

Some Thoughts on the Problems of Judicial Elections

Jeffrey Rosinek

Election season is within sight again, and with it come the obligatory attacks on the judiciary. Some call it simply campaigning or electioneering, while others believe it is more serious and a form of “judge bashing.” Whatever name the problems are given, the entire election process may have a marked effect on the independence of our judiciary, as well as the ethics of judges and judicial candidates. And in the end, because these problems affect the public’s faith in the judicial system, they must be addressed.

Most of the literature concerning an independent judiciary centers on the several federal judges of the United States, with little discussion about state court judges. Yet the American public is much more affected in its daily life by the results of state court judicial decisions than opinions from the federal judiciary. The majority of jury trials in Florida take place in its twenty circuit courts, which have 527 judgeships and also hear appeals from county court cases.¹ In total, 97% of all litigation in the United States is handled by state courts.²

Similar to problems plaguing the federal judicial system, much of the harshest recent criticism of judges has been directed at state jurists for issuing opinions at odds with the majority will in a variety of contexts. A California trial judge reported on the prevalence of criticism of California judges, and discussed a protocol initiated by the California Judges Association: when such inaccurate and unfair criticism occurs, selected judges stand ready to assist in offering a rapid response for publication or broadcast.³ There is some understandable concern as to the propriety and desirability of judges defending decisions of their brethren in the media. Effective response mechanisms must be developed that involve not only the bench, but also the bar and public, in a coordinated effort.

In state courts, judges are either appointed or elected for a specific initial term, and then up for retention or reelection by the voters, or reappointment by the governor or state legislature, for additional terms in office. As shown in the accompanying chart, most state court judges stand for some form of contestable election—and almost 90% of general jurisdiction trial judges go through a contestable election to gain a second term in office.

Florida has a three-tier judicial system: a trial level, consisting of the County Court, which is a court of limited jurisdiction (one county court in each of the 67 counties in Florida) and the Circuit Court, a general jurisdiction court (there are 20 geographic circuit courts in Florida); an appellate level, the District Court of Appeals (there are 5 geographic district courts of appeals in Florida); and one Florida Supreme Court. Florida is among the states in which judges of the trial courts are initially appointed by governor (when there is a vacancy or a new judicial seat created by the legislature), after recommendations from the governor-appointed judicial nominating committees, and then judges must stand for election, and may face opposition in a nonpartisan vote. The judges and justices of the appellate and supreme courts, respectively, are initially appointed by governor after recommendations from the appointed judicial nominating committees, and then the judges and justices must run for “merit” retention, without an opposing candidate.⁴

In total, state judges are subject to election, reelection, or retention election in 38 states.⁵ In 2001, the Florida Legislature revised the statute relating to the appointment of members of the state’s judicial nominating commissions. Prior to the change, the Florida Bar appointed three lawyer members, the governor appointed three members who could be either lawyers or nonlawyers, and those six commission members selected three nonlawyer members. Under the revision, the governor now appoints all nine members of each commission. Four of the lawyer members must be appointed from lists of nominees submitted by the Florida Bar. The law also requires the governor to consider racial, ethnic, and gender diversity, as well as geographic distribution, when making appointments to the commission.

This reform of the Florida judicial nominating commissions by the legislature further politicized the judicial election process. In addition to the appointment, election, and impeachment processes, states have their own judicial standards and monitoring bodies, such as Florida’s Judicial Qualifications Committee (JQC), an administrative agency that investigates judicial misconduct and recommends to the

Footnotes

1. Mike Schneider, *The Campaign Finance Coffers of Elected Florida State Court Judges Keeps [sic] Increasing*, ASSOCIATED PRESS, July 26, 2003, available at <http://www.judicialaccountability.org/articles/judicialectionsfl.htm>.
2. AMER. BAR ASS’N, AN INDEPENDENT JUDICIARY: REPORT OF ABA SPECIAL COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE § 5 (1997) [hereinafter ABA JUDICIAL INDEPENDENCE REPORT], available at <http://www.abanet.org/govaffairs/judiciary/report.html> (last

visited Sept. 27, 2004).

