

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Ways and Means Committee

BILL: CS/CS/CS/SB 2048

SPONSOR: Ways and Means Committee, Justice Appropriations, Judiciary Committee and Senator Crist

SUBJECT: Judges

DATE: April 21, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cibula	Maclure	JU	Fav/CS
2.	Hendon	Sadberry	JA	Fav/CS
3.	Herring	Coburn	WM	Fav/CS
4.				
5.				
6.				

I. Summary:

This bill creates two new district court of appeal judgeships, 20 new circuit court judgeships, and 12 new county court judgeships. Approximately one-half of the new circuit court and county court judgeships will be appointed by the Governor in 2005-2006, and the remainder will be elected in 2006-2007.

This bill substantially amends the following sections of the Florida Statutes: 26.031, 34.022, and 35.06.

II. Present Situation:

Certification of Need for Additional Judges

Section 9, Article V of the State Constitution requires the Florida Supreme Court to recommend to the Legislature the need for additional judges.¹ The Florida Supreme Court was directed in

¹ SECTION 9, Art. V, STATE CONST., states:

Determination of number of judges.—The supreme court shall establish by rule uniform criteria for the determination of the need for additional judges except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing or redefining appellate districts and judicial circuits. If the supreme court finds that a need exists for increasing or decreasing the number of judges or increasing, decreasing or redefining appellate districts and judicial circuits, it shall, prior to the next regular session of the legislature, certify to the legislature its findings and recommendations concerning such need. Upon receipt of such certificate, the legislature, at the next regular session, shall consider the findings and recommendations and may reject the recommendations or by law implement the recommendations in whole or in part; provided the legislature may create more judicial offices than are recommended by the supreme court or may decrease the number of judicial offices by

budget proviso to the 1998 General Appropriations Act to develop “a Delphi-based case load weighting system to determine the optimum caseloads for circuit and county judges and, in conjunction with other factors, to determine the need for additional circuit and county court judges.”² The resulting system was used to develop the Court’s latest request for new trial court judgeships.³ For the district court of appeal judgeships, the Court relied on average case filings per judge per district court of appeal to determine additional judges were needed.

As a result of the Court’s need analysis, the Court:

certif[ied] the need for sixty-seven new circuit court judges for fiscal year 2005-2006 as follows:

1. Seven additional circuit judges each for the Fifth, Tenth, and Eleventh Circuits;
2. Six additional circuit judges each for the Thirteenth and Seventeenth Circuits;
3. Five additional circuit judges each for the Sixth and Ninth Circuits;
4. Four additional circuit judges each for the Seventh and Nineteenth Circuits;
5. Three additional circuit judges each for the First and Twentieth Circuits;
6. Two additional circuit judges each for the Second, Fourth, and Eighteenth Circuits; and
7. One additional circuit judge each for the Third, Eighth, Fourteenth, and Fifteenth Circuits.

Further, after reviewing the requests of the trial courts and in light of the above considerations, we certify the need for forty-one new county court judges for fiscal year 2005-2006 as follows:

1. Six additional county judges for Broward County;
2. Four additional county judges each for Pinellas, Hillsborough, and Brevard Counties;
3. Three additional county judges for Orange County;
4. Two additional county judges each for Marion, Pasco, Miami-Dade, Palm Beach, and Collier Counties; and
5. One additional county judge each for Duval, Hernando, Lake, Volusia, Manatee, Bay, Seminole, Martin, Saint Lucie, and Lee Counties.⁴

The Court also certified the need of an additional judge in the Second and Fifth Districts.⁵

a greater number than recommended by the court only upon a finding of two-thirds of the membership of both houses of the legislature, that such a need exists. A decrease in the number of judges shall be effective only after the expiration of a term. If the supreme court fails to make findings as provided above when need exists, the legislature may by concurrent resolution request the court to certify its findings and recommendations and upon the failure of the court to certify its findings for nine consecutive months, the legislature may, upon a finding of two-thirds of the membership of both houses of the legislature that a need exists, increase or decrease the number of judges or increase, decrease or redefine appellate districts and judicial circuits.

² Budget proviso to Specific Appropriation 2217, ch. 98-422, L.O.F.

³ *In Re: Certification of Need for Additional Judges*, 889 So. 2d 734, 737 (Fla. 2004).

⁴ *Id.* at 740-741.

⁵ *Id.* at 741.

Figures 1. and 2. below show the geographic boundaries of each judicial circuit and district.

