

## HOW FLORIDA ACCEPTED MERIT RETENTION: NOTHING SUCCEEDS QUITE LIKE SCANDAL

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The wisdom of selecting judges on merit was slow to take root in the Sunshine State. It had been advocated since the 1940s, first by the Florida State Bar Association and then by the official Florida Bar, but a notoriously malapportioned, rural-dominated legislature was sterile ground. By the mid-1970s, however, circumstances had become ripe—and in a sense pungent—to accomplish in part what had seemed impossible.<sup>1</sup>

The two branches of government occupying Florida's old Capitol were now progressive. Owing to the United States Supreme Court's "one man one vote" decisions, forward-thinking legislators led an invigorated house and senate.<sup>2</sup> Reubin O'D. Askew, a lawyer and legislator committed to judicial reform, was elected governor. But a block away, the Florida Supreme Court was a school for scandal.

Of the seven justices, the five elected or appointed since 1968 all made trouble for themselves. Two resigned in the face of impeachment proceedings. Both had—among other things—tried to fix cases in lower courts. Another justice kept his seat despite having disposed of an improper *ex parte* document by tearing the evidence into "seventeen equal parts" and flushing them down a toilet.

Florida voters and their representatives drew the conclusion that politics had no place in high courts. Relying upon a merit selection process that Governor Askew had instituted for mid-term vacancies he could fill by appointment, the legislature and the voters agreed to exclusive merit selection and retention for the supreme court and district courts of appeal.

The troubles began in 1967 when Governor Claude R. Kirk Jr., appointed David L. McCain of Ft. Pierce to a new seat on the Fourth District Court of Appeal. McCain had volunteered office help to Kirk and he met the governor's Republican litmus test. Barely a year later, Judge McCain ran unsuccessfully for the supreme court. A major supporter was a prominent West Palm Beach lawyer, Joseph D. Farish Jr. For the next seven years McCain exposed himself to accusations of bias toward Farish and his clients. In one such instance, Judge McCain asked to exchange oral

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1. See Scott G. Hawkins, *Perspective on Judicial Merit Retention in Florida*, 64 FLA. L. REV. 1421 (2012). Where not otherwise attributed, the historical references in this essay are supported by my own observations. I have discussed these events in more detail elsewhere. See generally MARTIN A. DYCKMAN, *A MOST DISORDERLY COURT: SCANDAL AND REFORM IN THE FLORIDA JUDICIARY* (2008).

2. See JACK BASS & WALTER DeVRIES, *THE TRANSFORMATION OF SOUTHERN POLITICS* 110 (1976) ("Government in Florida was transformed almost overnight into a system far ahead of any other in the South in terms of its responsiveness to specific issues and its institutional ability to respond.").

argument assignments with a Fourth District colleague who rescinded the agreement on learning that a Farish case was scheduled on a date McCain requested. Political contacts McCain made in a subsequent campaign would lead to his resignation and disbarment.<sup>3</sup>

Governor Kirk was a lame duck when Justice Campbell Thornal's death enabled him to appoint McCain to the supreme court in December 1970. Kirk had agreed privately to allow the Bar to screen judicial appointments and submitted McCain's name. But he rejected the Bar's report that found McCain not qualified on account of what then-president Burton Young recalled as "legal improprieties" and "suspected criminal activities." Kirk then appointed nearly a dozen circuit judges without consulting the Bar, for which Young denounced him to the press.<sup>4</sup>

The governor-elect was watching with more than ordinary interest. As a state senator, Askew had sponsored legislation, vetoed by Kirk, to make judicial elections nonpartisan. (As governor, he signed a similar bill into law.) He had also drafted a total revision of Article V, unsuccessful at the polls in 1970, which contemplated judicial nominating commissions. "I'd been for merit selection since my freshman year [in 1959]," he said.<sup>5</sup> Eight months in office, Governor Askew issued an executive order establishing nominating commissions—then called *councils*—for each circuit and appellate jurisdiction. The councils were designed to be independent, with the governor appointing only three members of each nine-member panel. The Bar's Board of Governors chose three. Those six then named three public members. The system was incorporated into a successful revision of Article V in 1972, but in a way that left the commissions vulnerable to eventual political tampering.

Meanwhile, four new justices had been elected in the usual manner: by voters who favored the first name on the ballot every time. The winners were, in 1968, Circuit Judges Vassar B. Carlton of Brevard County and James C. Adkins Jr., of Alachua, and Joseph A. Boyd, a Dade Metro commissioner and former Hialeah mayor; and in 1970, Circuit Judge Hal P. Dekle of Dade.

Justice Carlton resigned before his term was up, not long after a media exposé of a high-roller junket to Las Vegas. The resignation evidently terminated a secret investigation by the Judicial Qualifications Commission (JQC).<sup>6</sup> Justices McCain and Adkins were alcoholics, although the latter gave up drinking pursuant to a secret ultimatum—

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3. See Letter from Judge William C. Owen Jr. to Thomas Barkdull (May 14, 1974) (on file with Fla. State Archives); see also Martin Dyckman, *Panel Hears of McCain Interference*, ST. PETERSBURG TIMES, Apr. 17, 1975, at 1-B.

