University of Florida Journal of Law & Public Policy

Volume 2 | Issue 1 Article 2

1988

# Trial Judges and Political Elections: A Time for Re-examination

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# TRIAL JUDGES AND POLITICAL ELECTIONS: A TIME FOR RE-EXAMINATION

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The *University of Florida Journal of Law and Public Policy*'s statement of purpose reflects a desire to publish articles "regarding contemporary legal and social issues facing public policy decision-makers." There are indications that within the next year Florida's public policy decision-makers will be called upon to address the legal and social issue of how Florida selects its trial judiciary.[1] As a result of my belief in the importance and timeliness of this issue, I have chosen to address the topic, "Trial Judges and the Political Election: A Time for Re-examination."

The quality of justice in Florida depends on the quality of its judiciary. It is my long-standing belief that a competitive political election is not the best way to ensure quality within our judicial system.[2] For example, would a citizen whose liberty, reputation, or prop-

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*Justice Overton presented his views on merit retention at an April 3, 1989, luncheon honoring him as the University of Florida, Journal of Law and Public Policy's second annual Distinguished Law Week Lecturer. He received his B.S.B.A. and J.D. degrees from the University of Florida and an LL.M. in Jurisprudence from the University of Virginia. He served as a circuit court judge for nearly ten years before his appointment to the Florida Supreme Court in 1974. Justice Overton was the first Florida Supreme Court Justice selected under the Merit Selection System. During 1976-78, Justice Overton served as Chief Justice. He was awarded the Florida Bar Foundation's medal of honor in 1984. Justice Overton is currently the Senior Justice on the Court.

The author wishes to express his appreciation to his law clerk Paula M. Sicard, University of Florida College of Law, Class of 1986, for her valuable assistance in the research and preparation of this article.

1. Recently, Rutledge R. Liles, President of the Florida Bar, stated:

> In my opinion, the time is ripe to apply merit selection and retention to circuit court and county court judges. In the process, we must be committed to strengthening judicial evaluation and the dissemination of public information about judges who are up for retention.
>
> In spite of the arguments for the status quo, there must be, and is, a more effective and more dignified way of choosing our trial judges. I believe the people of Florida deserve the best. I believe that the dignity of the position of judge requires reconsideration and adoption of a method of merit selection and retention.

Liles, *The Case for Merit Selection/Retention of Trial Judges*, 63 FLA. B.J., Mar. 1989, at 7.

2. In his 1976 Report to the Legislature on the State of the Judiciary, then Chief Justice Overton noted:

> [A]n individual thinking of the judiciary as a career may be concerned about the political uncertainty of the office even though he has been diligent and industrious.
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> . . . I recognize there are many who are concerned about merit retention and believe that it too far removes the judge from the people of his community. Merit

erty is at stake want the judge presiding in his case to have been selected as a judge because he had a popular name, the right political connections, or the biggest campaign fund? Similarly, would not a lawyer coming before a recently elected judge be concerned if opposing counsel had contributed to the judge's campaign or had been on his campaign committee, particularly if the concerned lawyer had not contributed to that campaign?[3] The above questions illustrate but a few of the problems brought about by competitive elections. This article will show why a merit selection and retention process for all trial judges would provide a quality judiciary and eliminate the numerous problems resulting from the competitive election process.[4]

We must first remember that judges in a competitive political arena have the same concerns as all other officeholders who must always be running for re-election. Besides the necessity of soliciting political contributions, the judge/candidate shares the same concern as any other elected public official in having the public readily identify his or her name, since "name identification" is as important to the competitive election process as are contributions.[5]

Many people do not realize that competitive election for judicial office is a mid-nineteenth century American innovation which began with the era of the so-called "Jacksonian Democracy."[6] The United

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> retention is frankly a compromise between a politically selected judge and an appointed judge. It is a means to take the judge out of the political sphere but still require that he be periodically accountable to the people.

Justice Overton reiterated these views in speeches and while participating as a member of the 1978 Constitution Revision Commission and Chairman of the Article V Review Commission and Judicial Council of Florida.

