

Chapter 8

Voting and Submitting Names of Nominees



After nominating commissioners have completed the initial steps of recruiting, screening, investigating and evaluating judicial applicants, they are ready to perform the final step in the selection process: selecting nominees.

Commissioners will find it helpful to agree on the voting and selection procedures in advance of their deliberations. Commissioners can discuss how they will proceed and commit guidelines to writing in four areas that directly affect the final selection of the best qualified candidates:

- post-interview deliberations;
- voting procedures;
- submitting names to the appointing authority; and
- issues of confidentiality.

Final Deliberations

In addition to the brief post-interview discussion of each candidate, commissioners will find it helpful to hold extensive deliberations upon completing all of the interviews. Commissioners can use this time to compare and evaluate the candidates, solidifying their own views before voting. By voicing favorable comments as well as concerns, a commission consensus may develop. A commission consensus will, in turn, make final voting easier. The vast majority of commissions deliberate in closed sessions. This encourages frank and candid discussion of the results of background checks and candidates' strengths and weaknesses, and preserves the privacy of those candidates.

Voting Procedures

Next, commissioners must choose a voting procedure. Although most commission rules require a majority of the members to agree on the nominees, voting methods vary. Less effective methods will not always produce a candidate with majority support nor will they yield nomination of the most qualified applicants. In fact, many existing systems for casting votes are manipulative and confusing. These less effective voting methods, as taken from the *Iowa Handbook for Judicial Nominating Commissioners*,¹ are described below:

Bloc. Each commissioner has a number of votes equal to the number of nominees. These votes can be applied to different candidates, all cast for one candidate, or otherwise apportioned. [Bloc-voting has been seen to compel commissioners to vote equally for candidates whom they do not approve strongly. Also, bloc-voting can skew the results where commissioners refuse to cast all the votes to which they are entitled. As Peter Fish observed in his article on choosing judges for the Fourth Circuit Court of Appeals, this voting system leaves “even

the wisest, best-informed and most insightful voter uncertain how best to cast a vote in order to obtain a desired choice.”²]

Bullet. Commissioners are allowed to cast fewer votes than the number of nominees, skewing the number of votes a candidate might receive in a round of balloting.

Plunking. In voting on each nominee’s position separately (especially with bullet voting) the commissioners can send to the appointing authority a slate of “strong and “weak” candidates, rather than only the best-qualified candidates, on the assumption that the “weak” candidates will be rejected. This in effect vitiates the power of the appointing authority. The balloting can be manipulated to give the appearance of a candidate’s strength or weakness by trading votes on a particular round or by bloc voting.

Weighted. Commissioners mark all candidates in numerical order with the most favored given the highest numerical ranking.³ The lists are collated and those nominees with the highest ranking are submitted to the appointing authority; or commissioners vote for one nominee at a time until the statutory number of nominees is reached.

This method is open to manipulation since a commissioner could rank a well-qualified applicant very low merely to eliminate competition for a different, favored applicant.

Choosing the system for casting votes is often considered to be the most difficult feature of a commission’s operation. The AJS study of U.S. Circuit Judge Nominating Commissions revealed that many commissioners found voting procedures to be a source of frustration and confusion.⁴ Choosing a voting method in advance frees the commission from criticism that certain members have manipulated the voting system to obtain nomination of their favorite candidates. A commission guided by clearly defined rules will be more likely to vote by a uniform and fair method.

Our study of constitutional provisions and statutes governing the operation of commissions shows that nominating commissions have the authority to establish their voting methods through procedural rules and guidelines. Very few commissions have not exercised their authority to adopt any procedural rules, and most have developed quite detailed rules. However, many of the commissions only loosely describe the method by which they cast their votes. And, in a notable development since this *Handbook* was last revised in 1985, commissions in a number of jurisdictions vote in public session.⁵

Although the constitutional or statutory provisions or procedural rules governing the commissions almost always specify that commissioners' votes on the final nominees be cast secretly by written ballot, one state, Nebraska, uses an oral roll-call voting procedure. Some commissioners have expressed a reluctance to adopt an open ballot voting procedure. They are concerned that an open ballot will inhibit free expression. For example, some commissioners may be intimidated into supporting an applicant openly favored by a more assertive commissioner. This same concern is true in jurisdictions where the vote is public. It may be particularly awkward for an attorney commissioner who publicly votes against, for example, a trial judge applying for an appellate position.

