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FLORIDA'S JUDICIAL MERIT SELECTION AND RETENTION SYSTEM:
THE BETTER ALTERNATIVE

Leander Shaw, Jr.

I. INTRODUCTION

FLORIDA currently acquires its judges through two methods—election and appointment. In 1976 the voters amended the Florida Constitution, removing the state's appellate judges from the competitive election process in favor of a system of merit selection and retention. Trial judges remained subject to competitive elections.

Whenever a vacancy occurs on the Florida Supreme Court or a district court of appeal (DCA), it is filled through the process of merit selection. A judicial nominating committee composed of lay citizens and lawyers presents a list of at least three qualified nominees to the Governor. The Governor then selects the nominee and appoints him or her to serve a term of at least one year, subject to an initial merit retention review in the next general election. In this election, voters decide whether to retain the justice or judge for an additional term by simply answering "Yes" or "No" on the ballot. This process repeats itself every six years until the judge retires or receives more "No" than "Yes" votes.

Circuit court judges are normally elected for terms of six years and, to retain their positions, must run for reelection every six years in a competitive election. County judges are elected for terms of four

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* Justice, Florida Supreme Court.
1. FLA. CONST. art. V, §§ 10, 11.
3. FLA. CONST. art. V, § 10(b).
4. Id. § 11(a).
5. Id. § 20(5).
6. Id. § 11(a).
7. Id. §§ 10, 11; cf. U.S. CONST. art. II, § 2, cl. 2 (the President "with the Advice and Consent of the Senate" appoints "Judges of the supreme Court, and all other Officers of the United States").
8. FLA. CONST. art. V, § 11(a).
9. Id. § 10(a); see also FLA. STAT. § 105.041(2) (1991).
10. FLA. CONST. art. V, § 10(a).
11. Id. § 10(b).
years and run in a like manner. If a vacancy occurs in either judicial position before the end of a term, the vacancy temporarily is filled by way of the merit selection process.

II. JUDICIAL MERIT SELECTION AND RETENTION: A POPULAR POSITION

The merit selection and retention process has gained considerable support in Florida and across the nation. As a practical matter, the majority of Florida judges reach the bench by virtue of the Governor filling unexpired terms, i.e., merit selection. The Florida Bar and most major newspapers in the state have spoken out in favor of merit selection and retention. Both the American Bar Association and the American Judicature Society have gone on record favoring the process. Ben F. Overton, Florida Supreme Court Justice, and Sandy D’Alemberte, immediate past president of the American Bar Association, have campaigned vigorously in favor of merit selection and retention of trial judges. A majority of the states, and the District of Columbia, now select all or a portion of their judges through the merit selection process. United States Supreme Court justices and federal circuit and district court judges are appointed.

III. JUDICIAL ELECTIONS VERSUS MERIT SELECTION AND RETENTION: PROS AND CONS

Despite the national popularity of merit selection and retention, this system of selecting judges has not gone unchallenged, and in Florida it

12. Id.
13. Id. § 11(b).
15. THE FLORIDA BAR, MERIT RETENTION AND SELECTION 64, 65 (Aug. 1992) ("The Florida Bar’s position in recent years has been to extend to the trial bench the existing constitutional provisions for merit selection and retention that apply exclusively to appellate level judges.").
16. Id. at 64-65, 69.
17. See Brian Dickerson, Selection of Judges Is Put on Trial, MIAMI HERALD, Feb. 5, 1984, at 1D (quoting Justice Overton as supporting merit retention for trial judges); Clay Hathorn, Select Judges By Merit: President-Elect Supports Judicial Election Reform, 77 A.B.A. J. 131 (Apr. 1991) (quoting D’Alemberte as "absolutely appalled at the thought of selecting judges through slick media campaigns").
18. THE FLORIDA BAR, supra note 15, at 70 ("37 states and the District of Columbia use merit systems. No state that has chosen the merit system has ever given it up.").
19. U.S. CONST. art. II, § 2, cl. 2; see also Thomson v. Robb, 328 S.E.2d 136 (Va. 1985) (federal circuit and district judges are among the "other Officers of the United States" required to be nominated by the President with the advice and consent of the Senate).
has been the source of considerable controversy and debate. Those favoring this system argue that the weeding-out process of the judicial nominating commissions results in the stronger candidates being presented to the Governor, who in turn appoints from this select group. Thus, in theory, the appointment process produces the most qualified judges. Advocates of this process view competitive elections as little more than beauty contests encompassing a feverish grasp for name recognition. They point to Carl Hiaasen's article in *The Miami Herald* as illustrative:

The billboards and bus benches shout the news: Soon it will be time to go to the polls and elect our judges.

