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# Merit Selection and Retention: The Great Compromise? Not Necessarily

Victoria Cecil

In the November 2000 election, the citizens of Florida had the opportunity to switch from the nonpartisan elective system to a merit selection and retention system for selecting trial judges in their respective circuits and counties. Although the majority of Florida voters favored electing their trial judges, this issue has spurred intense debate in the legal community concerning which is the better method for judicial selection. The crux of the debate centers on whether the judiciary should be independent or accountable to the public. On one end of the spectrum, judges are seen as heads of a branch of government that should be accountable to the citizens of their jurisdiction. On the opposite end, judges are viewed as different in that ethics, and not politics, dictate their governmental role. It is this ideological disparity that fostered the creation of the merit selection and retention system.

Prior to the November election, the merit system was being promoted as a great compromise of both ideologies. Merit selection is a form of direct appointment and is intended to preserve judicial independence. Merit retention is a form of popular election and is intended to encourage accountability. Although the merit system comprises two distinct methods of judicial selection to serve both interests, it is ineffective for judicial selection. Specifically, merit selection increases the politics that encompass direct appointment, and merit retention revisits the campaign issues that plague popular elections. However, some significant changes in the merit system would make it more effective for judicial selection.

## MERIT SELECTION

The concept of merit selection evolved from the direct appointment method used in the federal system for judicial selection. However, merit selection replaces the appointive role of the executive branch with an independent nominating commission who select judges solely on the basis of merit.<sup>1</sup> Although the idea for merit selection was proposed in the early 1900s, it wasn't until 1976 when Florida adopted this method for selection of appellate judges.<sup>2</sup> Proponents contend that

merit selection retains the benefits of direct appointment, i.e., judicial independence.<sup>3</sup> However, the very element that ensures judicial independence, i.e., appointment, also threatens judicial independence because of its political tendencies.

## The Merit Selection Method

The current merit selection method used to select Florida's appellate judges is the same as that proposed in November's election for selecting trial judges.<sup>4</sup> Basically, this method uses judicial nominating commissions, which are formed for each judicial circuit and district around the state, including one for the supreme court, in the event of a vacancy.<sup>5</sup> Each commission is composed of lawyers and lay persons for the purpose of recruiting, investigating, and screening judicial candidates.<sup>6</sup> The commission selects between three to six most qualified judicial candidates and submits the list to the governor.<sup>7</sup> The governor then appoints one judge from the list of nominees.<sup>8</sup> To understand the "merit" element of this method of judicial selection, we must discuss the nominating procedures in more detail.

## JNC Membership

Each judicial nominating commission (hereinafter, "JNC") consists of nine members who are appointed in groups of three from three separate appointing authorities.<sup>9</sup> First, the governor appoints three JNC members, who consist of lawyers and lay persons.<sup>10</sup> Those persons interested in a gubernatorial appointment to a JNC must complete and submit an executive appointment application to the governor's office.<sup>11</sup> Once all applications have been received, the governor's legal office reviews the applications and informally interviews the applicants.<sup>12</sup> The legal office then discusses the applicants with the governor and makes recommendations for appointment.<sup>13</sup> The governor then selects three people for appointment to a JNC.<sup>14</sup>

Next, the Florida Bar's Board of Governors appoints three Florida Bar members.<sup>15</sup> Those attorneys interested in serving on a JNC must complete and submit an application.<sup>16</sup> Once all of the applications are received, the Board of Governors forms

## Footnotes

1. See Madison B. McClellan, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 FLA. L. REV. 529, 54 (quoting the Florida Bar's definition of "merit selection" as "a method for selecting judges solely on the basis of merit rather than through the popular election process").
2. See *id.* at 533-39.
3. See John L. Remsen, *Is Merit Selection and Retention a Good Idea? Yes: We'll Get Better Judges*, 17 FLA. BAR NEWS 1, 9 (Jan 15, 1990).
4. See FLA. CONST., art. V, § 11.
5. See *id.* § 11(d). Currently, there are 26 JNCs.
6. See Symposium, *The 1997-98 Florida Constitutional Revision Commission: Judicial Election or Merit Selection*, 52 FLA.L.REV. 411, 417 (2000).

7. See generally Fla.R.Ct., *Uniform Rules of Procedure for Judicial Nominating Commissions* (1999).
8. See *id.*
9. See McClellan, *supra* note 1, at 531.
10. Telephone interview with Vicki Russell, JNC coordinator for the Florida Bar (June 19, 2000).
11. See *id.* (The application is actually titled "Questionnaire for Gubernatorial Appointments.")
12. Interview with Reginald J. Brown, Deputy General Counsel to Governor Jeb Bush (June 28, 2000).
13. See *id.*
14. See *id.*
15. Russell, *supra* note 10.
16. See *id.*

a screening committee to review the applications and make recommendations to the board for each JNC vacancy.<sup>17</sup> The board then decides on three lawyers to serve on a JNC.<sup>18</sup>

The final three JNC members are lay persons appointed by a majority vote of the six members previously appointed by the governor and the Florida Bar.<sup>19</sup> These members also complete and submit an application.<sup>20</sup> Once all of the applications are received, the six JNC members conduct their own screening and interviewing process to determine the three remaining JNC members.<sup>21</sup> Diversity in JNC membership is encouraged but not mandatory. Legislation that mandated the appointment of at least one minority from each of the three separate appointing authorities was ruled unconstitutional.<sup>22</sup>

Once a person is appointed to serve on a JNC, he or she is required to attend the “JNC Institute” for proper training.<sup>23</sup> The Florida Bar conducts this “institute,” which is a one-day training seminar held at least once a year that is designed to educate new JNC members on the nominating process.<sup>24</sup> In addition to educational training, the seminar also provides an opportunity for commissioners to discuss improvements in the JNC process.<sup>25</sup>

