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Rhode Island's Judicial Nominating Commission: Can Reform Become Reality?

Michael J. Yelnosky
Roger Williams University School of Law

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Michael J. Yelnosky*

"Well done is better than well said."[1]

INTRODUCTION

It seems an appropriate time to assess preliminarily Rhode Island's new judicial selection process. In just two years, fourteen judicial vacancies have been filled using the new process, including three on the five-member supreme court.[2]

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* Assistant Professor, Roger Williams University School of Law. B.S. 1982, University of Vermont; J.D. 1987, University of Pennsylvania. I am grateful to Michael A. Kelly, the Chair of Rhode Island's Judicial Nominating Commission, and Kathleen A. Sousa, the Commission's legal assistant, for fulfilling my requests for information. My thanks also to Richard Morris for his excellent research assistance.

I am delighted to have the opportunity to contribute to the inaugural issue of this review, our law school's first forum for articles addressing legal issues of interest to Rhode Island. Hopefully, the resources of the law school, the faculty, and the student body will regularly be used to try to improve the administration of justice here. "The mission of a law school is not just to educate persons . . . but also to contribute to and enhance the legal culture of every jurisdiction which the law school touches." Joseph R. Weisberger, Foreword, 1 R.W.U. L. Rev. vii, ix (1996); *see also* D. Morgan McVicar, *State's First Law School Begins Classes in Bristol*, Prov. J. Bull., Aug. 24, 1993, at A1, A6 (describing this law school's potential to improve the quality of the legal culture in Rhode Island). Some observers have argued the Rhode Island legal system is in need of significant reform. *E.g.*, Alan M. Dershowitz, Reversal of Fortune 309 (1986) (questioning the overall quality of justice in Rhode Island); *Roger Williams Law*, Prov. J. Bull., Sept. 6, 1993, at A6 (expressing hope that Roger Williams University School of Law can help elevate the professional and ethical standards of the state's legal system "[i]n view of . . . the disheartening news about the court system").

1. Benjamin Franklin, Poor Richards Almanac (1937) (*quoted* in Burton Stevenson, Home Book of Quotations 2227 (1967)).

2. A Judicial Nominating Commission is central to the process. Because the enabling legislation is silent on many important aspects of the Commission's work,

I have two objectives. The first is to recount comprehensively the work of the Judicial Nominating Commission since its inception, focusing on both the procedural issues it addressed and its selections.[3] Thus, Part I is an historical record that can hopefully inform subsequent discussions of the efficacy of the new selection process. My second objective is to offer some preliminary assessments of the new selection process. I do so in Part II, where I also respond to some of the comments made by other observers.[4] I conclude that although many improvements can and should continue to be made, the new selection process represents a significant step in the right direction. Specifically, the new process 1) reduces the likelihood that partisan politics will be the determining factor in judicial selection, 2) improves the chances that lawyers of all personal and professional backgrounds will be considered and selected for judicial vacancies, and 3) vastly increases opportunities for public participation and oversight, which should increase public confidence in the judiciary.

I. THE WORK OF THE JUDICIAL NOMINATING COMMISSION

A. *The Birth of the Commission*

Chief Justice Thomas Fay's resignation in September 1993 set the stage for changes in Rhode Island's judicial selection process.[5]

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the Commission had to formulate its own procedures for advertising vacancies, accepting applications, screening applicants, voting on applicants, accepting public comment, and otherwise opening its work to the public. The Commission has also sought and received one advisory opinion from the Rhode Island Supreme Court and two advisory opinions from the Ethics Commission.

3. As a representative of Common Cause of Rhode Island, I have attended most meetings of the Commission since it began its work in June of 1994. I am a member of the governing board of Common Cause, but the comments in this article are my own and do not necessarily reflect the views of Common Cause of Rhode Island. No member of that organization saw this article before it was published.

4. Barton Jenks, whose comments about the new judicial selection law appear in this volume, Barton P. Jenks, III, *Rhode Island's New Judicial Merit Selection Law*, 1 R.W.U. L. Rev. 63 (1996) and I previously addressed some of these issues in editorials in the *Providence Journal Bulletin*. *Compare* Barton P. Jenks, III, *The Flaws in Rhode Island's New Judicial Selection Process*, Prov. J. Bull., Feb. 14, 15, 1995, at A9, A11 *with* Michael J. Yelnosky, *A Noncynical Look at Judicial Reform*, Prov. J. Bull., March 21, 1995, at A11. I prefer to use this space to offer a detailed account and assessment of the work of the Nominating Commission rather than to focus on Mr. Jenks's critique. I will address his comments where they are implicated by my evaluation of the new selection process.

5. Russell Garland, *R.I. Changes the Method of Selecting its Judges*, Prov. J. Bull., June 3, 1994, at A1 [hereinafter *R.I. Changes Method*].

