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I. INTRODUCTION

In its never ending quest for the perfect judge, society continually changes the judicial selection process. Because judges are not perfect, but only human, the methods of judicial selection are constantly being adjusted. Occasionally, more dramatic changes occur when earlier methods are attacked as no longer acceptable and thrown onto the political junk pile. When such situations arise, most parties struggle to determine which method of judicial selection, the proposed or the existing, will best serve their personal interests. Incumbent judges try to identify the method that will allow them to retain office with the least disruption to their lives. Other participants, particularly the bar and the business community, assess the various proposals in terms of the type of judges it tends to produce. In some cases, members of the bar may be influenced by the effect a particular method has on their personal chances of attaining judicial office.[1] Consequently, no party comes to the process completely disinterested, notwithstanding protestations of lack of bias.

Ironically, the public, the group most affected by any proposed change in judicial selection methods, is the least involved. Its role remains largely that of a passive spectator, a muted Greek chorus, although most citizens may not even be aware that anything significant is transpiring. Courts and judges, though powerful social actors, are obscure by design. This notion deliberately makes the politics of judicial reform subterranean in nature.

The political and legal elites in Florida are currently considering changing the method by which trial judges are selected. The proposed

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1. All too often, we forget the goad of personal ambition in fostering change. New groups move to the fore and demand their turn in the seats of power. Because no judicial selection method is neutral, the choice of method always stimulates great interest in those involved.

method is full merit selection, rather than the current system of nonpartisan elections supplemented by gubernatorial merit appointments. Under the full merit system, if implemented, Florida judges will all be selected by the same judicial selection method for the first time since the early 1970s.[2] This Paper will present some general thoughts on the judicial selection process and will then focus on the difficulties of balancing the conflicting values of judicial independence and judicial accountability.

II. SEARCHING FOR THE PERFECT METHOD

Throughout American history, state court judicial selection methods have been the product of changing social and political currents. Historically, six distinct judicial selection methods have been employed, including legislative elections, gubernatorial appointment, partisan election, nonpartisan election, selection by sitting judges and merit selections. No one selection method has eliminated its preceding system; rather, the process has been mostly incremental in nature, with vestiges lingering on from earlier experiments. For example, several states continue to employ legislative election.[3]

Each method, in its heyday, was perceived by its advocates as an improvement on its precursor. Social concerns have shifted over time, rendering earlier arrangements obsolete, or at least less compatible with current needs. Jacksonian democracy, for example, with its emphasis on popular participation in the selection of public officials and a pervasive feeling that such powerful positions should be open to every qualified person, led to partisan election as the dominant selection method by the mid-nineteenth century.

More recently, the preferred basis for judicial selection has been professional qualifications. As a result, nonpartisan election and several forms of merit selection have become the favored vehicles for selecting judges.[4] Each method emphasizes social values; thus, because values change overtime, the preference for a particular selection method is bound to be short-lived. Later participants in the system often find their predecessors' motives incomprehensible or unacceptable.

Over the past thirty years, Florida has experimented with four of the methods identified above. Three of these methods are still partially in place: gubernatorial appointments, nonpartisan election process at the

2. Roger Handberg, *The Florida Courts: Change and Adaptation, in* GOVERNMENT AND POLITICS IN FLORIDA 192, 201 (Robert J. Huckshorn ed., 1991).

3. HENRY J. ABRAHAM, THE JUDICIAL PROCESS 22 (6th ed., 1993).

4. For a survey of merit selection plans, see Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 (1994), accompanying this Article.

trial court level, and full merit selection at the appellate level.[5] The state's political and legal elites have hammered out these fragile political arrangements against a background of massive population growth and the political and social dislocation associated with such growth. Continued dissatisfaction with the competitive election process (whether partisan or nonpartisan) has led to intensified lobbying efforts aimed at converting the entire state judiciary to full merit selection.

III. Assessing the Divergence

In America, the public debate regarding judicial selection methods is driven by two divergent values: judicial independence and judicial accountability. While not diametric opposites, each of these values emphasizes different facets of the judicial role.[6] Judicial independence emphasizes the effective isolation and separation of the judge from society, while judicial accountability focuses on the intimate connection between the governors and the democratically governed. The isolation required by judicial independence is perceived as necessary to preserve the unbiased nature of judicial decisions. Such decisions should be based on the legal merits of the controversy, not personal favor, whim, or other prejudicial influences. Judicial accountability emphasizes the judge's responsibility to society as a whole and its citizens. As with all good stewards, judges are occasionally called upon to render an accounting of their stewardship.