### The JNC Screening Process

The purpose of JNCs is to recruit, investigate, and screen judicial candidates to fill vacancies on the bench.<sup>26</sup> Currently, the only legal requirement for most judicial candidates is that they must be members of the Florida Bar for at least five years.<sup>27</sup> However, the JNCs also consider a nonexclusive list of criteria set forth in the uniform rules<sup>28</sup> and conduct extensive background investigations and personal interviews subject to the uniform rules.<sup>29</sup>

The JNC screening process begins when judicial candidates submit a comprehensive application to the JNC of relevant jurisdiction.<sup>30</sup> Since the application does not request information regarding race or ethnicity,<sup>31</sup> diversity among the applicants is encouraged through notices to minority bar associations.<sup>32</sup> Once all of the applications are received, the JNC determines if the applicants meet the initial legal

requirements for the office and conducts extensive background investigations on the candidates.<sup>33</sup>

The background investigations of the judicial candidates vary depending upon the vacancy. For instance, a vacancy on the supreme court may require a more extensive background check than would a judgeship for a district court of appeal or circuit court.<sup>34</sup> Once the background investigation is complete, the JNC then personally interviews the candidates.<sup>35</sup> These interviews are open to the public and are usually announced in local papers or on a notice posted at the courthouse.<sup>36</sup> Each JNC can employ its own interviewing process subject to the uniform rules.<sup>37</sup> These interviews are notoriously arduous and involve tough personal and professional questions that usually address sensitive social issues.<sup>38</sup> Once the investigations and interviews are complete, a majority vote of the JNC members determines the final list of at least three judicial nominees.<sup>39</sup> This list is then submitted to the governor in alphabetical order without any ranking or additional recommendations.<sup>40</sup>

Upon receiving the list of nominees from the JNC, the governor’s legal office begins its screening and interviewing process.<sup>41</sup> The intensity of this screening process depends on the judicial vacancy.<sup>42</sup> Once the investigations and interviews are complete, the governor meets with the legal office and then appoints one nominee from the final list to fill the judicial vacancy.<sup>43</sup>

### Arguments Regarding Merit Selection

The ideological debate between judicial independence and accountability is an interesting one. Advocates for merit selection contend that an appointment system for judicial selection preserves judicial independence by minimizing political influence, ensures judicial quality through an autonomous screen-

**[S]ome significant changes in the merit system would make it more effective for judicial selection.**

17. *See id.*

18. *See id.*

19. *See* FLA. CONST., art. V, § 20(5)(c). *See also* McClellan, *supra* note 1, at 531.

20. Russell, *supra* note 10.

21. *See id.*

22. *See* Mallory v. Harkness, et al., 895 F. Supp. 1556 (S.D. Fla. 1995). *See also* Fla. Bar Online, News Media Center, *Merit Selection and Retention*, <http://www.flabar.org> (last updated Feb. 2000).

23. Russell, *supra* note 10. (Ms. Russell is in charge of the “JNC Institute.”)

24. *See id.*

25. *See* William H. Overton, *Judicial Nominating Procedures*, 73 FLA. B.J. 72-73 (June 1999) (Report on the JNC Institute held on Jan. 20, 1999 in Miami).

26. *See* Symposium, *supra* note 6, at 417.

27. FLA. CONST., art. V, § 8. Eligibility for circuit and county courts judgeships requires membership with the Florida Bar for at least five years. Eligibility for supreme court and district court of appeals judgeships requires membership with the Florida Bar for at least ten years.

28. Russell, *supra* note 10.

29. *See id.*

30. *See* Uniform Rules, *supra* note 7.

31. *See id.* and Russell, *supra* note 10.

32. Russell, *supra* note 10. However, Ms. Russell states currently there is a problem getting minority applicants. She stated that the Judicial Nominating Procedures Committee is conducting studies to determine what more needs to be done to promote diversity on the bench.

33. *See* Uniform Rules, *supra* note 7.

34. *See id.*

35. *See id.*

36. Russell, *supra* note 10.

37. *See id.*

38. *See* Remsen, *supra* note 3, at 8.

39. Final voting procedure for the supreme court JNC is much more extensive and detailed.

40. Russell, *supra* note 10.

41. Brown, *supra* note 12.

42. *See id.*

43. Brown, *supra* note 12.

**[S]ome significant changes in the merit system would make it more effective for judicial selection.**

ing process, and promotes judicial diversity through rules and persistence.<sup>44</sup> Opponents argue that merit selection sacrifices accountability and merely substitutes one political system of selection for another. Although arguments for both sides are convincing, the contention

that merit selection preserves judicial independence fails.

The main argument supporting merit selection is that it retains judicial independence because the process minimizes political influence.<sup>45</sup> However, any kind of political influence, no matter how slight, jeopardizes judicial independence. The problem lies primarily with the JNCs' current nominating procedures, which create an atmosphere that is ripe for political influence and manipulation. This potential for abuse is evidenced in several incidents involving judicial candidates, JNC members, and the selection process.