3. Several Florida cases illustrate the problem of lawyer contributions to judicial campaigns. *See, e.g.*, Breakstone v. MacKenzie, 13 FLA. L. WEEKLY 2595 (Fla. 3d D.C.A., Nov. 29, 1988), *rehearing*, 14 FLA. L. WEEKLY 2223 (Fla. 3d D.C.A., Sep. 14, 1989) (en banc); Marexcelso Companio Naviera, S.A. v. Florida Nat'l Bank, 533 So. 2d 805 (Fla. 4th D.C.A. 1988); Caleffe v. Vitale, 488 So. 2d 627 (Fla. 5th D.C.A. 1986). *See also* Harrison, *Debate on Judge's Conflict Spurs Challenge to Bench Elections*, Miami Herald, Feb. 15, 1989, at B3; *Judicial Recusal*, County Court Courier, Apr. 1989, at 9 (reprinted from The Miami Review, Dec. 22, 1988).

4. The Florida Bar, in a handbook entitled "Merit Retention of Judges," defined merit selection as "[a] method for selecting judges solely on the basis of merit rather than through the popular election process" and merit retention as "[a] method of retaining judges on the bench, solely on the basis of merit rather than through contested elections." Young Lawyers Division of the Florida Bar, Merit Retention of Judges (1976).

5. Weingarten, *From the Editor: What's in a Name? About $80,000*, Miami Herald, Aug. 28, 1988, (Sunday Magazine), at 4; Ellis, *Familiar Name on the Ballot Doesn't Hurt*, Dallas Times Herald, Nov. 2, 1986, at B1.

6. Andrew Jackson's presidency was accompanied by a surge of "democratic populous ideals . . . [which] promoted and instilled in the hearts and minds of Americans the notion that everyone, including judges, should be popularly elected and subject to the will of the people."

States is the only common law country in the world where a substantial portion of the total judiciary is selected by popular election.[7] Of the continental European countries, only Switzerland allows a popular voting system to select some of its judges.[8] When the United States emerged as a nation, none of our judges were elected, and if this country's Founding Fathers were to return today, they would probably find no change more startling than an elected judiciary.

The popular election of judges came into vogue in the Jacksonian era. Mississippi was the first in 1832,[9] but almost every new state followed New York's lead[10] after it changed to elected judges in 1846.[11] It did not take long for public dissatisfaction with this process to become evident, and in the late 1800s and early 1900s, the cry began to "take the judge out of politics."[12] This was one of the principal concerns of Roscoe Pound in his famous address to the American Bar Association (ABA) in 1906, in which he emphasized that popular judi-

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Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 SW. L.J. 15 (special issue, May 1986) (citing Percy, *Should State Judges Be Elected or Appointed?*, 31 LA. B.J. 274 (1984)); *see also* THE FEDERALIST No. 76, at 454 (A. Hamilton) (C. Rossiter ed. 1961); Adkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. B.J., Mar. 1976, at 152; Winters, *Selection of Judges — An Historical Introduction*, 44 TEX. L. REV. 1081 (June 1966).

7. *See generally* Berkson, A MERIT PLAN FOR SELECTING JUDGES IN FLORIDA (Public Administration Clearing Service of the University of Florida, Civic Information Series, No. 55, 1975).

8. *Id.*

9. *See* L. HAYES, THE SELECTION AND TENURE OF JUDGES 100 (1944). The author states that

> [w]ithin ten years, fifteen of the twenty-nine states existing in 1846 had by constitutional amendment provided for the popular election of judges, and of the states which have entered the union since 1846, every one has provided that most or all judges shall be popularly elected for terms of years.

*Id.*

10. Winters, *The Merit Plan for Judicial Selection and Tenure — Its Historical Development*, 7 DUQ. L. REV. 61 (1968); *see also* Krivosha, *supra* note 6.

11. *See* Adkins, *supra* note 6; HAYES, *supra* note 9; Winters, *supra* note 10.

12. In the 1860s, the Tammany Hall organization in New York City ousted the elected judiciary, replacing able judges with incompetent ones. Shortly thereafter, a referendum was held on whether to return to the appointment method, but the referendum was defeated in 1873.

> Tammany control of the judiciary continued, and similar conditions in other states led to a revulsion against the elective system soon after it was established. . . . [S]tates which retained the elective system became increasingly concerned about the adverse effects of political selection on the quality of judicial personnel and developed the nonpartisan ballot as a means of "taking the judges out of politics."

