

**Constitution Revision Commission
Executive Committee
Proposal Analysis**

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

Proposal #: P 42

Relating to: JUDICIARY, Vacancies; SCHEDULE, creates new section

Introducer(s): Commissioners Schifino and Martinez

Article/Section affected: Article V, Section 11; Article XII, creates new section

Date: January 29, 2018

	REFERENCE	ACTION
1.	<u>JU</u>	Favorable
2.	<u>EX</u>	Pre-meeting

I. SUMMARY:

The proposal amends Section 11 of Article V of the State Constitution to provide the composition of the judicial nominating commissions. The Florida Bar Board of Governors appoints three commissioners who are members of the bar and have offices within the jurisdiction of the affected court. The Governor appoints three commissioners who reside in the territorial jurisdiction of the court. The six appointees then select and appoint three more commissioners who reside in the territorial jurisdiction of the court and may not be members of the bar. The appointing authorities are directed to seek appointees that reflect ethnic, racial, gender, and geographic diversity as well as the representation of each county within the judicial circuit. The proposal takes effect on July 1, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Following the adoption of the 1968 Florida Constitution, Section 11 of Article V was revised in 1972, 1976, 1984, 1996 and 1998.¹ The requirement that the Governor appoint judges from a list provided by judicial nominating commissions (JNCs) was created by the amendment effective in 1972.² The initial composition of the JNCs was provided in

¹ Senate Joint Resolution 52-D (1971), Committee Substitute for Senate Joint Resolution 49 and 81 (1976), House Joint Resolution 1160 (1984), Committee Substitute for Senate Joint Resolution 978 (1996), Revision 7 by the Constitution Revision Commission (1998), and Revision 13 by the Constitution Revision Commission (1998).

² Senate Joint Resolution 52-D (1971).

Article V, Section 20 of the Florida Constitution, with a requirement to create a separate judicial nominating commission as provided by general law for the supreme court, each district court of appeal, and each judicial circuit.³ In 1991, the implementing statute, s. 43.29, F.S., was revised by s. 1, Ch. 91-74, L.O.F., to require that the composition of the JNCs must include a member of a “racial or ethnic minority group or a woman.”⁴ The requirement that one third of the appointees to the JNCs be women or minorities was challenged by an applicant who was not in either of these categories. The operation of the statute was enjoined by the Federal District Court.⁵ The court held that the race and gender-based quota established by s. 43.29, F.S., violated the equal protection clause of the Fourteenth Amendment to the Federal Constitution.⁶ It held that because there was no evidence that the limited number of minorities and women on the JNCs was the result of past discrimination, a compelling state interest was not shown.⁷ It also held that the statute was not narrowly tailored, an absolute quota was not necessary, and less intrusive remedies existed.⁸ The court noted that in Florida less drastic remedies already existed.⁹ The court noted that in 1994, the Florida Legislature amended s. 26.021, F.S., to provide that:

[t]he 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 geographic distribution of the racial and ethnic minority population within the circuit.¹⁰ (emphasis in the original)

The court provided 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.¹¹

Section 43.29, F.S., was repealed by Ch. 2001-282, L.O.F.,¹² which established the current composition of the JNCs. Section 43.291, F.S., 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

³ Article V, s. 11(d), FLA. CONST.

⁴ Analysis prepared by the General Counsel of the Florida Bar on file with CRC staff.

⁵ *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995) aff'd 109 F. 3d 771 (11th Cir. 1997).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Committee Substitute for House Bill 367 (2001) by the Council for Smarter Government and Reps. Brummer and Cantens.

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.¹³

The 1996 amendment to Article V, Section 11, proscribed that the number of nominees sent to the Governor be not fewer than three but not more than six for each vacancy.¹⁴

B. EFFECT OF PROPOSED CHANGES:

This proposal provides for the composition of each JNC. It provides that each JNC is 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.
- Three electors who are appointed by the Governor and who must reside in the territorial jurisdiction of the court or in the circuit. These members may or may not be members of the bar.
- Three electors who must reside in the territorial jurisdiction of the court or in the circuit, who are not members of the bar, and who are selected and appointed by the six members 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 proposal takes effect on July 1, 2019.

¹³ Section 43.291, F.S.

¹⁴ Committee Substitute for Senate Joint Resolution 978 (1996).

C. FISCAL IMPACT:

None.

III. Additional Information:

A. Statement of Changes:

(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

None.