For example, in 1996, a lay member of a JNC in Ft. Lauderdale resigned his position after a newspaper uncovered his failure to reveal his past business relationship with a candidate for circuit court.<sup>46</sup> Specifically, the JNC member had once been president, and the judicial candidate vice president, of a now-defunct firm in downtown Ft. Lauderdale.<sup>47</sup> In fact, this past business relationship was not uncovered until after the candidate made the final list of nominees.<sup>48</sup> Currently, the uniform rules mandate JNC members to disclose to the JNC panel all personal, professional, and business relationships with an applicant.<sup>49</sup> But there is no law that requires such disclosure.<sup>50</sup>

Another incident that raised suspicion with JNC operations occurred in 1997, where Governor Chiles appointed an indi-

vidual to a JNC before the vacancy was even announced.<sup>51</sup> The former JNC member kept his resignation of his JNC position a secret from the public and the other JNC members out of deference to Governor Chiles who appointed him.<sup>52</sup> However, Governor Chiles appointed a new JNC member before the resignation or the JNC opening was made official.<sup>53</sup> Even more strange was the fact that the new JNC appointee was a long-time political friend of the former JNC member.<sup>54</sup> Although both JNC members and the governor denied any wrongdoing, the mere appearance of impropriety spoke volumes.<sup>55</sup>

Probably the strongest example of the potential for political manipulation on JNCs is an incident that occurred in 1996 in Palm Beach.<sup>56</sup> Suspicion of the JNC began with the commission's recommendation of three judicial candidates who were conspicuously unqualified.<sup>57</sup> In fact, the JNC chair sent Governor Chiles a letter apologizing for the selection, which then prompted a formal investigation into the JNC's operations.<sup>58</sup> Shortly thereafter, the commission quickly ousted their chairman in a secret meeting.<sup>59</sup> Although the investigation was hampered due to uncooperative JNC members and lack of evidence, it was revealed that one of the three judicial nominees was the wife of a member of the Florida Bar's Board of Governors.<sup>60</sup> Further, this board member-husband was instrumental in appointing two attorneys to the JNC who, in turn, effectively advocated the wife for a judgeship.<sup>61</sup> Also, one of the JNC's strongest supporters of the wife's judgeship was a long-time political friend of the husband.<sup>62</sup> Additionally, there were allegations that during the wife's interview with JNC members, some members "shepherded" the wife past questions addressing several discrepancies on her judicial application.<sup>63</sup> Nonetheless, even though some critics called for the disbandment of the JNC,<sup>64</sup> the commission continued operating.<sup>65</sup>

Besides JNC membership, another source for political influ-

44. See Symposium, *supra* note 6.

45. See Remsen, *supra* note 3, at 9.

46. See Buddy Nevins, *Adviser on Judicial Position Quits; Report About Business Dealings With Candidate Leads to Resignation*, SUN-SENTINEL (FT. LAUD.), Oct. 12, 1996, at 3B, available at LEXIS, Individual News Publication database.

47. See *id.*

48. See *id.*

49. See Uniform Rules, *supra* note 7.

50. See Nevins, *supra* note 46.

51. See Dan Christensen, *Leaving and Joining the JNC, Quietly*, BROWARD DAILY BUS. REV., Jan. 9, 1997, at A1, available at LEXIS, News Group File database.

52. See *id.*

53. See *id.*

54. See *id.*

55. See *id.*

56. See John Grogan, *Smell Should Lead Investigators to JNC*, SUN-SENTINEL (FT. LAUD.), Jan. 5, 1996, at 1B, available at LEXIS, News Group File database.

57. See *id.* See also, Bill Douthat, *Witnesses: Politics Moves JNC*, THE PALM BEACH POST, Jan. 5, 1996, at 1B (one candidate made several lies regarding her income and legal experience on her application, and another clearly appeared untrustworthy during his inter-

view); and Stephanie Smith, *Sach's Role on JNC Attacked; Ex-Bar Official: Lawyer Tried to Stack Nomination*, SUN-SENTINEL (FT. LAUD.), Jan. 6, 1996, at 1B (candidates who had 25 years legal experience or who were sitting county court judges were suspiciously not considered).

58. See Grogan, *supra* note 56.

59. See *id.*

60. See *id.* See also Victor Epstein, *New Head of JNC Must Deal With Debris from '95 Skirmish*, PALM BEACH DAILY BUS. REV., July 31, 1997, at A1, available at LEXIS, News Group File database.

61. See Grogan, *supra* note 56 (the JNC recommended the wife to the governor on a 7-2 vote).

62. See *id.*

63. See Steve Nichol, *Lawyer in JNC Case Lashes Out at Critics*, SUN-SENTINEL (FT. LAUD.), Jan. 19, 1996, at 3B, available at LEXIS, News Group File database.

64. See Editorial, *Chiles Should Disband JNC*, SUN-SENTINEL (FT. LAUD.), Jan. 21, 1996, at 4G, available at LEXIS, News Group File database.

65. However, this incident prompted the Florida Bar to implement screening procedures to evaluate potential bar appointees to a JNC. See Editorial, *JNC Fiasco May Yield Good Result: Reform of Judicial Selection Process*, SUN-SENTINEL (FT. LAUD.), Feb. 7, 1996, at 16A, available at LEXIS, News Group File database.

ence are the closed JNC deliberations.<sup>66</sup> Interestingly, school board deliberations regarding appointment of a new superintendent are constitutionally required to be open to the public.<sup>67</sup> However, JNC deliberations regarding the selection of judicial nominees are currently closed to the public.<sup>68</sup> Naturally, this secrecy could facilitate backroom dealing and foster public distrust.<sup>69</sup> This was evident in the incident involving the Palm Beach JNC and a recent incident involving the Fifth District Court of Appeal JNC. In 1999, a JNC member spoke out against the actions of two JNC colleagues who had personal meetings with sitting appellate judges to gather facts regarding judicial candidates.<sup>70</sup> It was argued that although judicial ethics allow judges to communicate “factually and succinctly” to the JNC, the appearance of impropriety is manifest because the meetings were conducted privately.<sup>71</sup> Hence, it is reasonable to conclude that closed JNC deliberations would also create the appearance of impropriety, as well as perpetuate public distrust of JNC operations and fuel suspicions of favoritism and political maneuvering.<sup>72</sup>