Judicial reformers in the United States must resolve the resulting tension in a fashion that sustains both values. Reform-minded legal professionals have focused their efforts on maintaining judicial independence. This value preference reflects the view that properly inculcated professional values and legal expertise (e.g. embodied in concepts such as the rule of law) are sufficient to restrain any potential abuse and make judicial accountability unnecessary.[7] When abuse of judicial power

5. Under Florida's limited merit selection process, the governor appoints interim trial court judges after merit review by the circuit commission. At the next election, however, opponents can challenge and run against the sitting judge. Therefore, this method lacks the retention election component, whereby a judge runs against his or her own record, but not an actual opponent. In point of fact, most incumbents run unopposed, unless there is either a controversy or perceived weakness. Burton Atkins writes that appointment followed by unopposed re-election has been the dominant pattern for many years, although it is now declining. Burton Atkins, *Judicial Elections, What The Evidence Shows*, 50 Fla. B. J. 152, 154 (1976).

6. These two values appear to be the most central within the American political context, although other values do exist. For example, the value of judicial competence has been much touted, although it is difficult to define the characteristics of a good judge. Code words used to describe "good" judges, such as "adherence to precedent" or "judicial deference" have had different values at different points in history.

7. In effect, the judges carry their values, their internal compasses, with them. These values are the product of proper legal education and professional experience. Judges are experts, and

does occur, the legal system provides remedial mechanisms, albeit often very slowly and too late. This professional vision, which permeates much of the legal reform literature, is a reversal of the earlier Jacksonian view that the people themselves, through their free and unincumbered choice, could best evaluate who should govern them. Those in office were there on sufferance and a short leash. Both of these traditions continue, although the professional view on judicial independence is becoming increasingly dominant. Our discussion proceeds against this shifting ideological background.

IV. INFORMAL DEFINITIONS

In order to further structure the discussion, we must offer an informal working definition of each concept. Our purpose is to isolate certain essential elements, rather than provide a logically complete and all-inclusive definition. Judicial independence refers to the notion that judges must have physical and emotional space to render impartial decisions, without fear of retribution (either formal or informal) for unpopular, yet sound, decisions.

It goes without saying that judicial decisions do not satisfy everyone. The very nature of judicial decisions means simply that someone wins and someone loses. Losing parties often attribute their loss to bias among officials, rather than objective outcomes.[8] While bias certainly exists in the occasional case, more frequently the losing party simply has a weaker case.

To reduce the appearance of prejudice, elaborate normative structures have evolved that isolate judges from *ex parte* contacts regarding pending or projected cases and restrict their personal involvement in certain activities.[9] Violating these norms can cost errant judges their positions, while outsiders can be sanctioned.

Protecting judges from all forms of retribution can be difficult. Some sanctions are social, such as ostracism by the local community, as occurred in the South during the 1950s.[10] Other sanctions are physical; some judges have been murdered by disgruntled litigants and defend-

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experts know best what society requires. In other contexts, this hubris has generated strong reactions because, as Justice Stone wrote in a dissenting opinion several years ago: "[T]he only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 79 (1936).

8. Sometimes, for tactical reasons, an attorney may initially "lose" in order to appeal to a wider and more friendly forum. Civil rights attorneys pursued this strategy in the South in the early 1960s, when Mississippi federal district courts were hostile to their claims, but the Fifth Circuit was more amenable.

9. *See* Jack B. Weinstein, *Learning, Speaking, and Acting: What Are the Limits For Judges?*, 77 JUDICATURE 322 (1994).

10. JACK W. PELTASON, FIFTY EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND

ants. Official sanctions can be direct, such as efforts to remove judges from the bench through impeachment, failure to reappoint, or defeat at the next election. They can also be indirect, such as denial of promotion to a higher court, reductions in court budgets, or denial of salary increases. Generally, most acts of retribution are concealed because public norms and laws prohibit overt actions. In actuality, sanctions are more frequently threatened than imposed.

Judicial accountability is informally defined as the definitive review of judges in set intervals by those whom they serve. Definitive review refers to the process by which a judge loses office upon a negative evaluation by the public.

Public review, in principle if not reality, acts as a check on any arbitrary and capricious exercise of judicial power. Each judge removed from office provides a moral example, to those remaining, of the effective limits of judicial power. While most judges continue in office, the worst, most abusive, and most incompetent are removed. The process is admittedly imperfect, but within a democratic setting, meets the crude test of judicial accountability.

