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Drew Noble Lanier

Roger Handberg

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IN THE EYE OF THE HURRICANE: FLORIDA COURTS, JUDICIAL INDEPENDENCE, AND POLITICS

Drew Noble Lanier and Roger Handberg***

I. INTRODUCTION

Underlying many of the shrill arguments made in the aftermath of the 2000 presidential vote in Florida were questions regarding judicial independence. The concept of judicial independence is often expressed in absolutist terms, but the reality is more complex. Courts, regardless of their rhetoric, are political institutions, born of politics and subject to political whims.

Florida state courts are no exception. This Article connects the historic events of the 2000 presidential election to the larger question of how to balance what are often seen as incompatible variables: judicial independence and political accountability.¹

The political and legal wrangling surrounding the 2000 presidential elections crystallized long-brewing public animosity towards the judiciary, particularly the Florida Supreme Court, perceived to be out-of-step politically with the rest of the state government. In this Article, we will discuss the concept of judicial independence, the political nature of courts, and efforts to insulate courts from the ordinary politics engulfing the popularly elected branches. We first review Florida's political history and changing political landscape. We then trace the development of the state's judicial selection processes and tie those processes to current legislation that the Florida legislature has considered and, in some cases, enacted in the wake of the 2000 Presidential election. Finally, we consider the

* Assistant Professor of Political Science, University of Central Florida, Orlando, Florida. B.A., 1986, University of North Texas; J.D., 1990, DePaul University College of Law; Ph.D., 1997, University of North Texas. Professor Lanier was formerly an associate attorney with Hughes, Watters & Askanase, L.L.P., Houston, Texas. The author may be contacted at P.O. Box 161356, Orlando, Florida 32816, (407) 823-3753, or via email at dlanier@mail.ucf.edu.

** Professor of Political Science, Interim Department Chair, and College of Arts and Sciences Pre-Law Advisor, University of Central Florida, Orlando, Florida. B.A., 1966, Florida State University; Ph.D., 1970, University of North Carolina. The author may be contacted at P.O. Box 161356, Orlando, Florida 32816, (407) 823-2608 or via email at handberg@mail.ucf.edu.

1. Roger Handberg, *Judicial Accountability and Independence: Balancing Incompatibles*, 49 U. MIAMI L. REV. 127, 130-31 (1994).

likely consequences of efforts to diminish the insulation that the Florida courts enjoy from the politics of the day.

II. JUDICIAL INDEPENDENCE

A. Politics Defined and Judicial Politics Explored

The key to understanding questions of judicial independence is to appreciate the political nature of courts. When we use the word "politics," we do not employ its pejorative variant. Rather, the definition we attach to politics is derived from the understanding that courts influence the policy-making process. In particular, we adopt the conventional definition of politics in our field: the process by which authoritative decisions are made about the allocation of goods in society.² Under this definition, judges have discretion, grounded in their respective jurisdiction, as to what judgments to render and whose interests to protect. They can support certain policies and outcomes while opposing others. Courts throughout the United States do so on a daily basis without arousing much public interest or controversy.³

While courts are certainly political institutions, they are also legal institutions that differ from the other political branches. Courts operate within a field of bounded discretion due to pre-existing rules that govern their decision-making. These include procedural and evidentiary rules that limit how and when courts can act and constrain a court's options when issuing a decision. Those rules inure to the legal system's benefit in that litigants and the public can generally anticipate how a court will react. This consistency gives the judiciary a greater legitimacy than that of the relatively unpredictable executive and legislative branches. Periodically, courts and their decisions captivate the public's attention. When their decisions are viewed to contradict the interests of the public, their behavior is often discussed at length.⁴ In those highlighted situations, the policy-making power of the judiciary becomes apparent to even casual observers who may vigorously oppose the policy interests announced in the court's decision. This dynamic

2. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 40-50 (1965).

3. Each state has a separate and autonomous judicial system in addition to that of the federal government. DAVID W. NEUBAUER, *JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES* 54 (2d ed. 1997).

4. Roger Handberg & Mark Lawhorn, *The Courts: Powerful but Obscure*, in *GOVERNMENT AND POLITICS IN FLORIDA* 148-68 (Robert J. Huckshorn ed., 2d ed. 1998). In addition to the 2000 presidential election contest, celebrity cases, such as O.J. Simpson's criminal trial in 1994-1995 in California, temporarily bring courts into the public eye. See NEUBAUER, *supra* note 3, at 244-45.

certainly was apparent during and following the presidential election in 2000. After that election, serious questions of judicial independence still linger.

B. Judicial Independence Defined

Judicial independence in America often resembles the proverbial elephant being examined by four blind men. Each reports a description of the beast based on touching the elephant in only one area. Judicial independence experienced a similar fate during the 2000 presidential election. The struggle over which candidate, Republican George W. Bush or Democrat Al Gore, received the most popular votes in Florida, and thus who would become president of the United States, heightened awareness of judicial independence.

When partisans begin to attack the legitimacy of the courts' decision-making power, questions of judicial independence become relevant. Many laud the independence of the judiciary without really knowing what judicial independence entails.⁵ To understand the political nature of courts as a policy-making arm of the government, the term "judicial independence" must be clearly understood. Becker defines judicial independence as follows:

Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own political attitudes, values and conceptions of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.⁶

For our purposes, the last element is key: judges must not be unduly limited in their decision-making by external influences. Accordingly, "judges who are free from potential domination by other branches of the government"⁷ are judicially independent. This independence becomes the touchstone of the courts, because without it, no one would agree to the judicial resolution of their dispute.

5. Tony Mauro, *Judges Taking Heat for Overturning Initiatives*, USA TODAY, May 12, 1997, at 5A.

6. THEODORE L. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONING OF THE COURTS* 144 (1970).

7. *United States v. Will*, 449 U.S. 200, 218 (1980).

The judge's initial neutrality is necessary even though ultimately the court favors one party over the other.⁸

Becker specifically defines the structural elements that must be present for courts to be independent.⁹ Their salary cannot be reduced while in office. They must have a fixed tenure (for a specific term of years or life) rather than having their employment be subject to the caprice of some other political actor (notably the executive). Finally, they must be selected either through executive appointment that is checked by some other actor or through direct election.¹⁰ The federal courts, for example, meet each of these criteria.¹¹

Florida state courts, however, satisfy only two of the three elements. The judges of the state's highest court and the intermediate courts of appeals are selected under the merit system, or the so-called Missouri Plan.¹² Because extra-governmental actors are included in the selection process (at least ostensibly), there is some measure of independence provided to the judges of these courts.¹³ In fact, in 1976 Florida voters opted to change the judicial selection method for the district courts of appeal and the supreme court from non-partisan election to the merit system in an attempt to bolster the political independence of the judiciary.¹⁴ Circuit and

8. MARTIN M. SHAPIRO, COURTS: A COMPARATIVE PERSPECTIVE AND POLITICAL ANALYSIS 1-64 (1981).

9. BECKER, *supra* note 6, at 148.

10. *Id.*

11. U.S. CONST. art. II, § 2, art. III, § 1.

12. Under this system, a judicial nominating commission composes a list of potential nominees, which is then given to the governor, who selects from among the listed individuals. After serving for one year, the incumbent stands in a retention election and, if successful, serves a term of six years. FLA. CONST. art. V, §§ 10-11; *see also* FLA. STAT. ch. 43.291 (2001) (detailing the composition and selection process for members of the Judicial Nominating Commission). For a more in-depth discussion of the Florida judicial system, *see* CAROL M. BAST, *FLORIDA COURTS* 37, 44 (2d ed. 1998) and B.K. Roberts, *The Judicial System*, in *THE FLORIDA HANDBOOK 1997-1998* 199 (Allen Morris & Joan Perry Morris eds., 26th ed. 1998).

