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THE SELECTION AND TENURE OF FLORIDA SUPREME COURT JUDGES

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In American political theory, systems for the selection and tenure of judges are usually explained as institutional implementations of a deliberate choice between the conflicting values of judicial independence, on the one hand, and accountability to the people on the other. The national system of selection of judges by presidential appointment with senatorial confirmation represents an initial concession, though remote and indirect, to accountability. Once appointment is consummated, however, the system is committed to judicial independence. Federal judges hold office "during good behavior," and short of the intervention of divine providence, impeachment is the only way of removing them if their behavior falls short of the constitutional mark. A few of the states use the same system, but in most, popular election for fixed terms theoretically places judicial selection and tenure on the side of direct accountability to the electorate. The so-called A. B. A. plan, adopted in substance by California and Missouri, seeks to compromise between appointment and election, but through fixed terms may be said to find its balance, theoretically, on the side of periodic accountability to the people.

Under no fewer than five constitutions since statehood, Florida has experienced both appointive and elective supreme court judges. Actually, the operational system that has come into being under the latest of these constitutions bears a passing resemblance to the A. B. A. plan. It is the principal purpose of this essay to give consideration to this development.

The Constitution of 1838, adopted while Florida was still a territory, was the constitution under which statehood was achieved. It provided that the powers of the Supreme Court should be vested in the judges of the circuit courts until such time as the legislature should establish a separate Supreme Court. Under this constitution, judges were elected by concurrent vote of a majority of both houses of the legislature to hold office initially for five years and subsequently during good behavior.[1] The judges could be removed by impeachment; or, if there were reasonable cause though insufficient for impeachment, the governor could remove them "on the address of two-thirds of each House," provided a hearing were held.[2]

This first constitution was amended in 1848 to fix terms at eight years, and again in 1853 to provide popular election for judges at terms of six

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1. FLA. CONST. Art. V, cl. 3, 11 (1838).
2. FLA. CONST. Art. V, cl. 12 (1838)

years. The second state constitution, approved in January, 1861, established a completely different system. Judges were to be appointed by the governor "by and with the advice and consent of two-thirds of the Senate." Terms were set at six years.[3] This constitution for the first time established a separate Supreme Court.

The third Florida constitution, adopted in 1865, retained the system for selection and tenure of judges of the 1861 constitution, except that in senatorial consent the requirement of two-thirds was dropped.[4] The state's fourth constitution, adopted in 1868, continued the appointive system of selection but provided that judges of the Supreme Court should hold office "for life or during good behavior."[5] They could be removed through impeachment.[6]

Florida's fifth and present constitution, in effect since 1885, re-established selection of Supreme Court judges by popular election for six-year terms.[7] Table I, following, illustrates in summary form the major differences and similarities in these systems constituted in Florida since 1838.

Both the Constitution of 1838, as amended, and the Constitution of 1885 provided for gubernatorial appointment to fill vacancies on the Supreme Court. The Constitution of 1838, as amended in 1853, provided that a special election should be held, but:

> That should it become necessary to fill any vacancy before an election can be held under the provisions of this Constitution, the Governor shall have the power to fill such vacancy by appointment, and the person so appointed shall hold this office from the date of his commission until his successor shall be duly elected and qualified.[8]

The Constitution of 1885, still in effect, provides:

> When any office, from any cause, shall become vacant, and no mode is provided by this constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission for the unexpired term.[9]

This provision has been the key to development of a working arrangement for the selection and tenure of Florida Supreme Court judges quite unlike the system of popular election contemplated in Article V of the Constitution of 1885. Essential facts about the operation of the system since 1885 are presented in Table II. Examination of these facts points to the following conclusions:

1. Despite the primary emphasis in the constitution on popular election, only eight of the thirty-one judges who have served on the Florida Supreme Court since 1885 reached the court initially through

3. FLA. CONST. Art. V, cl. 10 (1861).
4. FLA. CONST. Art. V, cl. 10 (1865).
5. FLA. CONST. Art. VI, § 3 (1868).
6. FLA. CONST. Art. VI, § 30 (1868).
7. FLA. CONST. Art. V, § 2 (1885).
8. FLA. CONST. Art. V, cl. 12 (1838), as amended by Art. V, § 4 (1853).
9. FLA. CONST. Art. IV, § 7 (1885).

election. Twenty-three reached the court initially through the Governor's power of appointment to fill vacancies.

2. Tenure covers a wide range from a minimum of two to a maximum of thirty-nine years. Expressed as the arithmetic mean, tenure is 11.7 years. In 1954, twenty-two judges had served at least six years, while only nine (including three of the present incumbents) had served less.