3. Testimony of Albert Dover, Feb. 21, 1997, quoted in ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 2, at § 5, n. 144.
4. An overview of the methods of judicial selection in Florida, including changes that have been made over time and attempted reform efforts, can be found on the website of the American Judicature Society. See History of Judicial Selection Reform, Florida, available at http://www.ajs.org/js/FL_history.htm.
5. ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 2, at § 5.

Florida Supreme Court the level of punishment believed warranted for each infraction. The Supreme Court then determines the degree of discipline, which may range from private reprimand to removal from the bench.

In a recent decision, *In re Angel*,⁶ the Florida Supreme Court noted “conduct related to partisan political functions [that] violated both the spirit and the letter of ... the Florida Statutes and Canon 7 of the Code of Judicial Conduct.”⁷ In *Angel*, the judge and his family had actively campaigned at a number of partisan political gatherings, holding the judge out as a member of a political party in a nonpartisan election; his opponent was not invited to these political events.⁸ Canon 7, as adopted in Florida, specifically forbids a judge from attending partisan political events outside of the campaign season; even then, the judge may not appear unless other candidates are invited and may address only matters relating to the law, improvement of the legal system, and the administration of justice.⁹ The court issued a public reprimand of Judge Angel, but warned that

more severe sanctions may be levied for partisan activity by judges: “Certainly, in very egregious cases, where a judge’s misconduct included implications that he or she would make partisan decisions on the bench, the JQC has recommended a substantial fine in addition to public reprimand and even removal.”¹⁰

The balance of powers, delicately established over two centuries ago, is destroyed when our political leaders attack judges and judicial decisions, without just cause, in order to play politics. As I have written previously, “a vicious assault on the independence of the judiciary is a direct attack on the viability of our government It is the public’s faith in the system of an impartial, independent judicial branch of government that embodies a constitutional law-abiding citizenry. Uncalled-for and unjustified political attacks on the independence of the judiciary defeat that concept so long enjoyed and cherished.”¹¹

In Ancient Roman times, Juvenal wrote, “*Sed quis custodiet ipsos custodias*”—“Who watches the watchmen?” This question is equally relevant and appropriate in modern times, when allegations of undue influence by political and financial benefactors may arise, often due to the very election process. The

SELECTION AND RETENTION SYSTEMS FOR STATE COURT JUDGES

APPELLATE COURTS

Total appellate judges: 1,243

Total that stand for some form of election: 1,084 (87%)

Total that stand for contestable election: 659 (53%)

INITIAL TERM

Appointment: 582 (47%)

Partisan Election: 495 (40%)

Nonpartisan Election: 166 (13%)

SUBSEQUENT TERMS

Appointment: 133 (11%)

Partisan Election: 400 (32%)

Nonpartisan Election: 166 (13%)

Retention Election: 518 (43%)

GENERAL JURISDICTION TRIAL COURTS

Total trial judges: 8,489

Total that stand for some form of election: 7,378 (87%)

Total that stand for contestable election: 6,650 (77%)

INITIAL TERM

Appointment: 2,061 (24%)

Partisan Election: 3,669 (43%)

Nonpartisan Election: 2,759 (33%)

SUBSEQUENT TERMS

Appointment: 1,013 (12%)

Partisan Election: 2,360 (28%)

Nonpartisan Election: 2,891 (35%)

Retention Election: 2,127 (25%)

Source: Report and Recommendations of the [ABA] Task Force on Lawyers’ Political Contributions, Part Two, July 1998, at 69, 73.