13. However, during the last general session, the Florida legislature amended the governing statute to increase the power that the governor has over the selection of judges on these appellate courts. Prior to the amendment creating the current form of the statute (43.291), the Florida Bar was given the authority to nominate individuals without the intervention of the governor. Florida Bar members were selected to serve on various commissions created for each of the appellate courts throughout the state. *See* FLA. STAT. ch. 43.29 (2000). We will more fully discuss the language of this bill and its attendant implications for the Florida courts below. *See infra* notes 114-131 and accompanying text.

14. *See* Handberg & Lawhorn, *supra* note 4, at 158; Rick Karl, *Electing Supreme Court Justices—For the Last Time*, 60 JUDICATURE 290 (1977) (discussing the 1976 elections to fill spots on the Florida Supreme Court); *cf.* Melinda Gann Hall, *State*

county court judges, on the other hand, are selected in non-partisan elections and serve four-year terms.¹⁵ Thus, for all four levels of courts in the judicial hierarchy, Becker's second and third indicia of judicial independence—fixed tenure and selection by either election or checked executive appointment—are satisfied.

While the state's constitution and statutes provide some measure of tenure protection, none of the judges in any of the state's courts have salary protection. Only one section of the Constitution even hints at such insulation from political retribution and even then the protection may be illusory.¹⁶ Members of the judiciary therefore enjoy some measure of salary protection at least until the legislature meets again and amends the general law of the state. Hence, according to Becker's definition of judicial independence, Florida courts are not as independent as federal courts and many state courts where all three elements, including salary protection, are satisfied through constitutional provisions, statute, or tacit practice. This lack of judicial independence pre-dates the events of 2000 but did not impact the courts because the public conflicts were muted. The lack of salary protection, however, means that the courts are more readily disciplined than even most legislators previously understood. Florida's state lawmakers are now well aware of this fact due to the events of the 2000 election.

III. FLORIDA'S POLITICAL HISTORY: THE PROLOGUE

A. Statewide Demographics: A "Polyglot" of Cultures

To understand the impact of politics on the Florida judiciary, one must first appreciate Florida's heterogeneous regions. Each region has its own distinct culture, which makes generalizations about the state problematic. Demographically, Florida's population is rapidly growing, with approximately 700 people joining the state's population each day.¹⁷ Because Florida's population is always changing, Floridians have been characterized as "rootless" in that they lack many traditional political anchors (e.g., churches, labor

Supreme Courts in American Democracy: Probing the Myths of Judicial Reform, 95 AM. POL. SCI. REV. 315-30 (2001) (arguing that efforts to remove partisanship from judicial selection do not entirely insulate judges from the effects of party politics).

15. FLA. CONST. art. V, §§ 8, 10. See also BAST, *supra* note 12, at 21, 29; Roberts, *supra* note 12, at 200. We more fully discuss the changes in judicial selection below. See *infra* notes 54-76 and accompanying text.

16. FLA. CONST. art. V, § 14 (providing that "all justices and judges shall be compensated only by state salaries *fixed* by general law") (emphasis added).

17. THOMAS R. DYE, *POLITICS IN FLORIDA* 2 (1998).

unions) that typically influence voters' political affiliations.¹⁸ Accordingly, Florida voters "drift from candidate to candidate with little lasting loyalty."¹⁹ Historically, the state's politics were, like those of other Confederate states, "white, conservative, segregationist, and one-party Democratic."²⁰ That homogeneity, politically speaking, was premised on race, an issue that has declined in saliency but not disappeared.²¹ Over the last forty years, the state's population has grown more diverse and its political culture more variegated.

Florida is divided into three regions, each with a distinct culture and political tendency. The locus of political power has shifted from the northern part of the state (Tallahassee, the state capital), to the central (Orlando, Daytona Beach, and the Space Coast), southwest (Tampa-St. Petersburg and Clearwater), and southeast (Miami, Ft. Lauderdale, and Palm Beach) regions. While the bulk of the state has shifted its political allegiance in recent years, those living in the northern part of the state have retained their conservative politics. The central Florida region, however, is the state's most rapidly growing area and tends to be a swing area in elections. Its voters tend to support conservative candidates and issues, although many retirees come to the area and support Democratic candidates. The retirees who dominate the southwestern part of the state tend to be economically well-off, Midwestern, and Republican. The southeastern region is "a polyglot of cultures,"²² including Anglo-Saxon, Jewish, African-American, Haitian, and Hispanic (which is primarily Cuban in origin, although that too is changing). This mixture produces divergent political affiliations throughout the region.²³

B. Politics Old and New: "Pork Choppers" and Political Realignment in Florida

The main factor driving the changes in the state's politics has been the tremendous population growth as millions of newcomers

18. *See id.* at 5.

19. *Id.*

20. *Id.*

21. *See* EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 116-19 (1989).

22. *Id.* at 8.

23. *Id.* at 2-8; *see also* Drew Noble Lanier, *Florida*, in *LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA* 1 (Herbert M. Kritzer ed., forthcoming June 2002).

moved into the state beginning in the early 1950s.²⁴ These new immigrants brought diversity to the state in terms of social background and political party affiliations. During the period of the Solid South,²⁵ the state legislature was dominated by Southern Democrats from rural districts, popularly known as “pork choppers.”²⁶ For many years, these Democrats struggled to retain control of political power within the state. Ultimately, they fell victim to the Warren Court’s reapportionment decisions.²⁷ In the aftermath, insurgent Republican strength was first consistently demonstrated by the 1966 gubernatorial election of Claude Kirk, the first Republican elected in Florida since the Reconstruction Era.²⁸ Until the 1970s, party affiliation among traditional Southern Democrats held, but eventually many shifted their allegiance to the Republican Party.²⁹ Since that time, Florida has consistently voted Republican and has often supported the Republican candidate in presidential elections.³⁰ This change in long-term political alle-

24. DYE, *supra* note 17, at 1-2.

25. See V.O. KEY, *SOUTHERN POLITICS IN STATE AND NATION* (1949).

26. The term “pork choppers” was coined by *Tampa Tribune* editor James Clendenin. He “relentlessly slammed legislative leadership for its narrow perspective, insisting that the small county representatives ‘fought only for pork, not principle.’” FLA. HOUSE OF REPRESENTATIVES, COMM. ON REAPPORTIONMENT, *Reapportionment in Florida: Out of the 19th Century, Into the 21st*, in REAPPORTIONMENT AND REPRESENTATION IN FLORIDA: A HISTORICAL COLLECTION 439-43 (Susan A. MacManus ed., 1991); cf. Hugh Douglas Price, *Florida: Politics and the “Pork Choppers,”* in THE POLITICS OF REAPPORTIONMENT 96, 101-02 (Malcolm E. Jewell ed., 1962) (noting that the term “pork chopper” is an informal term referring to someone who “benefits from preferential place at the expense of the commonweal”).

