

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

---

Prepared By: The Professional Staff of the Committee on Judiciary

---

BILL: SJR 1188

INTRODUCER: Senator Lee

SUBJECT: Prospective Appointment of Judicial Vacancies

DATE: March 11, 2014

REVISED: 03/12/14

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	<b>Fav/1 amendment</b>
2.			RC	

---

**Please see Section IX. for Additional Information:**

AMENDMENTS - Amendments were recommended

---

**I. Summary:**

SJR 1188 amends the State Constitution to require the Governor to prospectively fill a vacancy in a judicial office on the Florida Supreme Court or a district court of appeal. The amendment requires the Governor to prospectively fill a vacancy that will occur due to a justice or judge reaching the mandatory retirement age, failing to qualify for a retention election, or failing to be retained in office at an election.

Currently, the Governor's authority to appoint a Supreme Court Justice or district court of appeal judge does not manifest itself until the expiration of the sitting judge's or justice's term. Additionally, under the existing timeframes for filling a judicial vacancy, the potential exists for a judicial office to be vacant for 120 days after a vacancy occurs. Under the amendment, the existing timeframes for a judicial nominating commission to nominate individuals to fill a prospective vacancy begin at the conclusion of the qualifying period for retention or immediately following the general election in which the voters do not vote to retain a judge or justice.

In some cases, the amendment will require an outgoing Governor to appoint an individual to fill a judicial vacancy that under current law may be within the purview of an incoming Governor.

**II. Present Situation:**

**The Selection and Retention of Judges and Justices under Florida Law**

*Trial Courts -Election by Voters*

Florida law establishes two separate methods for selecting judges and justices for office. In the trial courts, comprised of the county and circuit courts, judges are elected by a majority vote of the qualified electors in a nonpartisan election. The term of office is 6 years. To serve an additional term, the judge must qualify and run for office in a subsequent general election and again be elected by a majority of the electorate voting in that election.

### **Appellate Courts -Nomination and Merit Retention**

#### ***Initial Appointment***

In the appellate courts, which are the district courts of appeal and the Supreme Court, the method is different. The selection process is called merit retention which was adopted in 1976 through an amendment to the State Constitution. The Supreme Court justices and district court judges are initially appointed by the Governor from a list of three to six nominees supplied by the appropriate judicial nominating commission. The new judge or justice faces his or her first merit retention vote in the first general election that is scheduled at least 1 year after appointment. If a majority of the electors in the territorial jurisdiction vote to retain, the judge or justice is retained for a 6-year term in office. The territorial jurisdiction for a judge on a district court of appeal is comprised of multiple counties and judicial circuits making up that particular jurisdiction. In contrast, because the Supreme Court has statewide jurisdiction, the name of the Justice appears on the ballot state-wide for election.

#### ***Subsequent Terms***

To serve a subsequent term, the judge from the district court of appeal or a justice from the Supreme Court must qualify for retention by a vote of the electors in the general election which occurs closest and before the expiration of the judge's or justice's term. The ballot then asks the simple question "Shall Justice (or Judge) (name of judge or justice) of the (name of the court) be retained in office?" If a majority of the qualified electors voting in the territorial jurisdiction of the court vote to retain, the justice or judge is retained for another 6-year term. If a majority of the electors vote to not retain, a vacancy exists in the office upon the expiration of the term being served by the justice or judge.<sup>1</sup>

#### ***Term of Office for Supreme Court Justices and District Court of Appeals Judges***

The term of office for a justice or judge who is retained begins on the first Tuesday after the first Monday in January following the general election.<sup>2</sup>

### **Judicial Nominating Commissions**

The State Constitution requires the establishment of a separate judicial nominating commission, as provided by general law, for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within the circuit.<sup>3</sup>

---

<sup>1</sup> The State Constitution, in s. 10, Art. V, provides that, under specified circumstances, a jurisdiction may approve a local option to select circuit or county judges by merit selection and retention rather than election. The local option has not been approved in any circuit or county.

<sup>2</sup> FLA. CONST. art. V, s. 10(a).

<sup>3</sup> FLA. CONST. art. V, s. 11(d).

Each judicial nominating commission is composed of four members of The Florida Bar, nominated by the Board of Governors of the Bar and selected by the Governor, and five members appointed by the Governor, of which two are members of the Bar and engaged in the practice of law. The members must be residents of the territorial jurisdiction served by the commission. The term of office is 4 years.<sup>4</sup>

No justice of judge is permitted to serve as a member of the commission but members may hold an office other than a judicial office. A member of a commission is not eligible for appointment to a state judicial office over which the commission has authority to make a nomination during his or her term of office or for 2 years afterwards.