Winters, *supra* note 6, at 1083; *see also* Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210 (1980).

cial elections were an important cause of public dissatisfaction with the administration of justice.[13]

In 1913, the American Judicature Society was founded, dedicated to the improvement of the administration of justice.[14] The director of research, a law professor at Northwestern University named Albert M. Kales, set out to devise a method of judicial selection that would represent a compromise between the appointment of judges for life and the political election of judges.[15] Kales desired to minimize the weaknesses of both systems while preserving their respective strengths.[16] He devised the merit selection and retention plan whereby a nonpartisan nominating commission would select qualified individuals as judicial candidates and then submit the names of the qualified individuals to the appointing authority.[17] Once appointed, the judges would stand for retention in a nonpartisan election.[18] As with most judicial reform movements, acceptance was slow, but the ABA finally endorsed the process in 1937. Three years later, it was amended into the Missouri Constitution on a local-option basis; hence, the name, "The Missouri Plan."[19] That process, known as the merit selection and

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13. Under the subheading "Causes Lying in the Environment of Our Judicial Administration," Pound distinguished as the fourth cause of popular dissatisfaction, "The Putting of our Courts into Politics" and stated: "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the Bench." Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. AM. JUD. SOC'Y 55, 66 (1962); *see also* Williams, *Recent Developments in Improving the American Justice System*, 67 NAT'L CIVIC REV. 26 (Jan. 1978).

14. *See* Williams, *supra* note 13.

15. Carbon, *supra* note 12, at 215.

16. *Id.*

17. Specifically, Kales' plan featured three major objectives: (1) formulation of judicial councils composed of presiding judges to nominate candidates for judgeships; (2) provision for the state's elected chief justice to choose judges; and, (3) tenure for judges to be dependent on their winning a noncompetitive election. *Id.*

18. Kales also proposed that judges serve a probationary term of three years to give them time to learn their responsibilities and to give the public time to assess their performance. The retention election would occur at the end of the third year. If successful, the judge would be subject to the same procedure six years later, and if again successful, the judge would stand for retention a third time nine years later. If successful at the third election (eighteen years after the original appointment), the judge would not have to stand for further retention elections. The judge would then be permitted to serve until death, voluntary retirement, or mandatory retirement at a certain age. *Id.*

19. *See* Winters, *supra* note 10, at 71. The Missouri Plan was limited to the supreme court, the court of appeals, the circuit and probate courts of the City of St. Louis and Jackson County, and the St. Louis Court of Criminal Corrections. After serving twelve months, the judge would come before the voters at the next general election on a special nonpartisan ballot. The judge would be retained for a full term by a majority vote. If a majority was not achieved, the judge's

retention plan, is basically Florida's present system for selecting and retaining its appellate judiciary.[20]

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term would expire at the end of the calendar year and the nomination and appointment processes would again be instituted to fill the vacancy. *See* MO. CONST. art. V., § 29 (1940); *see also* Carbon, *supra* note 12, at 213.

20. In 1976, the Florida Legislature passed and placed on the ballot a proposed amendment to article V of the Florida Constitution to require merit retention elections for all *appellate* judges in Florida. The amendment was approved by an overwhelming vote of the electorate, and the first merit retention election was held in 1978. However, the constitutional amendment did not change the election procedures required for county and circuit judges. Article V, § 10, presently provides:

> Section 10. Retention; election and terms. —
>
> (a) Any justice of the supreme court or any judge of district court of appeal may qualify for retention by a vote of the electors in the general election next preceding the expiration of his term in the manner prescribed by law. If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge. When a justice of the supreme court or a judge of a district court of appeal so qualifies, the ballot shall read substantially as follows: "Shall Justice (or Judge) (*name of justice or judge*) of the (*name of the court*) be retained in office?" If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to retain, the justice or judge shall be retained for a term of six years commencing on the first Tuesday after the first Monday in January following the general election. If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.
>
> (b) Circuit judges and judges of county courts shall be elected by vote of the qualified electors within the territorial jurisdiction of their respective courts. The terms of circuit judges shall be for six years. The terms of judges of county courts shall be for four years.

FLA. CONST. art. V, § 10.

Article V, § 11, governing vacancies, states:

> Section 11. Vacancies. —
>
> (a) The governor shall fill each vacancy on the supreme court or on a district court of appeal by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment, one of three persons nominated by the appropriate judicial nominating commission.
>
> (b) The governor shall fill each vacancy on a circuit court or on a county court by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election, one of not fewer than three persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.
>
> (c) The nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor shall make the appointment within sixty days after the nominations have been certified to him.