Finally, another source for potential political abuse in JNCs is the considerable opportunity for lobbying. Currently, there is no rule censuring contact with JNC members during the nomination process.<sup>73</sup> Consequently, former JNC members report receiving numerous phone calls and letters from the candidate’s friends, relatives, clients, and influential community leaders.<sup>74</sup> Also, there were some incidents where the candidates themselves would attempt direct contact with a JNC member.<sup>75</sup> But efforts have been made to curb lobbying efforts of JNCs. Recently, the Judicial Nominating Procedures Committee discussed developing an advisory letter that would inform candidates as to what constitutes appropriate contact with JNC members.<sup>76</sup> Nonetheless, until a rule limiting contact between JNC members and judicial candidates or their supporters is implemented, merit selection has the potential of becoming a lobbying contest instead of a merit contest.<sup>77</sup>

The apparent opportunity for political influence in JNC operations is not the only threat to judicial independence. The governor’s influence regarding judicial appointments also plays a significant role in maintaining politics in the judiciary.<sup>78</sup> For instance, the governor can politically control a JNC by appointing someone based upon personal friendship or politi-

cal relationship.<sup>79</sup> More importantly, the governor’s JNC appointees could then influence the other three lawyers when determining the remaining three lay members. Thus, the governor could arguably control the list of judicial nominees because of his or her dominating influence over the commission.<sup>80</sup>

Advocates for merit selection concede that merit selection is not perfect, but contend that it preserves judicial independence because political influence is minimized. However, any amount of political influence can threaten judicial independence. Even the appearance of political abuse or manipulation can promote public distrust of lawyers and the entire judicial system. The fact that merit selection has already existed in Florida for over twenty years does not exemplify success. Merit selection is not perfect, but its flaws can be corrected.

**“[I]t is reasonable to conclude that closed . . . deliberations would also create the appearance of impropriety . . . .”**

## MERIT RETENTION

Merit retention is a form of the elective system where voters decide whether to retain the incumbent judge by casting a simple “yes” or “no” vote on ballots within the territorial jurisdiction of their court.<sup>81</sup> If the judge obtains more affirmative votes, then he or she is retained for another term of judgeship.<sup>82</sup> Thereafter, the trial judge would stand for review every six years.<sup>83</sup> However, if the judge receives more negative votes, their judgeship is deemed vacant and is subsequently filled through the merit selection process.<sup>84</sup> Although merit retention is thought to provide a democratic balance to the merit selection process, it resurrects the problems inherent in judicial elections.<sup>85</sup> To fully understand this reasoning, we must first discuss the arguments regarding the election method.

## The Election Method

In the November 2000 general election, Florida citizens voted to continue selecting their trial judges in their respective communities by popular nonpartisan elections.<sup>86</sup> Advocates for judicial elections contend that this method of judicial selec-

66. See Editorial, *Open JNC Deliberations to Public*, SUN-SENTINEL (FT. LAUD.), Jan. 2, 2000, at 6H, available at LEXIS, News Group File database.

67. See *id.* See also FLA. CONST., art. I, § 24(b).

68. See Uniform Rules, *supra* note 7.

69. See Editorial, *supra* note 66.

70. See Jamie Malernee, *Judicial Selection Process Criticized*, ST. PETERSBURG TIMES, Nov. 30, 1999, at 1, available at LEXIS, STPETE database.

71. See *id.*

72. See Editorial, *supra* note 66.

73. See Russell, *supra* note 10.

74. See Russell Troutman, *Florida Judicial Nominating Commission*, 54 FLA. B. J. 534 (1980) (Mr. Troutman discussed his experiences when he was a member of the Florida Supreme Court JNC). See also McClellan, *supra* note 1, at 547.

75. See Fla. Bar Online, News Media Center, Mark D. Killian, *Panel Takes Testimony at Third Merit Selection Hearing*, <<http://www.flabar.org/>

<http://www.flabar.org/publicmediainfo/tfbnews/99nov15-8.html>>(Nov. 15, 1999) (Alfonso Perez, Jr. stated that when he chaired the 11th Circuit JNC “county court judges who wanted to be elevated to the circuit bench would appear behind me in a pew in church and I knew they weren’t members of the church”).

76. See Overton, *supra* note 25.

77. See McClellan, *supra* note 1, at 547.

78. See *id.* at 548.

79. See *id.*

80. See *id.*

81. See Symposium, *supra* note 6, at 417.

82. See *id.*

83. See FLA. CONST., art. V, § 10(a).

84. See Fla. Bar Online, News Media Center, *Merit Selection and Retention*, <<http://www.flabar.org/>> (last updated Feb. 2000).

85. See *id.*

86. See Symposium, *supra* note 6, at 420.



**“The main argument against judicial elections for which there appears to be no resolution is the issue of judicial campaign contributions.”**

tion preserves the democratic process and ensures direct accountability to the public.<sup>87</sup> However, opponents of the election method stress that judges are different in that their position does not require accountability like that of legislative and executive officials.<sup>88</sup> Furthermore, judicial elections require campaign contributions, which threaten judicial independence.<sup>89</sup> Although popular

elections provide a more democratic means of judicial selection, the judiciary is a unique branch of government where legal ethics—instead of politics—govern judicial behavior.

The main argument against judicial elections for which there appears to be no resolution is the issue of judicial campaign contributions.<sup>90</sup> Like all elections for public office, judicial elections cost money, and the expense necessary to run a judicial campaign is substantially high.<sup>91</sup> Although some judicial candidates are able to finance their own campaigns, private financial contributions from lawyers, law firms, and special interest groups are the norm.<sup>92</sup> Consequently, judicial independence, impartiality, and ethics are compromised, and the appearance of impropriety becomes apparent.<sup>93</sup> This concern is evidenced in several Florida cases.