For accountability to be effective, judges need not actually be defeated. Rather through the evaluation process itself they are reminded of their relationship to the people they serve. In effect, evaluation provides a dose of humility to those who occupy positions of power and receive deference from those around them.

Balancing judicial independence and judicial accountability has long haunted the judicial selection and retention process at the state level. By contrast, federal judges, particularly Article III appointees, are distanced from real accountability by conscious political design. This trend may be changing, however, if the increased use of the impeachment process over the past decade persists, although it is more likely that these recent cases reflect only unusually obstinate judges who had refused to resign.[11]

It can be argued that people consider state judges to be far too important to be insulated the way federal judges are. State courts still have a much greater impact on the lives of individuals than do federal courts. The bulk of cases disposed by state courts, especially criminal, personal injury, and family law matters focus directly on individuals. The state court's focus on the individual has become even stronger in

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SCHOOL DESEGREGATION 9-10 (1961). Professor Peltason reported on the social isolation of federal judges who strove to enforce the Supreme Court's *Brown* decisions.

11. MARY VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE (1993). Professor Volcansek reviews the most recent impeachment cases, including that of Alcee Hastings of Florida, who was removed inspite of his acquittal of criminal charges.

recent years, as the federal courts have attempted to withdraw ever further from cases resolvable by state courts. While Congress has made some efforts to increase federal involvement in areas such as domestic violence, the historical pattern has been for state courts to deal with the more personalized problems of society. Due to this individualist orientation, judicial accountability remains an important component in debates about state judicial selection and retention processes.

This view of state courts, however, presumes a personal link between the judge and the electorate.[12] This is a link, not in the intimate sense, but in the electorate's general awareness of the judge's actions. It is this personalized linkage which has proven to be the weak point in the accountability process, because the public remains largely unaware of judicial activity. The dilemma in Florida is that we are a rapidly growing state of strangers; government officials at all levels are unknown to new arrivals. Even the rural counties have grown significantly, changing the dynamics of the electoral relationship assumed to operate there.

For courts in particular, the linkage with the public is especially frayed, due to the general obscurity of judicial institutions—an obscurity fostered by judicial norms minimizing public exposure and bar norms protecting that obscurity. The bar, the group best informed about the courts, is unwilling and, by some lights, unable to provide objective information about judicial performance. This means that we, the public, are largely unaware of who our local judges are and how well they are performing their duties.

The result of this lack of information is that public judicial evaluations, either through regular competitive elections or retention elections, have many of the characteristics of a lightning strike on a Florida golf course: When it hits, it comes out of the blue, without warning. Most judges do survive their encounter, however, since relatively few judicial elections are contested. For example, a survey of retention elections from 1980 to 1990 found that out of 2,641 judges, only thirty-four (or 1.3%) were not retained. In fact, only sixteen of these thirty-four judges failed to receive a majority vote. In Illinois, eighteen judges were not retained because they failed to achieve the sixty percent approval rate, although they did receive a majority of votes.[13]

The reality is that judicial accountability through the election process is minimal. Usually there are no issues, no opponents, and no pub-

12. The difficulties of establishing accountability can be seen in PHILIP L. DUBOIS, FROM BALLOT TO BENCH, JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY (1980). Most judges are re-elected with minimal opposition.

13. Robert C. Luskin et al., *How Minority Judges Fare In Retention Elections*, 77 JUDICATURE 316, 319-20 (1994).

licity. When opposition based on ideology or issues actually does arise in a retention election, the debate is indirect and often confusing to the public. For example, in 1990, Justice Leander Shaw[14] and, in 1992, Chief Justice Rosemary Barkett confronted organized opposition to their respective bids. The primary issue in both challenges was abortion, although Chief Justice Barkett also confronted criminal justice issues and encountered more strenuous opposition than did Justice Shaw.[15] While both justices were ultimately retained in office, their experience show that the nature of retention elections has changed in Florida. Since 1990, the average negative vote has risen by about ten percent (from 25% to 34%).[16] There is greater dissatisfaction with judicial institutions, but its expression remains inchoate due to a lack of effective leadership and intensity on the part of the public. Florida's retention elections may be moving closer to situations such as the one faced by California Chief Justice Rose Bird.[17]

There continues to be a concern that a judge's excessive fear that he will be publicly singled out for performing a controversial action close to election time may compromise judicial independence. Judicial decisions are frequently controlled by factors other than the judge's preferences (if one holds to the concepts of precedent and rule of law). Consequently, these decisions can be controversial within local communities. Chief Justice Barkett argued this view, to mixed response, during her retention campaign.

