

September 30, 2019

Via electronic mail

Ms. Bianca Garcia
Executive Director
Judicial Nomination Commission
515 5th Street NW, Suite 235
Washington D.C. 20001
dc.jnc@dc.gov

Public Comments: Judicial Nomination Commission Regulations

Dear Ms. Garcia:

The Legal Aid Society of the District of Columbia¹ submits the following comments on the notice of proposed rulemaking the Judicial Nomination Commission issued on August 30, 2019 regarding procedures for nominating and confirming candidates to the District of Columbia courts. We also enclose suggested edits to the proposed rules.

Proposed 28 DCMR §§ 2102.1, 2103.7, and 2103.8(c)

It is our understanding that the Commission's current practice is to consider for potential nomination only those candidates who submit an application. This understanding is reflected in the proposed rules at 28 DCMR §§ 2102.1, 2103.7, and 2103.8(c). If the Commission intends to continue this practice, we recommend that it make the application requirement explicit in these regulations.

Suggested Addition to 28 DCMR § 2102.1(c)

The Commission should clarify in a new paragraph that any combination of having practiced law in the District, teaching on the faculty of a law school in the District, or employment as a lawyer by the U.S. or District governments for the five years immediately preceding the application should qualify a candidate for consideration by the Commission. For example, a lawyer who spends 20 years as an Administrative Law Judge in the District and then four years teaching full-time at a law school in the District should not be disqualified simply because her five years of employment immediately preceding her application featured a combination of qualifying professional activities.

¹ Legal Aid is the oldest and largest general legal services program in the District of Columbia. Over the past 87 years, Legal Aid has provided legal assistance to tens of thousands of individuals and assisted many more through our systemic litigation and advocacy. Today, we provide legal services in five broad areas: housing, family law, public benefits, consumer law, and immigration.

Proposed 28 DCMR § 2102.1(d)

Legal Aid is concerned about this proposed rule because it would reduce the number of candidates eligible for District judgeships, potentially depriving the District of highly qualified candidates. At present, applicable law requires a nominee to have “maintained an actual place of abode in the District for at least ninety days immediately prior to the *nomination*” by the President. D.C. Code § 1-204.33(b)(3) (emphasis added). In contrast, the proposed rule (which admittedly may reflect the Commission’s current practice) would require that an applicant have maintained District residency for at least ninety days before the Commission’s deadline for submitting an *application* to be placed on a list for potential nomination. By advancing the date by which an applicant must commence District residency, the proposed rule shrinks the pool of eligible candidates. We believe that the current statutory requirement is sufficient to protect the District’s interests in ensuring that judicial nominees and judges reside in and have sufficient ties to the District without unnecessarily restricting the pool of potential candidates.²

Indeed, we urge the Commission to study whether refining the statutory residency requirement could result in a bench that is more diverse in terms of race, class, and professional experience. At the outset, it is important to observe that a *post*-appointment residency requirement serves a different purpose than a *pre*-appointment residency requirement. As to post-appointment residency requirements, Legal Aid strongly supports the requirement that District judges and magistrate judges should be District residents for a variety of reasons, including that they should be subject to the same laws that they are interpreting and applying to others.

As to pre-appointment residency requirements, however, we would like the Commission to consider whether both the statutory language and certainly the more restrictive proposed rule pose unnecessary impediments to obtaining the highest quality judiciary. We believe it is imperative to ensure that District judges have a strong commitment to, close connection with, and solid understanding of the District, its residents, and its laws. The statutory requirements that a judge be a member of the District Bar and also have five years’ experience as a District practitioner, law professor, and/or government attorney are useful proxies for commitment, connection, and understanding. *See id.* § 1-204.33(b)(2). In particular, the Commission should keep commitment to District residents among its highest priorities in assessing candidates.

That said, although pre-appointment residency in the District will often be an adequate proxy for commitment to, connection with, and understanding of the District, it is not a perfect indicator and perhaps should not necessarily be required of all judicial nominees. An attorney living just outside

² For the same reason, we recommend that the Commission revise its application to replace the current certification, “I have been a bona fide resident of the District of Columbia for at least the past 90 days, with an actual place of abode in the District, and will retain such residency while serving as a judge, if appointed,” *Applicant Eligibility – Certification* (JNC Form 28), JUD. NOMINATION COMM’N, <https://jnc.dc.gov/sites/default/files/dc/sites/jnc/publication/attachments/JNC%20Form%2028.April%202017.pdf> (Apr. 2017), with the following, which more accurately captures the statutory requirement: “I will become a bone fide resident of the District of Columbia at least 90 days before any anticipated nomination by the President and will retain such residency while serving as a judge, if appointed.”

the District in Maryland or Virginia who has spent her career practicing District law in the District courts or administrative fora – for example, as an employee in the Office of the Attorney General, as a lawyer for a District of Columbia Agency, as an Administrative Law Judge, as a poverty legal services lawyer serving District residents, or as a criminal defense attorney on behalf of indigent District residents – may very well be a better candidate than an attorney who lives in the District and has spent his career practicing international patent law at a multinational law firm with an office in the District. But without knowing whether there is a reasonable likelihood that she will be placed on a list, nominated, confirmed, and/or appointed, this nonresident attorney (whose salary might be significantly lower than that of a judge) might be unwilling to move to the District only for the sake of submitting an application, as moving would likely cause significant expense and disruption of personal and family life.

