



# FLORIDA ACCESS TO JUSTICE PROJECT

*In Florida, we envision a judiciary reflective of our diverse state and free from the undue influence of special interest money, with access to justice for all.*

## **Executive Summary**

Florida's judicial system was once a model for the nation. Unfortunately, today the fairness and impartiality of our courts is under threat.

Special interest money spent on state Supreme Court races has more than doubled in the past ten years and continues to increase with \$56.4 million being spent in 2011 and 2012 alone. As the cost of races goes up so does the influence of special interest groups.

Political influences also present a constant challenge to the independence of the courts and its ability to act as a check and balance. In 2001, the Florida Legislature placed the authority to select who sits on Judicial Nominating Commissions (JNCs) entirely in the hands of the governor, returning them back into patronage committees undermining the purpose of merit selection. And in recent years, lawmakers have aggressively and repeatedly attacked the courts in a myriad of ways.

It is critical that the judiciary remain insulated from political and special interests. These influences negatively impact the diversity and objectivity of our courts and Floridians' access to fairness and justice. Florida's population is 22 percent Hispanic and 16 percent African-American. Yet among the state's judiciary, fewer than nine percent of judges are Hispanic, and fewer than seven percent are African-American.

The following nine steps would help to preserve the independence of Florida's judiciary and ensure diversity reflective of the citizens of our state on the courts.

1. Make the JNCs truly nonpartisan and remove the governor's outsized influence over the nominating committees.
2. Increase citizen involvement in the nomination process through civic engagement such as invitations to minority bars and better advertising of JNC meetings.
3. Create goals and benchmarks that would lead to greater judicial diversity.
4. Require non-partisan judicial performance evaluations to provide voters with objective information and help insulate those elections from partisan attacks.
5. Lengthen terms for judges and justices to reduce the frequency of retention elections allowing

judges to spend more time focusing on impartial decision-making and less time on raising contributions.

6. Move to merit selection at all levels of the Florida courts to bolster judicial independence and increase diversity on the courts.
7. While we still have judicial elections we need greater voter education and voter mobilization initiatives.
8. Improve access to the courts through anti-bias and cultural competency education for JNCs, judges, court staff and attorneys.
9. Increase public education efforts to ensure that court users and their family members understand their rights when they interface with the judicial system.

If these reform were enacted, Floridians could be assured of a more diverse and fair system of justice. These steps would remove partisan influence while creating greater public accountability and expanding judicial diversity, ensuring that our courtrooms are more objective and fair. But to make these reforms a reality we must have an engaged public and media that understand the critical role our courts play as well as how vital it is to protect the independence of the courts.

## **Introduction**

Eighty-five percent of Floridians who responded to a recent Florida Access to Justice Project survey identified as important that “people be treated fairly and equally in the criminal justice system, regardless of race and socioeconomic status.” Seventy-eight percent felt it was important that “judges who serve on the bench in Florida reflect the diversity of Florida.” And yet, more than a third (36 percent) do not believe “all Floridians regardless of race, socioeconomic status, gender, sexual orientation and age have equal access to justice in our courts.” There is good reason for this.

The truth is that while Florida’s judicial system was once a model for the nation, today the fairness and impartiality of our courts is under threat.

To understand what that threat is it is helpful to first have an overview of how our courts are structured and how judges are chosen.

## **Courts compositions and how judges are chosen**

For most of Florida history, judges were chosen by direct election. In 1971, Gov. Reubin Askew instituted a merit system for the Supreme Court. In 1976 a merit retention system was established for Florida appellate level judges. After initial appointment to the bench, appellate level judges must stand for retention (an up or down vote on the ballot, rather than a contested election). The trial level courts (circuit and county) are chosen by nonpartisan, contested elections.

The Florida court system is comprised of the Supreme Court, five district courts of appeal, 20 circuit courts and 67 county courts.