What a joke.

All around Florida, circuit and county judges already are out pressing the flesh, leeching campaign contributions from the very attorneys who bring cases before them. It's as close to naked extortion as you can get, but don't blame the judges.

It takes loads of money to run a political race. If you're a candidate for a judgeship, the logical place to solicit is law firms because (a) lawyers have the dough and (b) they're the only ones who have the remotest idea who you are.

The public, in most instances, hasn't got a clue.

The average voter walks into the booth and picks a name that looks distinguished or vaguely familiar. He hasn't the vaguest notion of whether or not the candidate is qualified to sit on the bench. Without reading the small print, he couldn't even tell you whether the vacancy is in criminal or civil court, county or circuit.

Unless a judge recently has been involved in a steamy scandal or a high-profile criminal trial, he or she remains largely anonymous to everyone but courthouse regulars. By the time the primary rolls around . . . most people will be taxed even to recall the name of the man who sentenced Miami policeman William Lozano . . .

The election process is not only shallow but tainted. It rewards the candidates who can afford the best billboards—in other words, those able to squeeze the most money out of lawyers. When the same lawyers later appear in that judge's courtroom, we are supposed to believe that the judge's actions will not be swayed by the memory of political generosities, or lack thereof.

The concept of "selling" judges is tricky because they don't campaign like county commissioners or congressmen; the nuances of someone's judicial record can't be compressed into a snappy 10-second sound bite. Judges can't even take a public stand on issues; they are forbidden by a code of ethics.

So what can they talk about on the political trail? Absolutely nothing of substance. Name recognition is everything; billboards,
balloons, blarney. Typically we are better informed about our choice of stick deodorant than our choice of judges.\textsuperscript{20}

With such a negative picture of competitive judicial elections, why has the merit selection and retention process not been more readily accepted? Even proponents of merit selection and retention acknowledge that it does not completely remove politics from the process and, once the judge is forced to take to the campaign trail, the judge is more or less relegated to traditional campaign practices. Any judge who has been forced into a merit retention campaign can attest to the fact that once you have taken to the hustings, there is precious little difference. The judge who made the following observation could have been running in either a competitive election or a merit retention race: "Running for judge was the most humiliating experience of my entire life . . . having to raise money and accept money from attorneys, constitutes in my opinion, the greatest evil in our judicial system."\textsuperscript{21} These are strong words, but I suspect they come close to echoing the sentiment of any judge who has been forced to take to the campaign trail for whatever reason. Perhaps public financing of judicial campaigns is an idea whose time has come.

Those who argue in favor of competitive elections are quick to point out the fact that many of the abuses that accompany competitive elections can be found in retention races. They also argue that the merit selection and retention process is a denial of the people's right to elect their judges and to "throw the rascals out" through the traditional election process. They relish the idea of two candidates vying for the same office, presenting their credentials to the public, and soliciting public support through customary campaign practices. They view this as a preservation of the people's right to elect judges, to rid themselves of incompetent judges, and to discipline judges who have misbehaved in office. As a practical matter, this ideal is more illusion than fact, for few incumbent trial judges are challenged\textsuperscript{22} and judicial corruption is effectively dealt with through the Judicial Qualifications Commission.\textsuperscript{23}

\begin{itemize}
\item 20. Carl Hiaasen, Judicial Race Is an Exercise in Extortion, MIAMI HERALD, Feb. 28, 1990, at 1B.
\item 22. For example, of the six circuit judge positions in the second judicial circuit up for election in 1990, only one of the six incumbents faced opposition in the primary. None faced general election opposition. All were reelected. See General Election Returns Nov. 6, 1990, Fla. DEP't of STATE, DIV. of ELECTIONS, at 58, 59 [hereinafter "1990 Returns"].
\item 23. FLA. CONST. art. V, § 12 (creating the Judicial Qualifications Commission (J.Q.C.)); see THE FLORIDA BAR, supra note 15, at 70 ("Since 1966, all Florida judges removed from office by the J.Q.C. originally reached the bench through popular elections.").
\end{itemize}
The public's will is not frustrated by a merit retention race. A simple "No" vote by a majority of the electorate removes the judge from office as effectively as a competitive election. The problem is more a lack of interest in, or ignorance of, the candidate than an inability to vote the judge out of office. This is borne out by the drop-off of votes in judicial races, be they merit retention or competitive elections.