Congress and the District appear to recognize that imposing a residency requirement only *after* appointment (not before) helps ensure a strong candidate pool for certain District judgeships and government positions. Family Court magistrate judges need not become District residents until 90 days after their appointment. *Id.* § 11-1732A(b)(5)(B). District Administrative Law Judges need not become District residents until 180 days after taking office. *Id.* §§ 2-1831.04(b)(6), 2-1831.08(d-1). Senior District officials, including subordinate agency heads, independent agency heads, and instrumentality heads, members of the Executive Service, Excepted Service, Senior Executive Service Attorney Service, and Legal Service of the Council, and highly compensated appointees, similarly need not become District residents until 180 days after their appointment. *Id.* §§ 1-515.03(a), 1-608.59(b). Applicants to other District positions receive preference in hiring if they are District residents, but they need not become District residents to serve. *Id.* § 1-515.02. The District has no residency requirement for sworn members of the Metropolitan Police Department. *See id.* § 5-107.01.

Given the importance of having lawyers with a diverse array of experience and the current and widespread practice of permitting District employees to acquire District residency after appointment (if it is required at all), the Commission should study whether, in unusual circumstances, permitting nonresidents to become judicial candidates – while maintaining the requirement that an appointed judge must become a District resident – would result in an improved bench. For example, a strong argument can be made that nonresident attorneys who have devoted a substantial portion of their career to the practice of District law should be eligible for judgeships, contingent on their moving into the District promptly after appointment and maintaining residency for the duration of their tenure on the bench.³

Delaying the date by which a candidate or appointee must become a District resident would not undermine the principle that once someone becomes a judge, that person must reside in the District.

³ By way of comparison, Delaware requires residency only once a judge has assumed office, and Maine, New Hampshire, and Rhode Island have no residency requirement for judges. DEL. CONST. art. IV, § 2 (requirement of current citizenship for Supreme Court Justices and State Judges); ME. REV. STAT. tit. 4, §§ 1, 101, 157(1)(A) (residency requirement for District Court Judges but not for Supreme Judicial Court and Superior Court Justices); R.I. GEN. LAWS § 8-16.1-4(a) (no residency requirement for any judges). We have not done a review of which cities do – and which do not – have residency requirements.

And although the Commission could continue to consider longstanding District residency as a factor in favor of any individual candidate, it would also have discretion to consider nonresident attorneys who have demonstrated a strong commitment to providing legal services to District residents and practicing in District tribunals.

Legal Aid of course recognizes that only Congress may amend the residency requirement. *See id.* § 1-203.03(a) (prohibiting amendments by the District Council to this part of the District Charter). Nevertheless, we believe that this issue is worthy of further study, and we urge the Commission not to promulgate regulations that foreclose this continued discussion.

Proposed 28 DCMR § 2103.6

Legal Aid takes no position on this proposed rule and writes only to alert the Commission to what appears on its face to be an inconsistency between the proposed rule and statutory requirements. The proposed rule requires the President to nominate someone from a list within 60 days of the Commission *transmitting* the list to the President. Under D.C. Code § 1-204.34(d)(1), however, the President has 60 days to nominate someone after *receiving* the list from the Commission. This difference may be inconsequential as a practical matter, but the Commission may want to harmonize the proposed rule with the statute.

Proposed 28 DCMR §§ 2103.7 and 2103.8(b)

Proposed 28 DCMR §§ 2103.7 and 2103.8(b) appear not to take into account the President's prerogative under D.C. Code § 1-204.34(d)(1) to nominate more than one candidate from one list if two vacancies exist at the same time. For example, under proposed § 2103.7, if the Commission transmits two lists of candidates to the President for two vacancies and the President nominates two people from the same list (one to fill each vacancy), the list from which both nominees were selected would be deemed expired as soon as the first nominee is appointed. Under the proposed rule, it is unclear what effect the expiration of the list would have on the otherwise pending nomination of the second nominee from that list. A similar ambiguity would exist under proposed § 2103.8(b) if the first nominee were rejected by the Senate and the President made no further nomination within 60 days. Again, under that scenario, the list would expire while the second of the two original nominations from that list was still pending.