4. Letter from Burton Young to Walter Manley (Aug. 6, 2003) (copy on file with author).

5. Interview with Reubin O'D. Askew, former Governor of Florida (Nov. 10, 2005).

6. See Martin Dyckman, *Justice Carlton Resigns After 33 Years on Bench*, ST. PETERSBURG TIMES, Jan. 17, 1974, at 1-B.

eventually leaked to the press—from the JQC.<sup>7</sup> Justice Boyd’s only known foibles were his politician’s instincts to shake as many hands and make as many friends as possible, but these would lead him into serious trouble.

So it was with Justice Dekle. Before taking his seat on the court, Dekle agreed to meet with a minor campaign supporter from Miami who was apprehensive over a real estate lawsuit pending at Panama City. Dekle, a native of that region, recommended an attorney to him. Eight months later, while representing the supreme court at an investiture at Panama City, Dekle approached W.L. Fitzpatrick, the circuit judge presiding over the man’s case. “Judge Dekle indicated very strongly to me that the defendants should prevail,” Judge Fitzpatrick testified. After a subsequent telephone call in which Dekle reminded him of the matter, Judge Fitzpatrick recused himself. The JQC heard of it, and in May 1973 formally notified Justice Dekle that he was under investigation.<sup>8</sup>

After a secret hearing in January 1974, the commission voted him guilty of conduct unbecoming the judiciary but could not agree by the necessary nine votes (among thirteen members) on either a public or private reprimand. The case would languish, the outcome unknown even to Dekle, until a public scandal forced the commission to act a year later.<sup>9</sup>

That scandal erupted from the first of two cases styled *Gulf Power Co. v. Bevis* in which power and telephone companies appealed Public Service Commission (PSC) decisions pertaining to how much of Governor Askew’s new corporate income tax could be included in customer billings.<sup>10</sup> When the court heard the first case, in July 1973, a five-justice panel evidently decided to give the utilities everything they wanted, and Justice Boyd was assigned to write the opinion.

But first he played golf with Edwin L. Mason, a former political colleague and an ex-member of the PSC, who was counsel for two telephone companies that were *amici* in the case. It is impossible to reconcile the sworn testimony as to what happened next. Mason said they discussed the complexity of the case and agreed that “I would put together an outline, a memorandum, call it what you want, that would assist in articulating the position the court had agreed to take.” In effect, it was a draft opinion, which Mason engaged another lawyer to prepare and which he said he delivered personally to Boyd. Justice Boyd, on the other hand, persistently denied under oath any direct knowledge of the document’s origin or how it came into his possession. Regardless, it was a *prima facie*

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7. See Duane Bradford & Wayne Ezell, *Chief Justice Agreed to Limit Drinking*, TAMPA TRIBUNE, Jan. 19, 1975, at 1-A; Martin Dyckman, *Judge Says Drinking Problems in the Past*, ST. PETERSBURG TIMES, Jan. 20, 1975, at 1-B.

8. See DYCKMAN, *supra* note 1, at 44–45.

9. See *id.* at 49–50.

10. *Gulf Power Co. v. Bevis*, 289 So. 2d 401 (Fla. 1974); *Gulf Power Co. v. Bevis*, 296 So. 2d 482 (Fla. 1974)

violation of the Code of Judicial Conduct, which forbids any such *ex parte* discussions and transactions and obliges judges to report violations to the Bar or the JQC.<sup>11</sup>

Justice Boyd reported to no one. Instead, he tore the document into strips and flushed it down a toilet, with his law clerk as a witness. He also changed his vote and wrote a short opinion upholding the PSC. He was unaware that Mason had given another copy to Justice Dekle, who, upon seeing that Boyd had switched, used it to draft what was intended to be a majority opinion reversing the PSC.<sup>12</sup>

Mason visited Dekle twice while the decision was pending. The second time, Dekle dictated a note to McCain through McCain's secretary: "HPD says that he thought you were with him on his 'dissent'; that Ed Mason spoke to him on it but missed seeing you." Two law clerks who had seen Boyd's original document perceived Dekle's "dissent" as identical and alerted Carlton, the chief justice, who ordered Dekle to rewrite it. It became something less than a full victory for the utilities. The clerks still did not know the source of the *ex parte* document, but when they chanced to see the memo Dekle had dictated, they concluded that the offense was serious and that the court intended to cover it up. They leaked the memo to the *St. Petersburg Times*, whose front-page article prompted the JQC to investigate Dekle and Boyd and reopen the earlier case against Dekle.<sup>13</sup>

The JQC recommended that both be removed from office, but substitute judges the court assigned in place of all but one of the justices reduced the punishment to public reprimands and dismissed the Fitzpatrick matter without regard to the merits. Of particular concern for future JQC cases, the panels held that a judge could be removed only for "corrupt motive." Reacting to intense criticism in the media and from members of the Bar, House Speaker Donald L. Tucker ordered an impeachment investigation, during which Justice Dekle resigned. The investigating committee voted against impeaching Justice Boyd, subject to his undergoing a mental examination—which he passed—for the JQC.<sup>14</sup>

