

# 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/CS/SB 1470

SPONSOR: Governmental Oversight and Productivity Committee and Senator Cowin

SUBJECT: Judicial Nominating Commissions

DATE: April 18, 2001                      REVISED: \_\_\_\_\_

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

## I. Summary:

The committee substitute changes existing law governing Judicial Nominating Commissions (JNC) only as follows:

- Allows current JNC members to complete their terms of office, but the membership of each JNC will eventually be reduced from 9 to 7 members as vacancies occur,
- Expands the Governor’s authority to appoint JNC members by allowing the Governor to appoint all 7 members of the JNC and allowing the Governor to reject, as many times as he or she considers necessary, the list of nominees recommended by the Florida Bar,
- Removes the ability of the Florida Bar and the JNC members to appoint JNC members, but allows the Florida Bar to submit a list of recommended nominees for an attorney vacancy on the JNC,
- Revises the composition of the JNC so that 3 members must be members of the Florida Bar and 4 members must be electors, with 1 of the electors being a member of the Florida Bar,
- Retains four-year terms for JNC members but makes them staggered,
- Replaces unconstitutional provisions mandating ethnic, racial and gender diversity with provisions to consider these factors in making JNC appointments,
- Expands the limited ban against a JNC member’s eligibility for a state judicial office under specified circumstances to a complete prohibition against eligibility for *any* state judicial office at *any* court level by a JNC member during his or her term and two years thereafter, and
- Expands the financial disclosure requirements to apply to all JNC members.

This committee substitute creates section 43.291, F.S, and repeals section 43.29, F.S. This committee substitute substantially amends section 112.3145, F.S.

## II. Present Situation:

Vacancies in judicial offices are governed by section 11 of Article V of the *Florida Constitution*. The Governor fills each vacancy in a judicial office by appointing a qualified person who is nominated by the appropriate judicial nominating commission. There is a separate judicial nominating commission for the Supreme Court, each district court of appeal, and each judicial circuit. General law is to provide for each judicial nominating commission. The 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. The proceedings and records of the judicial nominating commissions are open to the public except for deliberations regarding nominees.

Section 43.29, F.S., governs the appointment and membership of each 9-member judicial nominating commission as follows:

- Three members are appointed by the Board of Governors of the Florida Bar, each of whom must be a member of the Florida Bar and actively engaged in the practice of law in the applicable territorial jurisdiction.
- Three members are appointed by the Governor, each of whom must be a resident of the applicable territorial jurisdiction.
- Three members are appointed by majority vote of the other 6 members, each of whom must be an elector who reside in the applicable territorial jurisdiction.

No justice or judge may serve on a judicial nominating commission, but a member may hold any other public office. Furthermore, 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 his or her four-year term or up to 2 years thereafter.

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.” See *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995) (unconstitutional statutory requirement) [ See section IV of analysis for discussion]

Each JNC member serves a 4-year term and is not eligible for consecutive re-appointments. 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 *Florida Constitution*.

## III. Effect of Proposed Changes:

The committee substitute repeals s. 43.29, F.S., which provides the current appointment process for Judicial Nominating Commissions, and replaces it with a new s. 43.291, F.S., which sets forth a revised appointment process. The new section re-enacts existing statutory provisions relating to the JNC appointment process as follows: (a) commission members cannot be justices or judges; (b) all acts of the commission must be made with a concurrence of a majority of its members; (c) commission members may be suspended for cause by the Governor, and may

thereafter be removed by the Senate; and (d) commission members are not eligible for consecutive reappointment.

The CS differs from current law as follows:

- It reduces the membership of a JNC from 9 to 7 members. The reduction will occur through attrition with current members being allowed to complete their current terms.
- It removes the authority of the Board of Governors of the Florida Bar to appoint JNC members but allows the Board of Governors to submit to the Governor a list of 3 recommended nominees for vacant attorney positions on the JNC.
- It removes the authority of the JNC as a group to appoint JNC members.
- It expands the Governor's authority to appoint JNC members by giving the Governor the sole authority to appoint JNC members as vacancies occur. Additionally, the Governor is allowed to reject, as many times as the Governor feels is necessary, all of the nominees recommended by the Board of Governors of the Florida Bar and request the Board of Governors to submit a new list of three different recommended nominees.
- It changes the composition of a JNC so that: (a) 3 members must be members of the Florida Bar engaged in the practice of law with offices within the territorial jurisdiction of the affected court ; and (b) 4 members must be electors who reside within the territorial jurisdiction of the affected court, one of whom may be a member of the Florida Bar who is engaged in the practice of law with an office within the territorial jurisdiction of the affected court.
- It deletes unconstitutional provisions of existing law relating to membership representative of a racial or ethnic minority group. Instead, it directs the Governor 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 the Governor to also consider, for circuit commissions, the adequacy of county representation within the judicial circuit.
- It is more restrictive regarding whether commission members may hold a state judicial office. 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* at any court level 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:**

A federal court has held that the ethnic, racial and gender requirement for JNC membership in s. 43.29, F.S., is unconstitutional based on a violation of equal protection under the Fourteenth Amendment. *See Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995). It found that the State had failed to assert a compelling state interest sufficient to meet the strict scrutiny analysis. The basis for this assertion was that the state did not justify the requirement with “specific ‘judicial, legislative, or administrative’ findings” of past discrimination. The court then went on to find that the language in question was not the least intrusive remedy available as is constitutionally required. The court discussed in length, less intrusive methods and remedies, including the possibly acceptable alternative provided in this bill which require consideration of the ethnic and gender makeup of a community when making appointments to the JNC but does not require that a quota be met.

#### **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:**

The committee substitute requires each JNC to eventually be composed of 7 members, which will occur through the process of attrition as current members' terms expire. Conceivably, until the phase-in is complete, there could be commissions in different jurisdictions with 7, 8, or 9 members. This could prove to be problematic for an 8-member JNC when it must perform an official act as the committee substitute requires all acts of a JNC to be made with a concurrence of a majority of its members.

**VIII. Amendments:**

None.

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

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