Figure 1 Distribution of Circuit Courts

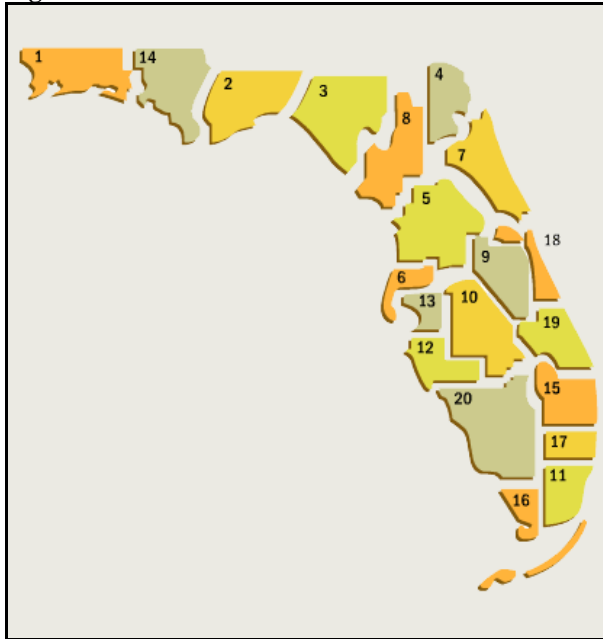
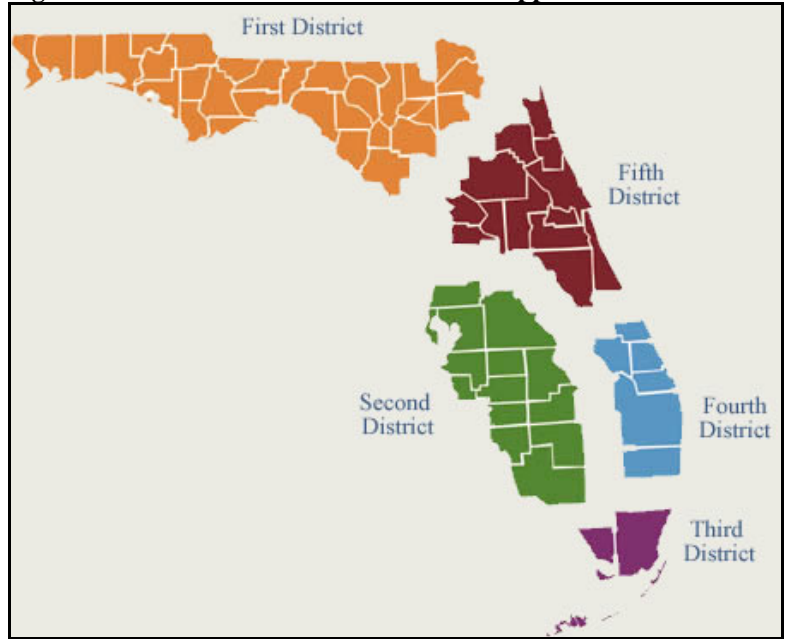


Figure 2 Distribution of District Courts of Appeal



Source: Florida State Courts at http://www.flcourts.org/courts/circuit/cir_dist.shtml.

Judicial Nominating Commissions

The Office of Program, Policy Analysis, and Government Accountability has described the process by which the Governor fills vacancies in judicial offices as follows:

Judicial vacancies are filled by the Governor from a list of three candidates nominated by the appropriate Judicial Nominating Commission (JNC). There are separate nominating commissions for the Supreme Court, district courts of appeal, and for each judicial circuit. The circuit court commissions make nominations for both circuit and county judges. Judicial Nominating Commissions are made up of nine members. The Governor has the sole authority to appoint JNC members. Four of the six Florida Bar members must be selected from nominees from the Board of Governors of The Florida Bar. The Board of Governors must submit a list of three recommended nominees for each of the positions, from which the Governor may select his appointment. The Governor may reject all nominees and request a new list of persons who have not been previously nominated. For the remaining five JNC positions, the Governor directly appoints the member, of whom at least two must be Florida Bar members. In making appointments, consideration should be given to ethnic, racial and gender composition, along with the geographic distribution of the population within the JNC and the adequacy of the representation of each county. The term of office for commission members is four years, appointed to staggered terms. JNC members are also

required to comply with financial reporting standards under the definition of “state officers” as specified in s. 112.3145, Florida Statutes.⁶

Under s. 11, Art. V, State Const., terms of judges appointed to circuit and county courts end “on the first Tuesday after the first Monday in January of the year following the next primary and general election occurring at least one year after the date of appointment.”

