

STORAGE NAME: h3367s1z.cp

****FINAL ACTION****

DATE: May 13, 1998

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CRIME AND PUNISHMENT
FINAL BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 3367 (Passed as CS/SB 418)

RELATING TO: Judicial Nominating Commissions (J.N.C.)

SPONSOR(S): Crime and Punishment, Bronson, Sembler, Spratt & others

COMPANION BILL(S): SB 418

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 6 NAYS 1
- (2) CRIME AND PUNISHMENT YEAS 7 NAYS 0
- (3)
- (4)
- (5)

I. FINAL ACTION STATUS:

Vetoed by the Governor on May 21, 1998.

II. SUMMARY:

Judicial Nominating Commissions are responsible for submitting lists of judicial candidates to the Governor for his appointment to the bench. All District Court of Appeals judges and Florida Supreme Court justices are nominated to the Governor by the Judicial Nominating Commission. The Governor, also, appoints circuit and county judges when the elected judge is unable to fulfill his or her term in office.

The bill requires each judicial nominating commission (J.N.C.) to include at least one resident from each county within each judicial circuit.

III. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

J.N.C.'s Facilitate the Appointment of Judges & Other Officials

All justices of the Florida Supreme Court and all judges of the five district courts of appeal are appointed by the Governor. Even circuit and county judges which are elected by the People are appointed by the Governor when the elected judge is unable to complete his term of office. See, Article V, Section 11 of the Florida Constitution. In all of these cases, the Governor must select an appointee from a list of candidates provided him by a Judicial Nominating Commission (J.N.C.). One-third of the members of the J.N.C. are appointed by the Florida Bar and one-third are appointed by the Governor. The final third of the commission is elected by the members which were appointed by the Governor and the Florida Bar.

The J.N.C.'s also nominate a list of candidates from which the Governor must select the three Capital Collateral Representatives and from which the Attorney General selects the Statewide Prosecutor. The J.N.C. must nominate at least three candidates and the Governor must choose from that list of nominated candidates. Usually three or four attorneys are nominated by the J.N.C.

Constitutional Authority for the J.N.C.'s

Article V, Section 11(d) of the Florida Constitution provides, in part:

(d) There shall be a separate judicial nominating 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.

Thus the constitution provides for a total of 26 Judicial Nominating Committees:

- ◆ Supreme Court -- 1
- ◆ District Courts of Appeal -- 5
- ◆ Circuit & County Courts -- 20

Membership Of the J.N.C.'s Is Provided By Statute

The composition of the Judicial Nominating Committees is set forth in Article V, Section 20(c) of the Florida Constitution and is to remain in effect "**until changed by general law.**" Section 43.29, Florida Statutes, regulates the various J.N.C.'s in the following manner:

Three Categories Of Members

- a. 3 Members (citizens) are appointed by the Governor.
- b. 3 Members (lawyers) are appointed by the Florida Bar Board of Governors.
- c. 3 Members (non-lawyers) are chosen by majority vote of the appointed members.

The Florida Bar Board of Governors, which makes the appointments, is elected by Florida's attorneys. Non-lawyers may not vote for members of the Florida Bar Board of Governors.

Required Composition Of J.N.C.'s

- ◆ All members must reside in and must be electors of, or have a law practice in, the territorial jurisdiction of the court.
- ◆ At least one member of each of the three foregoing categories of appointees (a., b., & c.) must be a member of a racial or ethnic minority group or a woman. (See, Comments)

Quotas For Race Or Ethnicity, and For Women

Currently, s. 43.29, F.S., requires that one member for each of the three member categories be a member of a racial or ethnic minority or a woman, thus ensuring three such members for every J.N.C. This language has been ruled unconstitutional and was struck down by the Florida Supreme Court. See, COMMENTS.

Membership May Not Be Representative Of All Counties In the Circuit

The twenty judicial circuits range in geographical size from one to seven counties, depending upon the populations therein. Currently, the bill does not require J.N.C. membership to represent each county in the circuit. Thus, a judicial nominating commission which represents a multi-county circuit may be entirely composed of members from just one of its several counties.