American Bar Association’s Commission on Separation of Powers and Judicial Independence circulated a list of questions to 245 state and local bar leaders and got 93 responses, listing the top factors that threatened judicial independence in their states: (1) judicial independence is being eroded by excessive criticism of judges for issuing opinions at odds with the majority will in a variety of contexts; (2) judicial reelection is too politicized; (3) judicial selection is too politicized; and (4) judges are too dependent on campaign contributions.¹²

It is the need to raise funds for costly campaigns that initially brings the notion of judicial independence into question to begin with, for a number of reasons. Organizing a judicial campaign has become very expensive. Judges must raise funds from a variety of outside sources in amounts that, only a few years ago, were unthinkable. The use of advertising on radio and television and in print media has skyrocketed. In a growing number of states, television advertising—by candidates and supportive special interests—is becoming the key to getting elected to America’s state supreme courts. Ads ran in 64% of the states with contested races in 2002, compared to less than a quarter of such states in 2000.¹³ An increasing per-

6. 867 So.2d 379 (2004).

7. *Id.* at 383.

8. *Id.* at 381-82.

9. *Id.* at 382.

10. *Id.* at 383.

11. Jeffrey Rosinek, *Political Pressure on an Independent Judiciary*, WASHINGTON TIMES, Sept. 2, 1997.

12. ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 2, at § 5.

However, the ABA Commission warned that “opinions [of bar leaders] may not be shared by rank-and-file members of the bar, let alone by judges,” and that the small sample size just of bar leaders may not be representative of all bar leaders’ views.

13. DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002 at 9 (2004), available at <http://www.followthemoney.org/press/Reports/200405061.pdf>.

Thirty percent of the state judges in Florida believed that campaign contributions made to judges had at least some influence on their decisions

centage of candidates in contested races are buying ads, and the number of special interests buying airtime has doubled in just two years. Altogether, in America's 100 largest media markets, candidates and interest groups spent almost \$8.3 million on television airtime in 2002.¹⁴ Judicial campaigns are pressured into hiring public relations firms to handle all the advertising needs. In some cases, these public relations firms and political consultants notify judges that though they have other potential

judicial candidates, these candidates will not run against any judge who hires their firm—arguably analogous to extortion, yet carried out like business as usual. And business costs money, so the need for candidates to raise funds for successful campaigns is greater than ever. Typically, incumbent judges in Miami-Dade County do not draw opposition because of the perception that they have status, name recognition, and money, but judges are kept in suspense up to the very last minute as to whether they will run unopposed or be faced with new challengers in an expensive election campaign.¹⁵

Unfortunately, this creates a perception that candidates are beholden to their financial benefactors, be they wealthy individuals, attorneys who try cases before them, special interest groups, or entire community demographic groups. No matter how ethical judges may be, that perception definitely affects the public's view of judges, particularly shaping how it will vote. In a national survey of state judges in late 2001, 60% of Florida state judges said that the conduct and tone of judicial campaigns had gotten worse over the past five years.¹⁶ Thirty percent of the state judges in Florida believed that campaign contributions made to judges had at least some influence on

their decisions, and 68% were concerned that “there are few restrictions on special interest groups who buy advertising to influence the outcomes of judicial elections and decisions.”¹⁷ (Nationally, the percentage was similar: 62%.)¹⁸

Interest group television campaigns are rapidly spreading. Just a few years ago, special interest ads were unheard of in judicial elections. But in 2002, special interests and political parties ran ads in more than twice as many states as in 2000.¹⁹

Judges and judicial candidates are always pressured to speak on current issues, such as the death penalty and abortion, which the Code of Judicial Conduct generally bars them from commenting on publicly.²⁰ There is always pressure to comment on current issues, which causes judges great concern. Ninety-six percent of Florida state judges favor a proposal that ensures “judicial candidates should never make promises during elections about how they will rule in future cases that may come before them.”²¹ That proposal is already the rule under the present Code of Judicial Conduct as adopted in Florida.²² Canon 7A(3)(d)(i) in Florida provides that judges or judicial candidates shall not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.” Subsection (d)(ii) in Florida provides that judges or judicial candidates shall not “make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” Although the United States Supreme Court in *Republican Party of Minnesota v. White*²³ found Minnesota's Code of Judicial Conduct provision forbidding judges from “announc[ing] his or her views on disputed legal or political issues” too broad to withstand constitutional challenge, the Florida Supreme Court has upheld the constitutionality of these Florida provisions after *White*.²⁴ It found that these canons, as adopted in Florida, were more narrowly tailored than the broad “announce” clause at issue in *White* and that the Florida provisions satisfied a compelling state interest in maintaining public confidence in an impartial judiciary; thus, the Florida provisions withstood a First Amendment challenge.²⁵