The timing of their indiscretions had been remarkable. When Dekle accepted and used Mason's document, he knew he was already under JQC scrutiny in the Fitzpatrick matter. Moreover, it was only three months after the court had revised the Code of Judicial Conduct, reiterating the

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11. See DYCKMAN, *supra* note 1, at 91–92; Martin Dyckman, *Boyd: No Help from Utility's Lawyer*, ST. PETERSBURG TIMES, Nov. 19, 1974, at 1-B; Martin Dyckman, *Mason Testifies Boyd Welcomed Offer of Help*, ST. PETERSBURG TIMES, Feb. 26, 1975, at 1-B; see also *In re Boyd*, 308 So. 2d 13 (Fla. 1975); Fla. Bar v. Mason, 334 So 2d 1 (Fla. 1976); cf. FLA. CODE OF JUDICIAL CONDUCT Canons 3A(4) & 3B(3).

12. *Mason*, 334 So. 2d at 2–3.

13. See DYCKMAN, *supra* note 1, at 49–50; Martin Dyckman, *Florida Judge, Lawyer Discussed Pending Case*, ST. PETERSBURG TIMES, Dec. 15, 1973, at 1-A.

14. See DYCKMAN, *supra* note 1, at 117–19. For his part, Mason was reprimanded and suspended from practice for a year. See *Mason*, 334 So. 2d at 7.

strictures against *ex parte* influences and affirming the duty of judges to report any offense.<sup>15</sup>

The house committee then took over the JQC's late-blooming investigation of Judge McCain, three years after he had telephoned Judge Joseph McNulty of the Second District Court of Appeal to try—unsuccessfully—to fix a criminal appeal for the president and two members of a labor union local that was supporting McCain's 1972 reelection. McCain then voted with the majority in a five-to-two supreme court decision overturning the bribery convictions that the Second District had upheld.<sup>16</sup>

The house committee voted to propose McCain's impeachment after hearing scathing testimony of his attempts to fix cases and an allegation—ultimately unsubstantiated—that he had received an unreported campaign contribution from a Farish client who was appealing a criminal conviction. McCain boycotted the hearings and resigned before the house could vote on impeachment articles. There were indications that McCain himself had been bribed in the bribery appeal, but the committee believed there was insufficient corroboration and did not pursue them.<sup>17</sup> Three years later, the supreme court unanimously disbarred Judge McCain for telephoning McNulty and lobbying a judge in another case. He was the first former Florida judge to be deemed unfit to practice law.<sup>18</sup>

The saga elicited several constitutional reforms from the 1975 and 1976 legislative sessions. These included providing that a judge can be removed for reasons less grave than corrupt motive, making JQC cases public upon findings of probable cause, specifying chief circuit judges in order of seniority to sit for the entire supreme court if a justice is accused, and—most importantly—merit selection and retention of the entire appellate bench, which 75% of the voters favored.<sup>19</sup>

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15. In re the Florida Bar—Code of Judicial Conduct, 281 So. 2d 21 (Fla. 1973). The court took the occasion to invalidate *sua sponte* a Florida statute that prohibited retired judges from practicing law.

16. See *Nell v. State*, 277 So. 2d 1, 5–7 (Fla. 1973) (holding that bribery is not committed when a public official does not have an actual duty in the matter). The legislature reacted by establishing the crime of unauthorized compensation. See FLA. STAT. § 112.313(4) (2012).

17. See DYCKMAN, *supra* note 1, at 124–34; Martin Dyckman, *Delivery of \$10,000 Cash to Justice McCain Alleged*, ST. PETERSBURG TIMES, Apr. 1, 1975, at 1-B; Martin Dyckman, *House Committee Votes to Impeach Justice McCain*, ST. PETERSBURG TIMES, Apr. 25, 1975, at 1-B; Martin Dyckman, *McCain Resigns*, ST. PETERSBURG TIMES, Apr. 29, 1975, at 1-A.

18. Fla. Bar v. McCain, 361 So. 2d 700 (Fla. 1978). McCain was a fugitive, having forfeited bail on a federal marijuana smuggling charge, when he died of cancer on November 11, 1986. See Lucy Morgan, *Authorities Are Satisfied that Body Was Fugitive Former Justice McCain*, ST. PETERSBURG TIMES, Nov. 14, 1986, at 1-B.

19. See FLA. CONST. art. V, §§ 11, 12. The constitution had also been amended in 1974 to permit discipline of a judge for any “present unfitness,” overturning a supreme court holding that judges were all but immune for conduct preceding their present terms. See *State ex rel Turner v. Earle*, 295 So. 2d 609 (Fla. 1974)

But the scandals had long since faded from public consciousness when in 2000 the voters in every county, preferring to continue electing trial judges, rejected merit retention for circuit and county courts. A year later, the legislature gave the governor the power to appoint all nine members of every nominating commission, erasing their independence. The public scarcely took notice.