

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: April 2, 1998 Revised: \_\_\_\_\_

Subject: Judicial Nominating Commissions

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Harkins</u>	<u>Moody</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>WM</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

The bill creates new provisions prescribing qualifications for members of a judicial nominating commission (JNC) and provides for appointment of members to a JNC.

Under the proposed bill, each JNC will be composed of nine members, all of whom must reside in the territory or jurisdiction of the affected court. Members of each JNC would be appointed as follows:

- The Governor appoints three members, at least one of whom must be a practicing member of The Florida Bar;
- The Florida Bar appoints three members, all of whom must be practicing members of The Florida Bar; and
- The Attorney General appoints three members, at least one of whom must be a practicing member of The Florida Bar;

The bill amends section 43.29 of the Florida Statutes.

**II. Present Situation:**

Section 11(c), Article V, Fla. Const., establishes 26 JNC's - 1 for the Supreme Court, 1 for each of the 5 district courts of appeal, and 1 for each of the 20 judicial circuits. The purpose of each of the commissions is to announce judicial vacancies, accept and screen applications for those vacancies, and recommend to the Governor at least three nominees for each vacancy. Section 11, Art. V, Fla Const., also provides that the separate JNC's shall be created and established by general law.

The JNC's for the following judicial circuits will be affected by this bill:

- The first judicial circuit is composed of Escambia, Okaloosa, Santa Rosa, and Walton Counties.
- The second judicial circuit is composed of Leon, Gadsden, Jefferson, Wakulla, Liberty, and Franklin Counties.
- The third judicial circuit is composed of Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, and Taylor Counties.
- The fourth judicial circuit is composed of Clay, Duval, and Nassau Counties.
- The fifth judicial circuit is composed of Citrus, Hernando, Lake, Marion, and Sumter Counties. Two of the circuit judges authorized for the fifth judicial circuit shall reside in either Citrus, Hernando, or Sumter County, and both of these judges shall not reside in the same county.
- The sixth judicial circuit is composed of Pasco and Pinellas Counties.
- The seventh judicial circuit is composed of Flagler, Putnam, St. Johns, and Volusia Counties. One judge shall reside in Flagler County; two judges shall reside in Putnam County; two judges shall reside in St. Johns County; and three judges shall reside in Volusia County. There shall be no residency requirement for any other judges in the judicial circuit.
- The eighth judicial circuit is composed of Alachua, Baker, Bradford, Gilchrist, Levy, and Union Counties.
- The ninth judicial circuit is composed of Orange and Osceola Counties.
- The tenth judicial circuit is composed of Hardee, Highlands, and Polk Counties.
- The eleventh judicial circuit is composed of Dade County.
- The twelfth judicial circuit is composed of Manatee, Sarasota, and DeSoto Counties.
- The thirteenth judicial circuit is composed of Hillsborough County.
- The fourteenth judicial circuit is composed of Bay, Calhoun, Gulf, Holmes, Jackson, and Washington Counties.
- The fifteenth judicial circuit is composed of Palm Beach County.
- The sixteenth judicial circuit is composed of Monroe County. One judge in the judicial circuit shall reside in the middle or upper Keys. There shall be no residency requirement for any other judge in the judicial circuit.
- The seventeenth judicial circuit is composed of Broward County.
- The eighteenth judicial circuit is composed of Brevard and Seminole Counties.
- The nineteenth judicial circuit is composed of Indian River, Martin, Okeechobee, and St. Lucie Counties.
- The twentieth judicial circuit is composed of Charlotte, Collier, Glades, Hendry, and Lee Counties.

Currently, a JNC must consist of nine members. s. 43.29, F.S. The Board of Governors of The Florida Bar appoints three members who must be Florida lawyers practicing in the territorial affected jurisdiction. The Governor appoints three members who must reside in the affected jurisdiction or in the judicial circuit appointed by the Governor. *Id.* These six members appoint three additional members who must not be members of The Florida Bar and who must reside in the affected jurisdiction. *Id.* In addition to the provisions of s. 11(c), Art. V, Fla Const., ss. 11(a) and (b) refer to the number of nominees sent to the Governor from the JNC's. District court of

appeal nominating commissions are required to nominate three people for the Governor's consideration, and trial court nominating commissions are required to nominate no fewer than three people.

