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Ensuring a Diverse Bench: Is Florida Up to the Task?

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When Judge Barr and Judge Jones asked me to speak at this symposium, my first (though private) reaction was, "Why in the world would I want to offer myself up as a punching bag for our distinguished panel in a 3-hour debate on this sometimes cantankerous, always highly emotional and controversial topic?" But, of course, I knew I had no choice. As the cover on the reports of the Racial and Ethnic Bias Study Commission emphasize, judges control the place where the injured fly for justice. How those judges reached the bench, what those judges look like, and what they do once they don their robes are all questions that strike at the very heart of that justice.

We are asking today whether Florida's present system is still the best compromise. Just looking at the present system makes me feel overwhelmed, if not downright nauseous.

On the one hand, we currently have a merit selection and retention system for appellate judges that is every bit as political as our elections, where who you know often counts for more than what you know, where nominating decisions are made in a secret star chamber, and where retention is determined by either a rubber-stamp vote of an uninformed, uninterested electorate or a special-interest dog-fight which can be more costly than the most competitive elections.

On the other hand, we have an election system for trial judges that wastes enormous amounts of money and incumbent judges' time and produces the spectacles of: 1) judges deciding cases involving their major campaign contributors; 2) unethical candidates slinging irrelevant mud, while ethical judges are handicapped by restrictive rules of judicial conduct; and 3) that same uninformed electorate deciding its vote based on something as frivolous as where the candidate's name falls on the ballot.

Though it may sound simplistic, here is the framework I use to begin sorting out whether, and how, we must change the current system.

I ask three simple questions. First, what are our collective goals for the system? Second, are those goals currently being met? Importantly, here, we must separate fact from fiction and, however comforting our

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myths may be, exchange those myths for reality. Third, how can those goals be better achieved? As I will explain, I am convinced that satisfying this last step will require Florida to exhibit vastly greater courage and creativity than it has shown in the past.

With this framework in mind, I offer the following suggestions.

First, what are the goals of the system?

For years, both in scholarly and legal literature and in the public discourse on the topic, two primary goals have been heralded: independence and accountability. Undoubtedly, these are fine goals, and there may be others, such as ensuring excellence. But Florida should go no further in this debate without agreeing that diversity of the bench is a goal worthy of equal, if not greater, commitment than all of the others combined.

If you are wondering who could disagree with that goal, then you have missed my point. We cannot merely agree not to disagree or continue simply to talk the good talk. We must commit ourselves to doing what must be done to make Florida's bench representative of Florida's people.

Why is that important? Reasons, such as fairness, are familiar, so I will emphasize just one: legitimacy. In this fragile government of the people we call "democracy," the power of judges to decide disputes ultimately flows from the consent of the governed. The Racial and Ethnic Bias Study Commission felt very strongly that "the State simply cannot expect continued acceptance of a judicial system in which minorities are virtually invisible in positions of decision-making and responsibility."[1]

Professor Donald Jones of the University of Miami School of Law expressed this point this way:

> There is a phrase by a writer named Richard Wright . . . about invisibility. [H]e said there was a black man accused of being irresponsible. And the [system] was saying, "Well, how can you be so irresponsible?" And the guy says, "You're damn right I'm irresponsible, I'm invisible." I think that invisibility, the lack of being visible in the system [as judges] . . ., has a lot to do with why a lot of people feel that they have nothing to be responsible for.[2]

Second, are our goals being met?

Whatever one may say about the success of the other goals, the goal of diversity is not being met by either system, appointive or elective.

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1. REPORT AND RECOMMENDATION OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, at 11 (1990) [hereinafter STUDY COMMISSION].

2. *Id.* (quoting Dr. Donald Jones's testimony before the Commission at a public hearing).

The reality is that, while we are certainly making some progress in diversifying Florida's bench, that progress is coming slowly, especially in the courts of lower jurisdiction.