He was the second consecutive chief justice of the Supreme Court of Rhode Island to resign in the face of allegations of official misconduct.[6] On June 2, 1994, legislation created a commission empowered to screen applicants for vacancies on all of Rhode Island's courts.[7] The commission must recommend three to five names to the governor for every vacancy.[8] The governor's selection from those recommended must be confirmed by the Senate,[9] except in the case of supreme court justices, who must also be confirmed by the House.[10]

Formerly, the governor had the statutory power to select judges for the lower courts, subject to senate confirmation.[11] Rhode Island's Constitution formerly gave the House and Senate sitting in grand committee the power to select supreme court justices.[12] The new selection statute controlled lower court selections immediately, but the new process did not go into effect for vacancies on the supreme court until November 1994, when the voters ratified a constitutional amendment.[13]

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6. Scott MacKay, *House Approves Bill to Change Judicial Selection,* Prov. J. Bull., May 27, 1994, at B5. Justice Fay had established a secret court fund that he managed with his court administrator, former Speaker of the House Matthew Smith. Chief Justice Fay's predecessor, Joseph Bevilaqua, was facing impeachment because of his links with organized crime figures and his use of court employees for personal errands. *Id.*

7. *R.I. Changes Method, supra* note 5, at A1.

8. R.I. Gen. Laws §§ 8-16.1-5(a), 8-16.1-6(a) (Supp. 1994).

9. *Id.* § 8-16.1-6(c).

10. *Id.* § 8-16.1-5(c).

11. R.I. Gen. Laws § 8-2-2(a) (1985) (superior court); *id.* § 8-8-7(a) (district court); *id.* § 8-10-11 (family court); *id.* § 28-30-2 (1968) (workers' compensation court); *id.* § 31-43-1 (administrative adjudication court). Each has been superseded by R.I. Gen. Laws § 8-16.1-6(a).

12. R.I. Const. art. X, §§ 4, 5 *amended by* R.I. Const. art. X, §§ 4, 5.

13. *R.I. Changes Method, supra* note 5, at A1. Rhode Island's Constitution now provides:

> The governor shall fill any vacancy of any justice of the Rhode Island Supreme Court by nominating, on the basis of merit, a person from a list submitted by an independent non-partisan judicial nominating commission, and by and with the advice of the senate, and by and with the separate advice and consent of the house of representatives, shall appoint said person as a justice of the Rhode Island Supreme Court. The governor shall fill any vacancy of any judge of the Rhode Island Superior Court, Family Court, District, Workers' Compensation Court, Administrative Adjudication Court, or any other state court which the general assembly may from time to time establish by nominating on the basis of merit, a person from a list submitted by the aforesaid judicial nominating commission, and by and with the advice and consent of the senate, shall appoint

The nine members of the commission were sworn in on June 15, 1994.[14] All were appointed by the governor. The governor has complete discretion to make four appointments, except that three of those appointees must be attorneys.[15] The remaining five commissioners are selected by the governor from lists forwarded by legislative leaders.[16] Members serve staggered four year terms.[17]

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said person to the court where the vacancy occurs. The powers, duties, and composition of the judicial nominating commission shall be defined by statute.

R.I. Const. art. X, § 4.

14. Russell Garland, *Commissioners to Screen Judges are Sworn In,* Prov. J. Bull., June 16, 1994, at D20.

15. § 8-16.1-2(a)(2)(ii)—(iii). Governor Sundlun's attorney appointments were Michael Kelly, who was then a partner at Adler, Pollock & Sheehan; Lise Gescheidt, a criminal defense lawyer in private practice; and Girard Visconti, a partner at Visconti & Petrocelli. Sundlun's non-lawyer appointment was Pablo Rodriguez, M.D., medical director of Planned Parenthood of Rhode Island. The governor exercised his power under § 8-16.1-2(e) to name Michael Kelly chair. *Commissioners to Screen Judges, supra* note 14, at D1.

16. The speaker of the house submits a list of three attorneys to the governor. § 8-16.1-2(a)(1)(i). From that list Governor Sundlun selected William Devereux, a partner at McGovern, Noel & Benik. *Commissioners to Screen Judges, supra* note 14, at D1. The majority leader of the senate submits a list of three persons who may or may not be attorneys. § 8-16.1-2(a)(1)(ii). The governor selected attorney Peter McGinn from that list, who is a partner at Tillinghast, Collins & Graham. *Commissioners to Screen Judges, supra* note 14 at D1. The speaker and majority leader also jointly submit a list of four non-attorneys. § 8-16.1-2(a)(1)(iii). The governor selected Sharon Burgess from that list, a blood transfusion specialist with the Rhode Island Blood Bank. *Commissioners to Screen Judges, supra*, note 14 at D1. The minority leader in the house submits a list of three non-attorneys. § 8-16.1-2(a)(1)(iv). The governor selected Barbara Colvin from that list, a retired nurse who was formerly assistant director of surgical nursing at Rhode Island Hospital. *Commissioners to Screen Judges, supra*, note 14 at D1. The minority leader in the senate also submits a list of three non-attorneys. § 8-16.1-2(a)(1)(v). The governor selected George Hartmann from that list, professor emeritus of biology at Rhode Island College. *Commissioners to Screen Judges, supra,* note 14 at D1.