14. *Id.*

15. Jay Weaver & Marc Caputo, *Many Incumbent Judges Retain Seats, But Six Spots Are up for Grabs*, MIAMI HERALD, May 7, 2004, available at http://www.judicialaccountability.org/articles/judicial_electionsfl.htm (last visited Oct. 2, 2004).

16. Survey taken November 5, 2001 through January 2, 2002 by Greenberg Quinlan Rosner Research and American Viewpoint for the Justice at Stake Campaign, available at <http://www.justiceatstake.org/files/SurveyPullOutFlorida.pdf> (last visited Oct. 2, 2004). In the Florida survey, 105 judges participated out of a total sample size of 701 judges; the reported margin of error for the survey of Florida judges was $\pm 10\%$.

17. *Id.*

18. *Id.* The national survey of judges had a reported margin of error of $\pm 2\%$.

19. GOLDBERG & SANCHEZ, *supra* note 13, at 9.

20. For a discussion of the limits of judicial speech during election campaigns following the United States Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), see Roy A. Schotland, *Should Judges Be More Like Politicians?*, Spring 2002 COURT REVIEW at 8; and Jan Witold Baran, *Judicial*

Candidate Speech After Republican Party of Minnesota v. White, Spring 2002 COURT REVIEW at 12. For a review of public opinion, as well as that of judges, regarding judicial selection, see David B. Rottman, *The White Decision in the Court of Opinion: Views of Judges and the General Public*, Spring 2002 COURT REVIEW at 16. Past *Court Review* articles from 1998 forward can be found on the web at <http://aja.ncsc.dni.us/courtrv/review.html>.

21. Survey, *supra* note 16.

22. Except when specifically noted otherwise, citations in this article are to the Code of Judicial Conduct as adopted in Florida. It is available on the web at <http://www.flcourts.org/sct/sctdocs/ethics/> (last visited October 2, 2004). Although most states have based their Codes on the ABA Model Code of Judicial Conduct, they generally make some modifications and, thus, the Code varies from state to state. The ABA Model Code of Judicial Conduct is available on the web at <http://www.abanet.org/cpr/mcjc/toc.html> (last visited October 2, 2004).

23. 536 U.S. 765 (2002).

24. *In re Kinsey*, 842 So. 2d 77 (Fla. 2003), *rev. denied*, 2003 Fla. LEXIS 513 (March 26, 2003), *cert. denied*, 124 S. Ct. 180 (2003).

25. *Id.* at 86-87.

If the Florida interpretation of *White* is eventually confirmed by the United States Supreme Court, this should dissuade candidates from making statements that commit or appear to commit them with respect to issues, cases, and controversies likely to come before the court. Even so, as a practical matter, judges may be attacked not only by candidates, who are subject to these restrictions, but also by third parties, who are not. Once attacked, judges are fearful about defending themselves against attacks, lest they disqualify themselves from handling the very issues in question later, should those issues come before the bench.

Sixty-eight percent of Florida judges are very concerned that “because voters have little information about judicial candidates, judges are often selected for reasons other than their qualifications.”²⁶ As one reporter recently summarized the situation, “Experts who study judicial elections say voters know little about the people who preside over the legal system and considerably less about whether they are doing a good job.”²⁷