3. Florida has had judicial nomination through primary elections since 1912. Nine of the thirty-one Supreme Court judges completed their tenure before the primary system came into effect. Of the twenty-two judges serving under the primary system, seven were never opposed for nomination. Not one of the fifteen opposed was opposed more than once.

4. Judge R. S. Cockrell, defeated in the 1916 primary, is the only incumbent judge since 1885 who has ever failed to receive nomination if seeking it. Against this single defeat, the thirty-one Supreme Court judges since 1885 received a total of seventy-five nominations.

5. No incumbent has been defeated in a general election. Since 1928, no incumbent has been opposed in a general election.

6. Of the twenty-four judges leaving the court since 1885, only three left through decision not to seek re-election at the expiration of a term, and only one through electoral defeat. The rest through in-term resignation, retirement, or death, created vacancies to be filled by gubernatorial appointment.

Table III shows the appointed members of the Supreme Court since 1885, together with their tenure and the identity of the governor making the appointment. From 1885 through 1954, Florida has had eighteen governors and one acting governor. Of these nineteen, two governors have each had four Supreme Court appointments, three have had three, six have had one, and the remaining seven have had none. In operation the system has placed an important and unchecked power in the office of the governor. This is especially true when it is remembered that, increasingly through the years, incumbency has amounted to a virtually unchallengeable option on the office.

In short, the difference between Florida's system for selection and tenure of Supreme Court judges as formally set forth and as actually practiced can be stated as follows:

1. The constitution places primary emphasis on popular election of judges, secondary emphasis on temporary appointment by the governor when an in-term vacancy occurs;

2. Actual practice places primary emphasis on appointment by the governor, secondary emphasis on the form rather than the substance of popular election.

This conclusion warrants some further analysis. A system of elected, fixed-term judges values theoretical accountability to the people more

highly than it values theoretical judicial independence. The provision for appointment by the governor to fill vacancies is theoretically an apt mechanism to insure that we are not caught without judges between elections. In this sense the appointive proviso of the constitution is not contemplated as being superior to the electoral process, but rather as a stop-gap until such time as regular, orderly, electoral processes are functioning. Such a system as this, ordained in our 1885 Constitution, postulates an informed electorate with capacity for choice based on the value that such choice is desirable. But such a system also postulates, at least inferentially, the *existence* of some choice. Choice is meaningless without alternatives. Political institutions in modern, democratic societies utilize party systems that organize the electorate into more or less distinct groups and that pose alternative viewpoints through alternative candidates. The device of the political campaign is indispensable because it informs the electorate of the alternatives between which choice may be exercised.

This whole theoretical system with its values and postulates, as it relates to selection and tenure of Supreme Court judges, collapses in Florida.

It collapses because the electoral processes have become in practice little more than casual referenda in which voters periodically go through the motions of endorsing judicial appointments made by our governors. Thus, the operational system involves inarticulate postulates and values radically different from those underlying the theoretical system set forth in the written constitution. This operational system denies the desirability of choice through direct action by the electorate. It gives choice instead to a state-wide, popularly elected official, in all likelihood responsive to some of the people, though under the single term limitation not directly accountable to the electorate.[10] Albeit in recent years Florida governors have tended to consult the bar before appointing judges to the Supreme Court bench, this hardly constitutes a formalized check. The only formalized check on the governor's discretion lies within these deficient electoral processes.

At this juncture the superficial resemblance of the system to the A. B. A. plan becomes apparent. The so-called "A. B. A. plan" dates from the 1937 recommendation adopted by the American Bar Association:

> (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for this purpose, who hold no other public office.

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10. The possibility of impeachment and removal of the governor by the legislature may be viewed as a remote and extreme form of indirect popular accountability, with the degree of indirection increasing as the degree of actual representation declines. The composition of the Florida legislature, for example, does not at all reflect the rapidly shifting center of the state's population.

(b) If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.

(c) The appointee after a period of service should be eligible for reappointment periodically thereafter, or periodically go before the people upon his record, with no opposing candidate, the people voting upon the question "Shall Judge Blank be retained in office?"[11]

Florida's system of appointment by the governor to fill vacancies, with recent informal consultation of the bar, followed by periodic elections where the Supreme Court judges are commonly unopposed both in the primary and general elections, has some similarity to the A. B. A. plan. There are, however, inherent differences.