17. To stagger the initial terms, some had to be abbreviated. One of the governor's attorney appointments and the appointment that came from the house minority leader's list served one year terms. Therefore, they have already been replaced. § 8-16.1-2(b)(1). Governor Almond named Alan Flink, a partner at Edwards & Angell, to replace Girard Visconti, a Sundlun appointee. Barbara Colvin, who was chosen by Governor Sundlun from the list forwarded by the house minority leader, was replaced by David Campbell, vice-president for human resources and employee development at Milford-Whitinsville Regional Hospital. Scott MacKay and Russell Garland, *Flink and Campbell Added to Judicial Nominating Panel*, Prov. J. Bull., June 26, 1995, at B3.

B. *The First Wave*

1. *Screening*

After the commissioners were named, Governor Sundlun notified the Commission of eight vacancies—four in the superior court, three in the family court, and one in the district court.[18] Before it could begin selecting nominees, the Commission first adopted temporary emergency rules and regulations to guide its work.[19] The Commission then solicited applications for the vacancies by publishing notices of vacancy in "newspapers circulated throughout the State of Rhode Island including minority publications."[20] The Commission prepared application and financial disclosure forms modeled after those suggested by the American Judicature Society.[21] More than 185 persons applied for the eight vacancies.[22]

Given the large number of applicants, the chair exercised the discretion given by the temporary rules to "appoint one or more subcommittees to review completed questionnaires and background materials as part of the screening process."[23] The Commission narrowed the field to approximately eighty applicants, whom

18. Russell Garland, *New Commission Nominates Judges,* Prov. J. Bull., Aug. 5, 1994, at A1. Under R.I. Gen. Laws § 8-16.1-6(a), "[t]he governor shall immediately notify the commission of any vacancy or prospective vacancy of a judge of any state court." *Id.*

19. Under the Administrative Procedures Act, R.I. Gen. Laws § 42-35-3(b) (1993), an agency may adopt a temporary emergency rule without the notice and comment period normally required. *Id.*

20. Draft Uniform Rules for the Judicial Nominating Commission, § I, p.1 (July 18, 1994) [hereinafter Draft Rules]. Ultimately, the commissioners adopted a rule requiring the Commission to publish the notice of vacancy, at a minimum, in *Rhode Island Lawyer's Weekly, Providence Journal Bulletin, Newport Daily News, Pawtuxet Valley Times, Westerly Sun, Pawtucket Times, Woonsocket Call, Providence American, Shoreline en Español, Portugese American Journal, La Precencian,* and *The Echo.* Uniform Rules for the Judicial Nominating Commission, § I, p.1 (Jan. 19, 1995).

21. Marla N. Greenstein, American Judicature Society, Handbook for Judicial Nominating Commissioners 31-33 (1985).

22. *New Commission Nominates Judges, supra* note 18, at A1.

23. Draft Rules, *supra* note 20, § I, p. 1. That provision still exists. Uniform Rules for the Judicial Nominating Commission, § I, p. 1 (Jan. 19, 1995).

it subsequently interviewed.[24] The Commission publicized only the names of applicants selected for interviews.[25]

In an attempt to promote free discussion between Commissioners and applicants during interviews, the Commission created a presumption in favor of private interviews. That presumption could be overcome only if an applicant chose a public interview.[26]

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24. *New Commission Nominates Judges, supra* note 18, at A1. The individuals chosen for interviews for superior court were District Court Judge Edward Clifton, Howard Croll, District Court Judge Gilbert Indeglia, Michael Silverstein, Netti Vogel, Frank Williams, Stephen Fortunato Jr., Scott Keefer, Paul Lietar, District Court Judge Patricia Moore, Michael McElroy, Susan McGuirl, District Court Judge Robert Pirraglia, Dennis Roberts II, Anthony DiGioia, Barbara Hurst, District Court Judge Walter Gorman, William Brody, Richard Kyte, Kent Willever, James Ryan, Kenneth Madden, David Martin and James O'Neil. Russell Garland, *Panel To Nominate Judges Seeks Opinions on Candidates*, Prov. J. Bull., July 19, 1994, at C7.

For family court the Commission interviewed Nancy Palmisciano, District Court Judge Gilbert Rocha, Robert Silva, Marilyn Shannon McConaghy, Joseph Roszkowski, Ira Schreiber, John Farley, Workers' Compensation Court Judge John Rotondi Jr., John Mutter, Laureen D'Ambra, Joseph Keough, Mary Nagle, George Muksian, Frank Cenerini, Lidia Sanchez, Barbara Margolis, Michael McCarthy, Sandra Lanni, Edward Newman, Alfred Rego, Maureen Hobson and Rossi Lee Harris. *Id.*

For district court the Commission interviewed Elaine Bucci, Patricia Byrnes, Frank Cenerini, Gregory Dias, John Farley, Family Court Judge Michael B. Forte, William Gallogly, Kevin Gavin, John Hardiman, District Court Special Master Joseph Ippolito, James Jerue, Joseph Keough, Nicholas Long, Kenneth Madden, John McLaughlin, George Muksian, John Mutter, Everett Petronio, former Sen. John Sabatini, Lidia Sanchez, Robert Silva, Michael Stone, John Turano, Robert Weisberger, Kent Willever, David Kerins, Ralph DellaRosa, James Donnelly, Merlyn O'Keefe and Administrative Adjudication Court Judge Marjorie R. Yashar. *Id.*

25. "The list of all persons to be interviewed shall be made public as soon as is practical and the Commission shall encourage written public comment regarding the qualifications of said interviewees." Draft Rules, *supra* note 20, at § III. This provision still exists. Uniform Rules for the Judicial Nominating Commission, § I, p. 1 (Jan. 19, 1995).