I suspect that most Florida lawyers and judges agree that a problem exists in the election and retention of judges, but they are unable to agree on the nature and extent of reform. Everyone agrees that the patient is sick, but no one can quite agree on the illness or the cure. The point is that a good case can be made for or against either competitive or merit retention elections.

There is further disagreement over whether the appointment system has facilitated the access of minorities to the bench. Until recently, the judicial nominating commissions were dominated by white males who tended to submit to the governor names that reflected the makeup of the commissions. The minority community perceived that the makeup of the commissions kept minorities off the bench. The reality is that in Florida more minorities have been appointed to the bench than have been elected, notwithstanding the composition of the commissions. Nevertheless, the number of minority judges remains disproportionately low and Governor Lawton Chiles and The Florida Bar, sensitive to this imbalance, have recently appointed more Afro-Americans, Hispanics, and women to the nominating commissions. In the last legislative session, the Florida Black Legislative Caucus de-

24. For example, in 1990, voters cast 3.5 million votes in the race for governor, while casting only 3.1 million votes in my merit retention election, a drop-off of 11.4%. 1990 Returns, supra note 22, at 43, 72. In the last presidential election year, 1988, Floridians cast 4.3 million votes for president, but only 3.3 million and 3.2 million in the merit retention races of Justices Stephen Grimes and Gerald Kogan, a drop-off of 23.2% and 25.6% respectively. General Election Returns Nov. 8, 1988, Fla. Dep't of State, Div. of Elections, at 27, 28, 48 [hereinafter "1988 Returns"].

25. Steven Davis et al., Judicial Nominating Commissioners: A National Profile, 73 Judicature 328 (Apr.-May 1990) ("While there have been slight increases in the numbers of minority commissioners, as a group, judicial nominating commissioners remain overwhelmingly white."); see also Judicial Nominating Commissions—The Need for Demographic Diversity, 74 Judicature 5 (Feb.-Mar. 1991) ("While white males predominate among commissioners, a profile . . . documents increasing participation by women and minorities.").

26. John L. Remsen, Is Merit Selection and Retention a Good Idea?, Fla. Bar News, Jan. 15, 1990, at 1, 9 ("[r]ecords of the State Court Administrator reveal that more blacks (19 of 23) and women (41 of 71) were appointed rather than elected . . . ."); see also The Florida Bar, supra note 15, at 70 ("[a] study by the Fund For Modern Courts, Inc., published in 1986, shows that merit selection of judges (17.1%) and executive appointments (17.9%) provide a higher percentage of women and minority judges than judicial election (11.7%), partisan election (11.1%), non-partisan election (9.4%), or legislative election (6.9%).").
feated the most recent effort to usher in merit selection of trial judges. In light of recent reform, the Caucus should be more inclined to support merit retention in the future. I say this notwithstanding the fact that the restructuring of the commissions is still seen by some as an effort to avoid or circumvent the impact of the Voting Rights Act upon judicial elections.

IV. MERIT SELECTION AND RETENTION: THE RIGHT CHOICE FOR FLORIDA?

The hard question abides: Is merit retention a good idea for the Florida trial bench? My own experience in three merit retention races prompts the observation that merit retention elections share many of the negative features of competitive elections. And, although I favor the former, it is not a happy choice. I would personally prefer lifetime appointment of judges during good behavior. It works for federal judges and I see no reason why it would not work at the state level. Having said this, I am realist enough to accept the fact that Florida voters are unlikely to give their judges lifetime tenure. Therefore, the most that realistically can be hoped for is some modification of the current merit retention process that would maintain the independence of the judiciary by insulating judges from the need to engage in campaigning to the extent that it is now necessary. If it is determined that modification of the present retention process is unacceptable to the public and I am left with the choice between competitive elections versus merit selection and retention as we now know it, I opt for the latter, much on the rationale of Sir Winston Churchill who, when comparing democracy to other forms of government, observed:

Many forms of government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.

