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JNCs: Return to the Way We Were

by Jesse H. Diner

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More independent. Less political.

That crucial combo had guided appointments to Florida's judicial nominating commissions and had worked well for nearly three decades — until Gov. Jeb Bush decided to exercise more control in 2001.

I strongly favor restoring the JNC process to the way it was before 2001 and the way Florida voters originally intended.

Here's a brief history:

In 1972, Florida voters were given an opportunity to vote on a complete revision of article V of the Florida Constitution. One of the amendments to article V was the creation of judicial nominating commissions that would supply a list of qualified names to the governor to fill interim judicial vacancies on county, circuit, and appellate courts.

In this tried-and-true system, the governor named three members of each JNC, none of whom were required to be lawyers. The Florida Bar named three lawyer members. Then, by a majority vote, those six members named the remaining three members, all lay people. So, there were three appointing authorities to each JNC.

That original JNC process was set up to depoliticize the judicial appointment process and underscored our founding fathers' wisdom that an independent and impartial judiciary serves as the vital check and balance on the other two branches of government.

But in 2001, the Legislature, heeding the wishes of the governor, put in place our current system that tips the scales toward a more politicized process. We went from three appointing authorities to one: the governor.

Now, the governor has the final choice on all nine members of Florida's 26 separate JNCs, by naming five members outright and also wielding the power to reject the Bar's remaining four nominees as many times as the governor wishes.

At the time of this drastic change in law, there was some relief that at least it wasn't the original House bill that had sought to purge the Bar from the JNC process altogether and hand over all power to an elected governor.

But while the Bar is still involved in the JNC process, our limited role is by way of our Judicial Nominating Procedures Committee, devoted to upholding the integrity and striving to improve the judicial nominating process.

The statutory changes made in 2001 gave the governor the sole responsibility for appointments to each JNC, appointments to the bench from the JNC, and investigating alleged JNC misconduct.

While the selection process was never totally depoliticized even under the old system, nor is any system perfect, the prior method appeared less subject to legitimate criticism we have seen and heard over the last few years.

There have been charges that judicial candidates have been asked inappropriate and political questions. There's been concern that the JNC process has lost its nonpartisan, independent nature, resulting in fewer applicants to serve on JNCs or on the bench, because they were from the wrong political party.

Last year, the JNC process was litigated at the Florida Supreme Court, when Gov. Charlie Crist and the Fifth District Court of Appeal JNC were at a stalemate. The Fifth DCA JNC had sent six names to the governor to replace Judge Robert Pleus, Jr., who had reached the mandatory retirement age. But Gov. Crist returned the list, asking the JNC to reconsider because he wanted more diversity, noting that two apparently qualified African-American candidates had applied, but were not nominated.

The Fifth JNC refused, with members saying they had chosen the most qualified applicants, and there was no constitutional authority for them to reopen deliberations. Crist refused to fill the vacancy, and Pleus filed for writ of mandamus asking the high court to order Crist to fill the vacancy. On July 2, 2009, the unanimous court noted "the absence of any language granting the governor authority to reject the JNC's certified list of nominees or to extend the time in which the appointment for judicial office must be made."

In finding for Pleus, the court withheld issuing the mandamus writ, believing that Crist would comply with the court's opinion, and he did. On August 4, 2009, Crist appointed 18th Circuit Judge Bruce Jacobus to the Fifth DCA.

On that legal challenge, the Florida Senate Judiciary Committee issued a September 2009 report that noted that the Supreme Court's *Pleus* opinion "emphasized that the origin and purpose of article V, section 11, was to place restraints on the governor's appointment power and to strengthen the nonpartisan selection of the judiciary."

This is not a Republican or Democratic, conservative or liberal issue, but a cry to maintain a fair and independent judiciary.

I think we should return to the JNC process voted on by the people of Florida in 1972 that has a proven track record of working well.

I think we should give a great gift to the people of Florida — and return to them an important judicial nominating process that was not broken in the first place.

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