Given the inertness of the general public regarding the courts, a small but vocal single issue group can have a disproportionate impact on an election, because it may be the only emotional voice raised in opposition or support. Most judges campaign in obscurity, with little name or other, public recognition. Some judges fear that a single act or decision can crystalize opposition, an opposition beyond reason or change, before the vote. Therefore, in theory, judges may avoid hard choices or unduly delay proceedings when an election looms close at hand.

On the one hand, one could argue that the accountability process is working, albeit crudely. On the other, uninformed votes are not helpful and, furthermore, undermine the case for accountability. More realisti-

14. Donna O'Neal, *Anti-Abortion Activists Put Pressure On Shaw*, ORLANDO SENTINEL TRIBUNE, Oct. 4, 1990, at B4.

15. Roger Handberg, "Gender, Crime and Abortion: Judicial Retention and Florida Supreme Court Justice Rosemary Barkett" (paper presented at the Annual Meeting of the Florida Political Science Association, Winter Park, Florida, April 1993).

16. Michelle L. Young, Merit Retention Election, What The Evidence Shows (unpublished paper, University of Central Florida, June 1994). The figures cited in this paper are based upon official reports of the Division of Elections, Florida Department of State.

17. *Cf.* George F. Uelmen, *Supreme Court Retention Elections In California*, 28 SANTA CLARA L. R. 333 (1988).

cally, the process operates well, notwithstanding its imperfections, given that the public receives little assistance from anyone who can provide information and guidance. The most accessible source of information, the media, focuses on the macabre and bizarre in a completely episodic fashion. This provides the public with no hard information as to how well the courts and individual judges are performing their functions.

Editorial endorsements are announced, but because they are summary statements, they are usually unrelated to any information useful to the public in determining why one candidate was endorsed over another in a competitive election or why a particular judge should be retained. Because judicial campaigns, whether competitive or retention, are largely without content, we must seek other mechanisms. There are no magic solutions, only partial and imperfect ones.

The struggle to develop and implement such solutions is fundamental to a healthy democracy. If a democracy produces a judiciary excessively remote from the public it serves, the result is a growing disrespect for the law and, ultimately, the degradation of society's legitimacy. The courts, and society in general, rely on uncoerced public compliance in order to achieve just outcomes. When overused, official coercion gradually loses its effectiveness, especially in a democracy, a government based on consent. Even authoritarian states, such as the former Soviet Union, discovered that coercion was both inefficient and counterproductive. There must be a living link between the state courts and their clientele, the people of the state.

V. Some Imperfect and Partial Suggestions

The following suggestions support this view that judicial accountability is as critical as judicial independence. Some are less feasible than others, because they require genuine change by institutions that are either reluctant or unable to change. None of these suggestions compromises judicial independence. In fact, each strengthens it, by reaffirming that judicial power is not, and will not be, exercised capriciously. These suggestions accept the political reality that merit selection is likely to continue, regardless of its outcomes.

First: *The public component on judicial selection committees must be strengthened.* This first suggestion is both the simplest and most difficult to implement. Diversity is currently coming to the committees through gubernatorial fiat—a policy likely to continue into the future because it is inexpensive and does not restrict a governor's power of patronage. I recommend the recruitment of public members, who are both more interested and personally assertive in the process of evaluating prospective judicial candidates. Far too often, attorneys dominate

the committees for reasons of expertise and interest. The selection of judges is not a science, but rather an assessment of an individual's career and his potential for growth. Business leaders and others engage in such activities continuously and routinely; they do not suddenly become incompetent when confronting attorneys. On the contrary, many business leaders are shrewd judges of legal talent, because they employ legal talent in their own daily affairs.

Instead, bar politics, with its special interest concerns, dominate the selection process. Such politics are not public, but rather reflect narrow economic and personal interests and are often contrary to the public interest. Because bar politicians make claims of special expertise or insight, these activities go effectively unchallenged in most instances. Committees, especially the public members, should solicit evaluations from outside the carefully constructed lists provided. A wider scope of inquiry would provide a more varied and realistic view of the prospective candidates. The ABA Committee on the Federal Judiciary has taken such a view of the evaluation process. Narrowly defining information about candidates, and keeping it accessible, aids those with self-interested agendas.

Second: *The evaluation of sitting judges needs to be strengthened and reported to the public in an understandable format.* This suggestion is not new; other states have already begun implementing this process. Some states, notably Colorado, have developed a multifaceted approach, including actually observing judges in the courtroom. Through systematic observation, judges can be evaluated in terms of their interactions with the public and other court room participants. This evaluation is process oriented, rather than content oriented. Far too often, incompetent or abusive judges remain in office until they push the state bar or individual attorneys too far.[18] Meanwhile, the public, lacking access to an effective complaint mechanism and often the courage to act, suffers from judicial tyranny.