In 1990, when the Racial and Ethnic Bias Study Commission published its first report, we documented that only 5.5% of Florida judges were African-American or Hispanic.[3] Today, that statewide percentage has increased to 7.1%[4]

I will share more good news before the bad. In 1990, the Commission reported the striking news that only two minority judges sat on all of the District Courts of Appeal [DCAs] combined, with four out of five DCAs having no minority members at all.[5] Since then, we have started to move in the right direction. The number of minority judges has grown to six, and at least one African-American or Hispanic judge now sits on each DCA.[6]

This brings us to Myth #1. Some judges and others point to these statistics as support for the argument that the appointment process, as currently structured, is fair to minorities. Apparently, this myth is widespread. In the 1991 survey of judges conducted for the Bench/Bar Commission, 59% of judges thought that the merit selection process provides an equal opportunity for minority candidates.[7]

Here is the reality. While it is true that 85% of minority judges currently on the county or circuit bench in Florida reached the bench by way of mid-term gubernatorial appointment, the level of representation of minorities is still far from acceptable and nowhere near what we can justifiably call "fair." The fact that the appointive system probably has produced more minority judges than the elective system says more about the unfairness of the elective system than the fairness of the appointive system.

As most of you know, Florida recently took a very significant step toward reforming the appointive system. Following the Racial and Ethnic Bias Study Commission's recommendation that the membership of all judicial nominating commissions [JNCs] be diversified, Governor Chiles made an unprecedented number of minority appointments to serve on those JNCs, and the Legislature later passed a bill requiring such minority JNC appointments. This particular reform was absolutely essential and, I am confident, accounts for a good bit of our progress on this front.

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3. *Id.* at 13.

4. Telephone Interview with Jane Flynn, Personnel Management Analyst, Office of State Courts Administrator (Jan. 26, 1995).

5. STUDY COMMISSION, *supra* note 1, at 13.

6. Telephone Interview with Jane Flynn, *supra* note 4.

7. THE FLORIDA BAR, BENCH/BAR COMMISSION JUDICIAL ELECTION SURVEY, at 15 (1991).

Nonetheless, I sincerely believe that this reform alone will be inadequate. If we begin appointing trial judges through the JNC process without enacting further reforms, then minorities will still occupy a minority voting position on many if not most JNCs. Beyond that, such a move would effectively "grandfather in" the nearly all-white bench which has resulted, in some measure, from the unfair elective and appointive processes that have been in place over the last fifteen years. Moreover, in the end, the quality of appointments depends on the identity and goodwill of the governor.

What about the current election system? Myths abound here as well. In the same 1991 survey conducted for the Bench/Bar Commission, of those judges who had an opinion on the subject, over half thought that at-large elections are fair to minority candidates.[8] Interestingly, in a survey conducted for the Racial and Ethnic Bias Study Commission one year earlier, a clear majority of African-American judges thought that at-large elections favor non-minority candidates.[9] Reality confirms the opinions of these African-American judges. Right now in Florida, minorities represent only 4.8% of all judges on the circuit courts.[10]

In the last ten years, voting rights lawsuits challenging the fairness of at-large judicial elections for state judges have been filed in twelve states.[11] Here in Florida, a 1992 case has held that the at-large election system for the Second Judicial Circuit and Leon County violated the Voting Rights Act,[12] and a panel of the Eleventh Circuit has ruled that at-large elections in Florida's Fourth Circuit and Duval County also unlawfully dilute the vote of minority citizens.[13]

What possible solutions achieve greater diversity?

Deciding whether to retain elections or adopt merit selection and retention for trial judges clearly requires this type of analysis for all stated goals, not just diversity. Because that broad analysis remains to be done, I do not yet advocate any particular system. What I do suggest, though, are specific reforms to achieve diversity whether we keep elections or move to merit selection for trial judges.

Before I offer my suggestions, let me dispel Myth #2: that the State has the option of switching to a merit selection and retention system

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8. *Id.*

9. STUDY COMMISSION, *supra* note 1, at 20-21.

10. Telephone Interview with Jane Flynn, *supra* note 4.

11. Brenda Wright, *The Bench and the Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections*, 19 FLA. ST. U. L. REV. 669, 670 n.9 (1991).

12. Davis v. Chiles, No. 90-40098 (N.D. Fla. Sept. 3, 1992).

13. Nipper v. Smith, 1 F.3d 1171, *vacated*, 39 F.3d 1494 (11th Cir. 1994).

without first making further reforms toward ensuring fairness for minorities.

Some perceive that the pending voting rights litigation—with its prospect of a mandated move to subdistrict elections—is fueling the drive to abandon the election process in favor of an appointive system. I personally believe this perception is grounded more in reality than in myth.