27. As the nation’s population moved from rural to urban areas, questions of equal political representation became more pressing. Urban representation lagged behind the changes in the distribution of the population while rural districts retained a disproportionate influence in the state legislatures. See Reynolds v. Sims, 377 U.S. 533, 550-54 (1964) (affirming the principle of “one man, one vote”); Baker v. Carr, 369 U.S. 186, 190 (1962) (holding that state legislative malapportionment was a justiciable question, and thus reversing its holding in Colegrove v. Green, 328 U.S. 549 (1946)). The Court later extended its holding to the Congress in Wesberry v. Sanders, 376 U.S. 1, 2 (1964).

28. See generally EDMUND F. KALLINA, *CLAUDE KIRK & THE POLITICS OF CONFRONTATION* (1993).

29. See Burton M. Atkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. B.J. 152, 153 (1976); see also Austin Ranney, *Parties in State Politics*, in POLITICS IN THE AMERICAN STATES 61 (Herbert Jacob and Kenneth N. Vines eds., 3d ed. 1976).

30. EARL BLACK & MERLE BLACK, *THE VITAL SOUTH: HOW PRESIDENTS ARE ELECTED* 74-75 (1992); GARY KING & LYN RAGSDALE, *THE ELUSIVE EXECUTIVE: DISCOVERING STATISTICAL PATTERNS IN THE PRESIDENCY* 439-46 (1988); HOWARD W. STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS* 81, 108 (5th ed. 1995). This does not imply, however, that Florida has always supported Republican candidates during this period. Florida voters supported Democratic candidates Lyndon B. Johnson in 1964 and Jimmy Carter in 1976. *Id.*

giance is known as a political realignment.³¹ Such changes in affiliation from the Democratic party to the Republican party is characteristic of most Southern states in the last thirty years.³² The whole region has transformed from one solidly Democratic to one consistently conservative and thus more competitive between the two major parties.³³

These shifting loyalties within the Florida electorate have exacerbated the tension between the judiciary and the democratically-elected branches—the executive and the legislature. Because of structural differences in their selection process, the judicial branch grew out of synchronization with its sister branches over time. Unlike the judiciary, the executive and the legislature have been popularly elected throughout the state's history.³⁴ Thus, they are intimately tied to changes in public opinion and shifts in political affiliation among the electorate. Accordingly, when the state's electorate became more Republican, a Republican governor, Claude Kirk, was elected in 1966. Thereafter, while the state was still dominated by Democratic officials at the local level, Republican strongholds developed in some areas of the state and Kirk's Republican appointees helped break the "Democratic stranglehold on the offices" of the state.³⁵ However, the judiciary was not as quick to respond. This lack of responsiveness led to changes in the selection process for the district courts of appeal and the Florida Supreme Court that diminished the link between the public and

31. Jonathan Knuckey, *Ideological Realignment and Partisan Change in the American South, 1972-1996*, 29 *POLITICS AND POLICY* 337-58 (2001) [hereinafter Knuckey, *Ideological Realignment*]; ALEXANDER P. LAMIS, *THE TWO-PARTY SOUTH*, 301-04 (2d. rev. ed. 1990) [hereinafter LAMIS, *TWO-PARTY SOUTH*]. The studies examining this phenomenon are vast. See, e.g., WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970); ALEXANDER P. LAMIS, *SOUTHERN POLITICS IN THE 1990s* (1999) [hereinafter LAMIS, *SOUTHERN POLITICS*]; Paul Allen Beck, *The Dealignment Era in America*, in *ELECTORAL CHANGE IN ADVANCED INDUSTRIAL DEMOCRACIES* (Russell Dalton, Scott Flanagan & Paul Allen Beck eds., 1984); Charles S. Bullock, III, *Creeping Realignment in the South, in THE SOUTH'S NEW POLITICS: REALIGNMENT AND DEALIGNMENT* (Robert H. Swanson & David M. Brodsky eds., 1987); Edward G. Carmines, *The Logic of Party Alignments*, 3 *J. OF THEORETICAL POL.* 65-85 (1991). See also Jonathan Knuckey, *Explaining Republican Success in Southern U.S. House Elections in the 1990s*, 21 *AM. REV. OF POL.* 179-200 (2000) (demonstrating that partisan realignment has extended from the state legislatures to the U.S. Congress) [hereinafter Knuckey, *Explaining Republican Success*].

32. Bullock, *supra* note 31 *passim*.

33. See, e.g., Knuckey, *Ideological Realignment*, *supra* note 31 *passim*.

34. See FLA. CONST. art. II, § 15 (setting out the terms for legislative representatives); FLA. CONST. art. III, § 5 (setting out the terms for state executives).

35. Handberg & Lawhorn, *supra* note 4, at 157; see also KALLINA, *supra* note 28.

the members of those courts. These changes distanced those jurists not only from changes in public opinion, but also from the views of the other two branches who were riding the crest of ascending Republican power in the state.

**C. History of Florida Judicial Selection:
“The Silent De Facto Conspiracy”**

Historically, Florida state courts were the non-controversial servants of the state’s dominant political forces.³⁶ That posture is typical of state courts throughout the United States. Since state courts are intimately tied to the political structure of the state, they tend to be creatures of local government infused with local values and mores.³⁷ The Florida Supreme Court’s position of ideological congruence with the dominant political culture, however, began to unravel in the 1960s. The degree to which it conflicted with the electorate varied over time, as will be explained.

Before those conflicts began to occur, several changes were made in the judicial selection process in an effort by the dominant conservative political forces to maintain control over the courts. Although nominally Democratic in party affiliation until the late 1960s, these forces controlled the Florida Bar, a so-called integrated bar, in which membership is mandatory for all practicing attorneys in the state.³⁸ Traditional political practice in the 1960s was that incumbent judges would resign their office a year or so prior to retirement. The governor would then fill that vacancy based on recommendations from the Bar and other political associates. The appointee would thereby be able to stand for re-election as an incumbent. In a partisan election, there was an extremely high probability of reelection. If the judge served a full term, in contrast, the electorate would directly choose the successor in partisan elections without the imprimatur of gubernatorial approval.³⁹

This “silent de facto conspiracy that existed among the judiciary, the Florida Bar, and the various governors”⁴⁰ has straightforward structural foundations. Practicing attorneys are reticent to run against sitting judges for fear that they may lose, earning the ire and enmity of the judges who will decide their cases. The bar asso-

36. In fact, one of the authors of this article entitled his review of Florida courts accordingly. See Handberg & Lawhorn, *supra* note 4.