Where is the merit selection and retention plan now? Thirty-four jurisdictions, including the District of Columbia, have some form of merit selection and/or merit retention for some or all of their judges.[21] Regarding trial judges, three jurisdictions, all original states, continue to appoint them for life.[22] Nine jurisdictions have the basic merit retention system for all trial courts.[23] Eight jurisdictions have no type of election process at all, but utilize a form of the merit judicial nominating commission or legislative process for selection, re-evaluation, and reappointment.[24] Four other jurisdictions employ merit retention for the trial judiciary in major metropolitan areas.[25] Stated another way, currently, in twenty jurisdictions, none of the trial judges are subject to a competitive election process after they reach the bench, and in four more, a substantial number of the trial judges are not subject to competitive elections.[26]

The merit selection and retention process reflects a compromise between the original "appointment for life" system and the competitive

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(d) There shall be a separate judicial nominating commission as provided by general law for the supreme court, each district court of appeal, and each judicial circuit for all trial courts within the circuit.

*Id.* § 11. *See also* FLA. STAT. § 105 (1987), entitled "Nonpartisan Elections for Judicial Officers."

21. Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, New York, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, and Wyoming all employ some form of merit selection or retention within their court system. *See* AMERICAN JUDICATURE SOC'Y, JUDICIAL SELECTION AND RETENTION IN THE UNITED STATES, A STATE-BY-STATE COMPILATION (1988) [hereinafter JUDICIAL SELECTION]. In addition to those jurisdictions utilizing merit selection to fill anticipated vacancies, the following states have provided, through a constitutional amendment, a statutory revision, or an executive order, that merit selection will be used to fill midterm vacancies: Alabama, Georgia, Idaho, Minnesota, Mississippi, Montana, Nevada, North Dakota, and Wisconsin.

22. Both New Hampshire and Rhode Island provide for a gubernatorial or legislative appointment of supreme court and superior court judges without a nominating commission. Massachusetts, by a merit selection through a nominating commission method, appoints supreme, appeals, and trial court judges to age seventy. *See* JUDICIAL SELECTION, *supra* note 21.

23. Alaska, Colorado, Illinois, Iowa, Nebraska, Pennsylvania, Utah, Vermont, and Wyoming have the basic merit retention system for all trial courts. *Id.*

24. Connecticut, Delaware, District of Columbia, Hawaii, Maine, New Jersey, South Carolina, and Virginia use a form of the merit judicial nominating commission or legislative process for selection, evaluation, and reappointment. *Id.*

25. Arizona, Indiana, Kansas, and Missouri use merit retention for the trial judiciary in major metropolitan areas. *Id.*

26. Alaska, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, and Wyoming do not subject their trial judges to competitive elections after they are on the bench, while Arizona, Indiana, Kansas, and Missouri subject only certain judges to competitive elections. *Id.*

political election. The process is designed to do the following: (1) obtain the best qualified individuals for judicial positions; (2) remove political influence and intimidation from judicial decision-making; and, (3) require judicial officers to be accountable to the public.[27]

Why should society treat judges differently from other elected public officials? Some make the argument that a judge is no different from any other elected public official and that eliminating the competitive election process also eliminates the right of the people to vote for important public officials. I submit to you that judges *are* different. It must be understood that the responsibility of a judge is very different from that of a legislative or executive official. This country's founders and our common law heritage recognized this critical distinction and never contemplated placing judges in the political arena.[28] Judges are different because they cannot be advocates, they cannot have political agendas, and in many instances, once a judge makes a determination of the facts, that judge has no choice of what law to apply.[29]

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27. *See generally* Winters, *supra* note 6; Winters, *supra* note 10; Carbon, *supra* note 12.

28. Alexander Hamilton, in 1788, stated:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST No. 78, at 469 (A. Hamilton) (C. Rossiter ed. 1961).