For instance, in *Mackenzie v. Breakstone*<sup>94</sup>, the plaintiff's attorney contributed \$500 to the trial judge's husband's circuit court campaign, and the defendant moved to disqualify the trial judge on these grounds. The trial judge denied the motion as legally insufficient. On appeal, the Third District court held that the \$500 contribution by the plaintiff's attor-

ney constituted a legally sufficient ground for disqualification.<sup>95</sup> In *MacKenzie v. Super Kids Bargain Store, Inc.*,<sup>96</sup> the defendant also moved to disqualify the same trial judge on the same grounds as in *Breakstone*.<sup>97</sup> The trial judge stated that based upon the Third District's ruling in *Breakstone*, the defendant's motion was legally sufficient for disqualification.<sup>98</sup> However, the trial judge concluded that since the contributing attorney's motion for withdrawal was granted, her recusal from this proceeding was not necessary and ultimately denied the defendant's motion for disqualification.<sup>99</sup> The two cases were then consolidated for purposes of *en banc* consideration by the Third District court.<sup>100</sup> The district court determined that the \$500 contribution was substantial enough to cause a reasonable person to fear that they would not receive a fair trial.<sup>101</sup>

On appeal, the Florida Supreme Court noted that the perception of bias is feasible where a judge receives a campaign contribution from a litigant or an attorney currently before the judge.<sup>102</sup> However, it concluded that an allegation that a litigant or an attorney made a campaign contribution to the presiding trial judge, or the judge's spouse, alone was not legally sufficient to warrant the judge's disqualification.<sup>103</sup>

The court's analysis focused primarily on the statutory limits and disclosure requirements on campaign contributions in judicial elections.<sup>104</sup> Specifically, the court acknowledged the judge's need for campaign contributions and noted that because most of these contributions come from lawyers, the appearance of impropriety in the judiciary is of special concern.<sup>105</sup> In response to this concern, statutes and provisions in Florida's Code of Judicial Conduct restrained solicitation of campaign funds, imposed monetary limits on campaign contributions, and required public disclosure of such contributions.<sup>106</sup> The court believed that although this legislation did not negate the existence of a reasonable fear of prejudice, it did virtually elim-

87. See Joseph W. Little, *Is Merit Selection and Retention a Good Idea? No: It's Voters' Right to Elect*, 17 FLA. BAR NEWS 1, 11 (Jan. 15, 1990).

88. See Justice Ben F. Overton, *Trial Judges and Political Elections: A Time For Re-examination*, 2 U. FLA. J.L. & PUB. POL'Y 9, 15 (1988-89).

89. See McClellan, *supra* note 1, at 555-57.

90. See Symposium, *supra* note 6, at 419.

91. See *id.* at 418.

92. See Symposium, *supra* note 6, at 419.

93. See McClellan, *supra* note 1, at 556.

94. See *Mackenzie v. Breakstone*, 565 So. 2d 1332 (Fla. 1990).

95. See *id.*

96. *Mackenzie v. Super Kids Bargain Store, Inc.*, 571 So. 2d 32 (Fla. App. 1990).

97. See *id.*

98. See *id.*

99. See *id.* at 1334.

100. See *id.*

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.* at 1337.

105. See *id.*

106. See *id.* Canon 7B(2) [now C(1)] of the CODE OF JUDICIAL CONDUCT provides:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, or solicit attorneys for publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any persons or corporation authorized by law. A candidate's committees may solicit funds for his campaign only within the time limitation provided by law. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

FLA. STAT. § 106.08(1) (1987), provided in pertinent part:

(1) No person, political committee, or committee of continuous existence shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:

(e) To a candidate for county court or circuit court judge, \$1000.

(f) To a candidate for retention as a

inate any appearance of impropriety.<sup>107</sup> Also, the court feared that to rule otherwise would result in judicial chaos, where too many attorneys and judges would be barred from cases due to campaign contributions.<sup>108</sup> However, Justice Kogan and Justice Overton mentioned changing to a merit retention system in light of the problems presented in the case.<sup>109</sup>

Like the majority in *Breakstone*, election advocates believe that statutory limits and disclosure requirements would alleviate the problems associated with judicial campaign contributions from other lawyers.<sup>110</sup> For instance, it is believed that requiring all campaign funding through campaign committees creates a kind of anonymity that minimizes the appearance of possible quid pro quo relationships.<sup>111</sup> However, other factors may reveal a contributor's identity.<sup>112</sup> For example, the very disclosure laws that require candidates to file reports revealing their campaign contributions would also reveal the contributors' names.<sup>113</sup> Also, fund-raising events where the candidates come in direct contact with their supporters and volunteer workers would easily reveal contributors.<sup>114</sup> Thus, funding through campaign committees would not eliminate the appearance of quid pro quo.

Also, monetary limits on judicial campaign contributions do not eliminate the appearance of impropriety, because the problem is not the amount of money contributed, but the act of contributing itself.<sup>115</sup> Although *Breakstone* held that a contribution from a lawyer alone was legally insufficient to require disqualification of a judge, the appearance of impropriety still lingers.<sup>116</sup> Mere acceptance of campaign funds, whether through a committee as required or individually, creates a financial relationship between the judge and the contributor, which virtually induces a quid pro quo effect.<sup>117</sup> Consequently, this mere appearance of impropriety diminishes public confidence in judicial impartiality and independence.<sup>118</sup>

Because campaign contributions are an integral part of judicial elections, the problems associated with them render the elective system unsuitable for judicial selection. The consequential appearance of impropriety, and the fact that legal ethics essentially govern the judicial office, prevents popular elections from being an acceptable method for judicial selection.

judge of a district court of appeal, \$2000.

(g) To a candidate for retention as a justice of the Supreme Court, \$3000.

It should be noted that this language has changed. Currently, Section 106.08(1), Florida Statutes (1999), prohibits contributions in excess of \$500 to any candidate for election or retention, or any political committee supporting or opposing said candidates.

Section 106.07, Florida Statutes (1987), requires a designated campaign treasurer to file regular reports disclosing contributors and the amount of contribution.

