

# STATE OF DELAWARE



## EXECUTIVE DEPARTMENT DOVER

### EXECUTIVE ORDER NUMBER FOUR

TO: HEADS OF ALL STATE DEPARTMENTS AND AGENCIES

RE: PRESERVATION OF DELAWARE'S INDEPENDENT JUDICIARY AND  
CONTINUANCE OF THE JUDICIAL NOMINATING COMMISSION

WHEREAS, under Article IV of the Delaware Constitution and Title 10 of the Delaware Code, the Governor appoints, by and with the consent of the State Senate, the Chief Justice and Justices of the Delaware Supreme Court, the Chancellor and Vice Chancellors of the Court of Chancery, the President Judge, Judges and Commissioners of the Superior Court, the Chief Judge, Judges and Commissioners of the Family Court, the Chief Judge, Judges and Commissioners of the Court of Common Pleas, and the Chief Magistrate of the Justice of the Peace Courts (collectively "judges"); and

WHEREAS, the State of Delaware has received national recognition for the quality and impartiality of its judiciary; and

WHEREAS, this recognition results from the State's long-standing commitment to a bipartisan judiciary composed of judges of high integrity, independence and excellent legal abilities; and

WHEREAS, for over thirty years, Governors of the State of Delaware have been assisted in their search for highly qualified judicial nominees by a Judicial Nominating Commission composed of distinguished attorneys and laypersons; and

NOW THEREFORE, I, JACK A. MARKELL, by virtue of the authority vested in me as Governor of the State of Delaware, do hereby ORDER:

1. The Judicial Nominating Commission is continued to assist the Governor regarding all appointments of judges as defined above.

2. The Commission shall consist of eleven members. Ten members shall be appointed by the Governor in the manner prescribed in this Order. The eleventh member shall be nominated by the President of the Delaware State Bar Association and, with the

consent of the Governor, appointed by the Governor. Not less than four of the Governor's appointees shall be members of the Bar of the Supreme Court of Delaware. Not less than four of the appointees shall be persons who are not members of the bar in any state. The members of the Commission shall reflect the broad diversity of the citizenry of Delaware.

3. Except as otherwise provided in this Order, all members of the Commission shall serve three year terms and may be reappointed. In making the initial appointments under this Order, the Governor shall designate four appointees to serve full three year terms, four appointees to serve two year terms, and three appointees to serve one year terms, all at the pleasure of the Governor. Any subsequent appointment upon the expiration of any term shall be for three years at the pleasure of the Governor. In the event a member for any reason does not complete his term, his replacement shall be appointed for the balance of the uncompleted term, at the pleasure of the Governor.

4. No member of the Commission shall hold elective constitutional office during the member's term on the Commission. No more than six members of the Commission shall be registered members of the same political party at the time of their appointment. Members of the Commission shall receive no compensation but shall be reimbursed for customary and usual expenses directly incurred in the performance of their duties.

5. The Governor shall designate one member of the Commission to serve as Chairperson and another as Vice-Chairperson. The role of the Chairperson and Vice-Chairperson shall be defined in the Commission's procedures and standards. The Commission shall adopt and make public procedures and standards for the conduct of its affairs, consistent with this Order. Unless and until new procedures and standards are adopted by the Commission, the existing procedures and standards of the Judicial Nominating Commission shall govern, so long as they are consistent with this Order. Except as otherwise provided in this Order, the Commission shall act by majority vote.

6. All records and deliberations with respect to persons under consideration as nominees or prospective nominees shall be held in confidence by the Commission and shall be disclosed only at the direction of the Governor and only to the Governor or the Governor's designee(s). To the extent deemed appropriate by the Governor or the Governor's designee(s), however, the Chairperson or the Delaware State Bar Association's designee to the Commission may disclose certain records and deliberations of the Commission to the Delaware State Bar Association's Committee on Judicial Appointments, provided such disclosure shall be held in confidence by that Committee and disclosed to no one outside that Committee. The Delaware State Bar Association's Committee on Judicial Appointments shall provide comments to the designee of the Delaware State Bar Association, who shall, in turn, provide those comments to the Commission, prior to the Commission making its recommendations to the Governor. The Judicial Nominating Commission is established by the Governor solely to assist in the exercise of the Governor's discretion regarding judicial appointments, and the creation of the Commission and its adoption of procedures and standards in no way waives any