29. Hamilton further cautioned:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

*Id.* at 468-69. In a report of the Committee on Qualification Guidelines for Judicial Candidates, the American Judicature Society published the following comments:

> The foremost responsibility of judges is to preside over courts where contesting litigants have come to seek a resolution of their disputes. The judge's job is to declare the rights and responsibilities of the parties in accord with what they find to be the law controlling a particular set of facts. "The judge's task," as one judge said, "is to adjudicate, to apply appropriate principles in accordance with legal discipline to facts that have been properly determined in accordance with that discipline.
>
> In making decisions judges wield considerable power, but along with this power, they have great responsibility. The combination of power tempered by responsibility

The judge must apply the law as written by the legislature or decided by a higher court — not as he or she might like the law to be.[30] The following statement of a circuit court judge in a capital case sentencing order illustrates the lack of judicial choice:

> I told juries and judges that capital punishment solved nothing, that capital punishment was not a deterrent . . . in fact, it was my candid belief that violence begets violence. I told juries, judges, and anyone who would listen that capital punishment was barbaric, the most premeditated form of murder known to man; that capital punishment could never be meted out in an evenhanded fashion; that no one forfeits his right to live until God deems it so.
>
> As a human being, I have never wavered from any of these beliefs and I expect . . . that I will hold strong to them forever. But I took an oath when I became a judge and swore that I would uphold the law and the law of this state says that you have forfeited your right to live.[31]

The trial judge then proceeded to impose the death penalty.

Our legislative and executive branch officials seek office and are elected on the basis of specifically held views and political agendas. On the other hand, judges must be objective, fair, and impartial.[32]

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> is part of every judge's role whether he sits on the highest appellate court of the state or the land, making bold declarations of principles which may affect the course of future litigation or whether he sits on a trial court, in a charged atmosphere of human conflict and emotion, making rulings which may affect such personal matters as the custody of children, incarceration and punishment of criminal defendants or the disposition of property and fortunes.

AMERICAN JUDICATURE SOC'Y, REPORT OF THE COMMITTEE ON QUALIFICATION GUIDELINES FOR JUDICIAL CANDIDATES 38-39 (1983).

30. The importance of an independent judiciary cannot be stressed enough. Hamilton presented his now famous views centuries ago:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST No. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961).

31. Excerpts of proceedings at sentencing, State v. Milo A. Rose, Circuit Court for Pinellas County, Criminal Division, Case No. 82-08683 CFANO, July 8, 1983, before the Honorable Susan F. Schaeffer (p. 14).

32. *See* CODE OF JUDICIAL CONDUCT Canon 1 (adopted by the Supreme Court of Florida, 1973).

Obviously, it would be contrary to the purpose of the position, as well as ethically improper, for a judge to hear a case in which that judge had previously been an advocate for one side or the other.[33] Would anyone want a judge to sit on his case who had previously expressed a view about how he or she would rule? We must also remember that our constitutional system places primary responsibility for the protection of minority interests, as well as the protection of individual and property rights, on the judiciary.[34] Many decisions involving such rights would never win a popular vote contest. No one ever contemplated that protection of our individual rights could be governed by the consideration of which decision would secure a judge the most votes in a competitive election.

Are we really ensuring that a quality judiciary will assume judicial responsibilities when candidates or incumbent judges in this state must raise upwards of $250,000 to compete in a circuit court judgeship election?[35] Similarly, are we really obtaining the most highly qualified individuals in the legal profession to become judges when many judge candidates seek to hire a specific campaign manager because he has a reputation for keeping other candidates away from races which he runs, or a campaign manager who is successful in judicial campaigns but is also a convicted felon?[36] Are we promoting a quality judicial system when a lawyer must decline to represent a client because the lawyer supported the opposing judicial candidate and because it would not serve the best interests of the client for the lawyer to represent him before that judge?

An article entitled *Juris Impuris* in the *Miami Herald* "Tropic" magazine published August 28, 1988, identifies the problem of obtain-

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33. Canon 1 states, in pertinent part: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." *Id.*

34. One scholar expressed his views in the following manner:

> [J]ustice is everybody's business, not the lawyers' alone. It affects every man's fireside; it passes on his property, his reputation, his liberty, his life; yes, his all! Courts sit to determine cases on stormy as well as calm days. We must therefore build them on solid ground, for if the judicial power fails good government is at an end. What good be laws, what value bills of rights, unless there be courts with strength and integrity in the hour of trial to resist the fashionable opinions of the day? Remedies alone are the life of rights, the substitutes for violence.

Clark, *Colorado at the Judicial Crossroads*, 50 JUDICATURE 118 (Dec. 1966).

35. *See Juris Impuris*, *infra* note 40, at 10, 12 & 14; *see also* Nicholson, *The Price of Justice: The Funding of Judicial Campaigns in Cook County over Three Elections*, Report to the Judicial Conduct Task Force, Special Commission on the Administration of Justice in Cook County.