107. See *id.* at 1337.

108. See Symposium, *supra* note 6, at 419.

109. See Mackenzie v. Breakstone, 565 So. 2d at 1341-43.

110. See Susan E. Liontas, *Judicial Elections Have No Winners*, 20 STETSON. L. REV. 309 (1990).

111. See *id.* at 322.

### The Merit Retention Method

Although merit retention is promoted as the answer to maintaining democracy in selecting our judges, it resurrects the same problems inherent in judicial elections. For instance, merit retention elections require citizens to vote whether to retain the incumbent judge based upon "merit," or his or her record. Therefore, retention elections are uncontested by other judicial candidates. However, incumbent judges can still be contested by special interest groups causing campaign contribution issues to return. However, adequate education of the public could minimize potential opposition during retention elections and, thus, abrogate the need to campaign and solicit contributions.

The main problem with merit retention elections is the return of campaign contribution issues. Currently, pursuant to merit retention procedures, a judge cannot actively campaign or raise campaign funds unless faced with active opposition.<sup>119</sup> Advocates for merit retention believe that because the incumbent is uncontested, campaign contributions become less significant.<sup>120</sup> However, although retention elections are uncontested by judicial candidates, an incumbent can still be contested by a disgruntled special interest group.<sup>121</sup>

For instance, in 1990, Florida Supreme Court Justice Leander Shaw faced strong opposition from Citizens for a Responsible Judiciary because of an opinion he authored that struck down a statute requiring parental consent before minors could obtain an abortion.<sup>122</sup> Although a majority of lawyers and judges believed Justice Shaw was a competent justice, his retention was still intensely challenged.<sup>123</sup> As a result, he was forced to raise and spend approximately \$300,000 on his retention campaign.<sup>124</sup> Ultimately, over 40% of Florida's citizens voted to remove Justice Shaw.<sup>125</sup>

**"[E]lection advocates believe that statutory limits and disclosure requirements would alleviate the problems . . . with judicial campaign contributions . . . ."**

112. See *id.* at 313.

113. See *id.*

114. See *id.*

115. See McClellan, *supra* note 1, at 556.

116. See *id.*

117. See Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?* 23 FLA.ST.U.L. REV. 1, 10 (Summer 1995).

118. See McClellan, *supra* note 1, at 555-56. See also Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 S.W.L.J. 15, 21 (1986).

119. See FLA. JUD. CODE OF CONDUCT, Canon 7C(2).

120. See Liontas, *supra* note 110, at 317.

121. See Webster, *supra* note 117, at 35-36.

122. See McClellan, *supra* note 1, at 549.

123. See *id.*

124. See Webster, *supra* note 117, at 36.

125. See *id.*

**“The main problem with merit retention elections is the return of campaign contribution issues.”**

Also, Florida Supreme Court Justice Rosemary Barkett faced strong opposition from several different groups in her 1992 retention election. The Citizens for a Responsible Judiciary, who was the same group that opposed Justice Shaw two years earlier, opposed Justice Barkett’s retention for joining Justice Shaw’s majority opinion striking down parental consent for abortions.<sup>126</sup> This group also cam-

aigned that Justice Barkett was “soft on crime” and managed to get more than half of the state’s law enforcement and state attorneys to oppose Justice Barkett’s retention.<sup>127</sup> Also, Florida Right to Life opposed Justice Barkett for her opinion which stated that permanently incapacitated people who have a living will or the like are not subject to forced feeding.<sup>128</sup> Consequently, Justice Barkett received one of the lowest bar poll ratings ever given to a supreme court justice in the history of the bar’s merit-retention poll.<sup>129</sup> As a result, Justice Barkett raised between \$270,000 and \$300,000, most of which came from lawyers, to fight her opposition.<sup>130</sup> Her campaign included television commercials and radio ads, literature, and personal appearances.<sup>131</sup> Ultimately, Justice Barkett was retained with only 60% of the vote.<sup>132</sup>

These examples demonstrate that incumbent judges in retention elections are still fair game for opposition. Once an incumbent judge’s retention is opposed, the judge must engage in a costly campaign that is primarily funded with private campaign contributions. Thus, a change in the merit retention process is very much needed.

## PROPOSALS FOR CHANGE OR ALTERNATIVES

The proposed compromise in the merit selection and retention method for judicial selection is not perfect. However, judicial independence and accountability can coexist with a few adjustments. For instance, changing the composition of JNCs and reforming JNC procedures with regard to judicial selection will significantly decrease political influence and improve judicial quality. Also, adequate education of the retention process combined with bar polls and judicial evaluations will encourage judicial accountability. Thus, if the public is properly educated and informed, the need for retention campaigns would be greatly reduced.

## Proposed Changes in Merit Selection

As previously noted, one problem with merit selection is the potential for political influence. In order to eliminate this problem, some reform in the merit selection system is required. This reform includes changing the composition of the JNC and implementing laws that would open JNC deliberations to the public and restrict lobbying of JNC members.

First, altering the JNC composition would minimize the potential for political abuse. For instance, change the number of JNC members from nine to seven. The three Florida Bar appointments and three lay-member positions would remain. However, the third set of gubernatorial appointments would be replaced with one member from the Judicial Qualifications Commission (JQC).<sup>133</sup> Each of the thirteen JQC members would serve on two of the twenty-six JNCs. Since the purpose of the JQC is to investigate judges and justices for alleged judicial misconduct during their term of office, it seems logical that a JQC member participate in judicial selection.<sup>134</sup> Moreover, removing the governor’s participation in the JNC membership and adding a JQC member to the mix would essentially decrease political influence and increase the focus on quality.<sup>135</sup>

The governor should not be completely removed from the judicial selection picture. The new seven-member JNC would still provide a list of three to six nominees for judgeship to the governor for appointment. To maintain accountability, the governor’s appointment would be confirmed by the Senate. This would provide the necessary “check” on the governor’s judicial appointments.

