

**HOUSE OF REPRESENTATIVES  
FINAL BILL ANALYSIS**

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| <b>BILL #:</b>              | CS/SJR 1188             | <b>FINAL HOUSE FLOOR ACTION:</b> |               |
| <b>SPONSOR(S):</b>          | Rules Committee and Lee | 74 <b>Y's</b>                    | 45 <b>N's</b> |
| <b>COMPANION<br/>BILLS:</b> | None                    | <b>GOVERNOR'S ACTION:</b>        | N/A           |

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**SUMMARY ANALYSIS**

CS/SJR 1188 passed the House on April 30, 2014. The joint resolution had no House companion.

A 2006 Florida Supreme Court opinion ruled that the Governor may not appoint a Supreme Court justice or district court of appeal judge until the expiration of the sitting judge's or justice's term of office. Because the appointment process may take up to 120 days before appointment of the successor justice or judge, this ruling has the potential to create workload issues due to extended vacancies in the state appellate courts, especially in the Supreme Court. Because judicial terms of office coincide with the Governor's term of office, conflicts between Governors regarding the authority to appoint a replacement justice or judge can arise. In the past, Governors have made conflicting judicial appointments on Inauguration Day.

CS/SJR 1188 proposes an amendment to the State Constitution creating a means for the Governor to prospectively fill certain vacancies in a judicial office on the Florida Supreme Court or a district court of appeal that occur due to a justice or judge reaching the mandatory retirement age, failing to qualify for a retention election, or failing to be retained in office at an election. If adopted by the electorate, the amendment will provide for transition time and avoid conflicts between Governors.

The Office of the State Courts Administrator does not expect the joint resolution to have a fiscal impact on the state courts system.

The joint resolution is not subject to the Governor's veto powers. If approved by 60 percent of the voters in the 2014 general election, the resolution will take effect on January 6, 2015.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **The Selection and Retention of Judges and Justices under Florida Law**

##### ***Trial Courts - Election by Voters***

Florida law establishes two separate methods for selecting judges and justices for office. In the trial courts, comprised of the county and circuit courts, judges are elected by a majority vote of the qualified electors in a nonpartisan election. The term of office is six years. To serve an additional term, the judge must qualify and run for office in a subsequent general election and again be elected by a majority of the electorate voting in that election.

##### **Appellate Courts - Nomination and Merit Retention**

###### ***Initial Appointment***

In the appellate courts, which are the district courts of appeal and the Supreme Court, the method is different. The selection process is called merit retention which was adopted in 1976 through an amendment to the State Constitution.<sup>1</sup> The Supreme Court justices and district court judges are initially appointed by the Governor from a list of three to six nominees supplied by the appropriate judicial nominating commission.<sup>2</sup> The new judge or justice faces his or her first merit retention vote in the first general election that is scheduled at least one year after appointment.<sup>3</sup> If a majority of the electors in the territorial jurisdiction vote to retain, the judge or justice is retained for a six-year term in office.<sup>4</sup> The territorial jurisdiction for a judge on a district court of appeal is comprised of multiple counties and judicial circuits making up that particular jurisdiction.<sup>5</sup> In contrast, because the Supreme Court has statewide jurisdiction, the name of the Justice appears on the ballot state-wide for election.

###### ***Subsequent Terms***

To serve a subsequent term, the judge from the district court of appeal or a justice from the Supreme Court must qualify for retention by a vote of the electors in the general election which occurs closest and before the expiration of the judge's or justice's term. The ballot then asks the simple question "Shall Justice (or Judge) (name of judge or justice) of the (name of the court) be retained in office?" If a majority of the qualified electors voting in the territorial jurisdiction of the court vote to retain, the justice or judge is retained for another six-year term. If a majority of the electors vote to not retain, a vacancy exists in the office upon the expiration of the term being served by the justice or judge.<sup>6</sup>

###### ***Term of Office for Supreme Court Justices and District Courts of Appeal Judges***

The term of office for a justice or judge who is retained begins a six year term on the first Tuesday after the first Monday in January following the general election.<sup>7</sup>

#### **Judicial Nominating Commissions**

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<sup>1</sup> See Fla. SJR 49 and 81 (1976).

<sup>2</sup> FLA. CONST. art. V, s. 11.

<sup>3</sup> *Id.*

<sup>4</sup> FLA. CONST. art. V, s. 10(a).

<sup>5</sup> See ss. 35.01- .043, F.S.

