

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SJR 1664

INTRODUCER: Senators Bogdanoff and Gaetz

SUBJECT: Senate Confirmation/Appointments to Supreme Court

DATE: March 21, 2011

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	<b>Pre-meeting</b>
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

This joint resolution proposes an amendment to the State Constitution to provide that each appointment of a justice of the Supreme Court is subject to confirmation by the Senate. If the Senate votes to not confirm the appointment, the judicial nominating commission (JNC) will reconvene to nominate new potential appointees to the Governor. The JNC will be barred from renominating a person whose prior appointment to fill the same vacancy was not confirmed.

This joint resolution amends section 11, Article V of the Florida Constitution.

**II. Present Situation:**

**History of Senate Confirmation of Supreme Court Justices in Florida**

Florida's 1868 Constitution provided for a Supreme Court with a chief justice and two associate justices.<sup>1</sup> Similar to analogous provisions in the U.S. Constitution,<sup>2</sup> justices were appointed by the Governor and confirmed by the Senate for life terms during good behavior.<sup>3</sup> The practice of Senate confirmation was thoroughly debated by the judicial article committee at the 1885 constitutional convention, but was ultimately not adopted in the 1885 revision of the State Constitution.<sup>4</sup> The practice of Senate confirmation was replaced by provisions requiring election of Supreme Court justices.<sup>5</sup>

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<sup>1</sup> FLA. CONST. art. VI, s. 3 (1868).

<sup>2</sup> U.S. CONST., art. 2, s. 2, cl. 2; U.S. CONST., art. 3, s. 1.

<sup>3</sup> FLA. CONST. art. VI, s. 3 (1868).

<sup>4</sup> Walter W. Manley, et al., THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821-1917, 273 (1997).

<sup>5</sup> FLA. CONST. art. V, s. 2 (1885).

## Current Florida Supreme Court Appointment Process

### *Judicial Nominating Commission*

Currently in Florida, appellate judgeships<sup>6</sup> are filled through a process of nomination and appointment that divides power between the Governor and constitutionally created judicial nominating commissions (JNCs).<sup>7</sup> There is a separate JNC for the Supreme Court and each district court of appeal, but the current appointment process for both judgeships is the same.<sup>8</sup> Although the JNCs are created by the Constitution, the details of their composition are provided in statute.<sup>9</sup>

Section 43.291, F.S., provides the following direction for the membership of each JNC:

- Four members of the Florida Bar, appointed by the Governor. These positions are filled by the Governor from a list submitted by the Board of Governors of The Florida Bar containing three nominees recommended for each position. The Governor has the option to reject all of the nominees recommended for a position and request a new list of nominees who have not been previously recommended for the same position; and<sup>10</sup>
- Five members appointed by the Governor, at least two of whom are practicing members of The Florida Bar.<sup>11</sup>

### *Vacancies on the Supreme Court*

In order to appoint a new justice to the Supreme Court, the Governor is required to choose one person from a list containing between three and six potential nominees provided by the appropriate JNC.<sup>12</sup> Under the current system, once the Governor chooses from the JNC's list, that person is officially appointed to the Supreme Court, without requirement for Senate confirmation.

A vacancy on the Supreme Court triggers the Governor's duty to fill the vacancy by appointing one person from the list of candidates provided by the JNC.<sup>13</sup> The term for the Governor's appointee ends "on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of the appointment."<sup>14</sup> In the next general election at least one year after the appointment, the justice must qualify for retention by a

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<sup>6</sup> The Governor also fills vacancies on a circuit or county court where judges are elected by a majority vote of the electors in a similar manner. FLA. CONST. art. V, s. 11(b).

<sup>7</sup> FLA. CONST. art. V, s. 11.

<sup>8</sup> FLA. CONST. art. V, s. 11(d).

<sup>9</sup> Section 43.291, F.S.

<sup>10</sup> Section 43.291(1)(a), F.S.

<sup>11</sup> Section 43.291(1)(b), F.S.

<sup>12</sup> FLA. CONST. art. V, s. 11(a).

<sup>13</sup> FLA. CONST. art. V, s. 11(a).