To address these ambiguities, we suggest adding 28 DCMR § 2103.12, which would clarify that once an individual is nominated, the expiration of the list on which that person appeared does not preclude that person's confirmation and appointment.

Proposed 28 DCMR § 2103.9

Legal Aid notes that this provision employs an unusual method for computing time that could be confusing, particularly to attorneys. The proposed rule would compute time to "include the date of the event that triggers the period," but judicial and administrative rules typically exclude the day of the triggering event in calculating time, and we see no need to depart from the usual practice here.

* * *

Thank you for the opportunity to submit comments on the proposed rulemaking. If you have questions about the foregoing comments, please contact me at 202-661-5957 or eangel@legalaiddc.org.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Angel". The signature is fluid and cursive, with the first letter "E" being particularly large and stylized.

Eric Angel
Executive Director

Enclosure: Suggested edits to proposed rules

JUDICIAL NOMINATION COMMISSION

NOTICE OF PROPOSED RULEMAKING

The Judicial Nomination Commission (Commission), pursuant to the authority set forth in Section 434(c)(2) of the District of Columbia Home Rule Act, effective December 24, 1973 (87 Stat. 796; D.C. Official Code § 1-204.34(c)(2) (2016 Repl.)), hereby gives notice of the intent to promulgate a new Chapter 21 (Judicial Nomination Commission) of Title 28 (Corrections, Courts, and Criminal Justice) of the District of Columbia Municipal Regulations (DCMR), in not less than thirty (30) days from date of publication of this notice in the *D.C. Register*.

The purposes of this rulemaking include to clarify ambiguities in the procedures relating to the status of applicants on judicial nomination lists. When there is a vacancy in a District of Columbia court, the Commission, following an application and background check process, selects three candidates and recommends those candidates on a list sent to the President, who nominates one of the Commission's recommended candidates. If the President does not nominate a candidate within sixty (60) days of receiving the list, then the Commission nominates a candidate from the list. Candidates must be confirmed by the Senate before being appointed to a judicial office.

The procedures in the Home Rule Act are ambiguous as to what happens when the Senate fails to confirm a nominee or returns a nomination. Accordingly, the Commission is promulgating these rules to clarify the procedure to be followed when the Senate fails to confirm or returns a nomination. The rulemaking specifies that when the Senate rejects, returns, or fails to take action on a nomination by the end of a Senate session, the nomination will be deemed rejected, and the President will have sixty (60) days to make another nomination. If the President does not make another nomination within sixty (60) days, the list of candidates for the vacancy is deemed expired, and the Commission submits another list to the President, starting the application process anew. The rulemaking also clarifies certain application procedures for judicial candidates and codifies what constitutes a quorum for the adoption of an action by the Commission. This rulemaking supersedes any prior rules of the Commission to the extent of any inconsistency.

Chapter 21, JUDICIAL NOMINATION COMMISSION, is added to Title 28 DCMR, CORRECTIONS, COURTS, AND CRIMINAL JUSTICE, to read as follows:

CHAPTER 21 JUDICIAL NOMINATION COMMISSION

Secs.

- 2101 MEETINGS OF THE COMMISSION
- 2102 APPLICATIONS FOR JUDICIAL NOMINATIONS
- 2103 RECOMMENDED NOMINEES LISTS

2101 MEETINGS OF THE COMMISSION

2101.1 A majority of the serving members of the Judicial Nomination Commission (Commission) shall constitute a quorum. The vote of a quorum shall be necessary for the adoption of an action by the Commission.

2102 APPLICATIONS FOR JUDICIAL NOMINATIONS

2102.1 To be considered for nomination for a vacancy in the position of judge of a District of Columbia court, a person must submit an application to the Commission. ~~a~~An applicants shall:

- (a) Be a United States citizens;
- (b) Be an active members of the unified District of Columbia Bar;
- (c) For the five (5) years immediately preceding the application:
 - (1) Have practiced law in the District of Columbia;
 - (2) Have been on the faculty of a law school in the District of Columbia;~~or~~
 - (3) Have been employed as a lawyer by the United States government or the District of Columbia government;or
 - (4) Have engaged in any combination of the activities described in paragraphs (1)-(3).
- (d) ~~Be bona fide residents of the District of Columbia, and have maintained an actual place of abode in the District for at least ninety (90) days immediately prior to the specified deadline for applications~~Certify that the applicant is prepared to comply with the District of Columbia residency requirements set forth in D.C. Code § 1-204.33(b)(3), including the requirement that the applicant, if nominated, have maintained District residency for at least ninety (90) days immediately prior to the nomination by the President;
- (e) Have not served, within two (2) years prior to the deadline for applications, as a member of the District of Columbia Commission on Judicial Disabilities and Tenure, or as a member of the Commission; and
- (f) Be under the statutory age of mandatory retirement for District of Columbia judges.