If a judge chooses to serve out a term, but announces in advance that he will not seek to succeed himself, the constitutionally prescribed system of election will be used to fill the position. If, as usually has been the case, a vacancy occurs for the governor to fill, there is no formal referral requirement, and even though a governor chooses to consult the bar, there is nothing binding about its recommendation. Besides, the A. B. A. plan does not stipulate the bar as the agency to prepare the list from which appointments would be made. Another important difference lies in the election or referendum part of the procedure. Under the A. B. A. plan the electorate has the right to reject a judge seeking to remain in office. In Florida this is possible only on the rare occasion of the judge being opposed, rejection taking the form of electing his opponent. There is no denying that from the standpoint of an incumbent judge the Florida system holds a perpetual threat of real opposition in the Democratic primary. Whatever else may be said about them, Florida primary campaigns for the Democratic nomination to statewide office are almost unbelievably expensive. Under the A. B. A. plan incumbent judges are not faced with the possibility of having to campaign against opposition or—perhaps even more important—the necessity of having to raise money to finance such a campaign.

Whenever elective systems of judicial selection and tenure are reappraised the A. B. A. plan is usually advocated and gains substantial, articulate support, especially among members of the bar and in the press. Still, in the seventeen years of the plan's existence, it has made scant headway. The chief merit of the plan seems to be its attempted compromise between the seemingly conflicting values of judicial independence and accountability to the people. A degree of independence is sought through the preparation of a list by a supposedly non-partisan group. This group is supposed to insure that appointments are made, not in response to

11. 62 A. B. A. Rep. 893-897 (1937), as cited in MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION (Vanderbilt ed. 1949).

political considerations, supposedly "bad", but rather reflecting such intangible virtues as independence and judicial temperament, supposedly "good". Appointment by a statewide, elective executive is a concession to indirect accountability. Periodic submission of the names of incumbent judges to a "yes" or "no" vote of the electorate is a concession to direct accountability, the absence of a campaign supposedly elevating the position above politics and re-enforcing independence.

There are some difficulties with the plan. It does not adequately recognize the limitations on popular control of the executive in one-party states. Where the executive may not succeed himself, either through choice or constitutional prohibition, responsiveness to the people may decline as the end of the term approaches. The character of the list from which a governor would make his appointments will depend in large measure upon the composition, character, and leadership of the group that submits it. In any such group it seems certain that the bar will be the field from which the list is compiled. Judges are required to be learned in the law. The bar, through judges or lawyers in the compiling group, will probably exercise either formal or informal leadership. If the bar has uniformly high, professional and ethical standards, these standards will probably be reflected both in the leadership of the agency and in the list it compiles. Likewise, the contrary is also true. But conceding both high standards and honorable intentions, the values of the bar—or its dominant elements —though undeniably important, are not necessarily identical with the values of the people whom courts must serve. This is only to suggest that what lawyers value in each other and in judges may not be the same as what laymen value in judges. An outstanding lawyer does not necessarily make an outstanding judge. The outstanding trial lawyer, for example, is by definition an outstanding *advocate*, and advocacy is surely a quality alien to "judicial temperaments." These are serious considerations because the courts are an important part of our system of governmental policy-making,[12] apart from which there is sometimes no, or only ineffectual, appeal. The national system of judicial appointment is deliberately geared to political considerations at presidential and senatorial levels. It is interesting to recall that few appointments to the U. S. Supreme Court have been hailed with enthusiasm by the bar. Yet, it is significant that there is no serious suggestion of the A. B. A. plan for federal judges.

This brings us to another difficulty with the A. B. A. plan. The proviso for periodic referendum is unrealistic. It assumes the desirability of some popular control over the appointed judiciary. Such control postulates an informed electorate with capacity for choice. The difficulty is that political campaigns in the American system of government performs the function of informing the electorate, but under the A. B. A. plan

12. This is obvious, but for example witness the recent Florida Supreme Court decisions in the gubernatorial succession cases and in the case invalidating legislation seeking to increase the state's share of pari-mutuel pools at dog tracks.

there is no contest and apparently no campaign. This leads uneasily to the feeling that without a campaign, and in the absence of some flagrant and widely-known abuse of judicial discretion, the lawyers will be the only ones who will know anything about the judge. A system which through design or default allows the bar to select judges does not seem compatible with our traditional democratic philosophy of government.

It has not been the purpose of this essay to suggest the "best" system for selection and tenure of Supreme Court judges in Florida. The complexities of American society at mid-twentieth century make it improbable that there is any single system uniformly beneficial in all circumstances. It has been the purpose of this essay to explain the system that has developed in contrast to the one announced by the written constitution, and also to raise some questions about underlying values.

The relative desirability of alternative arrangements for selection and tenure of judges ought to be measured against the features of existent operational systems. In Florida this means that proponents of the A. B. A. plan ought not to advance it as a substitute for an elective Supreme Court we have never really had. Measured against our existent operational system, adopting the A. B. A. plan in Florida would involve less radical change than trying to implement the system of direct, popular election contemplated in the Constitution of 1885.