- Supreme Court: comprised of seven justices, are selected via nominating commission which sends list of 3-6 candidates to governor for final selection. When their terms of six years expire, their names appear on the general election ballot for a merit retention vote. This is a non-contested election, and is instead a yes or no retention question. Justices are retained with 50+1% of the vote.
- District Courts of Appeal: consists of three judge panels chosen in the same way as Supreme Court justices, serve terms of six years and are eligible for successive terms under a merit retention vote of the electors. [Map](#). Judges are retained with 50% +1 of the vote.
- Circuit Courts: top of two-tier trial court system, 20 circuits established by the legislature, each has one circuit court. Judges are elected by the voters of the circuits in nonpartisan, contested elections against other candidates. Circuit court judges serve for six years, and are then up for reelection through a contested election. [Map](#).
- County Courts: each county has a county court selected through the same method as the circuit courts. Judges are elected by the voters in a nonpartisan contested election and serve for six years. After this term they are then up for reelection through a contested election.

### **Florida's judicial nominating commissions**

There are 26 judicial nominating commissions, one for the Florida Supreme Court, a commission for each of the five district courts of appeal, and a commission for each of the 20 circuit courts (commissions for circuit courts are only used when an interim vacancy must be filled.) Interim vacancies at all levels of the Florida judiciary are filled via gubernatorial appointment from a nominating commission.

Each commission includes nine members, appointed by the governor to four-year terms. The governor directly appoints five members (two must be attorneys) and the other four members are attorneys appointed from a list of nominees submitted to the governor by the Florida Bar. Commissioners also must be residents of the jurisdiction their commission serves. Members of the Florida Judicial Nominating Commissions (JNCs) have no limits on the amount of terms they may serve.

In 2001, the composition of the Florida JNCs changed. They were previously comprised of three lawyers appointed by the state bar, three lawyer or non-lawyer members appointed by the governor, and three non-lawyer members selected by other members of the commission.

## **Justice in jeopardy – too much money, not enough diversity**

Money spent on state Supreme Court races has more than doubled in the past ten years. From 2000 through 2009, \$207 million was spent on judicial races, with much of the money coming from special interests. The spending on judicial races continues to increase with \$56.4 million being spent in 2011 and 2012 alone.

Florida is one of the most diverse states in the nation, but you wouldn't know it from looking at our courts. Florida's population is 22 percent Hispanic and 16 percent African-American. Yet among the state's judiciary, fewer than nine percent of judges are Hispanic, and fewer than seven percent are black.

The situation has gotten so bad that South Florida's five black bar associations have formed a judicial diversity initiative with the goal of "increasing the number of black federal and state judges in Miami-Dade, Broward and Palm Beach counties." According to a September 2014 article in the [Tampa Bay Times](#), "Bar statistics show that minority participation on nominating commissions has declined during [Gov. Rick] Scott's term as well. Amid growing friction between Scott and the legal community, the Bar last year formed a task force on diversity that urged Scott to hire a diversity officer to reverse the decline in appointments of black judges. Scott has not done so.

The task force report included a survey of 1,555 lawyers, a whopping 77 percent of whom said partisan politics were more important than merit in winning appointments to nominating commissions.

A [survey on studies on judicial selection](#) by the Alaska Justice Forum illustrates how the change in Florida's nominating commission structure has altered judicial ideology in Florida.

Excerpt: "After the change in appointment procedures, nominating commissioners overwhelmingly identified with the political party of the governor (Republican at the time of the change in the law) and announced their alliance with, or intent to promote, conservative policies in their applications...A party affiliation bias carried over to the judges selected as well. Not only did the number of judges registered as Republican (as opposed to Democrat) increase from 61 percent to 77 percent with the change in selection process (about 10% of the judges selected were unaffiliated), but judicial applicants increasingly listed in their application prominent Republican politicians as personal references. Moreover, the change in the selection process brought an increase in the affiliation of judges with conservative and Christian Right social organizations and a decrease in appointees with liberal affiliations."