Judicial Elections

Under ch. 105, F.S., judicial elections are non-partisan. Candidates for judicial office during the next general election must qualify with the Division of Elections of the Department of State between noon, May 8, and noon, May 12, 2006.⁷ The next general election will be held on November 7, 2006.⁸ Judges elected in the next general election will take office on January 2, 2007.⁹

III. Effect of Proposed Changes:

This bill creates two new district court of appeal judgeships, 20 new circuit court judgeships, and 12 new county court judgeships. Approximately one-half of the circuit court and county court judgeships will not be filled until the 2006-2007 fiscal year.

The bill also provides that approximately one-half of the new circuit court and county court judgeships will be appointed by the Governor, and the remainder will be elected.

The judges appointed by the Governor will take office on January 2, 2006. The provisions of the bill reflecting the number of judicial vacancies for the district courts of appeal, circuit courts, and county courts that may be filled by the Governor take effect upon becoming a law.

The bill provides that the judicial offices filled by election will be created on January 2, 2007, although candidates will qualify in May 2006 and stand for election in September 2006. Under existing s. 100.041, F.S., the elected judges will take office on January 2, 2007.¹⁰ Related to the elected judges, the bill includes a legislative finding there is no emergency or public business requiring an immediate appointment. Further, it provides that the creation of the judicial offices to be elected constitute vacancies in office for purposes of qualifying of candidates for the 2006 general election.

⁶ THE OFFICE OF PROGRAM, POLICY ANALYSIS, AND GOVERNMENT ACCOUNTABILITY, JUDICIAL NOMINATING COMMISSION at <http://www.oppaga.state.fl.us/profiles/1072/02/>, last updated January 25, 2005.

⁷ FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, ELECTION DATES at <http://election.dos.state.fl.us/online/elecdate.shtml> and s. 105.031(1), F.S.

⁸ FLORIDA DEPARTMENT OF STATE, DIVISION OF ELECTIONS, ELECTION DATES at <http://election.dos.state.fl.us/online/elecdate.shtml>, s. 100.031, F.S., and s. 5, Art. VI, STATE CONST.

⁹ Section 100.041, F.S.

¹⁰ Section 100.041(1), F.S. states in part: “The terms of state officers other than the terms of members of the Legislature shall begin on the first Tuesday after the first Monday in January.”

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Under s. 29.008, F.S., counties are responsible for facilities costs for county and circuit courts. This bill will have an impact on counties to the extent that the additional judgeships create increased facilities costs.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Can the Legislature require that newly created circuit and county court judgeships be elected?

The Constitution and the Florida Supreme Court's opinions do not provide a definitive answer. The Court's opinions deal with situations in which sitting circuit and county court judge positions have become vacant. In one case, the vacancy was filled by appointment; in another, by election. The uncertainty seems to revolve around 2 issues. First is the need to fill judicial vacancies without waiting months for an election cycle. Second is the preference Florida's citizens have shown for elections for their judges. In the case of newly created judgeships, where public business is not harmed because no initial vacancy period exists and the Legislature specifies that the judges are to be elected, the scale may tip in favor of election.

1998 amendments to the Florida Constitution indicate a preference for merit selection, or appointment by the Governor.¹¹ Both The Florida Bar and the American Bar Associations have expressed a preference for merit selection and retention, citing higher quality and more diverse candidates and pointing out that judicial nominating commissions are better qualified than voters to evaluate candidates. The method of electing judges, however, is credited with making judges more accountable and more knowledgeable of their communities, as well as increasing voter participation.

Section 11(b), Article V, Florida Constitution¹², requires judicial vacancies on circuit and county courts to be filled by a gubernatorial appointment under certain circumstances.¹³

¹¹ See, e.g., *The 1997-98 Florida Constitution Revision Commission: Judicial Election or Merit Selection*, 52 Fla. L. Rev. 411, Martha W. Barnett.