The 2004 circuit judge election in Miami-Dade County, Florida (the 11th Circuit), the largest of Florida’s judicial circuits, illustrates some of these concerns perfectly. Data on candidate contributions is available through the Florida Secretary of State’s campaign financing database.²⁸ As of October 2, 2004, online data showed candidates in contested races had raised a maximum of \$360,556 (John Schlesinger, running against Teresa M. Pooler, who raised \$111,837) and as little as \$27,400 (William L. Thomas, running for an open seat against three other candidates, one of whom, Catherine B. Parks, had raised \$115,863). Sixteen candidates for the 11th Circuit (out of a total of 26 candidates) raised over \$100,000, and only two candidates were incumbents defending against challengers: D. Bruce Levy, who raised \$184,484 (running against Barbara Areces, who raised \$223,209), and Henry H. Harnage, who raised \$251,278 (running against Peter Adrien, who raised \$59,594). John Schlesinger holds the 2004 record for campaign contributions raised for all candidates in all of Florida’s circuits, followed by Henry Harnage, also of the 11th Circuit, with the second-highest amount in the state.

In 2002, the estimated population of the 11th Judicial Circuit was 2,332,559. In recent years, the cost to reach the voters has skyrocketed. To run a competitive campaign in Miami-Dade County, scores of thousands of dollars must be raised, with much of it coming from the practicing bar. These figures suggest that true judicial independence may be a thing of the past, or called into question at the very least, with such

large amounts of funds raised for campaigning.

The judicial election took place on August 31, 2004. There were only three judicial incumbents, two circuit judges and one county court judge, who were challenged. All three were defeated. The man who raised the most money, John Schlesinger, won handily.²⁹ But the overall victors were the public relations people, who walked away from the election financial victors, no matter which judicial candidate was elected.

A different situation exists in smaller counties, such as Polk, a county in west central Florida. There, as a local newspaper reporter put it, “lawyers may be hesitant to challenge incumbent judges for fear of reprisals. Hence, most judges are unopposed. In bigger cities—especially in states where judicial races are partisan contests—judicial elections can turn into highly charged, bare-knuckled brawls.”³⁰ Daniel Foley, an associate professor of journalism at the University of Tennessee who studies courts and criminal justice put it this way: “There’s no good way to elect judges. What we need to do is find the least bad way to elect them.”³¹

In the end, how can the tensions between judicial independence and elections be resolved? One idea to create a greater degree of judicial independence is to lengthen the terms judges serve. This would make the positions more attractive to draw and keep the best judges, and it would reduce the number of campaigns and the need for fundraising. Of course, many contend that the best solution is for all states to appoint their judges on a merit-based system, to alleviate even more problems associated with fundraising for costly campaigns. Most states that appoint their judges, including Florida’s appellate and supreme court judges, still subject them to run in retention elections (in which judges run unopposed), making fundraising not as big an issue. While this process could create a new set of issues, such as when governors appoint judges and politics and party affiliations get involved, the system seems preferable to hard-fought and expensive judicial elections.

The ABA Standing Committee on Ethics and Professional Responsibility recently proposed amendments to the Code of Judicial Conduct, which would state the ABA’s preference for

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26. Survey, *supra* note 16.

27. Jeff Scullin, *Why Judicial Contests Go Unnoticed*, (LAKELAND, FLA.) LEDGER, April 10, 2004, available at http://www.prisonpotpourri.com/COURTSandCASES/Why%20Judicial%20Contests%20Go%20Unnoticed%20theledger_com.html (last visited October 2, 2004).

28. Campaign contributions for circuit judges can be reviewed at <http://election.dos.state.fl.us/campfin/contrib.asp> (last visited Oct. 2, 2004).

29. Election results can also be found on the Florida Secretary of State website at <http://election.dos.state.fl.us/elections/resultsarchive/index.asp>. Schlesinger defeated Pooler, 57% to 43%. Adrien defeated Harnage by the same margin, 57% to 43%.

Areces defeated Levy, 58% to 42%. In the four-way race involving Thomas and Parks, those candidates qualified for a run-off with 30% of the vote apiece; the run-off will be held along with the November general election. Two other candidates, Josie Velis and Don Cohn, received 23% and 17% respectively. Velis raised \$60,705 and Cohn raised \$81,154.