2103 RECOMMENDED NOMINEES LISTS

- 2103.1 For each judicial vacancy on a District of Columbia court, the Commission shall transmit a Recommended Nominees List (List) of three recommended nominees to the President of the United States.
- 2103.2 The Commission shall not include on a List any person who is currently on a List for a vacancy on the same District of Columbia court.
- 2103.3 When a vacancy will occur due to the expiration of a District of Columbia judge's term of office or a District of Columbia judge reaching the statutory mandatory retirement age, the Commission shall transmit a List to the President no later than sixty (60) days prior to the last date of the judge's term or retirement date.
- 2103.4 When a vacancy occurs for any other reason not specified in § 2103.3, the Commission must transmit a List to the President no later than sixty (60) days after the date the vacancy occurs.
- 2103.5 When a person named on a List requests that the recommendation be withdrawn, dies, or in any other way becomes disqualified to serve as a District of Columbia judge, the Commission shall promptly recommend a person to replace the person originally recommended from the list of applicants for the vacancy.
- 2103.6 If the President does not timely nominate a person to fill a District of Columbia judicial vacancy from ~~the~~ an existing Lists within sixty (60) days of ~~the Commission transmitt~~ receiving the List for the particular District of Columbia judicial vacancy ~~to the President from the Commission~~, the Commission shall nominate one person from the List for that vacancy, and with the advice and consent of the United States Senate, shall appoint the person to the judicial vacancy, in accordance with Section 434(d)(1) of the District of Columbia Home Rule Act, effective December 24, 1973 (87 Stat. 796; D.C. Official Code § 1-204.34(d)(1)).
- 2103.7 When a person is nominated, by either the President or the Commission, and the United States Senate confirms the nomination, thereafter, upon the appointment of the person, either by the President or the Commission, the List for the vacancy filled by the nomination is deemed expired, and the Commission may include any person on the expired List on a subsequent List for a District of Columbia judicial vacancy if that person applies for the relevant vacancy.
- 2103.8
- (a)
- (1) When a nomination for a particular District of Columbia judicial vacancy, whether made by the President or the Commission, is rejected by the Senate, failed confirmation under the Standing Rules of the Senate, or is otherwise returned by the Senate, the nomination shall be deemed rejected.

(2) The President shall have sixty (60) days to nominate a person to fill the particular District of Columbia judicial vacancy from one of the Lists, unless the President is sworn into office during that sixty (60)-day period, in which case the President shall have sixty (60) days from the date of assuming office to nominate ~~another~~ person to fill the judicial vacancy.

(b) If the President does not timely nominate a person to fill a particular District of Columbia judicial vacancy within sixty (60) days of the date of the rejection, the List for that vacancy shall be deemed expired. The Commission shall promptly transmit a new List for the vacancy.

(c) In submitting a new List for a vacancy under this subsection, the Commission shall comply anew with the procedures specified by this chapter and Section 434 of the District of Columbia Home Rule Act, effective December 24, 1973 (87 Stat. 796; D.C. Official Code § 1-204.34). Persons on the expired list, including the rejected nominee, may reapply for the vacancy, but shall not be considered for the vacancy if they do not reapply.

2103.9 The computation of time for any time period specified in this section shall ~~begin on and in~~exclude the date of the event that triggers the period. Time periods shall be measured in calendar days, unless the last day is a Saturday, Sunday, or legal holiday, in which case, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

2103.10

(a) Lists shall be deemed transmitted on the day that they are sent to the President by the Commission, not when received by the President.

(b) Nominations rejected by Senate vote shall be deemed to have occurred on the date of the vote of rejection.

(c) Nominations deemed rejected by the operation of these rules shall be deemed to have occurred on the date on which the adjournment, recess, or other event triggers the operation of the rule.

2103.11 As of the effective date of these rules, all Lists from which a nomination has been rejected by the Senate and no subsequent nomination has been made are deemed expired. The Commission shall promptly transmit new Lists to the President for each such expired List consistent with the provisions of Subsection 2103.8(c).

2103.12 The expiration of a List shall not prevent the confirmation or appointment of any individual from that List who was nominated before the List expired.

All persons desiring to comment on the subject of this proposed rulemaking should file comments in writing not later than thirty (30) days after the date of the publication of this notice in the *D.C. Register*. Comments should be clearly marked “Public Comments: Judicial Nomination Commission Regulations” and sent to the Judicial Nomination Commission, 515 5th Street N.W., Suite 235, Washington, D.C. 20001, or by email to Bianca Garcia, at dc.jnc@dc.gov. Copies of the proposed rules may be obtained during the hours of 9:00 AM to 5:00 PM, Monday through Friday, excluding holidays by contacting Bianca Garcia, at 202-879-0478 or dc.jnc@dc.gov.