
Constitution Proposal Analysis

PROPOSAL NUMBER: 0042

SPONSOR: Commissioner William “Bill” Schifino, Jr.

SUBJECT: Judicial Nominating Commissions

REFERENCES: Judicial; Executive

Prepared by: Patrick L. “Booter” Imhof¹

I. SUMMARY

This proposal amends Article V, Section 11, Florida Constitution to provide for the composition of each judicial nominating commission. It provides that the commissions shall be composed of three members who are appointed by the Board of Governors of The Florida Bar from bar members who are actively engaged in the practice of law and who have offices within the territorial jurisdiction of the affected court or in the district or circuit.

It provides that three members who are electors are to be appointed by the Governor and they must reside in the territorial jurisdiction of the court or in the circuit. These members may or may not be members of the bar.

It provides that the remaining three members must reside in the territorial jurisdiction of the court or in the circuit, who are not members of the bar and are appointed by the six members on the commission appointed by the bar and the Governor.

The appointing authorities must seek to provide appointments that reflect diversity regarding ethnicity, race, and gender as well as providing geographic distribution of the population within the territorial jurisdiction of the court.

There appears to be no fiscal impact to The Florida Bar or to the Governor’s Office.

The amendment takes effect on July 1, 2019.

¹ General Counsel for The Florida Bar. This analysis is not a position of The Florida Bar and has not been submitted to The Florida Bar for approval.

II. CURRENT SITUATION

Section 11 of Art. V, Fla. Const., was adopted with the 1972 Revision to the judicial article of the 1885 Constitution.² The requirement that the Governor appoint judges from a list provided by judicial nominating commissions lead to real reform of the Florida judiciary which had suffered from patronage appointments.³ The composition of the judicial nominating commissions was provided in the § 20 schedule to Art. V, Fla. Const. Section 20 provided that “[a]fter this article becomes effective, and until changed by general law consistent with sections 1 through 19 of this article . . .,” subsection (5) established the composition of the judicial nominating commissions. The composition of the judicial nominating commissions in subsection (5) of this schedule is the same as the composition of the commissions in this proposal.

The composition of the judicial nominating commissions provided in subsection (5) was enacted by § 24, Chapter 72-404, Laws of Florida, and codified as § 43.29, Florida Statutes. Section 43.29, Fla. Stat., was amended several times before 2001.⁴ In 1991 § 43.29, Fla. Stat., was amended by § 1, Ch. 91-74, Laws of Fla., to require that the composition of the commissions must include a member of a “racial or ethnic minority group or a woman.”

The requirement that one third of the appointees to the judicial nominating commissions be women or minorities was challenged by an applicant that was not in either of these categories. The operation of the statute was enjoined by the Federal District Court in *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995) aff’d 109 F. 3d 771 (11th Cir. 1997). The court held that the race and gender-based quota established by § 43.29, Fla. Stat., violated the equal protection clause of the Fourteenth Amendment to the Federal Constitution. It held that because there was no evidence that the limited number of minorities and women on the Judicial Nominating Commissions was the result of past discrimination, a compelling state interest was not shown. It also held that the statute was not narrowly tailored, an absolute quota was not necessary, and less intrusive remedies existed.

The court noted that in Florida less drastic remedies already existed. In 1994, the Florida Legislature amended s. 26.021, Florida Statutes, to provide that:

The judicial nominating commission of each circuit, in submitting nominations for any vacancy in a judgeship, and the Governor, in filling any vacancy for a judgeship, shall **consider** whether the existing judges within the circuit, together with potential nominees or appointees, reflect the geographic distribution of the population within the circuit, the geographic distribution of the caseload within the circuit, the racial and ethnic diversity of the population within the circuit, and the

² *The Florida State Constitution*, 2d Edition, Talbot D’Alemberte, Oxford University Press (2017).

³ *Id.*

⁴ See Ch. 73-333, § 22; Ch. 77-20, § 1; Ch. 81-259, § 35; Ch. 84-33, § 1; Ch. 91-74, § 1; Ch. 92-202, § 1, Laws of Fla.

geographic distribution of the racial and ethnic minority population within the circuit. (emphasis in the original)

The court stated that “unlike § 43.29(1)(a), § 26.021 requires that the JNCs and the Governor “consider” diversity. The statute imposes no quota.” Such provisions were therefore permissible.

Section 43.29, Fla. Stat. was repealed by Ch. 2001-282, Laws of Fla.,⁵ which established the current composition of the judicial nomination commissions. Section 43.291, Fla. Stat. was enacted by that law and provides in part:

- (1) Each judicial nominating commission shall be composed of the following members:
 - (a) Four members of The Florida Bar, appointed by the Governor, who are engaged in the practice of law, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed. The Board of Governors of The Florida Bar shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Board of Governors submit a new list of three different recommended nominees for that position who have not been previously recommended by the Board of Governors.
 - (b) Five members appointed by the Governor, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed, of which at least two are members of The Florida Bar engaged in the practice of law. . . .
- (4) In making an appointment, the Governor shall seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered. The Governor shall also consider the adequacy of representation of each county within the judicial circuit.

Four bills have been introduced for the 2018 Regular Session dealing with the composition of the judicial nominating commissions.

SB 420 by Senator Bracy and its companion, HB 477 by Representatives Jacquet and Asencio would reinstate the composition of the judicial nominating commissions as it existed in § 20(5), Fla. Const. and § 43.29, Fla. Stat. (2000). The bills would also provide that five members of each commission could not be from the same political party. The members of the commissions could not serve on more than one commission,

⁵ CS/HB 367 by the Council for Smarter Government and Reps. Brummer and Cantens.

serve as a member of a judicial qualifications commission, hold any elective or appointive state, federal, or other political office, or be appointed to any state judicial office for two years after serving on a commission.

HB 753 by Representative White would remove the Florida bar member appointments to the commissions recommended to the Governor by The Florida Bar Board of Governors. Instead, the bill would provide that the President of the Senate and the Speaker of the House of Representatives would each appoint two Florida bar members to the commissions.

SB 1030 by Senator Bean would also remove the Florida bar member appointments to commissions recommended to the Governor by The Florida Bar Board of Governors. It would provide that the President of the Senate and the Speaker of the House of Representatives recommend to the Governor at least three, but no more than six nominees for each of the four positions required to be Florida bar members.

EFFECT OF PROPOSED CHANGES

This proposal reinstates the provisions in § 20(5), Art. V, Fla. Const., and is similar to the provisions of § 43.29, Fla. Stat., relating to the composition of the judicial nominating commissions. This proposal amends § 11, Art. V, Fla. Const. to provide for the composition of each judicial nominating commission. It provides that the commissions shall be composed of three members who are appointed by the Board of Governors of The Florida Bar from bar members who are actively engaged in the practice of law and who have offices within the territorial jurisdiction of the affected court or in the district or circuit.

It provides that three members who are electors are to be appointed by the Governor and they must reside in the territorial jurisdiction of the court or in the circuit. These members may or may not be members of the bar.

It provides that the remaining three members must reside in the territorial jurisdiction of the court or in the circuit, who are not members of the bar and are appointed by the six members on the commission appointed by the bar and the Governor.

The appointing authorities must seek to provide appointments that reflect diversity regarding ethnicity, race, and gender as well as providing geographic distribution of the population within the territorial jurisdiction of the court.

The amendment takes effect on July 1, 2019.

III. FISCAL IMPACT

A. Tax/Fee Issues

None.

B. Private Sector Impact

None.

C. Government Sector Impact

None.