a judicial merit selection panel [8] or to provide for popular election of circuit court judges.[9] On May 30, 1995, the House Judiciary Committee proposed a bi-partisan amendment to H.3961, which retained for the General Assembly the power to elect judges, but reformed the nominating system through creation of a nominating commission. The revised bill was adopted by the House and sent to the Senate.

On April 4, 1996, the Senate amended H.3961 in an effort to change the legislative voting system to give the smaller Senate an equal say in the election of judges.[10] The Senate amendment would have required judicial candidates to receive a majority of votes in each

chamber in order to be elected. The Senate amendment, however, failed to gain the approval of the House and was not included in the final legislation ratified in May 1996.

The reforms passed in 1996 were contingent upon voter approval of a constitutional amendment, which occurred in November 1996. The amendment took effect in 1997, creating the current Judicial Merit Selection Commission (the "JMSC"). The JMSC is empowered to nominate up to three candidates per judicial vacancy and the legislature can select only from among the candidates nominated by the JMSC. The Speaker of the House appoints five members of the JMSC, three of whom must be members of the House of Representatives and two of whom must be members of the public. Three members are appointed by the chair of the Senate Judiciary Committee and two are appointed by the president *pro tempore* of the Senate. As with the House appointees, three of the Senate appointees must be members of the Senate and two must be members of the public.[11]

The JMSC interviews all candidates and receives input from the public and the Bar, along with comprehensive disclosures submitted by the candidates regarding their legal experience and their financial stability.

In 2010, the JMSC's authority as the nominating body was tested after it found an incumbent family court judge "unqualified" and did not renominate her for the seat she had held for 16 years. There were no other candidates for the position, meaning that the General Assembly could not fill the seat. The JMSC's finding that the incumbent was unqualified was based upon a single case in which an unsuccessful party had argued that the judge should have recused herself. The judge sued the JMSC, challenging its composition, but the supreme court upheld the Legislature's power to include sitting lawmakers on the JMSC.[12] The court also declined to rule upon a separation of powers argument raised by the plaintiff. The following year, the vacant seat was filled with the election of a new judge.

Since the creation of the legislative screening committee in 1975 and subsequently the JMSC, a handful of incumbent judges have withdrawn applications for re-election when faced with complaints that threatened their re-election prospects. As in 2010, the JMSC in 2021 found an incumbent judge unqualified, prompting the incumbent's withdrawal from what had been an uncontested circuit court race. Another sitting circuit court judge, facing negative allegations, withdrew her application for re-election in 2017 prior to any formal action by the JMSC. In 2009, an incumbent circuit court judge requested that his reelection vote be held over until the next session of the General Assembly after complaints were aired following the JMSC screening regarding several sentencing decisions that he had made. He subsequently retired, and a new judge was elected to the seat the following year. In 1992, after a sitting circuit judge had been publicly reprimanded for a violation of the Code of Judicial Conduct, seven of eight members of the screening committee found the judge qualified for re-election, and the judge was re-elected. In 1982, an incumbent Ninth Circuit judge retired for medical reasons after initially seeking re-election, after controversy arose over the judge's possession of an illegal slot machine.[13] In 1988, his successor as circuit court judge also faced significant controversy about his qualifications to continue on the bench. Ultimately, with multiple opponents, the judge withdrew

from the race.[14] Several other judges have reportedly decided not to even apply for re-election when faced with substantial concerns about their performance on the bench.

Since 1900, most sitting judges seeking another term have been re-elected without a contested floor vote in the General Assembly. Between 1900 and 1925, eight incumbent circuit court judges faced contested re-elections in the General Assembly, and in seven of those cases, the incumbent prevailed[15]. An incumbent circuit court judge last lost a re-election vote in 1905, when D.E. Hydrick defeated seventh circuit Judge D.A. Townsend in a three-way race. Since 1925 no incumbent circuit court judge has faced opposition at the time of a re-election vote.

Perhaps the rarest of exceptions to the norm of uncontested judicial re-elections was a contested supreme court race involving two sitting justices, which occurred in 2014. Senior Associate Justice Costa M. Pleicones challenged incumbent Chief Justice Jean Toal, as she sought re-election with less than two years remaining before her mandatory retirement. Toal prevailed by a 95-74 vote,[16] and Pleicones was elected chief justice a year later to succeed Toal upon her retirement. Toal's re-election was the first supreme court election since 1898 in which an incumbent justice received less than a unanimous vote.[17]

Historically, seniority on the court has been a key factor in the selection of a chief justice. Every chief justice since the third chief justice, William Dunlap Simpson, who took office in 1880, has served on the court as an associate justice prior to being elected chief justice. Simpson, who was governor at the time of his election, was selected only after the senior associate justice, Henry McIver, declined election to the position.[18] The first chief justice, Franklin J. Moses, Sr., is the only other chief justice not to have served also as an associate justice.

