

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1470

SPONSOR: Governmental Oversight and Productivity Committee and Senator Cowin

SUBJECT: Judicial Nominating Commissions

DATE: March 28, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.	_____	_____	JU	_____
3.	_____	_____	AGG	_____
4.	_____	_____	AP	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute changes existing law concerning Judicial Nominating Commissions. Under the committee substitute, the terms of office for current commission members are terminated effective June 30, 2001. New commission members must be appointed by July 1, 2001. As in current law, the committee substitute provides that three appointments are to be made by the Board of Governors for the Florida Bar, three appointments are to be made by the Governor, and three appointments are to be made by majority vote of the six appointees. Moreover, as in current law, the members are to serve four-year terms; however, under the committee substitute, terms for the initial gubernatorial appointments and majority vote appointments are scheduled to end in two years. The committee substitute also changes existing law concerning: (a) the factors that appointing authorities should consider when making appointments; (b) a commission member's eligibility for state judicial office; and (c) which commission members are subject to financial disclosure requirements.

This committee substitute creates section 43.291, F.S, and repeals section 43.29, F.S. 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

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

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

commissions at each level of the court are to adopt uniform rules of procedure that may be overturned by the Legislature on a majority vote or may be overturned by 5 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 as follows:

- The Board of Governors of the Florida Bar is to appoint three members, who are 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.
- The Governor is to appoint three members, who must be residents of the territorial jurisdiction of the court or the circuit.
- Majority vote of the other six members of the commission is used to appoint three members, who are to be electors who reside in the territorial jurisdiction of the court or the circuit.⁶

No justice or judge may serve on a judicial nominating commission, but a member may hold any other public office.⁷ Further, a member of a judicial nominating commission is not eligible for appointment to the state judicial office for which that commission has the authority to make nominations, either during such term of membership or for a period of 2 years thereafter.⁸

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.”⁹ 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.¹⁰ 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.”¹¹ 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.¹² The court used the language in s. 26.021, F.S., as an example of a less intrusive manner to address racial and ethnic discrimination.¹³ This language does not establish a quota, but, instead, states that when a judge

³*Id.*

⁴*Id.*

⁵*Id.*

⁶Section 43.29(1), F.S.

⁷Section 43.29(2), F.S.

⁸*Id.*

⁹Section 9, ch. 91-74, L.O.F.

¹⁰*Mallory v. Harkness*, 895 F.Supp. 1556 (S.D. Fla. 1995).

¹¹*Id.*

¹²*Id.*

¹³*Id.*

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.¹⁴

Each member of a judicial nominating commission is to serve a term of 4 years and is not eligible for consecutive reappointment.¹⁵ 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.¹⁶

III. Effect of Proposed Changes:

The committee substitute repeals s. 43.29, F.S., which provides the appointment process for Judicial Nominating Commissions, and instead, creates s. 43.291, F.S, to set forth that process. Under the committee substitute, the appointment process is the same as current law to the extent that: (a) the Board of Governors of the Florida Bar appoints three members, the Governor appoints three members, and majority vote of these six members selects the final three appointments; (b) commission members appointed by the Bar must be attorneys, while members appointed through majority vote must not be attorneys; (c) commission members cannot be justices or judges; (d) commission members are permitted to hold public office, other than judicial office; (e) all acts of the commission must be made with a concurrence of a majority of its members; (f) commission members may be suspended for cause by the Governor, and may thereafter be removed by the Senate; and (g) commission members are not eligible for consecutive reappointment.

The CS differs from current law as follows:

- It terminates the offices of existing commission members effective June 30, 2001; however, any current member, who does not complete a four-year term as a result of the committee substitute, may be reappointed. In all other cases, as in current law, members may not be consecutively reappointed. It requires new members to be appointed for all of the commissions by July 1, 2001.
- It provides that the members shall serve four-year terms (current law also specifies four-year terms), except that the initial appointments made by the Governor in 2001, shall end June 30, 2003, and by majority vote in 2001, shall end July 31, 2003.
- It deletes provisions of existing law that have been declared unconstitutional. Pursuant to current law, at least 3 members of each commission must be members of a racial or ethnic minority group; however, a federal district court has held this requirement to be unconstitutional. The committee substitute deletes this language, and instead, directs the appointing authorities to consider whether the commission and potential appointees reflect the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the court's territorial jurisdiction. Additionally, the committee substitute directs appointing authorities for circuit commissions to also consider the adequacy of county representation within the judicial circuit.

¹⁴*Id.*

¹⁵Section 43.29(3), F.S.

¹⁶*Id.*

- It is more restrictive regarding whether commission members may hold of state judicial offices. Current law provides that a commission member is not eligible for appointment to the *state judicial office for which the commission makes nominations*, neither during his or her term of membership, or for two years thereafter. The committee substitute provides that a commission member is not eligible for appointment to *any state judicial office* during his or her term of membership, or for two years thereafter.
- It includes circuit and district commission members within the meaning of “state officers” for purposes of the financial disclosure requirements in s. 112.3145, F.S. Under current law, only members of the Supreme Court Judicial Nominating Commission are subject to these reporting requirements.

The committee substitute also appropriates \$25,000 from the General Revenue Fund to the Executive Office of the Governor to provide travel costs associated with attending training classes to the members of the commissions.

The committee substitute takes 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*,¹⁷ 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.¹⁸ The court then went on to find that the language in question was not the least intrusive remedy available as is constitutionally required.¹⁹ Methods of achieving the goal with less intrusive remedies were then discussed in some detail, including the alternative provided in this CS which requires consideration of the ethnic and gender makeup of the community, but does not

¹⁷895 F. Supp. 1556 (S.D. Fla. 1995).

¹⁸*Id.* at 1559.

¹⁹*Id.* at 1561.

require a quota.²⁰ While it appears the court is providing acceptable alternatives to the quota that was found unconstitutional, it is not absolutely clear in *Mallory* whether the court 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.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

²⁰*Id.*