The existing statute, s. 43.29, F.S., provides that the Board of Governors of The Florida Bar, the Governor, and the six members appointed by the Board of Governors of The Florida Bar and the Governor, each must appoint at least one individual who belongs to a racial or ethnic minority group or a woman. *Id.* Therefore, each JNC must consist of no less than three members who are either of an ethnic or racial minority or female. However, in *Mallory v. Harkness*, 895 Fla.Supp. 1556 (S.D. Fla. 1995), the court held that s. 43.29(1)(a), F.S., as a race/gender based quota, violated the Fourteenth Amendment of the U.S. Constitution and permanently enjoined its enforcement against the *Mallory* plaintiff. Presumably, any individual adversely affected by s. 43.29(1)(a), F.S., who has standing, could obtain an injunction for the reasons set forth in *Mallory*. The same race/gender quotas contained in s. 43.29(1)(a), F.S., are contained in ss. 43.29(1)(b) and 43.29(1)(c), F.S. Therefore, these portions of the present statute are likewise subject to challenge under the Fourteenth Amendment of the U.S. Constitution as construed by the court in *Mallory*.

Currently, members of a JNC may neither be justices nor judges. s. 43.29, F.S. Other than judicial office, members of a JNC may hold public office. *Id.* A member of a JNC may not be appointed to state judicial office in the territory or jurisdiction in which that member makes nominations either during the member's 4-year term or any time less than 2 years after the expiration of the member's 4-year term. *Id.* Members may not serve consecutive 4-year terms and may be suspended by the Governor and removed by the Senate in a manner consistent with s. 7, Art. IV, Fla. Const. *Id.*

### III. Effect of Proposed Changes:

Under the proposed bill, the Board of Governors of The Florida Bar and the Governor will continue to appoint three members to each JNC. However, the bill provides that instead of the remaining three members being selected by those six, the Attorney General will select the remaining three. The bill requires the new JNC member composition to be accomplished by July 1, 2003.

Currently, at least one of the JNC members appointed by the governor, one appointed by The Florida Bar, and one of the additional three selected by those six appointees must be a member of an ethnic or racial minority or the female gender. s. 43.29, F.S. The proposed bill deletes this mandate as, given the *Mallory* ruling, it is clear that the constitutionality of the race and gender requirements of s. 43.29, F.S. are subject to challenge. However, the bill does require that those appointing members to the JNC *take into consideration* in appointing JNC members the racial, ethnic, gender of the populations affected by the JNC to which the appointment is being made.

The bill also requires that the geographic diversity of the territorial jurisdiction of a JNC be considered in the appointment of members and, when feasible, that the JNC membership be representative of the different counties within that territorial jurisdiction.

#### IV. Constitutional Issues:

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

None.

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

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

The Court held that s. 43.29(1)(a), F.S., was unconstitutional because it created an improper race/gender based quota. *Mallory v. Harkness*, 895 Fla.Supp. 1556 (S.D. Fla. 1995). Classifications based upon race must be justified by specific “judicial, legislative, or administrative findings” of past discrimination. *Regents of University of California v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 2757, 57 L.Ed.2d 750 (1978). The court in *Mallory* noted that neither the Ethnic Bias Study Commission Report (utilized in the development of the 1991 amendment to s. 43.29, F.S.), nor the Attorney General (who intervened to defend s. 43.29, F.S., in the *Mallory* case), either asserted or proved that there had been any prior discrimination by a JNC. *Mallory* at 1560. The court also noted that although promoting racial diversity has been recognized as a compelling state interest in the educational context, such recognition has not been extended beyond the academic setting. *Id.* The *Mallory* court noted that even within the educational context, the Supreme Court of the United States has specifically held that an asserted state interest in diversity is not properly advanced when diversity is measured exclusively by reference to race or ethnicity. *Id.* The *Mallory* court held that s. 43.29(1)(a), F.S., which measures diversity strictly in terms of race and gender, does not properly advance a compelling state interest. *Id.* However, the court did not find s. 43.29(1)(a), F.S., violative of the First Amendment of the U.S. Constitution. *Id.* at 1562.

The court in *Mallory* did not opine as to the constitutionality of the remainder of s. 43.29(1), F.S., because that issue was not before the court. However, each subparagraph within s. 43.29(1), F.S., contains a race/gender based quota. The portions of the statute unaffected by the *Mallory* decision remain subject to challenge by any individual with standing to challenge those portions.

The proposed bill imposes no racial, ethnic, or gender based requirements upon the composition of JNC's, and therefore avoids the implications of the *Mallory* decision. However, the bill does require the Governor, The Florida Bar, and the Attorney General, to consider the race and gender diversity of the territorial jurisdiction of the JNC when making appointments.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.