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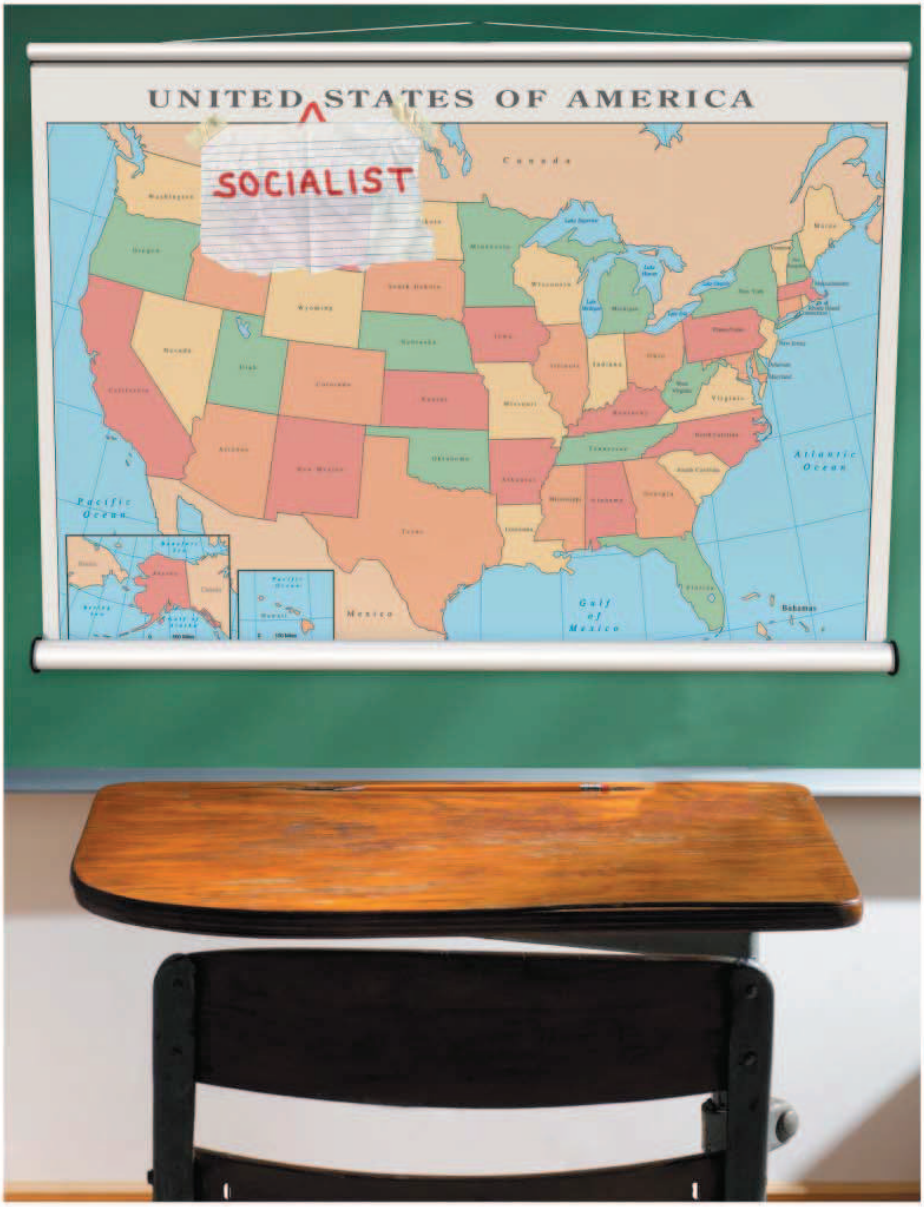

Beware When Goverment Runs Both Politics and the Economy

RECENT MERIT-SELECTION REFORM CAN IMPROVE FLORIDA'S COURTS

BY WILLIAM W. LARGE

Early in 2009 Gov. Charlie Crist will complete reshaping the Florida Supreme Court, having appointed four of its seven justices. Unlike the judges in many other states, those serving in Florida's appellate courts, including the Supreme Court, are selected through a judicial nominating process.

In Florida this process was established in the 1970s after years of politicization of the one branch of government that should be the most independent. Adopting a system for selecting justices for Florida's high courts was intended to ensure that judges were picked based on merit rather than politics.

Those who advocate a judiciary that is selected purely through elections ignore history. Electing members of the judiciary through a popular vote has resulted in the possibility of partiality because judicial candidates have to raise money—often large sums of money from the very individuals who appear before them. Such a system allows lawyers and other fundraisers to influence the process.

Merit selection helps to minimize the role that elective politics and partisanship play in the selection of state court judges, instead emphasizing the experience and quality of the potential appointee to the bench while preserving public accountability through retention elections.

As *St. Petersburg Times* columnist and author Martin A. Dyckman notes in his 2008 book *A Most Disorderly Court*, published by University Press of Florida, this state adopted the merit-based

selection process after a "succession of scandals at the Supreme Court, all rooted directly or indirectly in the election process, dramatized the case for merit selection."

Dyckman's book highlights a number of those scandals. Had the process not changed, he writes, "In all likelihood, Florida's judges of last resort would still be elected like common politicians, with justice for sale at auction in each increasingly expensive campaign."

Granted, the judicial nomination process itself has also been criticized for benefiting lawyers with connections or those whose politics match the Governor's. However, running for office forces judges to raise money, much of it from lawyers. In a May 11, 2008 *St. Petersburg Times* article about the debate over the nominating process versus elections for judges, Judge Marion Fleming highlighted the differences and benefits of the judicial nominating process:

> "There is no perfect way to pick a judge," Fleming wrote. "But I have come to believe that the process of having a judicial nominating commission interview candidates, select and send the proposed list to the governor for him to appoint, provides for, in my opinion, judicial excellence. Because you have the opportunity for the legal cream of the crop, so to speak, to rise to the top."