Recommended Method

The ideal voting method should be uncomplicated and equitable. We recommend a successive majority voting system that heightens the likelihood of conclusive results. Our successive majority system consists of three features:

- First, the number of votes allotted to each commissioner equals the number of names required to be submitted to the appointing authority;
- Second, each commissioner is allowed to cast only one vote per applicant; and
- Third, commissioners must cast each of their allotted votes for the applicable number of candidates. For example, if the commission must submit five names to the appointing authority, then each commissioner must allot one vote to each of five candidates. Voting will be repeated until the necessary number of candidates are nominated. On the first round commissioners will vote on the entire list of candidates. Each applicant must receive at least one less than a majority vote to remain under consideration during this initial round. For example, with a nine member commission each applicant must receive four votes.

If, after the first round of voting is completed too many applicants remain under consideration, this voting procedure is repeated with the remaining applicants. At this stage, to remain under consideration, each applicant must receive a majority of the commission's votes. For example, with a nine member commission each applicant must receive five votes. In some instances, it will be necessary to repeat the procedure until the prescribed number of candidates, usually three, has been selected. Again, each applicant would be required to receive a majority of votes to remain under consideration. However, the number of votes allowed each commissioner would be reduced by one. This model voting procedure yields a list of nominees that has maximum support among the commissioners.

For examples of how other jurisdictions phrase the successive-majority voting rule, please see the Appendix to this chapter for the recommended Iowa voting rule, and the Nevada and Rhode Island rules; the Rhode Island rule is followed by a schematic of their process.

Submission of Names and Disclosure of Nominees

After a list of nominees has been selected, the commission must determine how it will submit its choices to the appointing authority. Most constitutional provisions and statutes do not indicate the specific manner in which the commission transmits the names of nominees to the appointing authority.

There are several options. Although the names could be ranked in preferential order, that method may be unduly restricting to the appointing authority and lend credence to the criticism that merit selection is merely “selection by commission.” A better method requires the names of the nominees to be submitted in alphabetical order, a practice followed by the vast majority of commissions.⁶ Without infringing upon the appointing authority’s discretion, an alphabetical list allows for evaluation of each nominee, independent of any commission preference. Submission of an alphabetical list eliminates the possibility that commission biases for or against specific candidates will affect the final appointment.

The appointing authority is dependent upon the findings of the commission in selecting the most qualified candidate. At times, the governor or other appointing authority may want to benefit from the commission’s active investigative efforts. Commissions should, therefore, develop a policy concerning the circumstances under which applicant questionnaires, investigative files or other sources of information can be made available to the appointing authority. Limited disclosure is also possible. If the appointing authority merely needs preliminary information to begin an investigation, reference letters and certain documents such as criminal background and professional discipline investigations and tax returns could be turned over.

Confidentiality

The issue of commission confidentiality remains a delicate balance. The public’s right to be kept informed of the judicial process must be weighed against the rights of the applicants. Applicants’ rights include protection from public scrutiny and possible embarrassment when not receiving a final nomination. Experienced commissioners overall support some limited disclosure; they particularly support publication of names submitted to the appointing authority. In practice, almost all commissions make public the names of the nominees.⁷

Commissions may find it helpful to incorporate a general approach to the issue of confidentiality as part of their written guidelines. It should be noted that the public will often have more confidence in the commission's activities when it is kept informed. If the commission agrees that the list of names submitted to the appointing authority should be publicized, a time for publication should be determined. In addition, the chair or a designated commissioner may be given the responsibility of releasing the list of nominees and responding to the press. By selecting a spokesperson for the entire commission, the confidentiality of the deliberations will be protected and questions pertaining to individual commissioner's personal preferences may be avoided.

Ethical Considerations

Commission deliberations will play an important part in the final selection of judicial nominees. During these deliberations, each commissioner should feel that he or she can speak openly about the candidates. Special consideration should be given to the newly appointed and the non-lawyer commissioners to ensure that they have an adequate opportunity to participate in the discussions.

Since the results of the voting process are almost always made public, it is important that the voting procedures be fair and well-defined. By establishing specific voting procedures at the initial organizational meeting, commissions can avoid accusations that a method was chosen to favor specific candidates.

