

STORAGE NAME: h0367.jo.doc
DATE: March 5, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 367
RELATING TO: Judicial Nominating Commissions
SPONSOR(S): Representative Brummer
TIED BILL(S): None

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

- (1) JUDICIAL OVERSIGHT
 - (2) SMARTER GOVERNMENT
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

HB 367 changes the method of selection of the members of the Judicial Nominating Commissions (JNCs). Under current law, the Governor selects three members, the Florida Bar Board of Governors selects three members, and those six members select three more members. Under this bill, the Governor selects all nine members. The Governor must make appointments to each JNC that include representatives for each of the circuits or districts that comprise the court for which the JNC will make nominations. The Governor is encouraged to seek to ensure that the Governor's appointments to the JNCs reflect the racial and ethnic diversity of the jurisdiction.

This bill removes all current JNC members and permits the Governor to select replacements. Current JNC members are eligible for reappointment under the bill. Under the bill, terms of JNC members would coincide with the term of the Governor. Under current law, members serve four year terms.

The bill takes effect on July 1, 2001.

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 type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

In Florida, appellate judgeships are filled by a system of nomination and appointment in which power is divided between the Governor and constitutionally created bodies called judicial nominating commissions (JNCs). See Art. V, s.11, Fla. Const. Although the Constitution creates JNCs, the number of members and composition of each JNC is provided for by statute. See Art. V, s. 11(d), Fla. Const. When an appellate judgeship becomes vacant, candidates submit their applications to the JNC for that court. The commission sends a list of three to six nominees to the Governor and the Governor fills the vacancy by selecting from that list. See Art. V, s. 11(a), Fla. Const. Seats on the trial courts are determined by election but vacancies on the trial court bench that occur between elections are filled in the same manner as vacancies on the appellate bench. See Art. V, s. 11(b), Fla. Const.

Article V, Section 11(d) of the Florida Constitution provides that JNCs shall be created by general law for the supreme court, each district court of appeal, and each judicial circuit for all trial courts within that circuit. Section 43.29, Florida Statutes, implements the constitutional provisions. Under the statute, each JNC consists of nine members. The Board of Governors of the Florida Bar appoints three members who must be lawyers practicing in the affected jurisdiction, e.g. appellate district or judicial circuit. See s. 43.29(1)(a), F.S. The Governor appoints three members who must reside in the affected jurisdiction. See s. 43.29(1)(b), F.S. Those six members, by majority vote, appoint three members who are not members of the Florida Bar and who reside in the affected jurisdiction. See s. 43.29(1)(c), F.S.

Members of a JNC serve four year terms and are not eligible for consecutive reappointment. See s. 43.29(3), F.S. No justice or judge may serve on a JNC but a JNC member may hold another public office. See 43.29(2), F.S. A JNC member is not eligible for appointed to state judicial office for which that commission has authority to make nominations during the member's term on the commission or for two years after leaving the commission. See 43.29(2), F.S.

The statute requires that one member appointed by the Governor, one member appointed by the Florida Bar, and one member appointed by the other members must be a member of a racial or ethnic minority group or be a woman. See ss. 43.29(1)(a)-(c), F.S. In Mallory v. Harkness, 895 F.Supp. 1556 (S.D. Fla. 1995), the court issued a permanent injunction against enforcing this provision. The court found that the provision was a race and gender-based quota that violated equal protection. Mallory, 895 F.Supp. at 1564.

C. EFFECT OF PROPOSED CHANGES:

The bill repeals the current law regulating the selection and composition of judicial nominating commissions and replaces it with a new method of selecting JNC members.

Section 1 of the bill creates section 43.291, Florida Statutes. It declares that each JNC, established pursuant to Article V, section 11(d) of the Florida Constitution, shall consist of nine members appointed by the Governor. Each member must be a resident of the territorial jurisdiction served by that commission on which the member serves. Five of the JNC members must be members of the Florida Bar who are actively engaged in the practice of law. Four of the JNC members shall not be members of the Florida Bar. The bill gives the power to appoint JNC members to the Governor and removes the Florida Bar and the other JNC members from the process.

The bill requires that the Governor seek to ensure that the appointments reflect the racial, ethnic, and gender diversity of the population of the court's territorial jurisdiction. There is no requirement that the JNC appointees be of a particular race or gender as exists under current law. Discussing another statute, the Mallory court said a requirement that the Governor "consider" diversity was not a quota. Mallory, 895 F.Supp. at 1561. Similarly, this statute requires that the Governor attempt to appoint a diverse commission but does not impose a quota.

The bill requires that when members are appointed to a particular circuit's JNC, one member must be appointed from each county within the circuit. The member must reside in that county. This requirement can be met since no judicial circuit contains more than seven counties. For example, in the First Circuit JNC, one member must come from each of the following counties: Escambia, Santa Rosa, Okaloosa, and Walton. The remaining members may reside in any county within the circuit.

Similarly, the bill requires that when members are appointed to a court of appeals JNC, one member must be appointed from each circuit within the appellate district. For example, on the First District Court of Appeals JNC, one member reside in each of the First, Second, Third, Fourth, Eighth, and Fourteenth Judicial Circuits. The remaining three members can reside in any judicial circuit in the district court's territorial jurisdiction.

The bill requires that one member of the Supreme Court JNC must reside in each appellate district. The other four members of the Supreme Court JNC may reside anywhere in the state.

The bill prohibits justices or judges from being members of a JNC but permits other public office holders to serve on JNCs. Anyone who serves on a JNC is not eligible for appointment as a justice or judge to the court for which that JNC makes nominations during the member's term or for two years thereafter. This provision is the same as current law.

The bill provides that the terms of JNC members are concurrent with the term of the Governor. All terms end at midnight on the evening prior to the inauguration of the Governor following the next general election. If a JNC member is unable to complete his or her term, the Governor shall fill the seat by appointment.

The bill removes all current members of JNCs from office but permits the Governor to reappoint those members.

Section 2 of the bill contains a severability clause so that if one portion of the bill is declared unconstitutional, other portions are not struck down.

Section 3 of the bill repeals section 43.29, Florida Statutes, the current statute regulating the selection and composition of judicial nominating commissions.

Section 4 provides an effective date of July 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

See Section II.C. Effect of Proposed Changes

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

The bill does not change the total number of JNC members so it should have minimal fiscal impact.

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.

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V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

The Florida Bar lists opposition to this bill as one of its legislative positions. (Source: www.flabar.org, downloaded February 21, 2001)

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

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