On only three other occasions has the senior associate justice at the time of a chief justice vacancy not been elected chief justice. In 1909, Eugene B. Gary was about 18 months senior to Ira Boyd Jones on the Court, but Jones defeated Gary in the race to become the sixth chief justice. Gary, however, became the seventh chief justice in 1912 and served longer in that position than any other chief justice until Jean Hoefer Toal. In 1931, Eugene S. Blease was five years junior to Thomas P. Cothran but defeated Cothran in the race for chief justice.[19] Cothran never became chief justice. In 1940, senior Associate Justice Jesse Francis Carter stepped aside in favor of 85-year-old Milledge Lipscomb Bonham. Carter was in ill health when the next chief justice vacancy occurred in 1943 and died before it was filled.

D. Gordon Baker and Edward Ladson Fishburne were sworn in as associate justices on the same day in 1935, but Baker was considered senior by virtue of having been sworn in first. Baker subsequently served as acting chief justice in 1943-1944, prior to his election as chief justice following the death of Bonham. The importance of seniority resulted in an unusual round of voting in 1961. With the retirement of Associate Justice Lionel Kennedy Legge scheduled for July 1961, J. Woodrow Lewis was elected by the General Assembly on February 15, 1961, to fill Legge's seat. On February 20, however, Chief Justice Taylor Stukes died unexpectedly, and on February 23, Associate Justice Claude Ambrose Taylor was elected as the new chief justice, creating another associate justice vacancy. Lewis then announced that he would forego Legge's

seat and run for Taylor's former seat, which would allow him to qualify immediately rather than having to wait for Legge's retirement. He was elected unanimously, and Thomas Patrick Bussey eventually filled Legge's seat. With the seniority afforded by his earlier qualification for Taylor's former seat on the court, Lewis later became chief justice instead of Bussey.

With the creation of the JMSC and the limitation to three nominees, multiple-ballot judicial elections in the General Assembly have become rare.[20] In the two years prior to creation of the JMSC, three multiple-ballot appellate court elections had occurred. On March 21, 1995, E.C. Burnette III defeated Pleicones and Ralph King Anderson, Jr., in two ballots.[21] That same day, Kaye Gorenflo Hearn also prevailed on a second ballot over H. Samuel Stilwell and Tom J. Ervin, to fill an open court of appeals seat.[22] A year later, in February 1996, Ralph King Anderson, Jr., required three ballots before defeating Wallace K. Lightsey by a vote of 83-81 to fill another court of appeals seat.[23] Since 1997, no appellate court races and only two circuit court elections have required multiple ballots. Circuit court races in 2005 and 2006 each required two ballots, resulting in the elections of Thomas Russo[24] and Carmen Mullen.[25]

With a limited field of nominees for each position after screening, it has become common practice for nominees to withdraw when facing certain defeat by another candidate, reducing the field of JMSC nominees from which the legislature can choose. Thus, in many instances, only one nominee remains by the time a vote is taken in the General Assembly. Because the Legislature is not required to approve any of the nominees, an occasional practice has developed of a legislator demanding a recorded vote for or against the sole remaining candidate. In 1990, a member of the General Assembly, James Cleveland "Tee" Ferguson was elected without opposition to fill a vacant circuit court seat and received a single "no" vote.[26] In 1994, an unopposed incumbent judge, Edward B. Cottingham, received 45 negative votes despite having been found qualified by a unanimous screening committee.[27] The legislative Women's Caucus placed a statement in the Journal of the House expressing concern over Judge Cottingham's level of sensitivity to victims of crime, especially women.[28] Since 2016, other unopposed judicial candidates have received as many as 20 votes in opposition to their election.

Alongside creation of the JMSC, an equally impactful provision of the 1997 constitutional amendment was the addition of a requirement that no one could file an application to become a judge elected by the General Assembly while serving in the General Assembly. By statute, a former member of the Legislature is not eligible for election as a judge until at least one year after the candidate leaves the General Assembly.[29]

A statute passed in 1937 already prohibited a sitting legislator from being selected to fill a position created during that legislator's time in office.[30] It was that law which was cited by the South Carolina Supreme Court in a unanimous opinion in 1979 invalidating the elections of four of the five judges to the newly created intermediate South Carolina Court of Appeals because they had been members of the General Assembly at the time of their selection.[31] The 1997 amendment effectively extended the prohibition to prevent a sitting legislator from filling any judicial seat. In 1996, the Legislature also banned any trade by a legislator, including a pledge to vote for a another candidate or for proposed legislation, in exchange for a vote for a judicial candidate.[32]

Since the beginning of 1997 and the enactment of the prohibition on election of a sitting member of the Legislature, 78 new circuit court judges have been elected, of whom only five were former legislators. The direct pipeline that once existed between the legislature and the circuit court bench ended, although there continue to be instances of family members of legislators being elected to the bench.