When the Governor Must Appoint a Judge From Candidates Nominated

The Florida Supreme Court has held in In re Advisory Opinion to the Governor, 551 So.2d 1205 (Fla. 1989) that the governor did not have to appoint judges from a list of six candidates nominated for three judicial positions because article V, section 11(b) of the Florida Constitution provides, with respect to "each vacancy," that the Governor is to appoint "one of not fewer than three persons nominated by the appropriate judicial nominating commission." Therefore, the court held, the Governor would not be required to appoint three judges until the Judicial Nominating Commission provided a list of nine candidates.

B. EFFECT OF PROPOSED CHANGES:

JNC's To Have Circuit Wide Representation

The bill requires judicial nominating commission membership to represent each county within its judicial circuit. For example, a JNC which covers four counties and whose membership is derived entirely from one or two of those counties must nominate/elect one member from each of the unrepresented counties as vacancies arise.

The bill specifically declares that the law will apply, only, to members appointed to the commission after the effective date. This means that county representation will be achieved with new members through the normal appointment process. Thus, existing J.N.C. members will not be dismissed in order to achieve the law's objective.

Unconstitutional Language Mandating Race and Gender Is Removed

The bill strikes the unconstitutional language which legislated quotas for racial or ethnic minorities, and women. Nonetheless, the following language is included in the bill:

The appointing authorities shall consider whether the existing commission members, together with potential appointees, reflect the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which they are making nominations.

Thus, the bill maintains that the racial or ethnic, and gender quotas which were stricken by the Florida Supreme Court are, nonetheless, desirable objectives of the legislation.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

- a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. The bill imposes new requirements for membership in the J.N.C.'s.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 43.29, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Provides that each judicial nominating commission must include at least one resident from each county within the circuit.

Section 2: Provides an effective date.

IV. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See, Fiscal Comments

2. Recurring Effects:

See, Fiscal Comments

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments

4. Total Revenues and Expenditures:

See, Fiscal Comments

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See, Fiscal Comments

2. Recurring Effects:

See, Fiscal Comments

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See, Fiscal Comments

2. Direct Private Sector Benefits:

See, Fiscal Comments

3. Effects on Competition, Private Enterprise and Employment Markets:

See, Fiscal Comments

D. FISCAL COMMENTS:

At the time of publishing this report, the Criminal Justice Estimating Conference had not met to consider the bill. Nonetheless, the Conference offered a tentative estimate that there would be no fiscal impact.

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Because the bill does not mandate expense of any kind, it could not be considered an unfunded mandate.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce anyone's revenue raising authority.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the state tax shared with counties and municipalities.

VI. COMMENTS:

This bill does not affect the ability of the Florida Bar to choose one-third of the appointed members or of the Governor to choose one-third of the appointed members or that the final third of the members will be elected by their appointees. However, the bill would make the J.N.C. membership more representative of the people who live in the same territory as the judges who are being selected.

The Florida Constitution expressly authorizes general law to determine how the membership of the various J.N.C. committees is to be composed. Article V, Section 11 of the Florida Constitution.

Quotas

Section 43.29, F.S., which imposes racial and gender requirements on J.N.C. membership, has been ruled unconstitutional by a federal court for violating equal protection guarantees under the Fourteenth Amendment. In Mallory v. Harkness, 895 F.Supp 1556 (S.D. Fla. 1995), the court set forth its reasons, as follows:

Because the statutory quota attempts to promote diversity outside of the academy and because it measures diversity strictly in terms of race and gender, the Court, though it readily acknowledges the good intentions of the legislature, finds that Section 43.29(1)(a) does not properly advance a compelling state interest.

Id., at 1560.

Dual Office

Both Section 43.29, and the Constitution In Art. V, Sect. 20(c)(6) provide:

A member of a judicial nominating commission may hold public office other than judicial office.

This provision is In conflict with Art.II, Sect. 5(a) which, In part, provides:

No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein...

The prohibition against dual office holding may be controlling since it was most recently amended without reference to exceptions, and Art. V, Sect. 20(c) was meant to be temporary until controlling general law was passed. However, Art. V, Sect. 20(c) is more specific and specific language is usually controlling over general language.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Senate struck the language regarding race and gender and added the language regarding legislative desire to achieve racial and gender diversity.

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VIII. SIGNATURES:

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