

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/SB's 826 & 398

SPONSOR: The Judiciary Committee, Senator Grant and Senator Cowin

SUBJECT: Judicial Nominating Commissions

DATE: March 27, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This committee substitute amends s. 43.29, F.S., which provides for membership of the judicial nominating commissions. The CS provides that the Governor and the Florida Bar will each have one additional member and those two groups of four members shall select an additional joint member.

The CS provides the appointing authorities are to *seek* to ensure that the commission reflect the racial, ethnic, and gender diversity as well as the geographic distribution of the population within the jurisdiction of the court for which it is making nominations.

Section 114.01, F.S., is amended to provide that a vacancy in a judicial office is created 60 days prior to a judge's mandatory retirement date. A new subsection (3) is created to provide that the incumbent Governor fills judicial vacancies occurring on the date a new Governor is sworn in when those vacancies are the result of resignation or mandatory retirement.

This bill substantially amends s. 43.29 and s. 114.01 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

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

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

³*Id.*

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 five justices of the Supreme Court.⁴ The 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

⁴*Id.*

⁵*Id.*

⁶Section 43.29, F.S.

⁷Section 9, ch. 91-74, L.O.F.

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

⁹*Id.*

¹⁰*Id.*

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.

Of the members currently serving in judicial nominating commissions for the 20 circuits, 5 district courts of appeal, and the Supreme Court, one third were appointed in 1996, one third were appointed in 1998, and the remaining third in 1999.

Section 114.01, F.S., defines when a vacancy occurs for purposes of filling vacant positions. The section addresses the point in time when a letter of resignation creates a vacancy. The section does not define when a vacancy occurs when there is mandatory retirement as with judges.

III. Effect of Proposed Changes:

The committee substitute provides that the Governor and the Florida Bar each appoint four rather than three members to each judicial nominating commission. These appointees will then select the four additional members. This increases the total membership of each judicial nominating commission by three members, one in each category of membership.

Paragraph (1)(a) currently states that the electors appointed by the Florida Bar must be “actively engaged in the practice of law with offices within the territorial jurisdiction of the affected court, or in the district or circuit.” The proposed committee substitute strikes the language “or in the district or circuit” thus requiring the members to be within the area of the court for which the commission is established.

The proposed committee substitute creates a new subsection (2) to provide for the appointment of alternate members. In addition to the appointments in subsection (1), the Governor may appoint to each circuit court judicial nominating commission one alternate from a county in which no other member resides. The alternate is appointed by August 1, 2000 to serve a four year term. The alternate is to serve in place of one of the Governor’s members, as decided by the Governor, whenever the commission fills a county court vacancy in the county where the alternate member resides. The alternate is to participate in all other meetings concerning circuit court vacancies but not as a voting member.

The stipulation that all acts of the judicial nominating commission be made with a concurrence of a majority of its members is removed and replaced by new subsection (6) to state that all acts of the commission must be made with a concurrence of its *voting* members. Thus the alternate member can not be counted toward the majority unless authorized to vote for the nominations in question.

The committee substitute modifies the method for addressing the racial, ethnic, and gender makeup of the commissions. The appointing authorities are to seek to ensure that the existing commission members together with the potential appointees will reflect 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 are also to seek to ensure the “adequacy of representation of each county within the judicial circuit.”

The restrictions placed on members of the judicial nominating commissions are expanded. Justices and judges continue to be prohibited from serving on judicial nominating commissions, though a member may continue to hold any other public office. The restriction on future judicial appointments is expanded such that members of judicial nominating commissions are prohibited from accepting appointment to *any* judicial office in the state while they are a member of a commission and for two years after the end of their term of office.

A member may be suspended by the Governor for cause pursuant to rules established by the commissions consistent with s. 7, Art. IV of the State Constitution. The Senate may thereafter remove the appointee.

The bill also amends s. 114.01, F.S., to clarify that a judicial vacancy occurs 60 days prior to a judge reaching mandatory retirement age and that the incumbent Governor fills all vacancies not filled by election, when the vacancy occurs after a general election for Governor on or before the first Tuesday after the first Monday in January.

This act is to take effect upon becoming a law.

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.” 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. 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:

The CS continues the requirement that each entity making appointments ensure that one of the appointments is a member of a racial or ethnic minority group or a woman in addition the CS includes a new subsection (5) directing the appointing authorities to *seek* to ensure the commissions reflect the racial, ethnic and gender diversity, as well as geographic distribution.

The CS removes the 4 year terms of office for all members except the alternate member appointed by the Governor.

VII. Related Issues:

None.

VIII. Amendments:

None.