¹² Section 11(b), Article V, Florida Constitution:

11. VACANCIES.--

(b) The governor shall fill each vacancy on a circuit court or on a county court, wherein the judges are elected by a majority vote of the electors, by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election occurring at least one year after the date of

Section 11(b) was amended in 1996¹⁴ to add the requirement that gubernatorial appointments are for a term ending in January of the year following the next primary and general election "occurring at least one year after the date of appointment."¹⁵ This amendment, followed dicta in *Judicial Nominating Commission, Ninth Circuit v. Graham*,¹⁶ in which the Florida Supreme Court noted that the 1978 Constitution Revision Commission had suggested that the Constitution be amended to allow the Governor to appoint circuit and county judges, by adding a provision, similar to that for Supreme Court or district court of appeal vacancies, to require appointment for a term ending after the next election following the appointment. The interest served by the 1996 amendment to Section 11(b) is preventing a temporary loss of judicial manpower, while allowing the Governor to appoint qualified candidates who would otherwise be discouraged from shutting down their law offices to serve for a short term of 6 months or less.¹⁷

In the 2000 case of *Pincket*,¹⁸ an existing, filled judicial seat became empty before the candidate qualified. The court held that Section 11(b) trumps the public policy of allowing elections when necessary because there was an empty seat that needed to be filled.¹⁹ The Court recognized that a judicial vacancy could occur when there was "emergency or public business requiring an immediate appointment." The Court cited a 1992 advisory opinion²⁰ in which it advised the Governor that:

appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

¹³ Also note that Section 3, Article X, Florida Constitution, provides:

3. Vacancy in office

Vacancy in office shall occur upon the creation of an office, upon the death, removal from office, or resignation of the incumbent or the incumbent's succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.

¹⁴ Senate Joint Resolution No. 978, 1996 regular legislative session.

¹⁵ In *Hoy v. Firestone*, 453 So. 2d 814, 816 (Fla. 1984), the Florida Supreme Court, prior to the 1996 and 1998 amendments to Article V, held that the Legislature may create judicial offices to be filled by election.

¹⁶ 424 So. 2d 10 (Fla. 1982). Note that the main opinion in *Judicial Nominating Commission* was that the Constitution mandated an election when there is sufficient time to afford the electorate an opportunity to fill a judicial vacancy.

¹⁷ In 1995 the Florida Legislature created the Florida Article V Task Force to review the judicial article of the Constitution. Among those issues which the Legislature directed the task force to review were selection and retention of trial judges and the minimum term of office for circuit court and county court judges. In the Final Report of the Florida Article V Task force, dated December 1995, the task force proposed that judicial vacancies be filled by gubernatorial appointment for a minimum term of at least one year before facing an election. Recommendation # 8 from the final report states:

The Task Force unanimously adopted a motion to provide appointees to the trial court the same minimum term of office that is provided to appointees to the supreme court and the district courts of appeal. The Task Force determined that a minimum term of office would serve several functions. First, it would enhance the quality of candidates applying for the bench because many persons are unwilling to sacrifice successful legal practices for the uncertainty that they could face an election challenge immediately after taking office. Second, the minimum one-year term of office would afford the newly appointed judges the opportunity to develop skills as judges and not be forced to immediately wage a campaign. Third, the minimum one-year term would provide the newly appointed judge the opportunity to develop a record before facing an opponent.

¹⁸ See *Pincket v. Harris*, 765 So. 2d 284, 286 (Fla. 1st DCA 2000).

¹⁹ The Court agreed with the reasoning in Attorney General Opinion 00-41, July 6, 2000.

²⁰ *In re Advisory Opinion to the Governor*, 600 So. 2d 460 (Fla. 1992).

where a judge resigned effective August 1, 1992, but filling the vacant seat with an elected judge would mean that the office would remain vacant from August 1992 through January 1993, "because no unreasonable vacancy should exist, it is your [the governor's] duty to appoint someone for the August 1, 1992 to January 5, 1993 time period if this can be accomplished."

This had the effect of limiting the application of a prior decision of the Court,²¹ requiring the election of judges when a vacancy exists, to situations in which a judge resigns effective at a future date and no interim vacancy will exist.

More recently, the Florida Supreme Court opined in 2002 that the governor's obligation under Section 11(b), Article V, Florida Constitution, to fill a vacancy in an existing judicial seat did not apply to a judicial office that became vacant when candidates had already qualified for the election.²²

In that case, a sitting judge had been involuntarily retired on May 30, 2002, due to a physical disability. Her term would otherwise have ended January 7, 2003. Between May 13 and 16, three persons qualified for the judgeship. The Court held that the empty seat does not activate the Governor's obligation to appoint judges when the seat becomes empty after the election process has begun (when candidates have qualified) despite any hardship on judicial workload.