A 2015 survey conducted by the Florida Access to Justice Project asked judicial experts what the greatest challenge is facing our state court system. One respondent answered, "political

takeover of the Judicial Nominating Commissions,” and went on to explain: “The commissions are supposed to take politics out of the process, limiting the governor’s selection to the slate of candidates determined to be the most qualified. Changes to the JNCs made under Jeb Bush have made a total sham of the process – with the governor now appointing all members of the JNCs and therefore ensuring candidates with the desired ideology make it through to the governor for appointment. Florida was once considered a model for non-partisan selection prior to the changes to the JNCs in 2000.”

In recent years the legislature has repeatedly attacked the courts, threatening to split up our Supreme Court in an effort to weaken its power and starve the courts through lack of funding because of court decisions that have thwarted the legislature’s attempts to amend our state constitution in unconstitutional ways.

Instead of tackling the real threats of special interest money tainting judicial elections and lack of diversity on the court, the legislature is pushing for judicial term limits, an approach that has been widely criticized by editorial boards and legal observers (Orlando Sentinel: [No need for term limits for judges](#), Tampa Tribune: [Don’t politicize process for deciding state Supreme Court and appellate judges](#), [Martin Dyckman: Judiciary term limits? Bad idea](#)).

Florida Supreme Court Justice Jorge Labarga has also been speaking out about “[removing barriers to civil justice](#)”. As he plainly states, “Those who can afford it will have access to civil justice; those who cannot afford it will not.” The Florida Commission on Access to Civil Justice also recently issued this [report](#) and, again, editorial boards have weighed in about this concern (Orlando Sentinel: [Florida must close gap in civil justice](#), Palm Beach Post: [Florida ‘civil justice gap’ also an issue for middle class](#)).

### **History of politics in Florida courts – the era of Disorderly Politicians**

In the 21<sup>st</sup> century, Florida moved from era of Disorderly Courts into the era of Disorderly Politicians.

Beginning with a system that was designed to promote a high quality judiciary, insulated from political and special interest pressures, the other two branches of government have done everything possible to establish a political foothold in the courts.

In 2001, the Florida Legislature gave the governor complete power to appoint all members of the state’s judicial nominating commissions.

In 2011, the Republican-controlled legislature came close to sending a proposed amendment to voters that would have split the Supreme Court into a Supreme Court of Criminal Appeals and a Supreme Court of Civil Appeals. The rationale was that more expertise was needed for criminal

cases. Under the proposal, the three most experienced justices (Justices Pariente, Lewis, and Quince) would have served on the Supreme Court of Criminal Appeals to handle what has been called the “brain surgery of the law” — death penalty appeals. And yet, in 2012, the state Republican Party cited the death penalty as one reason for opposing the retention of these same justices. This marked the first time since Florida adopted merit selection that a party took sides in a nonpartisan retention race.

From 2000-2010, documented spending in Florida Supreme Court retention races totaled \$7,500. Then, in 2012, the retention races turned into a bitter political battlefield. Nearly \$5 million was spent – 70% by outside groups. The candidates themselves raised over \$1.5 million.

Also on the ballot in 2012 was Amendment 5, which would have required state Senate confirmation for Supreme Court appointees, allowed the legislature to override any Florida Supreme Court administrative decision with a simple majority (as opposed to the current 66% supermajority), and would have given legislators access to confidential records of the commission that investigates complaints against judges. Voters overwhelmingly rejected this amendment (it got only 37% of the vote) and re-elected the justices with roughly two-thirds of the vote.

Two years later, in 2014, Florida voters defeated a proposed constitutional amendment that would have given the outgoing governor the power to make “prospective appointments” as his or her term comes to a close. This was an attempt by the legislature to vest the outgoing governor with the power to appoint a judge in the event that a judicial vacancy occurs on the same day that a new governor takes office. Significantly, on January 8, 2019, three justices will reach the end of their terms and be subject to mandatory retirement. Gov. Rick Scott, who is term-limited, will leave office the same day. This issue still requires clarification before the end of the current governor’s term.

With only 48 percent approval, Amendment 3 fell 12 points shy of the 60+1 percent threshold needed for passage.