Additionally, because the JNC membership will be reduced from nine to seven, each JNC should be funded in an amount sufficient to retain two full-time investigators to assist in background checks, interview preparation, and general reviews on candidates’ qualifications.<sup>136</sup> These investigators would come from the private sector and would be chosen by a majority vote of the JNC membership. Also, with regard to diversity in JNC membership, section 43.29 and the uniform rules of JNC procedure would still encourage the appointment of minorities to serve on JNCs.

Another remedy that would virtually eliminate political influence is to open JNC deliberations to the public and maintain a public record of the vote. Currently, the uniform rules of JNC procedure prohibit open deliberations and do not require recording of the votes.<sup>137</sup> Also, legislative efforts in

126. See Thomas J. Billitteri, *Chief Justice Fights for Her Life on Bench*, ST. PETERSBURG TIMES, Oct. 12, 1992, at 1A.

127. See Diane Rado, *Fiery Debate Rages Ever Hotter Over Chief Justice Keeping Job*, ST. PETERSBURG TIMES, Sept. 9, 1992, at 4B, available at LEXIS, STPETE database; and *Barkett’s Friends, Foes to Try All Tricks*, ST. PETERSBURG TIMES, Oct. 31, 1992, at 1B.

128. See Billitteri, *supra* note 126.

129. See Rado, *supra* note 127.

130. See *id.*

131. See Diane Rado, *Barkett’s Support in Bar Poll Is Low*, ST. PETERSBURG TIMES, Sept. 12, 1992, at 6B; see also Billitteri, *supra* note 126.

132. See Rado, *supra* note 127. (In 1980, Justice Joseph Boyd

received a bar poll rating of 59 percent due to scandal for which he was nearly impeached in the early 1970s.)

133. FLA. CONST., art. V, § 12 provides for a Judicial Qualifications Commission consisting of thirteen members: two district court of appeals judges, two circuit court judges, two county court judges, four Florida Bar members, and five lay persons appointed by the governor.

134. See FLA. CONST., art. V, § 12(a)(1).

135. However, the addition of a JQC member to a JNC will require an amendment to FLA. STAT. § 43.29(2) (1999), which currently prohibits a judge or justice from being a member of a JNC.

136. See Webster, *supra* note 117, at 40.

137. See Uniform Rule, *supra* note 7.



both houses to open JNC deliberations have failed.<sup>138</sup> Allowing the public to view deliberations would ensure that politics and prejudices are not playing a role in the final selection. More importantly, if the final selection is challenged, the voting process would be documented for review.<sup>139</sup> Thus, JNC deliberations should be made open to the public to eliminate the potential for wrongdoing.

Finally, another solution for removing politics is to implement a law severely limiting contact between candidates, or their supporters, and JNC members. Recently, JNC members discussed developing an advisory letter informing applicants of what constitutes appropriate contact with JNC members.<sup>140</sup> However, such a mandate would be more effective if it were implemented as part of the uniform rules of JNC procedure or as a provision under § 43.29 of the Florida Statutes. Specifically, this mandate would permit a JNC to publicly announce a time period in which it could receive information on the judicial candidates. Once the specified time period has expired, any contact regarding the candidates would be deemed unlawful lobbying. This may result in disciplinary measures or penalties for the respective candidate. Furthermore, this mandate would require JNC members to immediately disclose any contacts received after the specified time period from either the candidates or their supporters,<sup>141</sup> or they too may be subject to discipline. Establishing a rule or law limiting lobbying efforts would curb the appearance of political influence while allowing for public participation.

These proposed solutions to the concern of potential political influence in the merit selection process virtually eliminate politics while maintaining the delicate balance between judicial independence and accountability.

### Proposed Changes in Merit Retention

The core problem with merit retention is not so much the return of campaign funding issues as it is the lack of information to assist the average voter. In fact, the proposed solutions for improving the publication of merit retention information may help resolve the issues associated with retention campaign funding.

138. Senate Bill 0396 passed the Senate Judiciary Committee but died 5/5/2000 in Committee on Rules and Calendar. House Resolution 0923 passed the House Judiciary Committee but died 5/5/2000 on calendar.

139. One of the problems that hampered the investigation involving the Palm Beach JNC in 1996 was that deliberations were closed and no record or minutes were kept of the voting process.

140. See Overton, *supra* note 25.

141. See Troutman, *supra* note 74, at 537.

142. See Fla. Bar Online, *supra* note 84.

143. See Nicholas P. Lovrich, John C. Pierce, and Charles H. Sheldon, *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 33 (June-July 1989) (“...actual knowledge of the courts has a more powerful impact upon voting participation than self-imagined informedness”).

144. See Gail Gray, *The Bar's Role in Assuring an Independent Judiciary*, 21 PENNSYLVANIA LAWYER 36, 40 (Jan./Feb. 1999).

145. Recently, the Florida Bar formed a special committee that has developed a plan to educate the public about merit selection and retention. The committee is called the Merit Selection and

First, the electorate must be educated on the merit retention process. Studies have showed that a majority of Florida voters are confused about the retention process.<sup>142</sup> However, in order for the public to appreciate merit retention, the public must first understand the fundamentals of the judiciary.<sup>143</sup> Specifically, the public should understand the importance of a judge's impartiality in decisions based on the rule of law<sup>144</sup> and the distinct functions of the trial and appellate courts. Then local newspapers and the Florida Bar should join forces to educate the public on how the merit retention system works and what the expectations are from the electorate.<sup>145</sup> Once the public understands the merit retention process, then it should be provided with adequate information regarding a judge's record in order to assess judicial performance when determining a judge's retention. This could be accomplished by combining bar ratings with sufficient information from an independent source.