<sup>14</sup> *Id.*

vote of the majority of qualified voters.<sup>15</sup> Once elected for retention, the justice serves a term of six years.<sup>16</sup>

### **Florida Senate Confirmation of Other Appointments**

The State Constitution currently provides for Senate confirmation of certain appointees. For example, under article IV, section 6 of the State Constitution, when provided by law, Senate confirmation or the approval of three members of the cabinet shall be required for appointment to any designated executive statutory office. In turn, the Florida Statutes contain numerous references to Senate confirmation of heads of state agencies and other positions. For example, s. 20.05, F.S., specifies that gubernatorial appointment of a department secretary must be confirmed by the Senate.

Section 114.05, F.S., prescribes the procedures employed when a vacancy in office is filled by appointment that requires Senate confirmation. When an appointment is made, the Governor is required to transmit a letter of appointment to the Secretary of State. The letter sets forth the legal authority for the appointment, the office, the name and address of the appointee, the term of the office, and the effective date of the appointment. Upon receipt of the letter of appointment, the Secretary of State transmits to the appointee an oath of office, questionnaire for executive appointment, and a bond form, when required. Once the appropriate paperwork is completed by the appointee and returned to the Secretary of State, a certificate is issued by the Secretary of State and sent to the appointee. A copy of the certificate and the completed questionnaire are then sent to the Senate for confirmation consideration. Once received by the Senate, the President lays the appointment before the Senate for confirmation “in accordance with this section and the applicable Senate rules.”<sup>17</sup>

### **Senate Confirmation of U.S. Supreme Court Justices**

The U.S. Constitution empowers the President to nominate Supreme Court justices for appointment, “by and with the Advice and Consent of the Senate.”<sup>18</sup> After the President formally selects a nominee, the “advice and consent” requirement is fulfilled by a confirmation vote in the Senate, which requires a simple majority.<sup>19</sup> In between presidential nomination and final Senate confirmation, the nominee is referred to and considered by the Judiciary Committee before being acted on by the full Senate. The constitutionally prescribed federal model for Supreme Court appointments represents a sharing of power between the executive and legislative branches.<sup>20</sup> U.S. Supreme Court justices serve lifetime appointments, as long as they exhibit good behavior.<sup>21</sup>

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<sup>15</sup> FLA. CONST. art. V, s. 10(a).

<sup>16</sup> *Id.*

<sup>17</sup> Section 114.05(1), F.S.

<sup>18</sup> U.S. CONST., art. 2, s. 2, cl. 2.

<sup>19</sup> Congressional Research Service, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, 2 (Feb. 19, 2010), available at <http://www.fas.org/sgp/crs/misc/RL31989.pdf> (last visited Mar. 15, 2011).

<sup>20</sup> *Id.*

<sup>21</sup> U.S. CONST., art. 3, s. 1.

## **Constitutional Amendments**

Section 1, Article X of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose. Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.<sup>22</sup>

### **III. Effect of Proposed Changes:**

This joint resolution proposes a constitutional amendment to add an additional step to the appointment of justices to the Florida Supreme Court by creating the requirement for Senate confirmation of the Governor's appointments. If the Senate votes to not confirm the appointment, the judicial nominating commission (JNC) will reconvene to nominate new potential appointees to the Governor as though a new vacancy had occurred. The JNC will be barred from renominating a person whose prior appointment to fill the same vacancy was not confirmed. This measure in effect adds a level of legislative oversight to a process that is currently carried out within the executive branch and the JNC, which is a constitutional entity whose membership the Governor has a role in selecting. It also has the effect of distinguishing the appointment of Supreme Court justices from other appellate judgeships in the state. The joint resolution specifies that the appointment of a justice is effective on the date of Senate confirmation.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

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<sup>22</sup> FLA. CONST. art. XI, s. 5(e).

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

If the joint resolution is passed by the Legislature, the Department of State will bear the costs associated with publishing notice of the proposed amendment and the date of the election at which it will be submitted to electors in one newspaper of general circulation in each county where a newspaper is published.<sup>23</sup>

There could also potentially be some cost associated with additional meetings of the Senate to confirm appointees if a vacancy occurs on the Supreme Court at a time when the Legislature would not otherwise be meeting.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>23</sup> FLA. CONST. art. XI, s. 5(d).