The Commission's Chair, Michael Kelly, expressed concern that an applicant's professional reputation would be harmed if the public knew the applicant was not selected for an interview. Commissioner Peter McGinn added that he did not see any great public interest in revealing the names of those who did not get by an initial review. *Panel to Nominate Judges, supra* note 24, at C7. An editorial in the *Newport Daily News* agreed with McGinn. *Judicial Panel Starts Off on Wrong Foot*, Newport Daily News, July 19, 1994, at A7 (explaining that "there is no great harm in declining to release the names of those who are not interviewed.").

26. *Panel to Nominate State Judges, supra* note 24, at C7. The *Newport Daily News* editorialized in favor of public interviews. "Rhode Islanders," it wrote, "long accustomed to backroom deals that result in judicial appointments, soon will learn to distrust a selection commission that meets secretly to weed out applicants." *Judicial Panel Starts Off on Wrong Foot,* Newport Daily News, July 19, 1994, at A7.

Ultimately, more than half the interviews were public.[27] Each interview lasted approximately fifteen minutes.

The Commission solicited written comment on the interviewees from the public. It invited District Court Chief Judge Albert DeRobbio and Family Court Chief Judge Jeremiah S. Jeremiah to instruct the commissioners on how to identify the characteristics of a good judge. During Judge DeRobbio's presentation, commissioner Peter McGinn invited him to meet privately with the commission, "no minutes," to help the Commission select the best candidates.[28] After seeking legal advice, the Commission declined to hold this private session with Judge DeRobbio.[29]

After interviewing candidates and reviewing application forms, financial statements, police background checks, and written comments from the public, the Commission voted on the nominees to send to the governor.[30] The Commission's rules required the vote to take place in public, but the rules permitted the Commission to deliberate in closed session.[31] On August 4, 1994, the Commission voted to send thirty-nine nominees to the governor for the eight vacancies: nineteen for the four superior court vacancies;[32] fifteen for the three family court vacancies;[33] and five for the district court vacancy.[34]

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27. Russell Garland, *A New Process of Nominating Judges Tested*, Prov. J. Bull., Sept. 26, 1994, at A3.

28. Russell Garland, *2 Top Judges Offer Insights on Judicial Candidates*, Prov. J. Bull., July 24, 1994, at D8.

29. The Commission's Counsel expressed concern the meeting would violate the Open Meetings Law and the Commission's own rules. *New Commission Nominates Judges, supra* note 18, at A8.

30. *Id.*

31. Draft Rules, *supra* note 20, at § V.

32. The Commission voted in favor of District Court Judge Edward Clifton, Netti Vogel, Frank Williams, Stephen Fortunato Jr., Michael Silverstein, Richard Gonella, Kenneth Madden, District Court Judge Walter Gorman, David Martin, Robin Feder, Paul Lietar, Sandra Lanni, District Court Judge Gilbert Indeglia, Susan McGuirl, James E. O'Neil, District Court Judge Patricia Moore, Kent Willever, Michael McElroy, and James Leavey. *New Commission Nominates Judges, supra* note 18, at A1.

33. The Commission voted in favor of District Court Judge Gilbert Rocha, Frank Cenerini, Francis Murray, Joseph Keough, Marilyn Shannon McConaghy, Workers' Compensation Court Judge John Rotondi Jr., John Mutter, Richard Kyte, Vincent DiMonte, Jack McMahon, Ira Schreiber, Sharon O'Keefe, James Donnelly, Joseph Roszkowski, and John Farley. *Id.*

34. The Commission voted in favor of John McLoughlin, Peter Nolan, Frank Cenerini, John Hardiman, and Elaine Bucci. *Id.*

Every nominee was selected by unanimous vote of the members of the Commission, although the statute requires only that "[a]ll names submitted to the governor by the commission shall be approved by at least five (5) members of the commission voting in favor of each selection."[35] Chairman Michael Kelly[36] explained that "although there was no advance agreement about whom to nominate, when we sat down to go through things, we basically came up with a consensus of who the best candidates were."[37]

The *Providence Journal Bulletin* editorial board was not impressed with the initial work of the Commission. It wrote that,

> [t]he tenor of the commission's selections is, to put it mildly, anti-climactic, given all the talk about how this new procedure would upgrade the quality of state judges. . . . The commissions' lists contain enough competent people whose names the governor can, without embarrassment, send along for the Senate's consideration. But the results so far reinforce skepticism about the value of creating an appointed commission — that is not responsible to the public and conducts many of its crucial deliberations in private — and allowing that panel to restrict the judicial nominating authority of the governor, who at least is subject to the public's judgment as expressed in the voting booth.[38]

2. *Nomination and Confirmation*

Governor Sundlun nominated Netti Vogel, Michael Silverstein, District Court Judge Edward Clifton and Stephen Fortunato for the superior court vacancies. He nominated Municipal Court Judge John Mutter, District Court Judge Gilbert Rocha, and Workers' Compensation Court Judge John Rotondi, Jr. for the family court vacancies. He nominated Frank Cenerini for the district court.[39] The nominations of Judges Clifton, Rocha, and Rotondi created the possibility of three additional vacancies — two on the

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Instead of creating separate lists of three to five candidates for each vacancy on the superior and family courts, the commission consolidated all the superior court nominees onto one list and all the family court nominees onto one list. The Commission sent the list of names to the governor, "in alphabetical order without indicating any preference of the Commission." Draft Rules, *supra* note 20, at § VI.