37. See NEUBAUER, *supra* note 3, at 174.

38. NEUBAUER, *supra* note 3, at 131-32.

39. Atkins, *supra* note 29, at 153-54; see also Handberg & Lawhorn, *supra* note 4, at 156-57.

40. Handberg & Lawhorn, *supra* note 4, at 157.

ciation itself tends to support the incumbent candidate, making it even more difficult for challengers to gather support.⁴¹ Moreover, judicial elections are bland and non-controversial due, in large part, to canons of ethics that prevent judicial candidates from staking out issue positions during the campaign.⁴² This dynamic makes it difficult for voters to evaluate and distinguish candidates for judicial office. In fact, those sitting judges who are not re-elected usually fail in their bid due to personal scandal.⁴³ "For example, one [Florida] judge was found to be printing pornography on his office computer. Local attorneys and other judges had been aware of the drinking problem of another judge for years, but no effective action was taken until he hit a parked police car after a liquid lunch."⁴⁴ Accordingly, partisan changes in the composition of the bench occurred with much less frequency and at a much slower pace than in the other two branches.⁴⁵

The historical dominance of the state Democratic Party, a vestige of the Solid South, reinforced this trend. The election of Claude Kirk as governor first demonstrated the effect of potential Republican voters in the state. This changed the partisan dynamics of the selection process since Republican candidates now had a fighting chance to first attain office and later to shape the judiciary through appointments. Indeed, Governor Kirk's appointees to the bench furthered this transformation. On a statewide basis, however, Kirk's Republican Supreme Court appointees fell to Democratic challengers in the subsequent general elections.⁴⁶

41. *Id.*; see also NEUBAUER, *supra* note 3, at 170.

42. *E.g.*, Anthony Champagne & Greg Thieleman, *Awareness of Trial Court Judges*, 76 JUDICATURE 271-77 (1991); Marie Hojnacki and Lawrence Baum, *Choosing Judicial Candidates*, 75 JUDICATURE 300-09 (1992); *cf.* Karl, *supra* note 14, 291-96 (discussing the relatively lackluster 1976 campaign for seats on the Florida Supreme Court); William Glaberson, *Fierce Campaigns Signal a New Era for State Courts*, N.Y. TIMES, June 5, 2000, at A1.

43. Handberg & Lawhorn, *supra* note 4, at 157.

44. *Id.*

45. Also, because judges are elected, they must campaign and raise funds to pay for the expense of that effort. This process inevitably raises questions of impropriety and the legitimacy of judges who seek contributions from the lawyers who may later appear in their courts. *See, e.g.*, NEUBAUER, *supra* note 3, at 170; see also Burton Atkins, *Judges' Perspective on Judicial Selection*, 49 ST. GOV'T 182 (1976).

46. This trend reflected the Democratic dominance of state politics despite Kirk's election in 1966, and a split in the Democratic ranks eventually developed. His opponent, Robert King High (the mayor of Miami), was perceived as too liberal, so critical financial support went to Kirk. This, coupled with the usual decline in turnout of less educated Democratic voters in the off-year election of 1966, proved insurmountable for King, especially given the animosity against the Democratic National Party in

Regardless, the harbingers of change were clear, leading to several changes in judicial election procedures. Although these changes were intended to retain Democratic judges, their general effect was to improve Republican candidates' chances of attaining office by moving major statewide races to an off-year election cycle.⁴⁷ By the 1980s, the Republican party was clearly on the rise, capturing more legislative seats with each election.⁴⁸ The House first came under Republican control in 1994, and the Senate followed in 1996.⁴⁹ For the first time since Reconstruction, the Republicans were in the majority.⁵⁰ During the same time period, in 1994, Republican gubernatorial candidate John Ellis "Jeb" Bush lost to Democrat Lawton Chiles, a former U.S. Senator.⁵¹ This defeat largely nullified Republican legislative gains within the judiciary since it preserved the older, Democratic elements in control of access to the bench. Bush, however, ultimately prevailed and won the post in 1998, defeating former Democratic Lieutenant Governor Buddy McKay.⁵² Hence, beginning in 1998, the Republicans held control of both the governorship and the legislature, two key elements for influence over the judiciary.⁵³

D. Changes in the Judicial Selection Processes Over Time: From Partisanship to the Merit System

Largely because Governor Kirk's judicial appointees were considered to be partisan, Florida voters made the selection process⁵⁴ for all four levels of courts nonpartisan.⁵⁵ Thus, in 1972, Article V

North Florida after the 1964 presidential election during which North Florida voters overwhelmingly supported Republican candidate Barry Goldwater.

47. FLA. STAT. ch. 100.041 (2001).

48. See generally MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 2002, at 360-63 (2001).

49. *Id.* at 362.

50. Wayne L. Francis & Elizabeth G. Williams, *The Legislature and the Legislative Process*, in *GOVERNMENT AND POLITICS IN FLORIDA* 124-46, 127 (Robert J. Huckshorn ed., 2d ed. 1998).

51. *Id.* at 364.

52. *Id.* at 365.

53. *Id.*

54. The emphasis on elections to select members of the judiciary arose during the Jacksonian era, which emphasized the democratization of the political process and sought to diminish the elitism of the judiciary. Most states from 1832 to 1933 adopted such judicial election. *E.g.*, Atkins, *supra* note 29, at 152.

55. There are four levels of courts within the Florida judicial hierarchy: the Florida Supreme Court, the district courts of appeals (5 in number), the circuit courts (20 in number), and the county courts (67 in number, one for each county). Handberg & Lawhorn, *supra* note 4, at 151-52. Circuit courts and county courts have primarily original jurisdiction to try cases. *Id.*

of the Florida Constitution was amended to replace partisan selection methods with nonpartisan judicial elections. This change from partisan to nonpartisan elections coincided with the state becoming a more competitive, two-party system and the decline of the Florida Democratic party's historical hegemony.⁵⁶ Moreover, in 1972 an amendment was passed instituting an appointment process to fill interim vacancies. This enhanced the governor's power over the judiciary because appointed judges had rarely encountered even minimal opposition and even more rarely were defeated due to the difficulties of opposing an incumbent.⁵⁷

The larger effect of this change from partisan to nonpartisan elections was to diminish gradually the link between the courts and the partisan dynamics of the state. This created a lag between changes in public opinion, quickly felt by the executive and the legislative branches, and the composition and decision-making of the Florida judiciary. Although the Republican Party was on the rise in Florida, that change was not mirrored in the courts over which traditional political forces, like the Florida Bar, still held sway. Democrats also retained control of the legislature while Republican governors, J. Claude Kirk⁵⁸ and Bob Martinez,⁵⁹ were elected for only single terms. The Republican Party's ability to impact the judiciary was therefore limited.⁶⁰

The system of non-partisan election of judges continued unabated until a series of incidents in the mid-1970s involving four of the Florida Supreme Court's seven justices. Two of the justices were accused of attempting to influence separate decisions in lower courts. The allegations were so serious that the legislature invoked

56. Indeed, this correlation has been observed in other states as well. Atkins, *supra* note 29, at 153. See generally BURNHAM, *supra* note 31; LAMIS, SOUTHERN POLITICS, *supra* note 31; LAMIS, TWO-PARTY SOUTH, *supra* note 31; Beck, *supra* note 31; Bullock, *supra* note 31; Carmines, *supra* note 31; Knuckey, *Explaining Republican Success*, *supra* note 31; Knuckey, *Ideological Realignment*, *supra* note 31.