The key here is providing comprehensible information to voters. This approach replaces or supplements ongoing bar surveys, which remain plagued by low rates of return and uninformed attorney voting (that is, voting about judges with whom they have not professionally dealt or whose opinions they have not read). The media generally ignores such surveys, or else provides such cursory coverage as to effectively ignore the survey results. Such surveys have little effect on public

18. Media reports in Florida recurringly demonstrate this pattern, where judges come into conflict with the bar and only then does something happen. In actuality, many of the situations fester for a while. But the key is that the bar moves when its prerogatives and feelings are hurt. Until that point, the public is allowed to suffer.

evaluations of judicial candidates.[19]

The obvious difficulty with implementing a more thorough evaluation approach is in sustaining the necessary elaborate data collection efforts after initial enthusiasm and volunteers disappear. Routinization of new and controversial procedures is often difficult, partly because the resistance and inertia among those affected (judges in this instance) is strong and prolonged, and because the observation work required by this evaluation process can be tedious and boring. Volunteer groups, such as the League of Women Voters, may staff initial efforts, but over the long term the efforts of such groups can degenerate into just another vested interest.

The key is to make more useful information available to voters. Whether voters use that information correctly is immaterial. What is important is that information is made available; voters can exercise their own choice about how to use it. While the elite often disparages voter competence, in a democracy it is the voters who are the final judges of what is done on their behalf. Elite actions and inactions have fostered voter misinformation; their condescension, therefore, reflects only the elite's past and ongoing failures to support an activist democracy. Disparaging remarks about voters do not substitute for information that enables voters to make more educated decisions.

The final suggestion similarly falls under the principle of increasing information, but is more dependent upon the media for effective dissemination. *The Florida Supreme Court should publish each year, in an accessible form to the public, an accounting of the court system's general activities including a summary of disciplinary actions taken regarding judges.*

Judicial discipline in Florida is apparently successful, although it operates largely as an invisible process, except in those rare instances when unusual episodes surface in the public domain. These normally involve a judge caught in some publicly embarrassing situation, and are often resolved by the judge's resignation. The public perception of the judiciary is, therefore, a mixture of rumors concerning judicial misconduct and partial media reports of sensational cases. The result is a public perception that judges are excessively protected from public scrutiny.

Publication of the annual reports for the state court system lags too far behind events to be useful in informing the public of the system's activities. The Chief Justice's public presentation to the State Legislature takes place in the confusion of the annual session, and is perceived

19. John M. Scheb, *Is Anyone Listening? Assessing Bar Influence On Merit Retention Election In Florida*, 67 JUDICATURE 112 (1983). Scheb reported that Florida Bar surveys had little discernable impact on voters' choices.

as the self-interested pleadings of another bureaucrat seeking funding from the public trough.

By including a summary of the disciplinary process with that public report, the Court would reaffirm to the populace that its interests are being protected, even though judges are routinely, and almost automatically, returned to office. In light of the reality of automatic tenure, the judicial discipline and removal process becomes even more central to sustaining some notion of judicial accountability and instilling in the public the perception that judges are accountable. This last suggestion assumes that the electorate, when properly informed, will make intelligent choices in their own best interest.

VI. CONCLUSION

Selecting judges is difficult, even under the best of circumstances. The process is made more difficult in Florida, because the state is in the process of redefining itself into a "California East" in terms of its diversity and size. At the same time, the politics of the state are seeking a new equilibrium as the traditional Democratic dominance fails and the Republicans surge into power. These factors influence the changes in the courts.

Merit selection of judges is not the answer to every question and problem. In fact, merit selection may be wholly ineffective in handling the problem of intense interest group involvement in retention elections. The constraints on judges in responding to such attacks may leave the judiciary in far worse peril than earlier systems did because, under the new system, they have no automatic group rallying to their support. Running as an individual professional can be lonely, especially if the bar is split or neutral on the candidacy. Merit selection perceives judicial selection as the sport of the professionals, a possibly self-interested and outdated perspective. The public now considers courts to be too important to be the exclusive prerogatives and provinces of the professionals. That fact may distress the bar, but their own activities (through litigation) and the resulting decisions have made the courts too intrusive and central for important social issues. When issues of life and death, such as abortion, crime, and punishment motivate voters, the courts will be buffeted by those public passions.