Since late 2022, the legislative election of judges has again received prominent news coverage,[33] with merit selection tied also to diversity concerns, especially on the supreme court and the circuit courts. In 1976, Ernest A. Finney, Jr., became the first African-American elected to the circuit court. In 1980, Richard E. Fields joined him on the bench. In 1985, Finney became the first African-American associate justice on the South Carolina Supreme Court since Jonathan Jasper Wright, and in 1994, he was elected by the General Assembly as the state's first African-American chief justice. In 2016, Donald Beatty was elected as the state's second African-American chief justice. However, in 2023, after the retirement of Allison Lee from the circuit court bench, only 7 of the 59 justices and judges serving on the state appellate and circuit courts, and nine of 58 family court judges, are African-American.

In 1988, Jean Toal became the first woman elected to the South Carolina Supreme Court, and she was joined on the court in 2009 by Kaye G. Hearn, who had previously served as the first female chief judge of the South Carolina Court of Appeals. Toal served as the first female chief justice from 2000-2015, succeeding Ernest Finney in that office. In 1988, the same year that Toal was elected to the supreme court, Carol Connor became the first woman to serve as a circuit court judge. Connor later served also on the court of appeals.

With Hearn's retirement from the court in 2023 and the subsequent election of Garrison Hill as her successor, the supreme court returned to being an all-male court. Of the eight members of the court of appeals, half are female. Ten of 46 circuit court judges are female. Of the 58 family court judges, 31 are female.

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[1] *The State*, July 16, 1975, at p. 7-B.
[2] 1975 S.C. Acts, No. 119.
[3] S.C. Code Ann. § 8-13-930.
[4] Barry Edmond Hambright, THE SOUTH CAROLINA SUPREME COURT (Doctoral Dissertation Completed 1981) at 148-152 (available at the University of South Carolina School of Law Library).
[5] *The State,* April 7, 1995, at p.A-1.
[6] H.3961, JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, April 6, 1995, at p. 2312.
[7] *The State,* April 7, 1995, at p.A-1.
[8] H.3986, JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, April 11, 1995, at p. 2338.
[9] H.4004, JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, April 12, 1995, at p. 2369.
[10] JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, April 4, 1996.
[11] S.C. Code Ann. § 2-19-10 (B).
[12] *Segars-Andrews v. Judicial Merit Selection Commission*, 691 S.E.2d 453 (S.C. 2010).
[13] *The (Charleston) News and Courier*, April 17, 1982, at p.1-B.
[14] Lawrence E. Richter, Jr., retired as a circuit court judge in 1988 after initially filing for re-election. His retirement came after a prominent lawyer alleged that the judge had been associated with illegal drug use, claims that the judge denied. Richter was critical of the screening process, taking issue with public comments made by the chair of the legislative screening committee regarding the judge's qualifications and claiming that a committee

witness affidavit regarding the judge's character had been received by the media before the judge was even aware of its existence. *The (Charleston) Evening Post*, May 4, 1988, at p. 2-B.

[15] The seven who successfully withstood floor challenges to their re-elections were D.A. Townsend in 1901, James Aldrich and J.C. Klugh in 1906, J.W. DeVore in 1916, I.W. Bowman in 1918, James E. Peurifoy in 1920, and R.W., Memminger in 1925.

[16] JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, February 2, 2014, at p. 667.

[17] Incumbent justices seeking re-election had only twice before received less than unanimous support. On January 18, 1898, incumbent Chief Justice Henry McIver was re-elected by a vote of 98-51 against George S. Mower. In1893, incumbent Associate Justice Samuel McGowan was defeated by Eugene Blackburn Gary

[18] McIver later was elected chief justice in 1891 after Simpson died in office in 1890.

[19] Chief Justice Bruce Littlejohn later said that he had been told that, as a consequence of Blease's decision to run against Cothran, "unpleasantries" arose with regard to Blease's relationship with other members of the Court, which contributed to Blease's eventual resignation as chief justice. Bruce Littlejohn, LITTLEJOHN'S HALF CENTURY AT THE BENCH AND BAR (1936-1986) 159 (S.C. Bar Fdn. 1987); Bruce Littlejohn, LITTLEJOHN'S SOUTH CAROLINA JUDICIAL HISTORY 1930-2004, at 18-19 (Joggling Board Press 2005). However, contemporaneous newspaper accounts gave no indication that Blease's resignation was prompted by problems with other justices.

[20] In 1982, well prior to creation of the JMSC, the General Assembly had conducted eight ballots before electing Frank P. McGowan, Jr., to a vacant circuit court seat.

[21] JOURNAL OF THE SENATE, STATE OF SOUTH CAROLINA, March 21, 1995, at p. 1082.

