

# A Look Through the Looking Glass: The JNC and Judicial Nominating Process “Deconstructed”

by Linda Bond Edwards and Michael R. Band

**T**he people of the state of Florida, through their elected officials, have chosen “merit selection” as a method of choosing judges through appointment. While the trial bench has remained subject, in part, to the elective process, the state’s appellate courts are solely within the province of the appointive process. Florida is one of 24 states, as well as the District of Columbia, in which judges are appointed to the bench using a nominating commission. Florida’s 26 judicial nominating commissions (JNCs) follow five basic steps in the appointive process: 1) acknowledging and advertising the judicial vacancy; 2) receiving applications by interested candidates; 3) vetting and interviewing prospective candidates by the nominating commission; 4) formulating a “short list” of nominees to be forwarded to the governor; and 5) the governor appointing a candidate from the list to fill the judicial vacancy.<sup>1</sup>

## JNCs in Florida: From the Beginning

Before the adoption in 1968 of art. V of the revised Florida Constitution, judges were elected by partisan ballot. In the late 1960s, Gov. Claude Kirk agreed to a “judicial screening program,” Florida’s first attempt at a form of merit selection. In 1971, with the passage of H.B. 468 implementing art. V, Florida moved from a nonpartisan ballot to a merit selection system for filling interim vacancies.

On July 23, 1971, an executive order by Gov. Reubin Askew established judicial nominating councils, which became the basis for Florida’s current judicial nominating commission system of merit selection, and made applicable to new appointments and midterm vacancies at all levels of the state judiciary by a 1972 constitutional amendment.<sup>2</sup>

The current hybrid system of elections and appoint-

ments most recently was modified by the Florida Legislature in 2001. “Prior to 2001, the governor named three members to the judicial nominating commission; The Florida Bar named another three; and those six commissioners decided on the final three members. Under the 2001 amendments, the governor [gained] authority to appoint all commissioners. Four of the commissioners, however, must be selected from names submitted by the Bar. Although the governor has the authority to reject the entire slate of Bar nominees and call for a new one,”<sup>3</sup> until Gov. Rick Scott took office, no governor had ever invoked that authority. Since taking office, Gov. Scott has repeatedly rejected lists submitted by The Florida Bar.<sup>4</sup> The statute, however, does not require the governor to provide a reason for the rejection.

F.S. §43.291 is the codification of the governor’s appointment powers for the JNCs. One of the key components of the appointment process was the reference to diversity spelled out in F.S. §43.291(4) (emphasis added), which states:

In making an appointment, the [g]overnor *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 [g]overnor shall also consider the adequacy of representation of each county within the judicial circuit.

The predecessor, F.S. Ch. 43.29, was amended on October 1, 1991, and required that one-third of all JNC seats be occupied by either a woman or a member of a racial or ethnic minority group. Following a legal challenge, U.S. District Judge Kenneth Ryskamp found that the restriction amounted to an illegal quota in

violation of the 14th Amendment to U.S. Constitution.<sup>5</sup> Since that time, diversifying the JNC membership has been left to the discretion of the current governor.

### **The Importance of JNCs to the Judicial Process**

Because JNCs serve the citizenry by recommending names to the governor for judicial appointment, “justice for all” has to be a driving and constant reminder to JNC members. In “Building a Diverse Bench: A Guide for Judicial Nominating Commissioners,”<sup>6</sup> former Ohio Supreme Court Justice Brown expresses the aspiration of every person that might come before a judge either as a lawyer or party: “Our court system should be filled with judges who are not only intelligent, but thoughtful and faithful to the rule of law, but also bring diversity of experience and background.... Justice demands not only equality, but the appearance thereof.”<sup>7</sup> As such, JNCs have a monumental task of 1) recruiting diverse applicants; 2) screening applicants; 3) conducting thoughtful, probing, and unbiased interviews; and, finally, 4) making recommendations that reflect the diversity of the population that judge will serve. Diversity means more than race and gender but also disability, sexual orientation, economic status, and by practice area and geography.

*The Florida Judicial Nominating Commissioner 2015 Manual*<sup>8</sup> requires that “whenever a vacancy occurs in a judicial office within the jurisdiction of a judicial nominating commission, the appropriate commission *shall actively seek, receive, and review the approved background statements submitted by those who voluntarily request consideration and by those who otherwise consent in writing to such consideration by the commission.*”<sup>9</sup>

### **How to Become a Member of the JNC**

Many lawyers and citizens have asked how to become a member of the JNC. The immediate answer is to apply! While the governor

currently has the final appointment power for all nine members, as outlined in F.S. §43.291, four of the appointments must come from nominees from the Bar and five are direct appointments by the governor. The Bar and the governor each have a separate application process. The Florida Bar solicits applicants for appointments by the Board of Governors. Those appointments become effective July 1 of each year. Generally, the Board of Governors makes their recommendations in May and submits the lists of names to the governor prior to the July 1 effective date to allow sufficient time for consideration and appointment.

In selecting members of the Bar to recommend to the governor, the Board of Governors reviews the applications for each JNC and rates applicants based on, among other things, the following criteria:

1. Length of practice;
2. Area(s) of practice;
3. Bar activities and community service (including leadership roles);
4. Reputation (feedback from peers and/or Board of Governors members);
5. Prior JNC service;
6. Prior careers and life experiences;
7. Certification in practice area;
8. Diversity (geographic, gender, ethnic, and racial);
9. Any disciplinary issues; and
10. Quality and completeness in filling out the application.<sup>10</sup>

The governor’s application for appointment is included on the governor’s website.<sup>11</sup> Before making final appointments to the JNC, the governor’s office may conduct interviews with potential members.