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28. One example of such a modification would have judges appointed for a 12-year term. An incumbent judge willing to be reappointed would submit his or her name to the Judicial Nominating Commission for recommendation to the governor who would then reappoint the incumbent for another 12-year term. A judge found to be unfit or unqualified could be denied recommendation upon an affirmative vote of at least two-thirds of the commission members.
My enthusiasm for judges facing elections every four or six years is further dampened by the emergence of single-interest groups that organize themselves for the express purpose of defeating judges on the basis of opinions with which these groups disagree. Judges in northern Florida recognize their vulnerability and are apprehensive that these groups will, in time, be successful in removing entire slates of judges from office by vigorously campaigning against one or two. Not being bound by the Judicial Code of Conduct, or for that matter any other code of ethics, these groups misrepresent facts, misconstrue opinions, and distort the judge's record, while concealing their true purpose for wanting the judge removed. Such organized opposition is extremely difficult for a judge to defend against because of lack of candor and truthfulness. District court of appeal judges unfortunate enough to find themselves on the ballot with a supreme court justice who is under attack may be swept out with that justice. Even faced with this prospect, the DCA judges are unable to campaign and must remain mute unless they themselves have drawn active opposition.

The result is that the judicial careers of these judges are irresponsibly threatened. For example, in my 1990 merit retention race, abortion opponents organized a campaign against me, largely on the basis of a single opinion. In the appellate districts where I did best—the third and the fourth—the DCA judges were retained by a substantial margin, too; in districts where I fared less well, DCA judges also did less well.

30. Accord, Gary Blankenship, Dimond Blasts Barkett's Critics as Race Heats Up, Fla. Bar News, Sept. 15, 1992, at 1, 29 (quoting Alan Dimond, Florida Bar President, responding to criticism of Justice Rosemary Barkett's record on crime: "Judicial independence, the cornerstone of American democracy and tradition, is being threatened by the irresponsible attacks of special interest groups in Florida.").

31. Fla. Bar Code Jud. Conduct, Canon 7 (1982). This canon restricts a judge from "political activity inappropriate" to his or her judicial office, including announcing views on disputed legal issues. This canon also severely restricts campaign activities.

32. Id. 7B.(3) The canon restricts campaigning activity for an incumbent judge who is a candidate for retention in office until the judge certifies that the "candidacy has drawn active opposition." Id.

33. State's Chief Justice Keeps His Seat, Miami Herald, Nov. 7, 1990, at 17A ("Shaw[, the first black Supreme Court chief justice in state history and one of only two nationwide, found himself the target of an effort to oust him after he wrote a decision striking down Florida's law requiring parental permission for a minor to obtain an abortion[, In re T.W., 551 So. 2d 1186 (Fla. 1989)].").

34. I was retained with a 59.4% "Yes" vote statewide. District Court of Appeal judges in the first, second, and fifth districts averaged "Yes" votes strikingly close to mine: 60.5%, 64.1%, and 61.2%, respectively. By contrast, in counties comprising the third and the fourth district courts of appeal I polled "Yes" votes of 70.9% and 68.7%, respectively. Judges in those districts were retained by similar average voting percentages: 73.5% and 73.0%. Given that the average "Yes" vote for all DCA judges in 1988 was 74.4%—ranging from 71.2% in the first
V. CONCLUSION

When I consider the two methods of electing and retaining judges, I accept merit retention as the lesser of the evils. I feel strongly, however, that, in the present climate, a four- or six-year term is grossly insufficient. It is my opinion that any constitutional amendment extending merit retention to the trial level should at a minimum contain a provision lengthening the term of office. A judge’s tenure should be no less than twelve years. Many talented and successful lawyers who might otherwise consider the bench, even at considerable financial sacrifice, will be reluctant to give up private practice to face the specter of defeat every four or six years. The possibility of defeat historically has been remote but, in today’s climate, the possibility is becoming increasingly real. I believe that by extending merit selection and retention to the trial bench and lengthening the term of office, our state will attract and retain the most qualified jurists—a goal all Floridians share.

DCA to 77.6% in the fourth—and that there was no organized opposition to the retention of Justices Grimes and Kogan, one can fairly conclude that voters tend to vote for or against DCA judges based more on association with a supreme court justice on the same ballot than on the merits of the individual judges. (Computation made by Florida State University Law Review based on 1990 Returns, supra note 22, at 72-77, and 1988 Returns, supra note 24, at 49, 50.)