Of course, the era of Disorderly Politicians isn’t unique to Florida.

### **What we can learn from other states**

In Kansas, the entire judicial branch stands on the brink of shutting down after the legislature made the entire court budget conditional on the court’s not striking down a bill that stripped the Chief Justice of administrative authority.

In Wisconsin, the political branches advanced a constitutional amendment designed entirely to replace the liberal Chief Justice with a more conservative Chief of their liking.

And judges in Oklahoma, Washington and elsewhere have faced impeachment threats over rulings on topics ranging from the Ten Commandments to school funding to marriage.

### **Money in the courts – “Without fear or favor”**

In 2015, the U.S. Supreme Court held in *Williams-Yulee v. The Florida Bar* that states can prohibit judicial candidates from personally soliciting campaign contributions. Florida adopted its personal solicitation rule in the wake of the corruption scandals of the 1970s.

In upholding Florida’s rule, Chief Justice Roberts’ majority opinion emphasized the importance of protecting the integrity of the courts, preserving both the appearance and reality that “judges will apply the law without fear or favor.”

The opinion recognized that contributions to judicial candidates could lead to the perception of favoritism.

The Chief Justice concluded: “Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity.”

This ruling was a victory for the state’s ability to regulate judicial fundraising. And that has value – but it only goes so far. In the era of unrestricted independent campaign spending, there is nothing that can be done to stop outside groups with a political axe to grind from running a smear campaign against any judge.

“Without fear or favor” becomes more challenging when judges know that they’re most likely to be attacked as being soft on crime. A study by the American Constitution Society found that ad spending in judicial elections makes it less likely that a judge will rule in favor of a defendant. Another study found that campaign contributions were correlated to pro-business rulings.

It is possible that judges aren’t actually doing the calculus of how a particular ruling will impact their donors or how it will play with voters. Although former justices have acknowledged that this is indeed something they think about, then try not to let it influence them.

The flood of campaign cash is having an effect on the public’s confidence in the courts too. In a national poll conducted by Justice at Stake in 2013, 87% of voters felt that campaign contributions had “a great deal” or “some” influence on judges’ rulings (with 59% saying “a great deal of influence”). An equal percentage (87%) felt that independent spending on behalf of a judge would influence judicial decision-making.

A full 90% thought it was a serious problem when judges received campaign contributions from attorneys or parties with pending cases that they might have to rule on – or when those parties

place their own ads on behalf of a judge. Not surprisingly, 92% of those surveyed felt that judges should step aside, rather than hear cases by parties that had contributed significantly to their campaigns or those who had run ads on their behalf.

In this new era, the biggest risk to an independent judiciary and to the public's confidence in the courts doesn't come from outright, intentional corruption. Rather, it is the insidious influence of political pressure and the back-of-the-mind question of whether *this* decision in *this* case is going to be the one that comes back to haunt a judge at the polls. It's the relatively new, but increasingly real, need to raise money for retention elections just in case someone decides to launch an unexpected attack.

### **What can be done to safeguard the independence of the courts?**

Changing this overly politicized climate isn't something judges can do alone. To make matters worse, where partisan politicians see the opportunity to score points by targeting the courts, they do the math and are likely to attack. It's our job to change that calculus. Backlash from voters, from civil society groups, and from the media can tip the scales in the other direction – to the point where the likely cost is not worth the potential gain.

The voters of Florida have shown – repeatedly – that they don't want their courts tampered with by politicians. Civil society groups have formed – in Florida and nationwide – to defend the independence and impartiality of the courts, and to make sure everyone can have their fair day in court. Policies that can help to insulate Florida's courts from political pressures are described below. Many would require a constitutional amendment or a change in the existing political climate, so may involve a multi-year organizing and public education effort.

