

**Constitution Revision Commission  
Judicial 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): Commissioner Schifino

Article/Section affected:

Date: January 18, 2018

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

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**I. SUMMARY:**

A proposal to amend Section 11 of Article V of the State Constitution to provide the composition of the judicial nominating commissions. The Florida Bar Board of Governors shall appoint three commissioners who are members of the bar and have offices within the jurisdiction of the affected court. The governor shall appoint three commissioners who reside in the territorial jurisdiction of the court. The six appointees shall then select 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 amendment would take effect on July 1, 2019.

**II. SUBSTANTIVE ANALYSIS:**

**A. PRESENT SITUATION:**

The current language of Section 11 of Article V was adopted with the 1972, 1976, 1996 and 1998 revisions to the judicial article respectively.<sup>1</sup> The requirement that the Governor appoint judges from a list provided by judicial nominating commissions were the result of the 1972 amendment.<sup>2</sup> The initial composition of the judicial nominating commissions was provided in Article V Section 20 but can be changed by general law.<sup>3</sup> 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

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<sup>1</sup> Talbot D’Alemberte, *The Florida State Constitution, 177-78 (2nd ed. 2017)*.

<sup>2</sup> *Id.*

<sup>3</sup> Fla. Const. Art. V, § 11.

group or a woman.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> It also held that the statute was not narrowly tailored, an absolute quota was not necessary, and less intrusive remedies existed.<sup>8</sup> The court noted that in Florida less drastic remedies already existed.<sup>9</sup> 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 geographic distribution of the racial and ethnic minority population within the circuit. (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.<sup>10</sup>

Section 43.29, Fla. Stat. was repealed by Ch. 2001-282, Laws of Fla.,<sup>11</sup> 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

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

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> CS/HB 367 by the Council for Smarter Government and Reps. Brummer and Cantens.

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.<sup>12</sup>

The 1996 amendment proscribed that the number of nominees sent to the governor be not fewer than three but not more than six for each vacancy.<sup>13</sup>

## **B. EFFECT OF PROPOSED CHANGES:**

This proposed amendment provides 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.

## **C. FISCAL IMPACT:**

None.

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<sup>12</sup> Fla. Stat. § 43.291.

<sup>13</sup> Talbot D'Alemberte, *The Florida State Constitution*, 178 (2nd ed. 2017).

**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.