Commissions may also need to determine what information, if any, should accompany the list of nominees submitted to the appointing authority. If supplemental information is submitted for one nominee, the same kind of information should be submitted for all. Ethical problems may arise should the commission wish to pass on confidential information. If applicants have been informed ahead of time that such information will be available to the governor or other appointing body, and the confidential information remains confidential in its new hands, many problems can be avoided. Applicants, if informed, will be less likely to feel that their privacy has been invaded.

Conclusion

Commissions have found each aspect of judicial selection to require careful planning and clear procedures. Without careful planning, the vote may yield a weak compromise candidate or other unintended results. The goal is to design a fair system of voting, one that is simple and straightforward and results in the selection of candidates with broad commission support. The model for voting outlined

here, coupled with submission of an alphabetical list of nominees to the appointing authority, allows commissioners to fulfill their responsibilities to both the public and the appointing authority.

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- 1 Supreme Court Council on Judicial Selection, *Handbook for Iowa Judicial Nominating Commissioners* 13 (Celeste F. Bremer, ed., 2nd ed. 1990).
 - 2 Peter G. Fish, "Merit Selection and Politics: Choosing a Judge of the United States Court of Appeals for the Fourth Circuit, 15 *Wake Forest L. Rev.* 635, 645-46 (1979).
 - 3 For example, where there are ten candidates, the commissioner will rank the most favored *10* and the least favored *1*.
 - 4 Peter G. Fish, "Merit Selection and Politics: Choosing a Judge of the United States Court of Appeals for the Fourth Circuit, 15 *Wake Forest L. Rev.* 635, 646 (1979).
 - 5 E.g., Alaska; Arizona; Lake County, IN; New Mexico; North Dakota; Rhode Island.
 - 6 *Judicial Merit Selection Current Status*, Table 3—Rules governing submission of list of nominees (Chicago: American Judicature Society, 2003).
 - 7 *Id.*

APPENDIX TO CHAPTER 8

Sample Voting Rules

A.Iowa (recommended by the Iowa Supreme Court Council on Judicial Selection)

B.Nevada

C.Rhode Island

A. Iowa Voting Procedure Recommended by the Iowa Supreme Court Council on Judicial Selection¹

An *integrated* balloting method is recommended; balloting continues until candidates receive a number of votes equal to the majority of the statutory number of commissioners. This system is outlined below:

1. Ballot Round 1 and 2: From the list of all applicants, commissioners vote for the number of nominees to be chosen [i.e., 3 for Supreme Court, 5 for Court of Appeals, 2 for District Court, 3 for Associate District Court]. Commissioners cannot bloc or bullet vote.
2. To stay in the running after Rounds 1 and 2, each applicant must receive the number of votes at least equal to one less than a majority of the statutory number of commissioners (i.e., 7 for State commission, 5 for District commission, 3 for Magistrate commission).
3. Ballot Round 3: Commissioners vote for the number of nominees to be chosen [i.e., 3 for Supreme Court, 5 for Court of Appeals, 2 for District Court, and 3 for Associate District Court]. To be further considered, a candidate must receive the number of votes at least equal to a majority of the statutory number of commissioners (i.e., 8 for State commission, 6 for District commission, 4 for Magistrate commission).
4. Subsequent Ballot Rounds: If further rounds of balloting are necessary, each commissioner votes for one candidate less than the number of nominees required [i.e., 2 for Supreme Court, 4 for Court of Appeals, 1 for District Court, and 2 for Associate District Court].

¹ Supreme Court Council on Judicial Selection, *Handbook for Iowa Judicial Nominating Commissioners* 14 (Celeste F. Bremer, ed., 2nd ed. 1990).

B. Nevada

Rule 10: Selection of Nominees¹

10(D). The secretary shall prepare ballots, listing in alphabetical order the names of all applicants remaining under consideration.