36. *See Juris Impuris*, *infra* note 40, at 10, 11.

ing a quality judiciary under our present system and suggests that Florida may have graduated to the Texas class of judicial politics.[37] The *Miami Herald* article addresses the trial judge competitive election process for 1988 in Dade County. The notorious *Pennzoil-Texaco* case[38] illustrates the Texas problem. A republished comment from the *Washington Post* reflects the situation in that case:

> When a Pennzoil lawyer gave $10,000 in campaign contributions to the judge assigned to hear its $11 billion lawsuit against Texaco, defense attorneys yelled "foul." They demanded a new judge. They asked for a retrial. They filed an appeal. And they struck back in kind, dishing out $72,700 in campaign contributions to seven Texas Supreme Court judges expected to make a final ruling in the case, including three justices who weren't up for reelection. A good investment? Maybe not good enough. When the checks were tallied, Texaco attorneys learned they had been outbid — Pennzoil lawyers gave Texas Supreme Court justices more than $315,000, including donations to four justices who weren't running.[39]

Anyone having substantial interests at issue in the courts and wanting an impartial and quality judiciary should be deeply disturbed by the effect competitive elections have had on the judicial system, as the preceding examples illustrate.

Contributions represent but one problem inherent in a competitive judicial election, but we must also consider the name identification factor. Are we ensuring a quality judiciary when the name game is a key factor, and a popular name is more important than ratings or endorsements? The significance of the name game was explained in

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37. *See, e.g.*, Ellis, *Donations to Two Judges Criticized: Attorney for Pennzoil Co. Contributed after Verdict*, Dallas Times Herald, Feb. 9, 1988, at B1. In early 1987, in his "State of the Judiciary" address to a joint session of the legislature, Texas Chief Justice John Hill called for adoption of an appointive system for judges rather than the elective system in force. In an unusual action, five associate justices held a news conference to contest Hill's remarks and suggested Hill was motivated by plans to enter the 1990 gubernatorial campaign. Under Hill's proposed system, the governor would make the judicial appointment. However, Hill defended his position by pointing out the high cost of running for judicial office, a fact he believed would discourage qualified candidates. *See* Ellis, *Judge Election Plan Splits Hill, Justices*, Dallas Times Herald, Feb. 10, 1987, at B1.

38. *See* Adler, *The Texas Bench: Anything Goes*, THE AMERICAN LAWYER, Apr. 1986, at 11; *see also* T. PETZINGER, OIL AND HONOR: THE TEXACO-PENNZOIL WARS (1987).

39. Kaplan, *The Texas Touch for Financing Judicial Campaigns*, COMMON CAUSE MAG., *reprinted in* 298 J. ACADEMY OF FLORIDA TRIAL LAWYERS 19 (July 1987).

the *Miami Herald* "Tropic" article, which cited one example where a publicist suggested that a judicial candidate change her name because her real name was a political liability.[40] It has not been unusual for good judges with good reputations, high ratings, and unanimous endorsements to be defeated by a popular name in this state and others. Interestingly, one of the most successful trial judge candidates in Texas in 1986 was a judge who had the same name as a popular local radio personality.[41]

Do the voters really know the judges on a competitive election ballot? A Texas exit poll in 1986 reflected that eighty-one percent of the voters in Dallas County and seventy-seven percent of the voters in Harris County (Houston) could not recall the name of the candidate for a judicial district seat in the voters' respective counties.[42] Is it any wonder that popular names win judicial elections?

I suggest we do obtain a higher quality judge from the merit selection process. Our own judicial discipline records clearly support this conclusion. They reveal that the merit selection process enhances the quality of our judiciary far more than the competitive election process. Since 1972, almost all seats open in an election year, including vacancies resulting from retirement at the end of a term and newly created seats, have been filled by competitive election.[43] On the other hand, in non-election years, the new positions and vacancies have all been filled through the merit selection process. Our judicial discipline records reveal that of the twenty-seven judges disciplined in Florida, twenty-four came to the bench via competitive election or a partisan political process and were not involved in merit selection.[44] Only three were the product of merit selection commissions.[45] Also noteworthy is the fact that five of six judges who resigned after formal charges were filed against them came to the bench through a competitive election or a partisan political process.[46]

Opponents of merit selection and retention argue that the process interferes with the people's right to elect their judges.[47] This argument,

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40. Achenbach, *Juris Impuris*, Miami Herald, Aug. 28, 1988, (Sunday Magazine), at 10.

41. Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146, 151 (Oct.-Nov. 1988).

42. *Id.*

43. Statistics were compiled by the Office of the State Courts Administrator.

44. Statistics were compiled by the Judicial Qualifications Commission and the Office of the State Courts Administrator.

45. *Id.*

46. *Id.*

47. Griffin & Horan, *Merit Retention Elections: What Influences the Voters?*, 63 JUDICATURE 78 (Aug. 1979). Spaeth, *Reflections on a Judicial Campaign: Should Judges Ride a Political Bandwagon?*, 60 JUDICATURE 10 (June-July, 1976).

however, is misleading because it fails to recognize that many incumbent judges do not have opponents and never appear on the ballot. In fact, many open seats are uncontested.[48] The Judicial Council of Florida, in its 1985 Annual Report, noted that the nominating commission process produced more applicants for a judicial position than the competitive election process.[49] The report explained that when a competitive election is used to fill a vacancy, no more than two candidates typically apply and qualify; however, when a new position is filled through the nominating commission process, often more than twenty persons apply.[50] Clearly, more choice is available through merit selection than election.

Some critics charge that the merit selection process is elitist. However, that claim has no basis in fact. Statistics reveal that more blacks and women have received judgeships in Florida through the merit selection process than through a competitive election.[51] In fact, nineteen out of twenty-three black judges and forty-one out of seventy-one women judges came to the bench through the merit selection process.[52]

Critics also suggest that retention elections result in media control of the judiciary.[53] However, a study of merit retention elections found that judges who were defeated in a retention election lost not because of media control, but because they lacked professional competence, were guilty of misconduct, or were perceived to have a political agenda.[54]

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48. The Judicial Council of Florida's 1985 Annual Report, using statistics generated by the Office of State Courts Administrator, stated:

> Evidence presented to the council reflected that, when a vacancy is filled by a competitive election without involving the nominating commission, only two candidates typically apply. On the other hand, when a new position is filled through the nominating commission process, often more then twenty persons apply for the position. During the 1984 election, twenty-six circuit judgeships did not have an incumbent running. Of these twenty-six judgeships that are to be filled by competitive election, nine open judgeships had only one candidate qualify; fifteen judgeships had two candidates, one judgeship had four candidates, and one judgeship had five candidates.

JUDICIAL COUNCIL OF FLORIDA, 1985 ANNUAL REPORT 2 (Feb. 1, 1986).

49. *Id.*

50. *Id. See also 39 Attorneys Applying for Vacant Judgeship*, Orlando Sentinel, Mar. 17, 1987, at B2.

51. Statistics were compiled by the Office of the State Courts Administrator.

52. *Id.*; *see also* Krivosha, *supra* note 6, at 19; AMERICAN JUDICATURE SOC'Y, WOMEN JUSTICES CURRENTLY SERVING ON STATE COURTS OF LAST RESORT: METHODS OF INITIAL SELECTION (1988).

53. *See generally* Griffin & Horan, *supra* note 47, at 83.

54. *Id.* at 80.

I firmly believe that judges should be evaluated on their merits and capabilities as judges, not on their successes as politicians, and I suggest that most members of the public believe likewise. There is no justifiable reason which should prevent the public from voting on a constitutional amendment which would provide for trial judges the same merit selection and retention process now in existence for the appellate judges of this state. Although the merit retention plan removes the judicial office from competitive politics, it still requires the judges to be responsive to the people by having their names on a retention ballot at regular intervals.

As previously mentioned, thirty-four states presently employ a form of merit retention for at least some of their judges. Many states have utilized this system for more than fifteen years, and none have chosen to return to the competitive election system.[55] In recent years, the issue of how to evaluate judges who are subject to a retention election has been of considerable interest. Colorado, based on successful experiments in 1984 and 1986, established permanent performance evaluation commissions.[56] Effective in 1988, these evaluation commissions, composed of both lawyers and non-lawyers, utilized not only bar polls but questionnaires distributed to court personnel, law enforcement officers, jurors, and other groups regularly involved with the courts.[57] The commissions also observed the judges at work and interviewed them personally.[58] The commissions must make final evaluation reports at least thirty days prior to the date when the judge must determine whether he desires to be retained.[59] Initial reports, particularly from the pilot programs, seem to suggest that this process provides responsible citizen evaluations and a reasonable and suitable means to inform the public without adversely affecting the independence of the judiciary.