The Court relied on the provisions of Section 10(b), Article V, Florida Constitution,²³ which are in conflict with the provisions of Section 11(b).²⁴ "In view of this conflict

²¹ *Spector v. Glisson*, 305 So. 2d 777 (Fla. 1974). The Spector court examined the meaning of the term "vacancy" in the Florida Constitution and concluded that a vacancy, albeit a future one, was created once a Supreme Court justice, in a letter dated February 1974, submitted notice of his intent to resign effective midnight, January 26, 1975. *Spector*, at 780, 784. Determining that a vacancy had occurred by virtue of submission of the resignation letter, the Supreme Court determined that the position should be filled through the election process rather than through the appointment process. In support of its determination, the court explained:

we have historically since the earliest days of our statehood resolved as the public policy of this State that interpretations of the constitution, absent clear provision otherwise, should always be resolved in favor of retention in the people of the power and opportunity to select officials of the people's choice, and that vacancies in elective offices should be filled by the people at the earliest practical date.

²² See *Advisory Opinion to the Governor; Re: Appointment or Election of Judges*, 824 So. 2d 132 (Fla. 2002).

²³ Section 10(b), Article V, Florida Constitution:

10. Retention; election and terms

(b) (1) The election of circuit judges shall be preserved notwithstanding the provisions of subsection (a) unless a majority of those voting in the jurisdiction of that circuit approves a local option to select circuit judges by merit selection and retention rather than by election. The election of circuit judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court.

(2) The election of county court judges shall be preserved notwithstanding the provisions of subsection (a) unless a majority of those voting in the jurisdiction of that county approves a local option to select county judges by merit selection and retention rather than by election. The election of county court judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court.

(3) a. A vote to exercise a local option to select circuit court judges and county court judges by merit selection and retention rather than by election shall be held in each circuit and county at the general election in the year 2000. If a vote to exercise this local option fails in a vote of the electors, such option shall not again be put to a vote of the electors of that jurisdiction until the expiration of at least two years.

between sections of the constitution, we conclude that the conflict must be resolved by a construction which gives effect to the clear will of the voters that circuit and county judges be selected by election."²⁵

The entirety of Section 10(b) was proposed by the 1998 Constitution Revision Commission.²⁶ Section 10(b) requires that the election of circuit and county court judges is preserved unless the majority of voters in the jurisdiction of a circuit or county approves a local option to select judges by merit retention. In 2000, a local option for merit selection and retention of trial judges appeared on the November ballot. The measure was rejected in every jurisdiction. The average affirmative vote was only 32%.

The pertinent changes to Section 10(b) and Section 11(b) were both approved by the voters as part of a bigger revision in 1998. Based on a careful reading of Section 11(b) in light of prior case law, an argument can be made in favor of the Governor always appointing new circuit and county court judges. However, in the specific implementation of Section 10(b), the voters, by never selecting appointment over election of judges, have shown a clear preference for election as a method of selection.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Litigants may have cases resolved faster.

b. After the year 2000, a circuit may initiate the local option for merit selection and retention or the election of circuit judges, whichever is applicable, by filing with the custodian of state records a petition signed by the number of electors equal to at least ten percent of the votes cast in the circuit in the last preceding election in which presidential electors were chosen.

c. After the year 2000, a county may initiate the local option for merit selection and retention or the election of county court judges, whichever is applicable, by filing with the supervisor of elections a petition signed by the number of electors equal to at least ten percent of the votes cast in the county in the last preceding election in which presidential electors were chosen. The terms of circuit judges and judges of county courts shall be for six years.

²⁴ Section 11(b) was amended in 1998 to qualify the Governor's power to appoint circuit and county court judges to apply only in those locations where "judges are elected by a majority vote of the electors."

²⁵ *Advisory Opinion to the Governor; Re: Appointment or Election of Judges*, at 136.

²⁶ Revision 7, proposed by the 1998 Constitutional Revision Commission.

C. Government Sector Impact:**State Government**

This bill does not appropriate the funds necessary to support the new judges. Appropriations will be added to the bill or included in the 2005-2006 General Appropriations Act. The estimated the fiscal impact of the bill is:

	FY 2005-06	FY 2006-07
Judges	18	16
FTE	45	35
Funding	3,459,252	3,302,500

The Office of State Courts Administrator estimates that approximately half of any new judges are would be assigned to criminal court. This will create a significant increase in the workload of the state attorneys and public defenders.

Local Government

The bill will also create a significant increase in the workload of the clerk of the courts. In addition, new judges would require an increase in the facilities, security, and information technology. Such costs for trial court judges are the responsibility of the counties.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
