

STORAGE NAME: h2013.jud
DATE: April 1, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 2013
RELATING TO: Judicial Nominating Commissions
SPONSOR(S): Representative Brummer
COMPANION BILL(S): SB 2000 (I)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY
 - (2)
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

The bill amends s. 43.29, F.S., deleting the requirement that at least one member of a judicial nominating commission ("JNC") be a member of a racial or ethnic minority group or a woman. Instead, the bill requires the "appointing authorities" to consider whether commission members as well as potential appointees reflect the racial, ethnic, and gender diversity and geographical distribution of the population within the territorial jurisdiction of the court for which they are making nominations. The bill also requires a JNC to include among its members and electors at least one resident from each county within the judicial circuit.

The bill has an effective date of July 1, 1999.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Operation of a Judicial Nominating Commission (JNC)

Under s. 43.29, F.S., the statute this bill would amend, each JNC consists of nine members. The Board of Governors of The Florida Bar appoints three members who must be Florida lawyers practicing in the affected jurisdiction. The Governor appoints three members who must reside in the affected jurisdiction or in the judicial circuit. *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.*

Currently, members of a JNC may not be justices nor judges. s. 43.29, F.S. Members of a JNC may hold public office other than judicial 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.*

Presently, each county within a given judicial circuit may or may not be represented on a particular judicial nominating commission, i.e., representation is possible, but not required. *This bill would require representation for each county.* The following is a list of the 20 judicial circuit courts and the counties which comprise each:

- 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 neither of such two judges shall 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.

Constitutionality of Racial, Ethnic, and Gender Requirements

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, on July 7, 1995, 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 s. 43.29(1)(b) and (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*.

In its final report, the Article V Task Force recommended the elimination of language relating to the racial or gender composition of nominating commissions. However, the Article V Task Force also recommend that this language be replaced with language suggestive of the aspirations reflected in the current statutes with respect to race and gender diversity. The Florida Bar approves such a change.

B. EFFECT OF PROPOSED CHANGES:

The bill deletes portions of s. 43.29, F.S., which were determined to be unconstitutional race/gender quotas in the case of *Mallory v. Harkness*, 895 Fla.Supp. 1556 (S.D. Fla. 1995). The bill replaces these quotas with a requirement that appointing authorities consider whether existing commissions reflect the racial, ethnic, and gender diversity as well as the geographic distribution of the population of the territorial jurisdiction affected by a judicial nominating commission.

Additionally, the bill provides that each judicial nominating commission (JNC) for each of the twenty judicial circuits have at least one member from each county within the judicial circuit affected by each commission. The new requirements of this bill apply to members or electors appointed on or after July 1, 1998.

The requirement that every county in a particular judicial circuit be represented on that circuit's judicial nominating committee (JNC) could be problematic in some circumstances. For example, the third judicial circuit is composed of seven counties: Columbia, Dixie, Hamilton, Lafayette, Madison, Suwannee, and Taylor. Under this bill, The Florida Bar would still pick three members, each of whom must practice law in the affected jurisdiction. Therefore, The Florida Bar must choose three practicing attorneys who desire the position, preferably from three different counties (recall that in order to satisfy the requirements of this bill, seven of the nine ultimate members of this commission must be from separate counties). Hypothetically, if the only lawyers interested in the position were from Columbia County, the bar would be obligated to pick those three. There being only six additional positions, the governor's and the three appointees' choices would be limited to one person from each of the remaining counties. It might be difficult to find a person willing or able to serve from every small county.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

The bill does not reduce an agency or program.

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?
No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

The bill does not purport to provide services to families or children.

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?
No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

The bill does not create or change a program providing services to families or children.

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 43.29, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1 amends s. 43.29, F.S., deleting the requirement that at least one member of a judicial nominating commission be a member of a racial or ethnic minority group or a woman. The bill requires that the “appointing authorities” consider whether commission members as well as potential appointees, reflect the racial, ethnic, and gender diversity and geographical distribution of the population within the territorial jurisdiction of the court for which they are making nominations. The bill also requires a JNC to include among its members and electors at least one resident from each county within the judicial circuit. This requirement shall apply to members or electors appointed on or after July 1, 1999.

Section 2 provides an effective date of July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. **FISCAL COMMENTS:**

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. **APPLICABILITY OF THE MANDATES PROVISION:**

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of funds.

B. **REDUCTION OF REVENUE RAISING AUTHORITY:**

The bill does not affect the revenue raising authority of a city or county.

C. **REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:**

The bill does not affect the amount of state tax shared with a city or county.

V. COMMENTS:

This bill does not provide instruction as to how the Governor, the Board of Governors of The Florida Bar, and their appointees are to coordinate their appointments so as to assure that each county within a given judicial circuit has at least one member on that circuit's judicial nominating commission. Hypothetically, the Board of Governors of The Florida Bar could appoint three members, all of whom are residents of the same county within a given judicial circuit. The burden would then fall upon the Governor to choose members from other counties within the judicial circuit in order to assure compliance with this bill. If the Governor elected three members, all from the same county, assuming the hypothetical judicial circuit contains two counties, then the six members elected by The Florida Bar and the Governor would find their choice of potential appointees limited to residents of the remaining county. The problem would be more pronounced in the eight judicial circuits comprised of more than three counties. In such judicial circuits, neither the Governor, nor The Florida Bar, nor their six appointees could solely assure compliance with this. Appointing authorities will need to take measures to coordinate their appointments in order to achieve the requirements set forth in this bill. A more workable approach might be to specify county residence as one item that must be considered in making JNC appointments. In addition, if more members were appointed at one time, greater diversity might be achieved.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

Michael W. Carlson

Don Rubottom