[22] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, March 21, 1995.

[23] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, February 14, 1996. Lightsey's narrow defeat is not the closest in recent years. For example, in 2007, Benjamin H. Culbertson defeated Larry Hyman, Jr. by a vote of 80-79 to fill a vacant seat on the Fifteenth Circuit. Tanya A. Gee was elected to an at-large seat in 2015 by a vote of 83-80.

[24] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, May 25, 2005, at p. 4123.

[25] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, February 15, 2006, at p. 1043.

[26] A year later Ferguson was suspended and eventually resigned after criminal convictions under Operation Lost Trust related to his activities while still in the legislature, as well as a plea of no contest to drug charges.

[27] Despite the 45 "no" votes, Judge Cottingham was re-elected with 105 votes in favor.

[28] JOURNAL OF THE HOUSE OF REPRESENTATIVES, STATE OF SOUTH CAROLINA, February 2, 1994, at p. 1366.

[29] S.C. Code Ann. § 2-19-70 (A). The disqualification period is four years for former legislators seeking election as a judge on the Administrative Law Court. S.C. Code Ann. § 1-23-525 (1976).

[30] Code Section 2-1-100 provides as follows:

> No Senator or Representative shall, during the time for which he was elected, be elected by the General Assembly or appointed by any executive authority to any civil office under the dominion of this State which shall have been created during the time for which such Senator or Representative was elected to serve in the General Assembly.

[31] *State ex rel, Riley v. Martin***,** 262 S.E.2d 404 (*per curiam*)(S.C. 1980),

[32] 1996 S.C. Acts, No. 391, Part I, Section 1.

[33] *The (Charleston) Post and Courier*, December 18, 2022, at p.A-12; several bills, including H.3006 and H.3022 were introduced in the House of Representatives to require, among other changes, that lawyers appearing before judges not participate in judicial screening on the JMSC. The bills remained in committee at the end of the legislative session.

A HISTORY OF JUDICIAL ELECTIONS IN SOUTH CAROLINA
Part Nine: Impacts of a Growing Judiciary

In 1913 and again in 1916, lawyers who had not sought judgeships were elected by the South Carolina General Assembly to the circuit court. Both William L. Glaze[1] and George Warren[2] subsequently declined to serve. Such moments as these cannot be repeated under today's merit selection nominating procedures. The only candidates are those who affirmatively seek election. Many apply multiple times before they are elected, or even nominated. For those who pursue election to a judicial seat, controversy arising out of a revelation during the merit selection process or otherwise can derail ambitions quickly. An unqualified rating from the JMSC ends a campaign for judicial office.

In concept, merit selection is designed to advance only the most qualified candidates for judicial office. Even with limited nominations, however, the General Assembly must dedicate increasing amounts of time each year to judicial selection. The number of judges elected by the General Assembly has increased rapidly in the past half-century with the growth of state courts. During a five-year period from 1916-1920, the General Assembly elected a total of 16 judges, three on the supreme court and 13 for the circuit courts. During a similar five-year period fifty years later, between 1966 and 1970, the number of judges elected had slightly more than doubled to 33, including three supreme court justices and 30 circuit judges.

In 1973, South Carolina moved to a unified court system, abolishing old county courts in 1979, enlarging the number of circuit courts, and, in 1977, creating the family courts. The South Carolina Court of Appeals began its work in 1983, and the Administrative Law Court followed in 1993. As a result, during the five-year period of 2016-2020, the General Assembly elected 133 judges. Thus, the average number of judicial elections in the General Assembly grew in 100 years from 3.2 per year to 26.6 per year. In Fall 2021 alone, the JMSC screened candidates for 37 seats.[3]

Although many judicial elections involving incumbent judges are uncontested, vacant seats often draw large numbers of applicants, all of whom must be screened. Whatever criticisms may be raised against legislative election of judges, the current system does provide a coordinated process for merit review and nomination. In whatever manner judges may be selected in the future, if merit selection is to continue, the number of candidates requiring review will necessitate the expenditure of significant resources to provide comprehensive and effective merit screening.

Ultimately, the selection of judges, even after merit review, is inherently a political decision. The principal variant in the different selection methods that have been proposed over the years in South Carolina and across the nation lies in who holds the ultimate decision-making authority in that political process. Despite periodic efforts to change the South Carolina system over nearly 250 years, today that authority remains undisturbed in the hands of the General Assembly.

[1] *The Columbia Record*, February 1, 1913, at p.3.
[2] *The Columbia Record*, February 17, 1916, at p.1.
[3] Judicial Merit Selection Commission's Report of Candidate Qualifications (January 13, 2022) available at .https://www.scstatehouse.gov/JudicialMeritPage/2021-Draft%20Report-DRAFT.pdf.