

**STORAGE NAME:** h0367s1z.jo.doc  
**DATE:** August 1, 2001

**\*\*AS PASSED BY THE LEGISLATURE\*\***  
**CHAPTER #:** 2001-282, Laws of Florida

## HOUSE OF REPRESENTATIVES

### JUDICIAL OVERSIGHT FINAL ANALYSIS

**BILL #:** CS/HB 367, 1st Eng.  
**RELATING TO:** Judicial Nominating Commissions  
**SPONSOR(S):** Council for Smarter Government; Representatives Brummer; Cantens and others  
**TIED BILL(S):** None

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

- (1) JUDICIAL OVERSIGHT YEAS 6 NAYS 4
- (2) COUNCIL FOR SMARTER GOVERNMENT YEAS 8 NAYS 3
- (3)
- (4)
- (5)

---

I. SUMMARY:

CS/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 Board of Governors of the Florida Bar selects three members, and those six members select three more members. Under this bill, the Governor selects all nine members. Five members are appointed by the Governor and two of those appointees must be members of the Florida Bar. Four members, who must be members of the Florida Bar, are appointed by the Governor from a list of nominees submitted by the Board of Governors of the Florida Bar (Board). The Board must submit three nominees for each position. The Governor can reject all of the nominees submitted by the Board and require the Board to submit different nominees. Each member of a JNC must reside in the district, circuit, or county that comprise the court for which the JNC will make nominations. The Governor is encouraged to seek to ensure that appointments to the JNCs reflect the racial and ethnic diversity of the jurisdiction.

This bill removes all current JNC members appointed by the Governor or appointed by other JNC members and permits the Governor to select replacements. Current JNC members who were appointed by the Board may serve the remainder of their terms.

The bill requires the Executive Office of the Governor to provide all administrative support for each JNC and requires the Executive Office of the Governor to adopt rules to administer the provisions of the bill.

The bill adds members of the district court of appeal and circuit court judicial nominating commissions to the group defined as "state officers" for the purposes of financial disclosure.

The bill takes effect upon becoming law.

The bill passed both houses, was approved by the Governor, and become Chapter 2001-282, Laws of Florida. The bill passed by the Legislature and approved by the Governor is substantially different from the bill initially passed by the House. See Section VI Amendments or Committee Substitute Changes for a discussion of the original House bill.

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 (Board) 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 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.

Four of the nine members of each JNC must be members of the Florida Bar and actively engaged in the practice of law. The Board shall submit three nominees for each of these seats to the Governor. The Governor may either select a member from these nominees or reject the nominees and require the Board to submit a new list of nominees.

Five members of each JNC shall be appointed directly by the Governor. Two of those members must be members of the Florida Bar who are actively engaged in the practice of law. The bill changes current law by giving the Governor sole power to appoint JNC members but allows the Board to have input by requiring the Governor to appoint four members from a list submitted by the Board.

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 "seek to ensure" a diverse commission but does not impose a quota.

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 removes the six members of each JNC not appointed by the Board. Replacements are appointed by the Governor pursuant to the following schedule:

1. two appointments for terms ending July 1, 2002. One of those appointments must be from a list of nominees submitted by the Board;
2. two appointments for terms ending July 1, 2003; and
3. two appointments for terms ending July 1, 2004.

Every subsequent appointment shall be for a term of four years.

The bill permits a member of a JNC to be suspended for cause pursuant to Article IV, Section 7 of the Florida Constitution.

The bill requires the Executive Office of the Governor (EOG) to provide all administrative support for each JNC and requires the EOG to adopt rules necessary to administer the statute.

Section 2 of the bill amends s. 112.3145, F.S., to define members of the district court of appeal and circuit judicial nominating commissions as "state officers" for purposes of financial disclosure.

Members of the Supreme Court Judicial Nominating Commission, a statewide body, are already covered under the statute.

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 that the bill becomes effective upon becoming law.

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.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

The bill requires the Executive Office of the Governor to adopt rules to administer the JNC statute.

C. OTHER COMMENTS:

The Florida Chamber and the Florida Retail Federation spoke in favor of the initial House version of the bill. The Florida Bar and the Florida Association of Criminal Defense Attorneys spoke in opposition to the initial House version of the bill. The Florida Bar lists opposition to this bill as one of its legislative positions.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Judicial Oversight considered the bill on March 6, 2001, and adopted two amendments. The first amendment added members of the district court of appeal and circuit court judicial nominating commissions to the group defined as "state officers" for the purposes of financial disclosure required by section 112.3145, Florida Statutes. The second amendment prohibits four of the nine members of each judicial nominating commission from being attorneys or members of a legal firm. The amendments are traveling with the bill.

The Council for Smarter Government considered the bill on March 13, 2001. The council approved an amendment to a Judicial Oversight amendment that prohibited employees of a law firm or lawyer or anyone who had ever practiced law in any state or federal jurisdiction from serving as a nonlawyer member of a JNC. The amendment was approved and the bill was made a council substitute.

The bill passed the House on March 22, 2001. As passed by the House, the bill changes the method of selection of the members of the Judicial Nominating Commissions (JNCs). Under the 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 the House 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.

The initial House bill states that five members of each JNC must be members of the Florida Bar and that four of the nine members of each JNC cannot be employees of a lawyer or law firm and cannot have ever been admitted to practice law in any state or federal court.

This bill removes all current JNC members and permitted 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.

**STORAGE NAME:** h0367s1z.jo.doc

**DATE:** August 1, 2001

**PAGE:** 6

The bill adds members of the district court of appeal and circuit court judicial nominating commissions to the group defined as "state officers" for the purposes of financial disclosure.

The initial House bill was substantially amended by the Senate and passed. On May 4, 2001, the House concurred with the Senate message. The bill was approved by the Governor on June 19, 2001.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

L. Michael Billmeier

Lynne Overton

AS REVISED BY THE SMARTER GOVERNMENT COUNCIL:

Prepared by:

Council Director:

L. Michael Billmeier

Don Rubottom

**FINAL ANALYSIS PREPARED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:**

Prepared by:

Council Director:

L. Michael Billmeier

Lynne Overton