There are, beyond doubt, defects in any system of popular election, as there are in any system of appointment, and as there are in the A. B. A. plan of modified appointment. There are certainly some serious defects in the arrangement we have developed. Short of the unlikelihood of our achieving perfection, there will be defects in any replacement system. Still, the vitality of self-government lies in willingness to undertake self-improvement. The most important thing is to be clear on the underlying values and devise a workable system for their implementation.

TABLE I

PROVISIONS FOR SELECTION AND TENURE OF SUPREME COURT JUDGES IN FLORIDA CONSTITUTIONS

Florida Constitution	Year	Method of Selection			Term		
		Elected by Leg.	Elected by People	Appointed*	Good Behavior	Six Years	Eight Years
1st	1838	x			x		
Amend.	1848	x					x
Amend.	1853		x			x	
2nd	1861			x		x	
3rd	1865			x		x	
4th	1868			x	x		
5th	1885		x			x	

*By Governor and Senate.

TABLE II*

SELECTION AND TENURE OF FLORIDA SUPREME COURT JUDGES UNDER THE CONSTITUTION OF 1885

Judges	Initial Status		Term	Years Tenure	Party Nominations**			General Election			Reason for leaving Bench				
	Apptd.	Elected			Times Opposed in Primary	Times Nominated	Times Defeated in Primary	Times Opposed	Times Elected	Times Defeated	Defeated	Resigned	Expired Term	Retired	Death
McWhorter	x		1885-1887	2		1						x			
Maxwell, A. E.	x		1887-1891	4		1		1	1			x			
Mitchell		x	1888-1891	3		1		1	1				x		
Raney	x		1885-1894	9		1		1	1			x			
Mabry		x	1891-1903	12		2		2	2				x		
Taylor		x	1891-1925	34		6		5	6			x			
Liddon	x		1894-1897	3		1			1			x			
Carter	x		1897-1905	8	1‡	2	1‡	2	2			x			
Maxwell, E. C.	x		1902-1904	2								x			
Schackleford	x		1902-1917	15		3		3	3			x			
Hocker		x	1903-1915	12		2		1	2				x		
Cockrell	x		1902-1917	15	1	2	1	2	2		x				
Whitfield	x		1904-1943	39	1	7		3	7					x	
Parkhill	x		1905-1912	7		1		1	1			x			
Ellis		x	1915-1938	23	1	4		3	4					x	
West	x		1917-1925	8	1	2		1	2			x			
Browne, J. B.		x	1917-1925	8	1	2		2	2			x			
Terrell	x		1923-	31†		6			6						
Brown, A.	x		1925-1946	21		4		1	4					x	
Buford	x		1925-1948	23	1	4		1	4					x	
Strum	x		1925-1931	6	1	2		1	2			x			x
Davis	x		1931-1937	6		2			3						x
Chapman	x		1937-1952	15	1	3			3						
Thomas	x		1938-	16†	1	3			3						
Adams	x		1940-1951	11		2			2			x			
Sebring		x	1943-	11†	1	3			3						
Barns		x	1946-1949	3	1	1			1					x	
Hobson	x		1948-	6†	1	2			2						
Roberts	x		1949-	5†	1	2			2						
Mathews	x		1951-1955	4		2			1						x
Drew	x		1952-	2†	1	1			1						

TABLE III

GUBERNATORIAL APPOINTMENTS TO THE FLORIDA SUPREME COURT, 1885-1954

Governor	Number of Appointments	Year of Appointment	Appointee	Tenure Years
Edward A. Perry	3	1885	George C. McWhorter	2
		1885	George P. Raney	9
		1887	A. E. Maxwell	4
Henry L. Mitchell	1	1894	Benjamin S. Liddon	3
William D. Bloxham	1	1897	Francis B. Carter	8
William S. Jennings	4	1902	E. C. Maxwell	2
		1902	Thomas M. Schackleford	15
		1902	Robert S. Cockrell	15
		1904	James B. Whitfield	39
Napoleon B. Broward	1	1905	Charles B. Parkhill	7
Sidney J. Catts	1	1917	Thomas F. West	8
Cary A. Hardee	1	1923	Glenn Terrell	31 to date
John W. Martin	3	1925	Armstead Brown	21
		1925	Rivers H. Buford	23
		1925	Louis W. Strum	6
Doyle E. Carlton	1	1931	Fred H. Davis	6
Fred P. Cone	3	1937	Roy H. Chapman	15
		1938	Elwyn Thomas	16 to date
		1940	Alto Adams	11
Millard F. Caldwell	1	1948	T. Frank Hobson	6 to date
Fuller Warren	3	1949	B. K. Roberts	5 to date
		1951	John Matthews	4
		1952	E. Harris Drew	2 to date