57. Atkins notes that of the forty-six Republican judges who responded to his mailed survey, about one-half obtained their positions during Governor Kirk's administration. Atkins, *supra* note 45, at 182; Atkins, *supra* note 29, at 153-54.

58. Not only did the Democrats control the legislature, but they also controlled the cabinet with which Kirk had a running feud. It was rumored that Kirk spent more time out of Tallahassee than in it because of this. Michael Gannon, *A History of Florida to 1990*, in GOVERNMENT AND POLITICS IN FLORIDA 50 (Robert J. Huckshorn ed., 1991).

59. Martinez was only Florida's second Republican governor since Reconstruction. *Id.* at 56.

60. Democrats Reuben Askew (1971-79) and Robert "Bob" Graham (1979-1986) intervened between Kirk's and Martinez's tenures. Thereafter, Lawton Chiles served two terms until Jeb Bush was elected in 1998. *Id.* at 52-56.

the rarely used impeachment process. Both justices resigned before the formal removal process was consummated, but they were later disbarred. One later died as a fugitive from drug-smuggling charges.⁶¹ At about the same time, it became publicly known that the supreme court's chief justice suffered from alcoholism to the point of impairing his work. The Judicial Qualifications Commission⁶² notified him that if he did not seek assistance with his dependency, he would be removed from office. A fourth justice was involuntarily committed "to Shands Hospital in Gainesville for a formal psychiatric evaluation because of his erratic behavior under stress."⁶³ He ultimately was able to return to work and served as the tribunal's chief justice until the mandatory retirement age of seventy.⁶⁴ Because of the lack of justices during this period, lower court judges had to be appointed to form a quorum so the court could meet its responsibilities.⁶⁵

The cumulative effect of these events damaged the legitimacy of the Florida court system in general and the supreme court in particular. Many of the state's legal and political elites grew uneasy because they believed that the apolitical image of the judiciary was being eroded.⁶⁶ A movement that the League of Women Voters and the Florida Bar led arose to change the selection process for the supreme court and the district courts of appeal to a more indirect, presumably less partisan method.⁶⁷ Consequently, Florida's judges were selected differently depending upon their level within the hierarchy.⁶⁸ A 1976 referendum changed the method of selection for appellate court judges from one governed by non-partisan elections to a merit selection system.⁶⁹ While the trial courts for-

61. Handberg & Lawhorn, *supra* note 4, at 158.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Handberg & Lawhorn, *supra* note 4, at 158.

67. *Id.* Reformers advocate the adoption of the merit system because it circumvents the structural problems with candidate recruitment and the voters' lack of information. *E.g.*, NEUBAUER, *supra* note 3, at 171-72.

68. *See* BAST, *supra* note 12, at 58; Lanier, *supra* note 23, at 10.

69. FLA. CONST. art. V, § 11. Under this system, a Judicial Nominating Commission composes a list of three to six potential nominees, from which the governor makes the ultimate selection. After a period of approximately one year, the selected judge stands unopposed in a retention election in which voters in his district decides whether to continue him in office. If successful, the judge serves a six-year term. If not, then the governor chooses another candidate and the process begins anew. FLA. CONST. art. V, § 10. *See generally* LYLE WARRICK, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS *passim* (2d ed. 1993); Anthony

mally retained the nonpartisan election mode, their judges continued the long-standing, informal practice of resigning prior to their terms' end, allowing the governor to appoint a successor to reap the benefits of incumbency. The state legislature recognized this reality and enacted a modified merit selection system to diminish, although not eliminate, gubernatorial influence on local judge selection. Under this revised system, the governor would choose an interim successor from a list of potential nominees compiled by court-specific judicial nominating commissions.⁷⁰ This system was much like the one in place for the state's appellate courts.⁷¹ Once the interim term expires, the sitting judge then stands in a competitive election (unlike members of the appellate bench who stand unopposed) and, if elected, serves a full, six-year term.

Efforts to extend the merit election system for all trial bench appointments—not simply interim ones—began immediately after the 1976 vote. The opponents of such efforts perceived merit selection as the Bar's attempt to disenfranchise them just as their turn at judicial power came in the political roulette wheel. In North Florida, primarily Jacksonville, local African-American leaders resisted such changes because they believed that the adoption of this reform would leave the courts hostage to the lawyers, especially the defense bar, whom they believed held contrary policy views.⁷² In South Florida, Hispanic voters, particularly members of the Cuban-American community, raised similar objections. Despite this resistance, or perhaps because of it, the now Republican-controlled Florida legislature passed two referenda items authorizing constitutional amendments. The legislature did this thinking that only narrow groups opposed the extension of the merit system beyond the appellate bench. The first referenda was whether to adopt a local option permitting voters residing in specific counties and within the state's judicial circuits to choose to adopt the merit system for all

Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53-117 (1986) (discussing the merit selection system); Mark S. Hurwitz & Drew Noble Lanier, *Women and Minorities on State and Federal Appellate Benches: A Cross-Time Comparison, 1985 to 1999*, 85 JUDICATURE 84-92 (2001) (discussing the link between judicial selection method and the incidence of women and minorities becoming appellate judges).

70. There are currently twenty-six judicial nominating commissions, one for the supreme court, one for each of the five district courts of appeal, and one for each of the twenty judicial circuits, the latter having jurisdiction over appointments to the circuit and county courts throughout the state. FLA. CONST. art. V, § 11.

71. FLA. CONST. art. V, § 11.

72. See DYE, *supra* note 17, at 6-7 (discussing the partisan allegiance of voters in North Florida and Jacksonville).

judges in their political subdivision. The referendum was put to vote in November 1998 and the voters chose to create such an option for both county and circuit subdivisions by a margin of about fourteen percent.⁷³ In the second referenda, held in November 2000, the option of selecting judges through merit selection itself was presented to voters in each of the state's twenty circuits and sixty-seven counties.⁷⁴ From this amalgam of eighty-seven different elections, the reform failed in all counties and circuits by wide margins. The closest vote occurred in Broward County, the traditional Democratic party stronghold in the southeast part of the state (40% in favor; 60% opposed).⁷⁵ These elections occurred at the same time as the 2000 presidential election but with much less fanfare and more long-term effects for the citizens of the state.⁷⁶ Thus, Florida's judiciary remains split, with the appellate courts existing under the merit system, while the state's trial courts are chosen directly by the state's electorate. This division remained in place until after the 2001 legislative session when several changes were imposed, which are discussed below.

E. Setting the Agenda: The Florida Bar and Membership on the Judicial Nominating Commissions

It is axiomatic in politics that if one can control a decision-making body's agenda, then the outcome of that group will largely be decided. Such is the case regarding the membership of the state's Judicial Nominating Commissions. Under the system in place after the 1976 referendum, the Committees were composed of a total of

73. The full text of the ballot measure and the vote data can be obtained at the Secretary of State's homepage at <http://election.dos.state.fl.us>. The corresponding amendment can be found in article V, section 10(b)(1)-(3) of the state constitution. FLA. CONST. art. V § 10(b)(1)-(3).