<sup>6</sup> The State Constitution, in article V, section 10, provides that, under specified circumstances, a jurisdiction may approve a local option to select circuit or county judges by merit selection and retention rather than election. The local option has not been approved in any circuit or county.

<sup>7</sup> FLA. CONST. art. V, s. 10(a).

The State Constitution requires the establishment of a separate judicial nominating commission (commission), as provided by general law, for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within the circuit.<sup>8</sup>

Each commission is composed of four members of The Florida Bar, nominated by the Board of Governors of the Bar and selected by the Governor, and five members appointed by the Governor, of which two are members of the Bar and engaged in the practice of law. The members must be residents of the territorial jurisdiction served by the commission. The term of office is four years.<sup>9</sup>

No justice or judge is permitted to serve as a member of the commission but members may hold an office other than a judicial office.<sup>10</sup> A member of a commission is not eligible for appointment to a state judicial office over which the commission has authority to make a nomination during his or her term of office or for two years afterwards.<sup>11</sup>

### **Vacancy in Office and Timeframes**

A vacancy in office occurs if a justice or judge is ineligible for retention, fails to qualify for retention,<sup>12</sup> or is not retained by a majority vote in the general election. The vacancy exists upon the expiration of the term being served by the justice. The State Constitution directs that the Governor must “fill the vacancy by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment.”<sup>13</sup> The Governor must make the selection from a list of three to six persons nominated by the commission for the Supreme Court or the District Courts of Appeal.<sup>14</sup> The Supreme Court has determined that the Governor must make his or her selection from the list of nominees supplied by the commission and is not allowed to reject the list and request another slate of names.<sup>15</sup>

The nominations must be submitted by the commission within thirty days after the prospective vacancy occurs unless the Governor extends the period for a time that does not exceed thirty days. The Governor then has sixty days after the nominations are submitted to him or her to make the appointment.<sup>16</sup>

### **Mandatory Retirement under the Constitution**

The State Constitution prohibits a justice or judge from serving after he or she has attained the age of 70 except for a temporary assignment or to complete a term “one-half of which has been served.”<sup>17</sup>

### **Term of Office - Governor**

A Governor is elected to a four-year term in office at each general election which is held in an even numbered year but which is not a multiple of four. The term begins on the first Tuesday after the first Monday in January of the year after the election.<sup>18</sup>

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<sup>8</sup> FLA. CONST. art. V, s. 11(d).

<sup>9</sup> FLA. CONST. art. V, s. 20(c); s. 43.291(3), F.S.

<sup>10</sup> Section 43.291(2), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> Section 105.031(1), F.S. provides that “candidates for judicial office shall qualify no earlier than noon on the 120th day, and no later than noon of the 116th day, before the primary election.”

<sup>13</sup> FLA. CONST. art. V, s. 11(a).

<sup>14</sup> *Id.*

<sup>15</sup> *Pleus v. Crist*, 14 So.3d 941 (Fla. 2009).

<sup>16</sup> FLA. CONST. art. V, s. 11(c).

<sup>17</sup> FLA. CONST. art. V, s. 8.

## When Appointments May be Made to Fill Vacancies

Governor Bush requested an advisory opinion from the Supreme Court in 2006 as to when a vacancy occurs as the result of a mandatory retirement of a judge who was not eligible for retention. The Court responded that the vacancy would not occur until the judge's term actually expired.<sup>19</sup> In a concurring opinion, Justice Cantero agreed<sup>20</sup> with the majority holding but emphasized that nothing in the Florida Constitution prevented the appropriate judicial nominating commission from beginning the nominating process to name a successor before the vacancy actually occurs. He stated that "the constitution is silent on when the process must begin" and noted that vacancies in office should be avoided when possible, or at least, minimized.<sup>21</sup> Justice Cantero wrote that if a judicial nominating commission is forced to delay the beginning of its proceedings until a judge leaves office, the affected court might be left without a judge for months, thereby placing an enormous burden on the remaining members of the court.<sup>22</sup>

## When Does a Governor's Authority to Make Appointments End?

In 1955, the Florida Supreme Court issued a decision resolving the question of when an outgoing Governor's authority to fill a judicial vacancy ends and when an incoming Governor's authority begins.<sup>23</sup> The Court concluded that the authority of the outgoing Governor did not end until the incoming Governor actually takes office.<sup>24</sup>