### **Vacancy in Office and Timeframes**

A vacancy in office occurs if a justice or judge is ineligible for retention, fails to qualify for retention,<sup>5</sup> or is not retained by a majority vote in the general election. The vacancy exists upon the expiration of the term being served by the justice. The State Constitution directs that the governor must “fill the vacancy by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment.” The Governor must make the selection from a list of three to six persons nominated by the judicial nominating committee for the Supreme Court.<sup>6</sup> The Supreme Court has determined that the Governor must make his or her selection from the list of nominees supplied by the commission and is not allowed to reject the list and request another slate of names.<sup>7</sup>

The nominations must be submitted by the judicial nominating committee within 30 days after the prospective vacancy occurs unless the Governor extends the period for a time that does not exceed 30 days. The Governor then has 60 days after the nominations are submitted to him or her to make the appointment.<sup>8</sup>

### **Mandatory Retirement under the Constitution**

The State Constitution prohibits a justice or judge from serving after he or she has attained the age of 70 except for a temporary assignment or to complete a term “one-half of which has been served.”<sup>9</sup>

### **Term of Office – Governor**

A Governor is elected to a 4-year term in office at each general election which is held in an even numbered year but which is not a multiple of four. The term begins on the first Tuesday after the first Monday in January of the year after the election.<sup>10</sup>

---

<sup>4</sup> FLA. CONST. art. V, s. 20(c); s. 43.291(3), F.S.

<sup>5</sup> Section 105.031(1), F.S. provides that “Candidates for judicial office shall qualify no earlier than noon on the 120th day, and no later than noon of the 116th day, before the primary election.”

<sup>6</sup> FLA. CONST. art V, s. 11(a).

<sup>7</sup> 14 So. 3d 941 (Fla. 2009).

<sup>8</sup> FLA. CONST. art. V, s. 11(c).

<sup>9</sup> FLA. CONST. art. V, s. 8.

<sup>10</sup> FLA. CONST. art. IV, s. 5(a).

### **When Appointments May be Made to Fill Vacancies**

Governor Bush requested an advisory opinion from the Supreme Court in 2006 as to when a vacancy occurs as the result of a mandatory retirement of a judge who was not eligible for retention. The Court responded that the vacancy would not occur until the judge's term actually expired.<sup>11</sup> In a concurring opinion, Justice Cantero agreed<sup>12</sup> with the majority holding but emphasized that nothing in the Florida Constitution prevented the appropriate judicial nominating commission from beginning the nominating process to name a successor before the vacancy actually occurs. He stated that "The constitution is silent on when the process must begin" and noted that vacancies in office should be avoided when possible, or at least, minimized. Justice Cantero wrote that if a judicial nominating commission is forced to delay the beginning of its proceedings until a judge leaves office, the affected court might be left without a judge for months, thereby placing an enormous burden on the remaining members of the court.

### **When Does a Governor's Authority to Make Appointments End?**

The Florida Supreme Court issued a 1955 decision resolving the question of when an outgoing Governor's authority to fill a judicial vacancy ends and when an incoming Governor's authority begins.<sup>13</sup> The Court concluded that the authority of the outgoing Governor did not end until the incoming Governor actually takes office.

When Governor Dan McCarty died in office on September 30, 1953, Senate President Charley Johns became acting Governor until the installation of Governor LeRoy Collins on January 4, 1955. Governor Collins had been elected in 1954 to fill the unexpired term of the deceased Governor. Outgoing Governor Johns appointed Thomas Tappy to fill a judicial vacancy that would occur at midnight, Monday, January 3, 1955, just hours before Governor Collins' inauguration. On Tuesday, January 4, 1955, inauguration day, Governor Collins was sworn into office at about noon. He tried to appoint another person to that same judicial office once he was inaugurated. The Supreme Court concluded that acting Governor John's midnight appointment of Thomas Tappy was valid. The Court noted that the incumbent Governor continued in office and was entitled to exercise any power to appoint an individual to office until his successor had been sworn into the office.

### **III. Effect of Proposed Changes:**

This joint resolution amends two sections of Article V of the State Constitution pertaining to the Governor's ability to appoint judges and justices to the district courts of appeal and the Supreme Court. The bill authorizes the Governor to "prospectively" fill vacancies and explains when a prospective vacancy occurs. The Governor is currently permitted to fill vacancies only upon the expiration of the term of the person vacating the office.

