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.)

BILL: CS/CS/SB's 826 & 398

SPONSOR: Governmental Oversight and Productivity Committee, Judiciary Committee, Senator Grant and Senator Cowin

SUBJECT: Judicial Nominating Commissions

DATE: April 27, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Johnson	JU	Favorable/CS
2.	White	Wilson	GO	Favorable/CS
3.			FP	
4.				
5.				

I. Summary:

This committee substitute for committee substitute amends s. 43.29, F.S., removing the requirement that the appointing authorities for the judicial nominating commission ensure that one of the appointments is a member of a racial or ethnic minority group or a woman. Instead, the appointing authorities are to consider whether the commission reflects the racial, ethnic, and gender diversity as well as the geographic distribution of the population within the jurisdiction of the court for which they are making nominations.

This bill substantially amends s. 43.29 of the Florida Statutes.

II. Present Situation:

Article V of the Florida Constitution provides for the filling of vacancies in judicial offices. The Governor is directed to fill each vacancy in a judicial office by appointing a qualified person who is nominated by the appropriate judicial nominating commission.[1] There is to be a separate judicial nominating commission for the Supreme Court, each district court of appeal, and each judicial circuit.[2] General law is to provide for each judicial nominating commission.[3] The commissions at each level of the court are to adopt uniform rules of procedure which may be overturned by the Legislature on a majority vote or may be overturned by 5 justices of the Supreme Court.[4] The

[1]Article V, s. 11(a) of the State Constitution.

[2]Article V, s. 11(d) of the State Constitution.

[3]*Id*.

[4]*Id*.

proceedings and records of the judicial nominating commissions are open to the public except for deliberations regarding nominees.[5]

The composition of the membership of the judicial nominating commissions is set forth in statute.[6] Three members are to be appointed by the Board of Governors of the Florida Bar. These members are to be members of the Florida Bar actively engaged in the practice of law with offices in the territorial jurisdiction of the affected court, district or circuit. Three members are to be appointed by the Governor. They must be residents of the territorial jurisdiction of the court or the circuit. Three members are to be selected by the majority vote of the other six members of the commission. These three members are to be electors who reside in the territorial jurisdiction of the court or the circuit. No justice or judge may serve on a judicial nominating commission but a member may hold any other public office. Further, no member of a commission may be appointed to a state judicial office for which the commission on which they serve has the power to make nominations, while serving on the commission or for 2 years after the term of service has ended.

One appointee in each of the three groups must be a member of a racial or ethnic minority group or a woman. The terms "racial or ethnic minority" are defined for purposes of this section to mean "members of a socially or economically disadvantaged group which includes Blacks, Hispanics, and American Indians."[7] The requirement that one of the Florida Bar appointees must be a member of a socially or economically disadvantaged group or a woman, however, has been found unconstitutional by the United States District Court for the Southern District of Florida.[8] Applying a strict scrutiny analysis, the court held that the ". . . defendants have failed to assert a compelling state interest to justify an infringement of plaintiff's right to equal protection under the Fourteenth Amendment." The court stated there was no factual basis to support a finding that there had been past discrimination in judicial nominations and further that the requirement was not the least intrusive remedy to any alleged discrimination.[9] The court used as an example of a less intrusive manner to address racial and ethnic discrimination, the language in s. 26.021, F.S. That language does not establish a quota but states that when a judge is appointed, *consideration* must be given to the racial and ethnic diversity of the population within the circuit and as to whether the current judges of the circuit reflect that diversity.[10]

Each member of a judicial nominating commission shall serve a term of 4 years and is not eligible for consecutive reappointment. A member may be suspended by the Governor and removed by the Senate for cause pursuant to rules of the judicial nominating commissions in accordance with Art. IV, s. 7 of the State Constitution.

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[5]*Id*.

[6]Section 43.29, F.S.

[7]Section 9, ch. 91-74, L.O.F.

[8]*Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995).

[9]*Id*.

[10]*Id*.

III. Effect of Proposed Changes:

The bill changes the method for addressing the racial, ethnic, and gender makeup of the commissions. The bill removes the requirement that one member appointed by the Florida Bar and by the Governor, and one member selected by the other 6 must be a member of a racial or ethnic minority group or a woman. Instead, the appointing authorities when making an appointment must "attempt to ensure" that the membership of the commission "reflects the racial, ethnic, and gender diversity" of the population within the territorial jurisdiction of the court for which nominations are to be made. The appointing entities must also "attempt to ensure the adequacy of representation of each county within the judicial circuit."

This act is to take effect July 1, 2000.

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:

In *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995), the United States District Court stated that the requirement that one member appointed by the Florida Bar must be a member of an ethnic or racial minority or a woman, failed to assert a compelling state interest sufficient to meet the strict scrutiny analysis for infringement of the right to equal protection under the Fourteenth Amendment. The basis for this assertion was that the state did not justify the requirement with "specific 'judicial, legislative, or administrative findings' of past discrimination." *Id.* at 1559. The court then went on to find that the language in question also failed constitutional muster for not being the least intrusive remedy available. *Id.* at 1561. Methods of achieving the goal with less intrusive remedies were then discussed in some detail, including the alternative provided in this bill which requires consideration of the ethnic and gender makeup of the community but does not require a quota. *Id.* It appears the court is providing acceptable alternatives to the quota that was specifically found unconstitutional, however, it is not absolutely clear in *Mallory* whether the count would require the suggested methods to also meet the strict scrutiny test which was the original basis for finding the quota unconstitutional.

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:

None.

VIII. Amendments:

None.