For instance, in 1988, Colorado established performance evaluation commissions. These commissions, composed of lawyers and lay persons, assess judicial performance and provide information to both the public and the judges being evaluated.<sup>146</sup> Specifically, the commissions distribute questionnaires to court personnel, law enforcement officers, jurors, and other people who regularly converse with the courts.<sup>147</sup> Commission members also personally interview the judges and observe them in the courtroom.<sup>148</sup> Upon completion of their evaluations, the commissions educate the public and inform the judges who have been evaluated with the results.<sup>149</sup> This method of judicial evaluation, which employs citizen participation, was deemed a success and became part of Colorado law.<sup>150</sup> Incidentally, this program was formed on the belief that public interest in retention elections would increase if the public was involved in the evaluation process.<sup>151</sup>

**“The governor should not be completely removed from the judicial selection picture.”**

Retention Implementation Special Committee, and their plan includes preparing educational videotapes, appointing local team captains statewide to speak, providing specialized pamphlets and videotapes to supplement speakers, issuing news releases, and producing television programs. See Fla. Bar Online, *Merit Selection and Retention Implementation Special Committee Report*, <<http://www.flabar.org/newflabar/organization/board/apr00min.html>> (accessed June 18, 2000).

146. See Liontas, *supra* note 110, at 317. See also Justice Ben F. Overton, *Trial Judges and Political Elections: A Time For Re-examination*, 2 U.FLA.J.L. & PUB.POLY 9, 21 (1988-89) (The commissions consist of ten members, two appointed by the speaker of the House of Representatives, two appointed by the president of the Senate, three appointed by the governor, and three appointed by the chief justice of the Colorado Supreme Court.)

147. See Overton, *supra* note 146, at 21.

148. See *id.*

149. See Liontas, *supra* note 110, at 317-18.

150. See *id.* at 318.

151. See Remsen, *supra* note 3, at 9.

**“[T]he public . . . should be provided with adequate information regarding a judge’s record in order to assess judicial performance . . . .”**

Another suggestion would be to expand the Florida Bar’s Judicial Evaluation Committee’s current judicial evaluation program. This committee primarily monitors the performance of all judges, whether sitting or up for retention, by distributing secret ballots to attorneys statewide.<sup>152</sup> The results are

shared with the judges who participate in the program and the public.<sup>153</sup> However, this program could be expanded to include more extensive evaluations of those judges seeking retention. Like Colorado’s citizen-based commissions, the bar’s Judicial Evaluation Committee could conduct similar detailed evaluations of the judges up for retention and publish the results. This evaluation, coupled with bar poll ratings, may be more effective when informing the public on judicial performance.

Additionally, recommendations from the Judicial Qualifications Commission would significantly increase the credibility of information on judicial performance. Currently, the JQC is only charged with investigating judges for alleged misconduct.<sup>154</sup> However, a constitutional amendment broadening the JQC’s authority to include evaluations of judges who are seeking retention would be very beneficial.<sup>155</sup> Thus, combined information on judicial performance produced from the Florida Bar poll ratings, reports from an evaluation commission (whether citizen based or a bar subcommittee), and the JQC may prove very effective in providing the necessary assistance to average voters so they could better review the record of a judge who is seeking retention.

Moreover, candid information on judicial performance from these sources may curb the need to campaign against opposition because the record will sufficiently speak for itself. In the event a judge’s retention is opposed, the news media should permit the judge to publicly respond, and the response should be limited to an explanation of the legal reasoning or principle exercised in the case at issue.<sup>156</sup> More importantly, in the event a judge’s record is unjustly criticized, the local bar association should assist in “setting the record straight.”<sup>157</sup> Naturally, the public is best served if these responses were published in newspapers that are widely circulated, and not just in legal publications.<sup>158</sup> Thus, providing explicit information on judicial performance coupled with limiting the mode of response to opposition may essentially abrogate the need for retention election campaigning and fund raising.

The success of merit retention depends on properly educating the public on the merit retention system and adequately

conveying to the public effective and sufficient information regarding the judges’ records.<sup>159</sup> Also, setting boundaries for a judge’s response to opposition may alleviate the need for campaigning and fund raising. Thus, these proposed solutions virtually eliminate the potential appearance of impropriety associated with judicial campaigns while maintaining democratic participation.

## CONCLUSION

A majority of Florida voters have decided to continue electing their trial judges and preserve a democratic means for choosing judges that only judicial elections can provide. However, the inherent need for campaign contributions renders the elective system unsuitable for judicial selection. Furthermore, the various statutory provisions and ethical codes on campaign practices do not eliminate the appearance of impropriety entirely. The merit system was promoted as the great compromise between the democratic accountability provided in popular elections and the essential judicial independence provided in direct appointments. Although this compromise appears viable, the same political influence that permeated direct appointment and the same campaign issues that plagued popular elections are revisited.

For merit selection and retention to truly be a great compromise, modifications must be made in both systems. The proposed changes in JNC composition and procedures would ensure more judicial independence and quality. Also, providing useful information regarding a judge’s record from credible sources would essentially alleviate the need for zealous campaigning for retention. The fact that the merit system has already been in existence in Florida for over twenty years does not denote success. These changes should be considered and implemented now if advocates want voters to extend the merit system to the selection of trial court judges.



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152. See, Fla. Bar Online, News Media, *Judicial Administration, Selection, and Tenure*, <<http://www.flabar.org/newflbar/publicmediainfo/tfbjournal/ja-jn.html>> (accessed June 18, 2000).

153. See *id.*

154. See FLA. CONST., art. V, § 12(1).

155. See Remsen, *supra* note 3, at 9.

156. See Gail Gray, *The Bar’s Role in Assuring an Independent*

*Judiciary*, 21 PENN. LAWYER 36, 38 (Jan./Feb. 1999).

157. See *id.*

158. See *id.*

159. See Kenyon N. Griffin and Michael J. Horan, *Merit Retention Elections: What Influences the Voters?* 63 AM. JUDICATURE 78, 88 (Aug. 1979).