Regardless of what I believe, however, the point is that a federal judge may very well be persuaded that a change to an appointive system for trial judges is being recommended primarily as a way to avoid compliance with the Voting Rights Act. Indeed, that very objection may come from the United States Attorney General, from whom five Florida counties must obtain "preclearance" under the Voting Rights Act for any change to their judicial election systems.

What does this mean? Simply, it means that Florida may not now switch over to a purely appointive system for its trial judges without, as part of that switch, instituting bold and creative reforms designed specifically to increase the diversity of the bench.

What are those bold reforms?[14] If Florida retains the election system to satisfy the overall goals the State has laid out, subdistricts should be created in those jurisdictions in which racial majority bloc voting usually defeats the candidate of most racial minority voters and in which minority voters are geographically compact and politically cohesive.

This suggested reform brings to us Myth #3: that voting rights plaintiffs or proponents are advocating a statewide conversion to a fragmented system of single-member districts. In reality, no one is advocating an automatic switch to single-member districts without first examining the needs and voting patterns of each jurisdiction. What is often discussed, though, is creating one or more subdistricts in those jurisdictions in which voting is polarized along racial lines, and then electing one or more judges from that subdistrict.

That any use of subdistricts would severely threaten judicial independence and integrity is Myth #4. This myth involves two related notions: 1) that judges elected from subdistricts would be open to greater political pressure from a smaller constituency; and 2) that judges elected from subdistricts would favor residents of their subdistrict over litigants residing outside the subdistrict.

First, we should remember that subdistricts have already been implemented, voluntarily or by the federal courts, in Mississippi, Louisi-

14. Because these reforms go beyond the work of the Commission, I am not now writing on the Commission's behalf.

ana, Texas, North Carolina, and Illinois, and we should draw upon their experiences.[15] As to the particular concern that subdistrict judges would face increased political pressure, subdistricts proposed as remedies for voting rights violations are often larger than some of the current at-large districts. This is certainly likely to be the case in Florida as well.

The concern that subdistrict judges would brew up their own "hometown cooking" or dispense "hometown justice" by favoring litigants who live in their subdistrict is unfounded. First, that danger lurks within the present system. State judges are frequently called upon to hear cases involving one party from the local judicial district and another from outside the district. In fact, this happens every time a resident of one district sues a resident of another. Judges are presumed to be capable of acting impartially in these situations. In fact, judges most often do not even know the particular residency of litigants appearing before them.

Most importantly, no evidence exists to suggest that judges elected from subdistricts are any less honest or impartial than judges elected at-large. Judges elected from subdistricts in other states, including Mississippi, have testified that they feel no increased pressure as a result of subdistricting and that the use of subdistricts has improved, not diminished, the overall perception of fairness on the bench.[16] Even if these concerns prove supportable by evidence, not merely by myth, they can be solved by assigning a subdistrict judge to only those cases arising from outside that subdistrict or by assigning another judge to hear cases involving both a member and a non-member of the subdistrict at issue.

If Florida chooses, for reasons independent of the voting rights litigation, to convert to an appointive process for trial judges, I offer this final reform for consideration. Where fairness and historical voting patterns dictate, the State could create the type of subdistricts I have described above. Instead of electing judges from those subdistricts, though, the State could establish a JNC for each of those subdistricts, with some or all of the JNC's members elected from that subdistrict. The JNC would then screen and ultimately recommend to the Governor, just as JNCS do now, the names of three judicial candidates from that subdistrict. A representative number of candidates could then be appointed from that subdistrict.

What would this accomplish? Through subdistricting, minority

15. Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991); Clark v. Roemer, 777 F. Supp. 471 (M.D. La. 1991); Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988); 1987 N.C. Sess. Laws 509; Ill. Laws 86-786.

16. Wright, *supra* note 11, at 687 (citing Clark v. Roemer, 777 F. Supp. 471, 477 (M.D. La. 1991)).

voters would have a greater opportunity to elect a JNC with minorities occupying the majority voting position. In this way, minorities would have a fair share of the power to decide who our judges will be. At the same time, the reform would avoid the parade of horribles this Symposium has demonstrated exists in judicial elections, and, in the process, just maybe we can get the best of both worlds.

Committing to a diverse judiciary . . .
Separating myths from reality . . .
Implementing bold, even innovative solutions . . .
Is Florida up to the task?