30. Jeff Scullin, *Why Judicial Contests Go Unnoticed*, THE LEDGER (Lakeland, Fla.), April 10, 2004, available at http://www.prisonpotpourri.com/COURTSandCASES/Why%20Judicial%20Contests%20Go%20Unnoticed%20theledger_com.html (last visited Sept. 27, 2004).

31. *Id.*

merit-based selection.³² A relatively new provision of the ABA's Model Code of Judicial Conduct, Canon 3E(1)(c),³³ suggests that campaign contributions made by attorneys or others who appear before the judge may raise questions about the judge's impartiality, depending on the source and size of such contributions.³⁴ Such contributions could be cause for disqualifying the recipients, perhaps a necessary deterrent to halt the appearance of judicial impropriety.

In the meantime, Florida residents voted in 2000 to keep electing their circuit and county judges rather than having them retained on a merit basis, so there is still strong public support, at least in Florida, for some election procedures.³⁵ It is ironic that the appointment process is credited with making the judiciary more diverse, yet several groups representing a variety of minority attorneys wanted to keep elections. The National Bar Association, the Hispanic Bar Association, the Cuban-American Bar Association, and the Florida Association for Women Lawyers all supported the current system of elections, while the Florida Bar and the American Bar Association spent about \$70,000 lobbying for the change to a merit-based system of retention.³⁶

The Florida proposal for merit selection and retention was

overwhelmingly rejected in every county. The average affirmative vote (in favor of merit-based retention) was only 32%; two-thirds of Floridians preferred electing their judiciary. Despite public debates and support for retention procedures from a variety of interest groups (including the Florida Bar), it looks like the election process will not be ending any time soon. What judges and judicial candidates do to campaign for these positions will continue to have a great impact on the public's trust in its judiciary.



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32. ABA JUDICIAL INDEPENDENCE REPORT, *supra* note 2, at § 6. The Commission admitted to focusing its efforts on the area of federal judicial independence since no two state systems are alike, but they encouraged state bars to conduct their own individual studies.
33. This provision of the ABA Model Code provides that one of the situations in which a judge's impartiality might reasonably be questioned, and thus in which he or she is disqualified, occurs when "the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than" a certain amount. The Model Code provision suggests two versions for states to consider in

determining the threshold contribution that would trigger disqualification: either a set amount [(\$) for an individual or (\$) for an entity] or a "reasonable" amount that [is reasonable and appropriate for an individual or an entity]. See ABA Model Code of Judicial Conduct, Canon 3E(1)(c), available at http://www.abanet.org/cpr/mcjc/canon_3.html (last visited October 2, 2004).

34. *Id.*
35. See History of Judicial Selection Reform, Florida, *supra* note 4.
36. Anita Kumar, *Floridians Keep Right to Elect Judges*, ST. PETERSBURG (FLA.) TIMES, November 8, 2000, available at http://www.sptimes.com/News/110800/Election2000/Floridians_keep_right.shtml (last visited October 2, 2004).

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Those who want the judges to be social activists. Those who find it easier to change the law via the court system than through legislative channels. Judges themselves who believe that they understand what social change is needed better than the makers of the law.

Some judges will discover social changes in the Constitution that never existed before. Some judges simply believe they are not controlled by the Constitution and law made pursuant to it if they determine that a socially desirable result is necessary and is justified. If this be the case, why have a constitution?

Why go to the trouble of having the Constitution amended? Why have a legislature make the law? No one will know the law until it is pronounced by some court. How are people to behave and how are they to conduct business in such an uncertain climate? Obviously, it becomes impossible.

Judges must judge cases by applying and interpreting the law. This is their proper function as set forth in the Constitution. There is room for different interpretation of the law, but there must be an effort by every judge to uphold the law, as the oath he takes upon taking the

bench requires. He must be impartial and lay aside any preconceived notions as to what the law ought to be. The court must consider the cases before it in a fair and thorough manner, and decide it in as expeditious a manner as possible. To do otherwise is to demean the judiciary and the litigants before it.

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