1. Each commissioner will have three votes. On each ballot, each commissioner must cast three votes in favor of three applicants deemed qualified to serve in the judicial vacancy being considered.
2. If, on the first ballot, three or more applicants do not receive four or more votes, then successive ballots are recast. If on the first ballot, only three applicants receive four or more votes, those with three or more votes will pass to the second round.
3. To remain on the ballot after the first round of voting, an applicant must receive no fewer than five votes.² If three or more applicants do not receive five or more votes, then ballots are recast until at least three applicants receive no fewer than five votes. Voting is complete only when three or more candidates receive the votes of at least a majority of those voting.
4. In the event a diligent effort to follow the above-described procedures nevertheless deadlocks at some point in the process and fails to produce three or more nominees, then the commission may follow whatever voting procedure agreed upon by the majority of the commission to accomplish the nominating process, or, by two-thirds majority vote, disqualify all applicants and begin the application and selection process anew.
5. If three or fewer constitutionally qualified applicants apply for the position under consideration by the commission, the commissioners may:
 - a. Refer all the names of the applicants to the Governor for consideration without taking a vote on the merits of the applicants; or
 - b. By a two-thirds majority vote, disqualify all applicants and begin the application and selection process anew.

¹ From *Rules of the Nevada Commission on Judicial Selection*.

² The Nevada Supreme Court Commission has seven members; for local District Court vacancies two members are added to the Supreme Court Commission — one lawyer and one nonlawyer from the judicial district in which the vacancy occurs — who serve only until nominations have been submitted to the governor.

C. Rhode Island¹

Section V. Final Selection of Nominees

The voting procedure shall be as follows:

1. Each Commissioner shall have up to five (5) affirmative votes and shall only be allowed to cast one vote per applicant. A recusal shall not count as one of the allotted votes.
2. Initially, the Commissioners shall vote on all applicants who have been interviewed. The voting shall be completed after the first round if three, four or five candidates receive at least five (5) votes and no others receive at least four (4) votes, except as otherwise provided in procedure no. 6.
3. If more than five applicants receive a total of five (5) or more votes in the first round, a second round shall be required including only those applicants receiving five (5) or more votes. Each Commissioner shall be allotted a total of five (5) affirmative votes in any second round of voting.
4. A second round of voting shall be required if after the first round, there are three, four or five applicants with five (5) or more votes and one or more with four (4) votes, except as otherwise provided in procedure no. 6.
5. If after the second round of voting, more than five applicants receive five (5) or more votes, then those five applicants with the most votes among such applicants will be the nominees submitted to the Governor.

In the event of a tie for one or more positions, a run-off vote shall be conducted between or among those tied for the remaining positions. Each Commissioner shall be allotted the same number of votes as there are positions to fill in such run-off vote, and the applicant/interviewee(s) with the most votes shall be the remaining nominee(s). A recusal shall not count as one of the allotted votes.

6. In the event there are more than ten applicants who are initially voted upon, and after the initial vote, less than five applicants receive a minimum of four votes, then the initial vote shall be considered to be a preliminary vote for the purpose of choosing the ten or more (in case of a tie) applicants with the most votes after such preliminary vote. Thereafter, the procedure set forth in procedures 1 through 5 shall apply to all subsequent votes.

¹ From *Uniform Rules of Procedure for the Judicial Nominating Commission* (Adopted January 19, 1995; Revised/Adopted December 17, 2001).

JNC VOTING RULES Rhode Island

IF, AT END OF ROUND 1 VOTING:	THEN	RULE
<p>< 5 candidates receive \geq 4 votes</p> <p>AND</p> <p>Initial pool was 10+</p>	Take top 10 (plus ties) and proceed as below.	Rule 6
<p>3 - 5 candidates have \geq 5 votes</p> <p>AND</p> <p>No others have 4 votes</p>	They are the list.	Rule 2
<p>3 - 5 candidates have \geq 5 votes</p> <p>AND</p> <p>One or more have 4 votes</p>	They go to Round 2.	Rule 4
<p>> 5 candidates have \geq 5 votes</p>	They go to Round 2.	Rule 3
IF, AT END OF ROUND 2 VOTING:	THEN	RULE
<p>3 - 5 candidates have \geq 5 votes</p>	They are the list.	Rule 4
<p>> 5 candidates have \geq 5 votes</p>	The 5 with the most votes are the list.	Rule 5
<p>Ties broken by run-off</p>	The 5 with the most votes are the list.	Rule 5

•5 votes per Commissioner, each round (includes recusals) **(RULE 1, 3)**

•In a run-off, each Commissioner has as many votes as there are positions remaining to be filled **(RULE 5)**