35. § 8-16.1-2(d).
36. *See supra* note 15.
37. *New Commission Nominates Judges, supra* note 18, at A8.
38. *The Usual Suspects,* Prov. J. Bull., Aug. 11, 1994, at A14.
39. Garland, *supra* note 27 at A3.

district court and one on the workers' compensation court. The Governor asked the Commission to begin immediately to screen candidates for these prospective vacancies.[40]

The Commission did not conduct new interviews or solicit new applications for the two "prospective" district court vacancies because it had already solicited applications for a vacancy there. Instead, it deliberated and voted unanimously to send one list of ten names to the governor. Four of the ten names were on the original list to fill the district court vacancy.[41] Governor Sundlun nominated Elaine Bucci and John McGloughlin.[42]

In the meantime, the Commission commenced and completed the solicitation, application, and screening process for the prospective workers' compensation court vacancy. On August 19, 1994, the commissioners voted, again unanimously, to place the names of William Buckley, Lane Newquist, and George Salem, Jr. on a list to be sent to the governor. They were selected from among eleven applicants chosen for interviews.[43] The governor nominated George Salem, Jr.[44]

On August 24, 1994, the Senate received the governor's nominations. The statute requires the Senate to conduct "an investiga-

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40. Governor Sundlun "telegraphed" these selections only one day after receiving the Commission's lists by informing the Commission that there were "several sitting judges in the district court and one in the workers' compensation court" on the Commission's lists and that he had "in the past frequently elevated sitting judges to other courts . . . [because] prior judicial experience is a valuable asset for a judicial candidate to possess." Letter from Governor Bruce Sundlun to Michael Kelly, Chairman, Judicial Nominating Commission (Aug. 5, 1994). Even before selecting the sitting judges he asked the Commission to commence proceedings to fill "up to two (2) prospective vacancies in the district court and one (1) in the workers' compensation court." *Id.*

41. *Judicial Panel Sends Sundlun 10 Names for District Court*, Prov. J. Bull., Aug. 17, 1994, at A9. The four former nominees were Elaine Bucci, John Hardiman, John McLoughlin and Peter Nolan. The additional six were Patricia Byrnes, Robin Feder, Richard Gonnella, Joseph Ippolito, Kenneth Madden and Michael Stone. *Id.*

42. Russell Garland, *Senate Receives Sundlun Judicial Picks,* Prov. J. Bull., Aug. 25, 1994, at D17.

43. *Judicial Panel Suggests 3 for Vacancy,* Prov. J. Bull., Aug. 22, 1994, at C4. The Commission interviewed Paul Bordieni, William Buckley, Dianne Craven, Harold Demopulos, Elaine Giannini, Peter Haydon, Vincent Kane, Lane Newquist, Diane Pearson, John Sabatini, and George Salem, Jr. Letter from Michael Kelly, Chairman, Judicial Nominating Commission to Professor Michael Yelnosky, Roger Williams University School of Law (Jan. 19, 1996).

44. *Senate Receives Sundlun Judicial Picks, supra* note 42, at D17.

tion and public hearing on the question of the qualifications of the nominee or nominees."[45] Because the Commission had not held public hearings on the candidates, "[t]he [Senate] Judiciary Committee hearings [were] the first and only public hearings on the nominees."[46]

After its hearings the Senate Judiciary Committee recommended that the full Senate confirm nine nominees: Michael Silverstein, Netti Vogel, District Court Judge Edward Clifton, and Stephen Fortunato for the superior court; District Court Judge Gilbert Rocha and Municipal Court Judge John Mutter for the family court; and Elaine Bucci, Frank Cenerini, and John McLoughlin for the district court.[47] Those nominees were subsequently confirmed.[48]

The Senate Judiciary Committee voted to reject Workers' Compensation Court Judge John Rotondi's nomination to family court. Three senators testified that they had heard from lawyers opposed to Judge Rotondi who wished to remain anonymous for fear that they might ultimately appear before Rotondi in family court.[49] The Senate Judiciary Committee learned that Judge Rotondi's ex-wife, Susan Epstein, had sent a letter to the Nominating Commission, in which Epstein asserted that the judge was not

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45. R.I. Gen. Laws § 8-16.1-6(d) (Supp. 1994).

46. *Senate Receives Sundlun Judicial Picks, supra* note 42, at D17.

47. Russell Garland, *Senate Panel Approves Four of Sundlun's Court Nominees*, Prov. J. Bull., Sept. 1, 1994, at D21; Russell Garland, *Judiciary Panel Approves Four Court Nominees,* Prov. J. Bull., Sept. 9, 1994, at C7.