74. Louis Jacobson, *Lobbying for "Justice" in State Courts*, 32 NAT'L. J. 3678 (2001).

75. The vote percentages for each subdivision can be obtained from the Secretary of State's homepage at <http://enight.dos.state.fl.us>. The constitutional amendment specifies that the question cannot be put to the electorate again until two years have expired since its first presentation. Even then, such a referendum requires the filing of a petition signed by a number of persons equaling at least ten percent of the votes cast in the immediately preceding presidential election. FLA. CONST. art. V, § 10(3). Broward County recently received intense media coverage because it was the site of one of the most bitterly contested recounts of the 2000 presidential election. See generally Don Van Natta Jr., *Counting the Vote: The Recount; Recounts Drag On; Court Battle Lines Are Drawn*, N.Y. TIMES, Nov. 20, 2000, at A1; see also *Analysis of Florida Ballots Proves Favorable To Bush*, N.Y. TIMES, Apr. 4, 2001, at A18.

76. The authors are presently at work examining the factors generally influencing the Florida voters' rejection of this referendum and the associated implications concerning the Florida judiciary.

nine members. The governor chose three appointees, the Bar three, and the governor and the Bar jointly three.⁷⁷ Attorney members of the Commissions have historically been extremely influential in composing the lists of potential nominees from which the governor selects the incumbent. Accordingly, the political views of the Bar influence the types of individuals recommended for selection and, thus, are material to understanding the political dynamics affecting appellate judicial selection. Control over the Florida Bar has become an object of intense campaigning and maneuvering between two main factions—the plaintiffs' bar (who tend to be more liberal) and defense attorneys (who tend to be more conservative). This type of struggle among ideological coalitions is common in many state bar associations.⁷⁸ Thus, because of the machinery that the merit selection system instituted at the appellate level and for interim appointments at the trial court level, the prevailing group within the Bar had indirect control over judicial nominations. By extension, judicial appointments went to whichever faction controlled the committee membership appointment process.⁷⁹ Accordingly, the Bar became an even more influential player in the politics of judicial selection after 1976.

F. The Supreme Court in the Public Eye

From this cauldron of interrelated forces, the Florida judiciary began to take shape quietly in the years leading up to the 2000 presidential election. The judiciary, in general, was effectively invisible to the public.⁸⁰ The members of the supreme court were considered to be moderate or moderately conservative in their de-

77. FLA. STAT. ch. 43.29(i) (2000).

78. See RICHARD A. WATSON & RONALD G. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* (1969); Charles H. Sheldon, *The Role of State Bar Associations in Judicial Selection*, 77 JUDICATURE 300, 304-05 (1994) (discussing the influence of partisan views in the state on the local bar's effects on judicial selection).

79. To become a member of one of the Judicial Nominating Commissions, one must apply to the Board of Governors. The application form is available on the Board's section of the Bar homepage (<http://www.flabar.org/newflabar/organization/Board/>). Notable among the questions asked of applicants is what their predominant fields of practice are and whether they are members of the plaintiff or defense bars. *Id.*

80. This posture contrasts with that of the California Supreme Court, which has been much more publicly visible since the 1970s. In fact, in 1986, four California Supreme Court justices were defeated including the tribunal's highly controversial chief justice, Rose Bird. John Culver & John Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81-89 (1986).

cision-making with occasional flashes of progressivism.⁸¹ In fact, no appellate court judge has lost a retention election since the merit system's inception,⁸² although some supreme court justices have been severely challenged because of their purported views. For example, challenges to Rosemary Barkett, the first female member of the supreme court and its chief justice,⁸³ and Leander Shaw, the African-American author of the state's abortion decision,⁸⁴ came from a combination of groups, including anti-abortion forces⁸⁵ and the National Rifle Association.⁸⁶ Barkett was particularly opposed because she was considered too lenient in criminal cases.⁸⁷ The elections of Barkett and Shaw notwithstanding, the remaining justices, who were not associated with controversial issues, have not generally attracted that kind of organized opposition.⁸⁸ However the court came into conflict with the Republican-controlled legislature and Republican Governor Bush in the Spring of 1999 for invalidating laws that would have accelerated death penalty executions in the state in the wake of one inmate being bloodied during an electrocution.⁸⁹ Indeed, Bush and the legisla-

81. Handberg & Lawhorn, *supra* note 4, at 148.

82. However, the average negative vote has risen from 25% to 34% from 1990 to 1994. Handberg, *supra* note 1, at 133 (citing Michelle L. Young, Merit Retention Election: What the Evidence Shows (June 1994) (unpublished manuscript on file with the University of Central Florida) (data based on figures from the Division of Elections of the Florida State Department)).

83. Chief Justice Barkett was nominated by President Clinton in 1993 for the U.S. Court of Appeals for the Eleventh Circuit. Her appointment was confirmed in 1994. Craig Crawford, *Senate Confirms Florida Chief Justice Barkett for Federal Judgeship*, ORLANDO SENTINEL, April 15, 1994, at A1.

84. *In re T.W.*, No. 74.143, 1989 Fla. LEXIS 1226, 1229 (Fla. Oct. 12, 1989) (substituted opinion for original opinion (551 So. 2d 1186 (Fla. 1989)) (invalidating a parental consent statute requiring minors to obtain parental approval to have an abortion).

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

86. The National Rifle Association is an organization dedicated to protecting the right of the people to keep and bear arms. See generally <http://www.mynra.com>.

87. O'Neal, *supra* note 85, at B4. See Stephen B. Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 169-70 (1997) (discussing the specific allegations and misrepresentations leveled against Chief Justice Barkett's record).

88. Currently, the justices are Charles T. Wells (Chief Justice, appointed by Governor Chiles in 1994); Leander J. Shaw, Jr. (appointed by Governor Graham in 1983); Major B. Harding (appointed by Governor Chiles in 1991); Harry Lee Anstead (appointed by Governor Chiles in 1994); Barbara J. Pariente (appointed by Governor Chiles in 1997); R. Fred Lewis (appointed by Governor Chiles in 1998); and, Peggy A. Quince (appointed jointly by Governor Chiles and in-coming Governor Bush in 1998). See <http://www.flcourts.org>. Thus, of the seven justices, a Democratic governor appointed six of them, and the last was jointly appointed by a Democrat. *Id.*

89. Justice Leander Shaw, as part of his dissent from the majority's decision in the fall of 1999 to uphold the use of the electrocution, posted three photos on his website

ture threatened to reduce the court's budget allocation and staffing.⁹⁰

IV. POLITICS AND THE SUPREME COURT

A. The Election and Its Aftermath: Surprise, Chaos, and a Brewing Storm

After what was generally perceived as a lackluster election, voters cast their ballots in November 2000 for the next president of the United States. After a night of contradictory network election coverage, it remained unclear who was the winner, Republican George W. Bush or Democrat Al Gore. A dramatic public competition soon followed with the presidency as the ultimate prize. Al Gore's campaign team alleged that many ballots had not been counted because of voting machine errors and other voting irregularities.⁹¹ Gore argued that if these votes were properly considered, he would have the majority of votes in the State.⁹² This would earn him Florida's 25 Electoral College votes and, ultimately, the presidency because neither candidate had reached the required 270 margin to attain the office.⁹³ As a result, election contest suits were filed in several different counties where the problems first arose.⁹⁴ During those events, the Florida courts became the central forum for litigating the disputes as to when ballot recounts should terminate or begin, what standards to employ, and which ballots should be counted as valid expressions of voter intent. Florida courts, and in particular the Florida Supreme Court, dominated the political and legal process until they were ultimately trumped by a U.S. Supreme Court decision.