### **JNCs Going Forward**

Both the 2018 CRC and the 2018 legislature considered similar changes for the composition of the JNCs. H.B. 477 intended to revise the composition of the JNCs, by reducing the number of lawyers from four to three, and allowed the Board of Governors to appoint them, gave the governor three appointees, but went back to the original selection process for the remaining three members by allowing the appointed six members to select the remaining three. These remaining three members cannot be lawyers, and

no more than five members of each commission may be of the same political party. H.B. 477 provided other guidelines for members of the JNC regarding term limits and holding other appointments. Significantly, diversity that includes ethnicity, race, disability, veteran status, gender, gender identity, sexual orientation, and geographic distribution remained a criterion for appointment and selection to the JNCs.

H.B. 753 was filed to address appointments to the JNCs. This proposed appointment process allowed the Senate president and the speaker of the House to appoint four members selected from names submitted by The Florida Bar and the governor would continue to appoint five members.

Both bills were indefinitely postponed and withdrawn from consideration prior to the end of the 2018 regular legislative session. The CRC proposal to change the composition of the JNCs was not voted out of the CRC Article 5 Committee and has been “laid on the table.” At this point, the proposal may still be voted on by the full commission but given the amount of proposals that received favorable committee votes, the chances of the CRC proposal advancing are slim. As such, the current process of appointment will continue.

### **The Judicial Nominating Procedures Committee**

One task of current and immediate past chairs of the Bar’s Judicial Nominating Procedures Committee (JNPC), has been to emphasize and encourage increased diversity on the JNCs. To that end, we invited presidents of diverse voluntary bar associations to committee meetings where the governor’s general counsel was present to hear about the JNC process and for the general counsels to hear from the voluntary bar presidents who had their fingers on the pulse of the JNC appointment process in their local communities. As the conversation continued, the JNPC invited members of the Supreme Court’s

Standing Committee on Fairness and Diversity to talk about implicit bias in selection to deepen the conversation.

Throughout the years, the JNPC has benefitted from having the governor's general counsel as a member of the committee. This has allowed the committee's membership to appreciate the governors' perspectives of the "ideal" judicial applicant and allowed the governors' office to gain insight as to what was happening "on the ground."

Further, the JNPC has previously assisted with drafting the judicial application, the rules that govern the commissions' deliberative process, and, when necessary, assisting the commissions in the calling of a "rules convention" to amend their rules or application. Finally, the JNPC provided training for the

commissioners for several decades, though this function has diminished since 2001. The JNPC maintains a website to aid the commissioners with information.<sup>12</sup> The Bar's website, <https://www.floridabar.org/directories/jnc/applications/>, advertises all judicial vacancies and provides access to the online application. All current commissioners are listed at <https://www.floridabar.org/directories/jnc/commissions-fl/>.

The JNPC will continue to fulfill the mission set forth by the Board of Governors to assist the governor and the judicial nominating commissions in discharging their statutory and constitutional duties. □

<sup>1</sup> See Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 *FORDHAM URB. L. J.* 163, 171, 182 (2007).

<sup>2</sup> Florida Bar Dep't of Public Information and Bar Services with Assistance of General Counsel and Governmental Affairs Staff, *Board Issue Paper — Merit Retention and Selection* (Feb. 21, 2017).

<sup>3</sup> Raquel A. Rodriguez, *Judicial Selection in Florida — An Executive Branch*

*Perspective*, 79 *FLA. B. J.* 16 (Jan. 2005), available at <https://goo.gl/vVKeAj>.

<sup>4</sup> The Florida Bar, *President's Special Task Force to Study Enhancement of Diversity in the Judiciary and on the JNC's*, Appendix 5 (2014), available at <https://goo.gl/BLMJRg>.

<sup>5</sup> *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995).

<sup>6</sup> Kate Berry, foreword by Former Chief Justice Yvette McGee Brown, *Building a Diverse Bench: A Guide for Judicial Nominating Commissioners*, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW (2016).

<sup>7</sup> *Id.* at 1.

<sup>8</sup> EXECUTIVE OFFICE OF THE GOVERNOR, THE FLORIDA JUDICIAL NOMINATING COMMISSIONER 2015 MANUAL, available at [http://www4.floridabar.org/TFB/TFBResources.nsf/Attachments/B0AEAA07D35852FB852574F90055C59E/%24FILE/JNC\\_Manual.pdf](http://www4.floridabar.org/TFB/TFBResources.nsf/Attachments/B0AEAA07D35852FB852574F90055C59E/%24FILE/JNC_Manual.pdf).

<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> The Florida Bar, *Understanding the Florida Judicial Nominating Commission and Judicial Application Process*, <https://goo.gl/LKFe1U>.

<sup>11</sup> Executive Office of the Governor, Judicial and Judicial Nominating Commission Information, <https://www.flgov.com/judicial-and-judicial-nominating-commission-information/>.

<sup>12</sup> The Florida Bar, Judicial Nominating Procedures Committee, <https://goo.gl/grYRX7>.

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