48. *A New Process of Nominating Judges Tested, supra* note 27, at A1. Of the nominees confirmed, only Judge Rocha was the subject of some controversy. Four senators announced that they opposed his nomination to family court because he had been nominated to the district court less than one year before and he had voted against fair housing bills in the 1960s while he was a state senator. *Judge Rocha's Nomination to Family Court Draws Fire*, Prov. J. Bull., Aug. 17, 1994, at D9. Joseph Fowlkes Jr., president of the Providence branch of the NAACP, testified that Rocha's opposition to that legislation should disqualify him. District Court Chief Judge Albert DeRobbio testified on Judge Rocha's behalf, reporting that Rocha received the highest possible score in an internal district court evaluation. Judge Rocha testified that his vote against the fair housing bills was a mistake. *Senate Panel Approves Four of Sundlun's Court Nominees*, Prov. J. Bull., Sept. 1, 1994, at D21.

49. Russell Garland, *Allegations Against Rotondi Probed in Nomination Process*, Prov. J. Bull., Sept. 8, 1994, at D20. Michael Kelly, the Nominating Commission's Chair, told reporters that no attorney ever submitted adverse comments to the Commission, even though it had solicited written comment on all applicants it interviewed and had assured the public the letters would be kept confidential. *Id.*

fit to serve on the family court. Chairman Kelly of the Commission told reporters that the Commission contacted and questioned individuals about Epstein's allegations and concluded that "the situation was a domestic dispute that had no bearing on Rotondi's fitness to be a Family Court judge."[50]

The Senate Judiciary Committee heard testimony from Judge Rotondi's twenty-five-year-old daughter, who told the Committee that Rotondi was qualified to sit on the family court.[51] The Committee also heard testimony from Susan Epstein and Judge Rotondi. Ms. Epstein testified that the judge was not fit to serve on the family court because of his conduct as a husband and father.[52] Judge Rotondi responded that he was the victim of his ex-wife's inability to put their divorce behind her.[53] After the Senate Judiciary Committee voted 10 to 7 to reject Rotondi, Governor Sundlun withdrew the nomination.[54]

The selection statute provides that "[i]f the nominee is rejected by the senate, the commission shall submit a new list of three (3) to

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50. *Id.* Commissioner Lise Gescheidt, who received the letter from Rotondi's ex-wife and passed it on to the other commissioners, eventually testified before the Judiciary Committee, as did Chairman Kelly. Kelly explained that the Commission called Rotondi back for a second interview to question him about Epstein's allegations and was satisfied they had no merit. He explained that the Commission did not formally question Susan Epstein because it did not have the authority to hold hearings. Russell Garland, *Letters Imperil Rotondi Approval as Judge*, Prov. J. Bull., Sept. 15, 1994, at D13.

51. *Letters Imperil Rotondi Approval as Judge*, *supra* note 50 at D13. She testified that "my parents got divorced 15 years ago and it was a crazy time for everybody," but that her father is "a good and fair person and he takes his job seriously." *Id.* She specifically responded to an allegation in her mother's letter to the Judicial Nominating Commission that Judge Rotondi "emotionally battered" her. She denied that she ever said it and testified that her father never emotionally abused her. *Id.*

52. Scott MacKay, *Judgeship Nomination Withdrawn*, Prov. J. Bull., Sept. 16, 1994, at A1, A12. She testified that Rotondi is prejudiced against women, showed little pride, no joy, and a total lack of interest in his children, engaged in marital infidelity, emotionally battered her and her daughter, and often missed child-support payments. *Id.*

53. Judge Rotondi explained that he had a good relationship with his daughter and that his estrangement from his son resulted from the fact that Epstein made the child choose sides after the divorce. Judge Rotondi said that he had attended therapy sessions with his wife to resurrect the marriage and that he was never more than two weeks late with support payments. *Id.*

54. *Id.* at A1. Judge Rotondi responded that he had been the victim of innuendo, hearsay, rumor, and politics, and that he was rejected "not because of my ability, but because I am a divorced man." *Id.* at A12.

five (5) candidates to the governor for the purpose of nomination."[55] The statute does not explain what happens in the event a nominee withdraws during the confirmation process. Chairman Kelly; William Poore, the Commission's legal counsel; and Elizabeth Myers, Governor Sundlun's legal counsel, all agreed that because Judge Rotondi had not been rejected by the full Senate, the Commission was not required to give the governor a new list of family court nominees.[56] Governor Sundlun selected Francis Murray from the list of fifteen names originally sent from the Commission.[57] Murray was subsequently confirmed.[58]

3. *Some Time For Reflection*

Reactions to the judicial selections were mixed. Russell Garland of the *Providence Journal Bulletin* reported that despite the attempts to depoliticize the selection process, rumors were circulating that the "fix was in for certain candidates."[59] Some observers had concluded that the new process was a success, even though it could not "suddenly end attempts to get preferred candidates on the bench."[60] Others expressed less equivocal support. Paul Kelly, the Senate majority leader, told Garland that "[f]or the first time the process itself was wide open. A[ll] who thought they were qualified . . . could present their credentials to a commission."[61] Chairman Kelly of the Commission concluded that while "persons may disagree on which nominee should have been appointed, [or] which was the most qualified . . . I don't think you can argue that anyone on the list of nominees we submitted was not qualified."[62] However, Chairman Kelly expressed disappointment that few members of the public attended commission meetings.