When Governor Dan McCarty died in office on September 30, 1953, Senate President Charley Johns became acting Governor until the installation of Governor LeRoy Collins on January 4, 1955. Governor Collins had been elected in 1954 to fill the unexpired term of the deceased Governor. Outgoing Governor Johns appointed Thomas Tappy to fill a judicial vacancy that would occur at midnight, Monday, January 3, 1955, just hours before Governor Collins' inauguration. On Tuesday, January 4, 1955, inauguration day, Governor Collins was sworn into office at about noon. He tried to appoint another person to that same judicial office once he was inaugurated.<sup>25</sup> The Supreme Court concluded that acting Governor John's midnight appointment of Thomas Tappy was valid.<sup>26</sup> The Court noted that the incumbent Governor continued in office and was entitled to exercise any power to appoint an individual to office until his successor had been sworn into the office.<sup>27</sup>

## Effect of Proposed Changes

This joint resolution amends two sections of Article V of the State Constitution pertaining to the Governor's ability to appoint judges and justices to the district courts of appeal and the Supreme Court. The bill authorizes the Governor to "prospectively" fill vacancies and defines when a prospective vacancy occurs. The Governor is currently permitted to fill vacancies only upon the expiration of the term of the person vacating the office.

## Article V, Section 10 - Retention

Under current law, a Governor is permitted to fill a vacancy on an appellate court when a justice or judge is either ineligible for retention, fails to qualify for retention, or loses a retention election. The

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<sup>18</sup> FLA. CONST. art. IV, s. 5(a).

<sup>19</sup> *Advisory Opinion to the Governor re Judicial Vacancy Due to Mandatory Retirement*, 940 So.2d 1090 (Fla. 2006).

<sup>20</sup> *Id.* at 1094-95.

<sup>21</sup> *Id.* at 1094.

<sup>22</sup> *Id.* at 1095.

<sup>23</sup> *Tappy v. State*, 82 So.2d 161 (Fla. 1955).

<sup>24</sup> *Id.* at 165.

<sup>25</sup> *Id.* at 162-64.

<sup>26</sup> *Id.* at 166.

<sup>27</sup> *Id.*

vacancy exists upon “the expiration of the term being served by the justice or judge” and not before that time.<sup>28</sup>

This amendment to the State Constitution authorizes the Governor to fill a “prospective” vacancy on a court. A prospective vacancy occurs, not at the end of the term being served by the justice or judge, but at the time that the justice or judge is either ineligible for retention, at the end of the qualifying period for retention when the individual fails to qualify for retention, or immediately after the general election when the judge or justice does not receive the necessary votes to be retained.

This amendment requires the judicial nominating commission to begin its work in advance of the expiration of the justice or judge’s term. By requiring the commission to provide the Governor with a list of nominees sooner, the process of nomination and appointment will conclude before the expiration of the term of the sitting justice or judge. If a justice or judge is not retained at the general election, the judicial nominating commission will begin its 30 day work in November instead of January as the current law requires. As a result, instead of actual vacancies on a court potentially lasting 120 days, some vacancies may be eliminated on the Supreme Court and district courts of appeal while others may be significantly reduced.

### **Article V, Section 11 - Vacancies**

The joint resolution amends article V, section 11, of the Florida Constitution to provide that whenever a prospective vacancy occurs in a judicial office subject to election for retention, the Governor must fill the prospective vacancy, as under existing law, by an appointment from a list of at least three but not more than six persons nominated by the appropriate judicial nominating commission. The amendment further specifies that the appointment commences upon the expiration of the term of the office being vacated and ends on the first Tuesday after the first Monday in January of the year following the next general election.

Although this amendment authorizes the Governor to select an appointee before the expiration of the current office holder’s term, it does not allow the Governor to shorten the current office holders’ term of office.

### **Application of the Amendment**

The amendment will first apply to judicial vacancies on a district court of appeal or on the Supreme Court which occur in January 2017.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The joint resolution does not appear to have any impact on state revenues.

#### **2. Expenditures:**

The Office of the State Courts Administrator does not expect the joint resolution to have a fiscal impact on the state courts system.<sup>29</sup>

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<sup>28</sup> FLA. CONST. art. V, s. 10.

Proposed amendments to the State Constitution must be published in a newspaper of general circulation in each county in which a newspaper is published in the 10th week and 6th week before the election in which amendments are submitted to the electors.<sup>30</sup> The state will bear the costs of publishing the joint resolution.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The joint resolution does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

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<sup>29</sup> Office of the State Courts Administrator, *Judicial Impact Statement for SJR 1188*, (March 21, 2014) (on file with the Judiciary Committee).

<sup>30</sup> FLA. CONST. art. XI, s. 5(e).