I believe that Judge Fleming's astute observations have proven to be correct. The fact is many voters don't pay attention to judicial races and don't know much about the candidates. Oftentimes voters will choose based on whether or not they like the sound of the candidate's name.

Circuit judges in Florida are still subject to contested elections. They are the only judges in the state of Florida who can take away a person's life and freedom, and can even terminate a parent's rights to his or her child. Yet voters—especially those in urban areas served by large numbers of judges—often find it difficult to make an informed choice. In the absence of sufficient information, name recognition becomes a factor, and judicial campaigns in heavily populated areas can be very expensive. This exemplifies the inherent and very disturbing flaws in judicial elections.

Some argue that an elite nominating commission should be responsible for selecting all members of a state's judiciary. While nominating commissions are a superior selection process for most judges, there is much to recommend Florida's process in which the Governor ultimately appoints all appellate judges from lists of applicants thoroughly vetted by judicial nominating commissions (JNCs). Under this system, the Governor also appoints circuit and county court judges when, as often happens, vacancies occur between election cycles.

Florida's judicial nominating process allows citizens to have input through the nominating commis-

sions and by ultimately relying on their elected chief executive, the Governor, to select the best candidates to serve in the state's judiciary.

When Jeb Bush was Governor, the Legislature significantly modified and enhanced the merit selection process, effectively improving the power of the Governor while minimizing the influence of special interest groups, particularly attorneys.

Prior to 2001, the Governor named three of the nine members of each JNC while the Florida Bar named another three, and those six commissioners decided on the final three members. In 2001, the system was amended, granting the Governor the authority to appoint all members of the nine-member commissions.

However, four of the commissioners must be selected from a list of names submitted by the Bar. Although the governor has the authority to reject the entire slate of Bar nominees and call for a new slate, to date this power has never been invoked. The result is that there is still some significant influence exerted by various special interests in the selection process, and the Bar is no exception.

In the selection of judges and justices, the JNC accepts applications, selects a group of candidates to interview, narrows down the list, and then provides the Governor with a slate of names from which the Governor chooses.

The wisdom of former Gov. Jeb Bush in implementing this revised process for selecting members of the judiciary was evident as Governor Crist went about appointing four new justices to Florida's Supreme Court. With his first selection, Justice Charles Canady, he appointed an exemplary candidate with impressive credentials. Justice Canady exemplifies the role nominating commissions can play in ensuring that governors are able to choose from the best qualified candidates to serve on the state's judiciary.

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Justice Canady was recommended by the Supreme Court JNC based on his extensive qualifications. He is a Yale Law School graduate who served as an appellate judge for five years prior to his appointment. In that position he compiled an impressive record of fair and consistent rulings. Prior to that Mr. Canady had served Florida in Congress and in the Florida House of Representatives.

Governor Crist again made an excellent pick with his second appointment to the Supreme Court, selecting Justice Ricky Polston. Governor Crist selected Justice Polston to fill the vacancy resulting from Justice Kenneth Bell's retirement. Justice Polston is also an eminently qualified and well-

rounded judge who in addition to serving on the First District Court of Appeals has been a certified public accountant for more then 30 years. Justice Polston was also honored with the prestigious "Order of the Coif," a distinction reserved for only the most highly regarded in the legal community who graduated in the top five percent of their class.

The Florida experience shows how JNCs, with the Governor's involvement, can be an extraordinarily successful means for selecting members of the judiciary. They allow the Governor to have the utmost confidence that he is appointing members of the judiciary from the "legal cream of the crop." Additionally, nominating commissions satisfy individuals who advocate the importance of citizens' participation in selection of judges while allowing judges and justices to be recommended by a well-respected commission that is ultimately put in place by the governor.

Florida's judicial nominating process preserves the sovereignty of our judiciary by ensuring that judges selected to serve on the state's highest courts are selected based on merit, including their legal record, expertise, and judgment. Perhaps the fundamental importance of a state's ability to select an independent, qualified judiciary, comprised of justices who are capable of maintaining an independent and just court system, immune to political influence and contributions, is best summarized by a concurrence written in 1951 by U.S. Supreme Court Justice Felix Frankfurter, one of the nation's most outspoken advocates for judicial restraint:

> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." — *Dennis v. United States* 341 U.S. 494 (1951).

William Large is president of the Florida Justice Reform Institute. Its mission is to fight wasteful civil litigation through legislation, to promote fair and equitable legal practices, and to provide information about the state of civil justice in Florida. Mr. Large received his Juris Doctor from the University of Florida in 1993.

EROSION *(Continued from page 35)*

Endnotes

1 U.S. Const. amend. V; Fla. Const. art. X, § 6
2 *Id.*
3 *Walton County v. Stop the Beach Renourishment, Inc.*, 33 Fla. L. Weekly S 761 (Sept. 29, 2008).
4 The Beach and Shore Preservation Act, Fla. Stat. §§ 161. 011-161.76 (2005)
5 *Belvedere Dev. Corp. v. Div. of Admin., State Dep't of Transp.*, 413 So. 2d 847, 851 (Fla. Dist. Ct. App. 4th Dist. 1982) (Hersey, J., specially concurring).
6 William Blackstone, 1 Commentaries on the Laws of England, 134-35 (1765) (available at http://press-pubs.uchicago.edu/founders/documents/v1ch16s5.html)