SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 22, 1998 Revised: 4/3/98

Subject: Judicial Candidate/Public Position

	Analyst	Staff Director	Reference	Action
1.	Harkins	Moody	JU	Favorable
2.			EE	
3.			RC	
4.				
5.				

I. Summary:

The bill proposes amending section 10, Article V of the Florida Constitution to provide that a candidate for judicial office cannot be precluded from taking a public position on issues.

The bill proposes amending section 10, Article V of the Florida Constitution.

II. Present Situation:

A. Judicial Canons

The State Constitution presently does not state that candidates for judicial office are precluded from taking a public position on issues. However, Canon 7 of Florida Code of Judicial Conduct prohibits judges from:

- Holding an office in a political party;
- Publicly endorsing or opposing another candidate for public office;
- Making speeches on behalf of political office;
- Attending political party functions;
- Making contributions to political organizations or candidates; and
- Making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.

In recent years, the constitutionality of some of the Judicial Canons has been challenged. Two cases are illustrative of the constitutional debate surrounding those Canons which prohibit judges from taking public positions on issues.

A. *A.C.L.U. of Florida, Inc., and John Roe v. The Florida Bar*

In *A.C.L.U. of Florida, Inc., and John Roe v. The Florida Bar*, 744 F.Supp. 1094 (N.D.Fla.1990), plaintiffs moved for a temporary restraining or, in the alternative, for a preliminary injunction to prevent The Florida Bar from enforcing Canon 7(B)(1)(c). *Id.* at 1096. Canon (7)(B)(1)(c) reads in pertinent part:

> A candidate . . . for judicial office . . . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his view on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact[1].

The federal district court granted the injunction sought by the plaintiffs. *A.C.L.U. of Florida, Inc., and John Roe v. The Florida Bar*, at 1099. In order to obtain the preliminary injunction, the plaintiffs were required to show, among other things, that they were likely to succeed on the merits. *Id.* at 1097. The court concluded that the plaintiffs were likely to succeed on their constitutional challenge to the Canon because, although the State of Florida has a compelling interest in protecting the integrity of the judiciary, the prohibition of all discussion of disputed political and legal issues is not the most narrowly tailored means of protecting that interest. *Id.* at 1098. The court opined that the public could place information received from judges in proper perspective and that judges announcing their view on legal and political issues would not undermine the public's confidence in the objectivity of the judiciary. *Id.* at 1099. Further, the court opined that:

> How judges choose to exercise their discretion is a matter of much concern to litigants, lawyers, and the public alike. That concern makes judicial candidates' views on disputed legal and political issues anything but irrelevant.

Id.

B. *In re Code of Judicial Conduct*

In this case, a challenge was made brought against Canons 1, 2, and 7A(1)(b). *In re Code of Judicial Conduct*, 603 So.2d 494, 495 (Fla. 1992). Canon 1 states: "A judge should uphold the integrity and independence of the judiciary." Canon 2 states: "A judge should avoid impropriety and the appearance of impropriety in all his activities." Canon 7 states that judges should not "publicly endorse a candidate for public office." Canon 7 A(1)(b). The Supreme Court of Florida observed that the purpose of Canon 7 A(1)(b) is to further the purposes of Canons 1 and 2, which provide that "[a] judge should uphold the integrity and independence of the judiciary" and "[a] judge should avoid impropriety and the appearance of impropriety in all his activities." *In re Code of Judicial Conduct* at 495.

The court observed that regulations, such as the Canons, which attempt to burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment

[1] This Canon no longer exists as Canon 7(B)(1)(c). Presently, the prohibitions previously expressed in Canon 7(B)(1)(c) are contained in various other sections of the Canons, e.g., Canon 7(C)(3).

that a particular mode of expression has to give way to other compelling needs of society. *Id.* at 496. Applying strict scrutiny, the court held that the State of Florida has a compelling interest in maintaining the impartiality, the independence from political influence, and the public image of the judiciary as impartial and independent, and the Canons were sufficiently tailored to meet those interests. *Id.* at 498. The court observe the opinion that:

> . . . [T]o the extent that judges are seen as political rather than judicial, to that extent they lose their authority and the power they now have to induce obedience to their orders.

Id. at 489. (Quoting Robert A Goldwin, Comments to Chapter 1, in The Judiciary in a Democratic Society 19-29 (Leonard J. Theberge ed., 1979)).

B. Florida Statutes

Section 105.041, F.S., provides that no reference to political party affiliation shall appear on a ballot with respect to any nonpartisan judicial office or candidate. Likewise, s. 105.071, F.S., provides that a candidate for judicial office may not participate in partisan political activities, represent herself or himself as a member of any political party, or make speeches other than in the candidate's own behalf.

III. Effect of Proposed Changes:

The bill proposes amending s. 10, Art. V, Fla. Const., to provide that a candidate for judicial office cannot be precluded from taking a public position on issues.

The phrase "taking a public position on issues" is subject to broad or narrow construction. Construed broadly, a judge could demand a right to place his or her party affiliation on a ballot, or could demand his or her right to publicly advertise himself or herself as a member of a political party. Advertising one's party affiliation on a ballot could be considered taking *a public position on issues*. If the language were given such a construction, ss. 105.041 and 105.071, F.S., would be subject to challenge on the ground that they violate this provision. Construed narrowly, the proposed amendment may entitle a particular judge to no more than the right to express his or her opinion on a specific public issue. However, the expression "*may not be precluded from taking a public position on issues*" seems to suggest that no branch of government may preclude a judicial candidate from participating in political speech. Cases brought under the First Amendment of the U.S. Constitution tend usually to construe political speech broadly, and afford that type of speech the greatest deference.

Under either construction of the phrase, Canon 7 of the Florida Code of Judicial Conduct may have to be revised.

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:

If the bill were a general bill, it may be subject to challenge as being violative of the separation of powers provision of the constitution, as the constitution provides that the Supreme Court is to regulate both the judicial branch and attorneys. The Supreme Court has stated that "the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches." *Chiles v. Children A, B, C, D, E, and F*, 589 So.2d 260, 268 (Fla. 1991). However, implicit in this statement is that the Legislature may constitutionally affect the powers of another branch through constitutional amendment.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In December of 1995, the Article V Task Force issued its final report. In that report, the Article V Task Force offered the following statement:

> . . . the Task Force distinguished judges from other state officials. The Task Force determined that judges [sic] are not state officials. The Task Force determined that judges are not "representatives" and therefore the election process serves to detract from the image of the judiciary. In particular, the Task Force found that the elective system requires judges to act like politicians and solicit campaign funds. The Task Force found that soliciting funds is contrary to the image of the judiciary and could lead to the perception of bias and impropriety.

Florida Article V Task Force, Final Report (December 1995).

If the language proposed by this bill is interpreted as prohibiting any branch of government from precluding judges from engaging in political speech, attempts to preclude judges from fully participating in the elective process become legally suspect. Of course, the expression "*may not be precluded from taking a public position on issues*" need not necessarily be interpreted so broadly.

VIII. Amendments:

None.