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55. R.I. Gen. Laws § 8-16.1-6(c) (Supp. 1994).

56. Letter from Michael Kelly, Chairman, Judicial Nominating Commission, to Honorable Bruce Sundlun (Sept. 16, 1994).

57. *Sundlun Proposes Francis J. Murray for Family Court*, Prov. J. Bull., Sept. 22, 1994, at D15.

58. The Senate never acted on George Salem's nomination to the workers' compensation court because his nomination was contingent on Judge Rotondi's move to family court. *See supra* pp. 92-93.

59. *A New Process of Nominating Judges Tested, supra* note 27, at A3.

60. *Id.* (quoting Philip West, Executive Director of Common Cause of Rhode Island). Governor Sundlun acknowledged that he was lobbied extensively on behalf of various nominees put forward by the Nominating Commission. *Id.*

61. *Id.*

62. *Id.*

Observers also disagreed on the significance of the demise of Judge Rotondi's nomination. While Governor Sundlun expressed displeasure with Rotondi's treatment by the Senate Judiciary Committee, he acknowledged that the Senate had the "right to reject the Rotondi nomination if they chose to do so."[63] Not surprisingly, Senate Majority Leader Kelly agreed that the Senate had acted properly. "Two groups of evaluators looked at the same nominee in two different ways," he said, "that in no way mars the process."[64] Garland opined:

> In the end, the clash over Rotondi probably was less a comment on the new judicial selection process than an example of what happens when a politically weakened governor tries to push his candidate through a reluctant Senate. Two days before the Judiciary Committee rejected Rotondi, Sundlun was soundly defeated in the Democratic primary.[65]

For some observers the Rotondi incident raised several serious concerns about the commission's operation. Susan Epstein's letter to the Commission opposing Judge Rotondi was made public during the Senate Judiciary Committee hearings, even though she had been promised by the Commission that the letter would be kept confidential. Majority Leader Kelly also expressed concern that the Commission had determined it did not have the power to conduct hearings or subpoena witnesses when screening applicants. He did not "see how the commission c[ould] thoroughly screen candidates unless it interview[ed] witnesses, such as Rotondi's ex-wife."[66]

The Commission engaged in some self-reflection. Based on its first round of experiences, the Commission proposed and thereafter adopted permanent changes to its rules.[67] Under these new rules: 1) The Commission must conduct applicant "[i]nterviews . . . in open session" except that "portions of an interview in which confi-

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63. *Id.* Governor Sundlun explained that he nominated Rotondi because he had helped to engineer changes in the workers' compensation law that were widely praised for saving the system. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Proposing permanent rules triggered the twenty day public notice and comment period of the Administrative Procedures Act. R.I. Gen. Laws § 42-35-3(a)(1), (1993 Reenactment), *amended by* 1995 R.I. Pub. L. Ch. 300, § 1. The amended version of the statute provides for a 30 day period. *Id.*

dential information would be discussed may be held in closed session at the discretion of the Commission or at the request of the interviewee;"[68] 2) The Commission must hold a public meeting prior to any final vote to receive comments from the public concerning the applicants interviewed by the commission;[69] 3) The Commission must conduct its public vote by following a "successive majority" system endorsed by the American Judicature Society.[70] It adopted several other changes as well.[71]

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68. Uniform Rules for the Judicial Nominating Commission, § III, p.2. The Commission announced informally that it would extend the length of interviews from fifteen to thirty minutes.

69. *Id.* "Following public notice, oral comments shall be entertained at a public hearing held prior to the Commission's vote to fill a judicial position. Public comments shall be considered by the Commission in its review and deliberation as to the qualification of candidates." *Id.*

70. Under that system,

> 1) The number of votes allotted to each member of the Commission shall equal the number of names required to be submitted to the Governor to fill judicial vacancies.
> 2) Each member of the Commission shall cast one vote per applicant.
> 3) Commission members cast one allotted vote for an applicant with voting repeated until the necessary number of names remain.
> On the first round, Commissioners vote on the entire list of applicants. Each applicant must receive at least one less than a majority vote to remain under consideration during this initial round. (Example: With a nine member Commission, each applicant must receive four votes).
>
> If too many applicants remain under consideration after the first round of voting is completed, this voting procedure is repeated with the remaining applicants. To remain under consideration, each applicant must receive a majority of the Commission's votes. (Example: With a nine member Commission, each applicant must receive five votes).
>
> It may be necessary to repeat the procedure until the prescribed number of candidates has been selected. 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.

Uniform Rules of Judicial Nominating Commission, § V, p. 3-4 (Nov. 30, 1994).