Before reaching the U.S. Supreme Court, two of the string of cases wound up at the Florida Supreme Court's door. The first

depicting the bloody body of Allen Lee "Tiny" Davis, who was the last person whom the state had electrocuted. *Provenzano v. Moore*, 744 So. 2d 413, 441 (1999) (Shaw, J., dissenting).

90. W.W. Norton, *Bush v. Gore: The Fracas Over Florida* 9 (2001). This review is also available online (<http://www.wwnorton.e-2000/home.htm>) [hereinafter *Fracas Over Florida*]. See generally also Claire Cooper, *Florida Court in the Crosshairs in Wake of 'Gore v. Bush'*, NATIONAL LAW JOURNAL, April 3, 2001.

91. For example, approximately 20,000 votes in Palm Beach County were initially invalidated because voters were purportedly confused about the construction of the two-paged or "butterfly" ballot and inadvertently marked more than one candidate for president. *Id.* at 4-5.

92. *Id.* at 12.

93. *Id.* at 10.

94. Unfortunately, an extensive legal analysis of these cases is beyond the scope of this article.

dealt with the question of whether Florida secretary of state Katherine Harris could certify the election results and refuse to include the results of still on-going hand recounts across the state.⁹⁵ If in fact Harris certified the results without the recount numbers, Republican George Bush would take the state and win the presidency. On November 21 (two weeks after election day), the Florida Supreme Court ruled that Harris must delay her certification and wait until 5 p.m. on November 26 to certify the amended totals.⁹⁶ However, the Bush legal team sought emergency relief from the U.S. Supreme Court, arguing in part that the Florida Supreme Court's decision intruded upon the power of the state legislature, enumerated in Article II of the U.S. Constitution,⁹⁷ to specify the manner of the election of the state's presidential electors.⁹⁸ The U.S. Supreme Court, in a per curiam opinion, ultimately ruled on December 4, 2000 (nearly one month after the election) and vacated the Florida Supreme Court opinion. The United States Supreme Court asked the lower court to clarify the basis of its earlier decision,⁹⁹ thus serving "notice that it was willing . . . to overrule the state's supreme court if it found reason to do so."¹⁰⁰ With that ruling, the high court remanded the case to the Florida Supreme Court for further consideration. In the midst of the legal battles, Florida House of Representatives speaker-elect and Republican Tom Feeney chastised the Florida Supreme Court for its decision to extend the certification deadline and announced that he would seek to have the Florida legislature certify the state's electors for Bush¹⁰¹ under provisions of the U.S. Code¹⁰² should the Florida Supreme Court ultimately rule for Gore.

The second case to reach the Florida Supreme Court for decision was Gore's actual challenge of the election results on various grounds¹⁰³ (the previous case only dealt with recount issues). On December 4, 2000, Leon County Court Judge L. Sander Sauls ruled

95. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1281 (Fla. 2000) (amended opinion of November 21, 2000 corrected on January 9, 2001).

96. *Id.*

97. U.S. CONST. art. II, § 1.

98. *Fracas Over Florida*, *supra* note 90, at 8-9.

99. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000).

100. *Fracas Over Florida*, *supra* note 90, at 26-27.

101. Steve Miller, *Florida House OKs Bush Electors*, WASH. TIMES, Dec. 13, 2000 at A1 (noting that the Florida House of Representatives approved a slate of electors for Bush hours before the United States Supreme Court ruled in *Bush v. Gore*, 531 U.S. 98, 110 (2000)).

102. 3 U.S.C. § 2 (2001).

103. *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000) (per curiam).

against each of Gore's claims that the results were invalid.¹⁰⁴ Once again Gore's attorneys immediately appealed to the Florida Supreme Court. On December 8, the court issued its ruling, reversing the lower court and ordering that disputed ballots in several counties be reviewed and some ballots be credited to Gore's column.¹⁰⁵ In the end, the court's decision left Gore about 150 votes shy of Bush's total.¹⁰⁶

As before, Bush's attorneys raced to file an emergency appeal to the U.S. Supreme Court. They argued that the Florida Supreme Court had violated the doctrine of separation of powers by overstepping its bounds and treading on the defined power of the state's legislature to select presidential electors. Bush's attorneys also argued that the Florida Supreme Court's allowance of recounts in various counties without a single, common standard for judging valid votes violated the Equal Protection Clause.¹⁰⁷ On December 12, 2000, the Court's ruling was made public. The Court ruled in favor of Bush, holding that the recount procedures that the Florida Supreme Court ordered violated Equal Protection concerns.¹⁰⁸ The Court, however, was split along partisan lines as to what remedy to order.¹⁰⁹ Five justices determined that the Florida Supreme Court's mandated recounts could not be completed and reviewed by the judiciary in sufficient time to allow for the state's electors to be chosen under the Florida legislature's safe harbor provision.¹¹⁰ Two justices posited that the case could be remanded to the Florida Supreme Court, directing it to order a recount using constitutionally proper procedures establishing uniform and consistent standards to determine the validity of a legal vote.¹¹¹ In poignant dissent, Justice Stevens wrote, "[a]lthough we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."¹¹²

104. See William Glaberson, *Contesting the Vote: The Legal Issues; Several Paths Available To Extend the Litigation*, N.Y. TIMES, Dec. 6, 2000, at A29.

105. *Gore v. Harris*, 773 So. 2d 524, 526 (Fla. 2000) (per curiam).

106. *Id.*

107. See generally Linda Greenhouse, *Contesting the Vote: The Overview; Justices' Questions Underline the Divide on Whether Hand Recount Can Be Fair*, N.Y. TIMES, Dec. 12, 2000 at A1.

108. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

109. *Id.* at 111.

110. *Id.*

111. *Id.* at 144-46 (Breyer, J., dissenting).

112. *Id.* at 128-129 (Stevens, J., dissenting).

From a political perspective, the Florida Supreme Court became the primary vehicle for maintaining the recount process (a position favorable to Gore) while the U.S. Supreme Court ultimately decided the question by terminating all recounts (a decision favorable to Bush).¹¹³ The ruling majorities for both tribunals were perceived by many as rendering a politically tainted decision, albeit in different directions, thus casting the Florida Supreme Court into the eye of the hurricane as the Florida legislature considered how to react to what it perceived as blatant partisanship by the court's members.