During the last fifteen years, various media and other organizations in Florida have supported the merit retention of trial judges. These organizations include The Florida Bar, the League of Women Voters,

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55. *See* JUDICIAL SELECTION, *supra* note 21.

56. *See generally* Rankin, *Citizen Evaluation of Judicial Performance: The Colorado Experience*, 72 JUDICATURE 210 (Dec.-Jan. 1989). The state commission consists of ten members, two who are appointed by the speaker of the house of representatives, two who are appointed by the president of the senate, and three each who are appointed by the governor and the chief justice of the Colorado Supreme Court. *Id.* at 212.

57. *Id.* at 214.

58. *Id.*

59. *Id.*

and the Circuit Judges Conference.[60] In 1978, the Constitution Revision Commission recommended merit selection and merit retention of all judges in its final report.[61] In 1984, the Article V Review Commission recommended adoption of this plan, stating that "extension of the merit retention system to circuit court and county court judges would improve the quality of Florida's judiciary . . . . [C]ompetitive elections for judicial office may discourage competent, qualified attorneys from seeking such a position."[62]

The Commission also noted in that report that, in 1983, Senator Bob Crawford, now President of the Florida Senate, introduced a joint resolution providing for merit retention of trial judges.[63] Recently, the President of The Florida Bar expressed his approval of such a system.[64]

In conclusion, I must emphasize that judges in a competitive political arena are not unlike other politicians who must run for re-election. Judges cannot be blamed for being political if they are placed in the same competitive election process as other public officials. I believe, however, that most who examine the problem objectively would agree that it is not beneficial to a quality judiciary for judges to have as major concerns the need for name recognition, a political organization, and a committee to solicit campaign funds. We cannot judge judges on their merits until they are removed from the arena of competitive politics. The merit retention system, in my view, will allow such objective evaluation and encourage highly qualified individuals to make the judiciary a career. We should remember the basic function of the judiciary, which Chief Justice Terrell best stated:

> [T]he judiciary has ever been the poor man's shield against oppression, the rich man's defense against the mob, and though the reformer may wince under the law's restraints, it is his only recourse for justice if he permits blind passion to enmesh him in its clutches. It will save the minority from the tyranny of the majority and protect both from the ruth-

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60. Recently, a number of media editorials have supported merit retention. *See For Better Judges*, Miami Herald, Apr. 3, 1989, at 14A (editorial); Buckwalter, *Judges Should Not Be Politicians*, Jupiter Currier Journal, Mar. 8, 1989, at A-4 (editorial); *For the Bench: The Herald Recommends*, Miami Herald, Nov. 1, 1988, at 26A (editorial); *Florida's Good Courts*, St. Petersburg Times, Oct. 27, 1988, at 20A (editorial); *Extend Merit Retention to Florida's Trial Courts* (WJXT-TV4 television broadcast, Mar. 13-14, 1989); *Judges "Elected" Without Elections* (WJXT-TV4 television broadcast, Aug. 15-16, 1978).

61. FLORIDA CONSTITUTION REVISION COMMISSION, FINAL REPORT (May 11, 1987).

62. THE SUPREME COURT'S ARTICLE V REVIEW COMMISSION, FINAL REPORT (Feb. 1, 1984), at 5.

63. *Id.*

64. *See* Liles, *supra* note 1.

> less hand of the demagogue. It is the saving quality that will make this government one of laws and not a government of men.[65]

I earnestly hope we all agree that politics should in no way intimidate or indirectly control the role of the judiciary in carrying out its function. When trial judges, because of their political involvement and problems, are portrayed as clowns on the bench, when a name means more than qualifications, when up to a quarter of a million dollars is necessary to run for a Florida circuit judgeship, and when almost all judges disciplined come to the bench through the competitive election process, it is time for us to re-examine how we select and retain our trial judiciary.

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65. Address entitled "The Judiciary and Democracy," given by Justice Glenn Terrell in St. Augustine, Florida (circa 1942). The quote was included in a subsequent essay by Justice Terrell entitled *The Judiciary in a Federal Republic*, which appears in THE FLORIDA HANDBOOK at 167 (A. Morris, 3d ed. 1952).