#### Change the way members of Judicial Nominating Commissions are chosen

As noted above, Judicial Nominating Commissions used to be composed of a variety of lawyer and non-lawyer members, each appointed by different groups so as to maintain their independence and nonpartisanship. In a new poll commissioned by Justice at Stake, seventy percent of Florida voters said they would support a constitutional amendment to make judicial nominating commissions truly nonpartisan and remove the governor's outsized influence. Eighty-three percent agreed "One person, like the governor, should not have total control of who becomes a judge." These findings are of particular interest in light of the fact that Florida's every 20-year Constitution Revision Commission is scheduled to convene next in 2017.

#### Increase citizen engagement in the JNC process

While the meetings of Judicial Nominating Commissions as well as applications of potential judicial nominees are available to the public, more can be done to encourage involvement of

the community in the nominating process. More robust advertising and public notification of JNC meetings, as well as specific invitations to women's bar associations, LGBT bar associations, and bar associations for people of color to attend meetings, would increase engagement and could help ensure more fairness and diversity in the process.

#### Create clear benchmarks and goals in order to increase diversity on the bench

Policies could be put in place, in consultation with the women's bar associations, LGBT bar associations, and bar associations for people of color, to require both members of the JNCs and nominees to the bench to represent the demographic makeup of Florida. Additional policies could give the JNC responsibility for recruiting a diverse applicant pool, assigning a certain number of the "lawyer" JNC positions to bar associations representing diverse constituencies and multiple intersectional identities (such as women of color, LGBT people of color, etc.), and requiring geographic diversity on JNCs filling state-level judicial vacancies.

#### Require non-partisan judicial performance evaluations (JPEs)

The Supreme Court and the Florida Bar currently offer a voluntary, confidential judicial feedback program for appellate judges. However, because it is voluntary, the evaluations are not consistent, evaluations are only offered by lawyers (i.e., the public does not have a chance to comment) nor do they apply to all judges or justices. Enacting policies that mandate a well-structured, required judicial performance evaluation process can provide citizens with objective nonpartisan information on which to base a vote in a judicial retention election. JPEs also provide an avenue for judges to improve their performance and an opportunity for the legal community as well as court users to provide feedback on their experience in the courtroom.

#### Lengthen terms for judges and justices

Retention elections have become costly affairs in which candidates' campaign committees have to raise vast sums of money and nasty political ads go out over the airwaves. Enacting policies to extend judges' and justices' terms on the bench makes these retention elections less frequent and helps ensure that judges can make impartial decisions free from frequent political pressure.

#### Move towards merit selection at all levels of the Florida courts including trial courts

The United States is virtually the only country in the world that elects judges by popular vote. Enacting policies that mandate merit selection not only bolsters judicial independence but also appears to have better outcomes for judicial diversity compared to judicial elections overall. A recent study Lambda Legal commissioned also found that jurisdictions that use merit selection have better outcomes in cases involving LGBT rights than those with elected judges.

### While judicial elections exist in Florida, there is a need for greater nonpartisan voter education and turnout

Many voters do not vote on “down ballot” candidates which usually include judicial candidates. Furthermore, very few people have any knowledge about judges who are running for election, making informed voting extremely difficult. Nonpartisan voter education and mobilization initiatives in Florida should include objective nonpartisan information and education on the judicial branch as well as the legislative and executive.

### Improving access to justice in the courts through anti-bias and cultural competency education

Anti-bias and cultural competency training for judges, court staff and attorneys, such as those conducted by Lambda Legal’s Fair Courts Project, reduce the harms of implicit and explicit bias in the courtroom thus improving court users’ experience in court, creating greater access to justice for our communities, and improving public confidence in the fairness of the courts. Civil society groups, including those in the Florida Access to Justice Project, can participate in training of trainers to replicate these trainings in as many Florida courts as possible; as well as organizing such trainings for Judicial Nominating Commissioners.

### Know your rights for court users

It is imperative that defendants, plaintiffs, jurors, witnesses and court users’ family members understand their rights when they interface with the judicial system. Lambda Legal provides a hub of information at Know Your Rights in Court ([www.lambdalegal.org](http://www.lambdalegal.org)), as well as palm cards for court users that include basic know your rights information.