---

<sup>11</sup> *Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So. 2d 1090 (Fla. 2006).

<sup>12</sup> *Id.* at 94, 95.

<sup>13</sup> *Tappy v. State*, 82 So. 2d (Fla. 1955).

**Article V, Section 10—Retention**

Under current law, a Governor is permitted to fill a vacancy on an appellate court or the Supreme Court when a justice or judge is either ineligible for retention, fails to qualify for retention, or loses a retention election. The vacancy exists upon “the expiration of the term being served by the justice or judge” and not before that time.

This amendment to the State Constitution requires the Governor to fill a “prospective” vacancy on a court. A prospective vacancy occurs, not at the end of the term being served by the justice or judge, but at the time that the justice or judge is either ineligible for retention, at the end of the qualifying period for retention when the individual fails to qualify for retention, or immediately after the general election when the judge or justice does not receive the necessary votes to be retained.

This amendment requires the judicial nominating commission to begin its work in advance of the expiration of the justice of judge’s term. By requiring the commission to provide the Governor with a list of nominees sooner, the process of nomination and appointment will conclude before the expiration of the term of the sitting justice or judge if a justice or judge is ineligible for retention or fails to qualify for retention. If a justice or judge is not retained at the general election, the judicial nominating commission will begin its 30 day work in November instead of January as the current law requires. As a result, instead of actual vacancies on a court potentially lasting 120 days, some vacancies may be eliminated on the Supreme Court and district courts of appeal while others may be significantly reduced.

**Article V, Section 11—Vacancies**

The amendment to this section of the State Constitution provides that whenever a prospective vacancy occurs in a judicial office subject to election for retention, the Governor must fill the prospective vacancy, as under existing law, by an appointment from a list of at least three but not more than six persons nominated by the appropriate judicial nominating commission. The amendment further specifies that the appointment commences upon the expiration of the term of the office being vacated and ends on the first Tuesday after the first Monday in January of the year following the next general election.

Although this amendment authorizes the Governor to select an appointee before the expiration of the current office holder’s term, it does not allow the Governor to shorten the current office holders’ term of office.

**Potential Outcomes**

When the term of a justice or judge expires at the same time as the term of an outgoing Governor, the amendment requires the outgoing Governor to make an appointment that, under existing law, would likely be made by the incoming Governor.<sup>14</sup>

---

<sup>14</sup> Recent news articles have stated that, if these constitutional amendments are adopted at the general election of 2014, whoever is Governor at the term ending in January 2019 will select replacements for three retiring Supreme Court Justices before the next Governor takes office in January 2019. The three justices’ terms end at the exact same moment that the sitting

### **Application of the Amendment**

The amendment will first apply to judicial vacancies on a district court of appeal or on the Supreme Court which occur in January 2017.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This joint resolution will be submitted to the voters for approval or rejection if agreed to by a three-fifths vote of the membership of each house of the Legislature.<sup>15</sup> To take effect, this amendment must be approved by a vote of at least 60 percent of the voters voting on the measure during the 2014 General Election.<sup>16</sup>

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator does not expect the joint resolution to have a fiscal impact on the state courts system.<sup>17</sup>

---

Governor's term ends. The Governor whose term begins on that day will be denied the opportunity to select those appointments.

<sup>15</sup> FLA. CONST. art. XI, s. 1.

<sup>16</sup> FLA. CONST. art. XI, s. 5(e).

<sup>17</sup> Office of the State Courts Administrator, *Judicial Impact Statement for SJR 1188*, (March 8, 2014) (on file with the Senate Committee on Judiciary).

Proposed amendments to the State Constitution must be published in a newspaper of general circulation in each county in which a newspaper is published in the 10th week and 6th week before the election in which amendments are submitted to the electors.<sup>18</sup> The state will bear the costs of publishing the joint resolution.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill amends sections 10 and 11 of Article V of the State Constitution.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

**147730 by Judiciary on March 11, 2014:**

Clarifies the ballot summary language to state that the Governor is required to prospectively fill vacancies resulting from a justice or judge reaching the mandatory retirement age or failing to qualify for retention and allows prospective appointments if a judge or justice is not retained at an election.

---

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---

---

<sup>18</sup> FLA. CONST. art. XI, s. 5(e).