

STORAGE NAME: h0175a.jud

DATE: November 3, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HJR 175

RELATING TO: Judicial Candidates/Public Position

SPONSOR(S): Representative Brummer

TIED BILL(S):

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

- (1) JUDICIARY YEAS 4 NAYS 1
 - (2) ELECTION REFORM
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

HJR 175 amends Section 10 of Article V of the State Constitution to permit a candidate for judicial office to take a public stand on issues. This would apply to candidates for election and sitting judges who are up for retention.

The bill also contains a ballot title and summary per s. 101.161, F.S.

The bill will have fiscal impact associated with the advertising of the proposed constitutional amendment.

The bill will be effective in January of 2001, following its acceptance by the general electorate in the 2000 general election.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

B. PRESENT SITUATION:

The State Constitution is silent with respect to a judicial candidate's ability to take a public position on issues. The only prohibition on activities of a political nature unique to judicial candidates is found in Art. V, sec. 13, Florida Constitution, which bars justices and judges from holding office in a political party.

Chapter 105, F.S., generally provides for the election of judicial offices in a nonpartisan manner. Section 105.071, F.S., specifically sets limitations on political activity for judicial candidates. Candidates to, or retention for, judicial office may not:

- (1) Participate in any partisan political party activities, except that such candidate may register to vote as a member of any political party and may vote in any party primary for candidates for nomination of the party in which she or he is registered to vote.
- (2) Campaign as a member of any political party.
- (3) Publicly represent or advertise herself or himself as a member of any political party.
- (4) Endorse any candidate.
- (5) Make political speeches other than in the candidate's own behalf.
- (6) Make contributions to political party funds.
- (7) Accept contributions from any political party.
- (8) Solicit contributions for any political party.
- (9) Accept or retain a place on any political party committee.
- (10) Make any contribution to any person, group, or organization for its endorsement to judicial office.
- (11) Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization.

In addition, the Supreme Court has adopted a Code of Judicial Conduct that establishes standards for the ethical conduct of judges. The Code was originally adopted in 1973 and has been through numerous modifications. *Reiter v. Gross*, 599 So.2d 1275 (Fla. 1992). The Court is vested with exclusive original jurisdiction to eliminate, change, or modify the Code's provisions. *Id.* (citation omitted).

The preamble to the Code states in part that the legal system in Florida is “. . . based on the principal that an independent, fair and competent judiciary will interpret and apply the laws that govern us.” Preamble, Fla. Code Jud. Conduct. The Florida Supreme Court has stated that “[m]aintaining the impartiality, the independence from political influence, and the public image of the judiciary as impartial and independent is a compelling governmental interest.” *In re Code of Judicial Conduct* (1, 2, and 7(A)(1)(b)), 603 So.2d 494, 497 (Fla. 1992).

In the same case, the Court went on to quote from Alexander Hamilton's writing in The Federalist No. 78:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

In re Code of Judicial Conduct (1, 2, and 7(A)(1)(b)), 603 So.2d 494 (Fla. 1992), at 497 (quoting The Federalist No. 78, at 231 (Alexander Hamilton) (Roy P. Fairfield, ed., 2d ed., 1986)).

The Supreme Court has noted that the right of judges to engage in political activity has been restricted in order to protect the independence of the judiciary. *In re Code of Judicial Conduct* (1, 2, and 7(A)(1)(b)), 603 So.2d 494 (Fla. 1992). In that regard, Canon 7(A)(3)(ii) of the Code of Judicial Conduct prohibits a candidate for judicial office from making “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court...”

C. EFFECT OF PROPOSED CHANGES:

HJR 175 amends Section 10 of Article V of the State Constitution to allow candidates for election or retention to judicial office to take public stands on issues.

Assuming that the amendment is accepted by the electorate, it will supersede Canon 7(A)(3)(ii), Code of Judicial Conduct.

D. SECTION-BY-SECTION ANALYSIS:

Not applicable.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Division of Elections is required to advertise proposed constitutional amendments in newspapers of general circulation in each county two times prior to the general election. This cost is estimated at \$46,000 for each amendment.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of any funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the revenue raising authority of any city or county.

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

The bill does not reduce the amount of state tax shared with any city or county.

V. COMMENTS:

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A. CONSTITUTIONAL ISSUES:

1. Ballot Title and Summary

The bill appears to meet the ballot title and summary provisions of s. 101.161, F.S.

2. Free Speech

Generally speaking, a state may treat candidates for judicial office differently than other candidates for free speech purposes. *Moral v. Judiciary Commission*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). The Florida Supreme Court has upheld the rationale behind Canon 7, and pointed out the importance of an impartial judiciary. *In re Glickstein*, 620 So.2d 1000 (Fla. 1993). In that case, the Court reprimanded a judge who had made his support of the retention of a Supreme Court justice public, stating in part that the “. . . judge’s involvement in political activity diminishes his or her ability to maintain independence on the bench.” *Id.* at 1002. The Court went on to state that “[a] judge’s neutrality in everything he or she does is necessary to sustain the public’s confidence in individual judges and in the judicial system as a whole. *Id.*

There have been successful challenges to similar “gag” provisions. See *ACLU v. The Florida Bar*, 744 F.Supp. 1094 (N.D. Fla. 1990)(prohibition against all discussion of disputed legal or political issues not narrowly drawn means to protect state’s compelling interest).

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

1. Disqualification of Judges

The bill may increase the number of judicial disqualifications in Florida courts. For example, a party-litigant has the right to seek the disqualification of a judge if that party believes that his or her right to a fair trial cannot be had on account of the judge’s prejudice. s. 38.10, F.S. (1999). A party may have a good faith argument in support of its disqualification claim if that party can show that the judge made statements, prior to conviction or judgment, that indicate his or her bias. *Cf. State ex rel. Shelton v. Sepe*, 254 So.2d 12 (Fla. 3d DCA 1971).

2. Judicial Nominating Commission Deliberations

It is likely that the bill will allow candidates for judicial office to make public their views on substantive issues to members of Judicial Nominating Commissions.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On November 2, 1999, the Committee on Judiciary adopted one amendment that is traveling with the bill. The amendment provides that a candidate for election, retention, or merit selection to judicial office shall not be precluded from taking a public position on issues, inserting the term “merit selection.”

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VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

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