B. The Legislature Strikes Backs: House Bill 367 and Joint Resolution HJR 627

After the public controversy of the presidential election and the surrounding legal drama concluded, the Florida legislature's new session began in March 2001.¹¹⁴ Among the measures that the members considered were two concerning the courts, both reflecting the strained relations between the legislature and the supreme court. The first of these was House Bill 367.¹¹⁵ The bill revised the procedures for selecting the members of the Judicial Nominating Commissions.¹¹⁶ Recall that prior to 2001, under the merit system instituted in 1976, the Judicial Nominating Commissions were composed of three members nominated by the Bar, three by the governor, and three by the Bar and governor together.¹¹⁷ Under the revised bill, however, the Florida Bar recommends four commission members for selection and the governor may reject all four at will.¹¹⁸ The governor exclusively selects the additional five members, although two of these individuals must be Florida Bar members.¹¹⁹ Accordingly, the governor's influence has drastically increased under the proposal. Indeed, Governor Bush signed the bill on June 19, 2001, giving him all but total control of the selection Florida's appellate judges and a heightened degree of influ-

113. For a discussion of the signaling on-going between the Florida Supreme Court and the U.S. Supreme Court during these cases, see Paul Brace and Laura Langer, *The Florida Supreme Court in the 2000 Presidential Election: Ambiguity, Ideology, and Signaling in a Judicial Hierarchy*, 34 PS: POL. SCI. & POL. 645 (2001).

114. For more information on the 2001 session, see the Online Sunshine site at <http://www.leg.state.fl.us>.

115. H.B. 367, 1st Sess. (Fla. 2001).

116. *Id.*

117. FLA. STAT. 43.291 (2001).

118. *Id.*

119. *Id.*

ence over the state's trial courts when there is an interim appointment.¹²⁰ Simultaneously, the interests of the Bar have a stronger voice in the selection process because five of the nine nominees must be Bar members.¹²¹

In addition to the changes in appointment procedures for the Judicial Nominating Commissions, the legislature also considered an amendment to the state constitution.¹²² Under the proposal, judges on the district courts of appeal and justices of the supreme court who stand in retention elections must obtain a two-thirds majority of votes, rather than the pre-existing majority margin, which likely would make it more difficult for judges to be retained.¹²³ Recall that if a judge is not retained, then the governor enjoys the right to nominate a successor. Thus, this proposed provision enlarges the amount of power that the governor enjoys under law. The legislature did seek to limit the governor's power to some extent by requiring, as in the federal system, that he submit his judicial nominees to the senate for confirmation.¹²⁴ In the same provision, however, the legislature proposed to eliminate the Judicial Nominating Commissions entirely.¹²⁵ In addition, the proposal would have nullified the requirement that the state's attorneys join the state Bar and the Bar's involvement in judicial selection, thereby expanding the governor's power even further. Although the bill died in the Committee on Judicial Oversight in May of 2001,¹²⁶ it is a harbinger of the increased partisan influences being brought to bear on the judiciary, particularly the appellate courts, that serve to restrain the discretion of the state's courts and hence imperil judicial independence.

V. JUDICIAL INDEPENDENCE IMPERILED: THE EPILOGUE

As a result of both these measures, the independence of the state's judiciary has been implicitly whittled down. The most notable erosion is that of the state supreme court, which holds signifi-

120. *Id.*

121. *Id.*

122. S.B. 1794, 103rd Reg. Sess. (Fla. 2001).

123. *Id.*

124. *Id.*

125. *Id.* The bill also would have limited to some extent the supreme court's jurisdiction and made its advisory opinions non-binding. *Id.* See also Cooper, *supra* note 90.

126. The House Joint Resolution may be obtained from the Online Sunshine site at <http://www.leg.state.fl.us>.

cant policy-making power.¹²⁷ According to Becker,¹²⁸ one measure of judicial independence is the extent to which executive appointment to the courts is checked in some fashion. Unlike the federal system,¹²⁹ no other branch or external group formally scrutinizes the Florida governor's judicial choices. Although to some extent the governor's discretion is limited by the collective decisions of the Judicial Nominating Commissions, its members are essentially his choice alone and presumably share his policy views about which candidates are qualified for the bench.¹³⁰ Further, while appellate judges have to enter retention elections approximately one year after their selection to the bench, such elections do not approximate the democratic ideal of accountability because informed voters do not choose from among different candidates. This results in the vast majority of judges being retained.¹³¹ The Florida governor is accordingly essentially unrestrained in his selection of appellate (and many trial court) judges.

Yet, the Republican legislature and Governor Bush may regret the passage of this bill. Although the governor has control over the judiciary, the governor is constitutionally limited to two four-year terms.¹³² The revised statute provides for staggered terms for the commission members, requiring two appointments to end July 1, 2002; two to end on July 1, 2003; and, two to end in July 2004.¹³³ Governor Bush must stand for re-election in November 2002. Given economic and other issues, re-election is never assured for a public official. A Democratic governor may be elected and, if so, the current administration will have handed its successor a large

127. Executive attacks on judicial independence have also occurred at the federal level. Most notable was Franklin D. Roosevelt infamous 1937 court-packing plan under which he would be able to nominate an additional justice for every current justice who was over the age of seventy. Roosevelt ostensibly proposed the plan because of the Court's lag in workload; however, its partisan overtones were clear. The Court had up until 1937 struck down a series of New Deal measures, drawing the ire of not only Roosevelt but also the Democratically-controlled Congress. However, despite Roosevelt's high popularity, his plan came under attack as reflecting a type of blatant politicking that the public would not tolerate with regard to the U.S. Supreme Court. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 56-58 (5th ed. 2001).

128. BECKER, *supra* note 6, at 144.

129. The United States President nominates federal judges and the Senate confirms the nominees. U.S. CONST. art. II, § 2, cl. 2.

130. The current membership of each Judicial Nominating Commission may be obtained on the Florida Bar's home page at <http://www.flabar.org/newflabar/organization/committees/standing/jnccirmemb.html>.

131. See *supra* note 82 and accompanying text.

132. FLA. CONST. art. IV, § 5.

133. FLA. STAT. ch. 43.291(3) (2001).

cache of ammunition to use in partisan battles through judicial selection.

The irony of these changes is striking. The changes that the legislature and the governor have instituted were enacted under the guise of restraining the partisanship of a "runaway" tribunal, but have served to politicize the courts even more.¹³⁴ Accordingly, Florida's judiciary may in the near term be damaged in its efforts to stand apart from the views of the executive or the legislature and exercise discretion concerning what policies to continue and which ones to nullify. This would tip the balance of power in favor of the executive branch to the detriment of the judiciary's overall independence. This might be manifested in comparably lower levels of diffuse support for the Florida courts as a whole, significantly diminishing their reservoir of legitimacy. Although not necessarily opposites, a tension exists between judicial independence and accountability, a tension that leads to inflamed rhetoric when partisans clash. Florida courts moved to center stage both by choice and from political pressures in the state. Ironically, their greatest legacy may be the shredding of the veil of impartiality normally surrounding the courts. This would be a regrettable loss; one possibly unrecoverable in a young century already heavy with turmoil and disaster.

134. *Fracas Over Florida*, *supra* note 90, at 30.