privilege attaching to the source and substance of any advice or information provided to the Governor in this regard, nor waives any privilege attaching to the records, investigations and deliberations of the Commission regarding the performance of its duties under this Executive Order. The records, investigations and deliberations of the Commission, along with all internal communications and communications with the Governor and the Governor's designee(s), are intended to be protected by the executive privilege.

7. All vacancies in any judicial offices filled by judges, as that term is defined above, shall be filled in the following manner. The Governor will notify the Chairperson of the Commission (or, in the Chairperson's absence, the Vice-Chairperson) of the occurrence, or expected occurrence, of the vacancy which the Governor intends to fill. Following the notice from the Governor, and in accordance with its own procedures and standards, the Commission shall submit to the Governor within sixty days a list for such vacancy of not less than three qualified persons willing to accept the office; provided, however, that the Commission may recommend fewer than three prospective nominees for such vacancy if, because of the small number of prospective nominees appropriate for recommendation at that time, or because of the existence of more than one office to be filled, a majority of the entire membership concludes that it should be permitted to submit a list containing fewer than three qualified persons for such office. The Governor may refuse to nominate a person from the list submitted and may require the Commission, within thirty days, to submit a supplementary list of no fewer than three other qualified persons willing to accept the office, subject to the same provisions governing the original list. The Governor may then nominate a person from the original or the supplementary list. The Governor shall not call upon the Commission for more than one supplementary list unless a majority of the members of the Delaware State Senate decline to give their consent to the Governor's nomination from the original or first supplementary list. If the Senate fails to confirm the Governor's nomination, then the Governor may direct the Commission to submit within thirty days a supplementary list of not less than three qualified persons willing to accept the office, subject to the same provisions governing the original list. The time limits for action by the Commission may be lengthened or shortened at any time by direction of the Governor.

8. The Governor shall only nominate a person from either the original list or a supplementary list to fill a vacancy created by a judge as defined above; provided, however, whenever there is a vacancy or prospective vacancy in the office of Chief Justice, Chancellor, President Judge of Superior Court, Resident Judge of Superior Court, Chief Judge of Family Court, or Chief Judge of the Court of Common Pleas, and the list of prospective nominees submitted by the Judicial Nominating Commission for such vacancy includes the incumbent, and the Governor elects to appoint a state judge of a constitutional or statutory court other than the incumbent to fill such vacancy, then the Governor also may elect, without further submission to or from the Commission, to appoint the incumbent, or any other person whose name appears on a list submitted by the Commission for such vacancy, to the derivative vacancy which will be created by the appointment of such other state judge.

9. In considering persons to submit to the Governor as prospective nominees, the Commission shall seek men and women of the highest caliber, who by intellect, work ethic, temperament, integrity and ability demonstrate the capacity and commitment to sensibly, intelligibly, promptly, impartially and independently interpret the laws and administer justice. The Commission shall seek the best qualified persons available at the time for the particular vacancy at issue.

10. If an applicant is not submitted by the Commission to the Governor as a prospective nominee, such action indicates merely that the Commission has determined not to recommend such applicant for the vacancy existing at that time and shall not reflect adversely on such applicant's qualifications and/or opportunity for future consideration for judicial appointment.

11. No member of the Commission shall be considered as a prospective nominee so long as he or she is a Commission member.

12. If any member of the Commission is an attorney for, or client, partner, employer, employee or relative of any applicant, then such member shall disclose the relationship to the Commission and shall not participate in the deliberations of the Commission concerning that applicant.

13. Executive Order Nos. Four and Sixteen, issued by Governor Ruth Ann Minner, are hereby rescinded.

**APPROVED** this 26th day of March, 2009

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**Governor**

**ATTEST:**

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**Secretary of State**