71. In its advertisements announcing a judicial vacancy, the Commission must "encourage racial, ethnic and gender diversity within the judiciary" and publish the advertisements "for a reasonable period of time to afford notice to prospective applicants and in consideration of deadlines imposed by the enabling statute." *Id.* § I, p. 1 (Nov. 30, 1994). The Commission must publish each notice of vacancy in at least the twelve publications it had used for previous vacancies. *Id.* app. B. The Commission must acknowledge receipt of each application for a judicial vacancy. *Id.* § I, p.1.

The Commission amended the applicant questionnaire to require practicing attorneys to provide the names of not more than ten attorneys who have been opposing counsel within the preceding twelve months whom the Commission could contact to comment upon the applicant's ability to fill a judicial position. For the

C. *On to the Supreme Court: The Chief Justice Vacancy*

On November 8, 1994, by a margin of seventy to thirty percent, Rhode Island's voters approved the constitutional amendment applying the new selection process to supreme court vacancies.[72] Thereafter, Governor Sundlun formally notified the Commission of a vacancy for the chief justice of the Rhode Island Supreme Court. The vacancy had existed since Chief Justice Fay's resignation in September 1993. The Commission followed its new rules and regulations to create a list of nominees for that vacancy.[73]

The Commission selected five of the nine applicants for interviews: Justice Joseph Weisberger, the acting chief justice; Superior Court Judge Richard Israel; Ira Schreiber, whom the Commission had previously nominated for a family court position; federal administrative law Judge Donald Ryan, and Kent Willever, whom the Commission had previously nominated for a superior court opening.[74]

In describing the subsequent interviews, the *Providence Journal Bulletin* reported that "[h]istory was made . . . in a tiny hearing room as five men publicly told a panel of lawyers and lay people why they want to be Rhode Island's top judge, a post traditionally handed to the person with the most juice in the General Assembly."[75] About a half-dozen spectators attended the half-hour interviews in which the candidates reviewed their qualifications with commissioners and answered questions about judicial philosophy and court administration.[76]

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same purpose, sitting judges were asked to provide the names of not more than ten attorneys who have appeared before them in the past six months. *Id.* app. A, p.12, ques. 39(b),(c).

Finally, the Commission made explicit that only those applicants who were interviewed could be considered for recommendation to the governor. *Id.* § V, p.3 ("[T]he Commission shall select no less than three nor more than five highly qualified persons to fill each judicial vacancy from the list of those persons *interviewed* who meet . . . legal requirements for the judicial office.") (emphasis added).

72. *Voters Reform Judiciary, Trim Legislature Size: A Proposed Amendment for a Constitutional Convention is Defeated,* Prov. J. Bull., Nov. 9, 1994, at A9.

73. Russell Garland, *Selection Process for Chief Justice is Underway,* Prov. J. Bull., Dec. 20, 1994, at D13.

74. Russell Garland, *Hopefuls for Bench Assigned Interview by Panel,* Prov. J. Bull., Jan. 20, 1995, at B4.

75. Russell Garland, *New Order in the Court,* Prov. J. Bull., Jan. 28, 1995, at A1.

76. *Id.*

Before its vote on the five candidates interviewed, the Commission confronted an ethics code dilemma. Each of the five lawyer members were representing clients before Justice Weisberger and the Rhode Island Supreme Court. Although the commissioners expressed confidence that they would be impartial, they sought an advisory opinion from the Ethics Commission.[77]

The Ethics Commission concluded that the lawyers could act on Justice Weisberger's application without violating the Ethics Code.[78] It reasoned that Justice Weisberger had the freedom to recuse himself from hearing any matters in which the lawyers appeared as advocates. Futhermore, the Ethics Commission emphasized that the commissioners simply made recommendations to the governor. "Once the lawyer-members of the Commission make their recommendations to the Governor," the Ethics Commission wrote, "they no longer have any . . . authority over whichever applicant is ultimately appointed."[79]

Thereafter, the Nominating Commission held its first public hearing to consider comments on the five applicants. Most of the eight witnesses testified in support of one of the five. However, a few spoke against Justice Weisberger because of his age, 74, and because he was on the court while former Chief Justice Fay and court administrator Matthew Smith managed a secret spending account. At the end of the hearing the Commission deliberated. In public session, it then followed its new voting procedure to recommend Justice Weisberger, Judge Israel and Kent Willever to Governor Almond, who had taken office one month earlier.[80]

As expected, Governor Almond selected Justice Weisberger. During confirmation hearings members of the House and Senate questioned Justice Weisberger and other witnesses about Weis-

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77. Letter from William Poore, Counsel to the Judicial Nominating Commission, to Martin Healey, Rhode Island Ethics Commission (Jan. 26, 1995).

78. *Panel Sees No Conflict for Lawyers Recommending a New Chief Justice.*, Prov. J. Bull., Feb. 3, 1995, at A5.

79. Advisory Opinion No. 95-10, Rhode Island Ethics Commission (Apr. 5, 1995).

80. Russell Garland, *Weisberger, Israel, Willever Nominated,* Prov. J. Bull., Feb. 7, 1995, at D5. Justice Weisberger received seven votes with two abstentions. Judge Israel received eight votes with one abstention. Kent Willever received nine votes. Ira Schreiber received three votes, and administrative law Judge Donald Ryan received one. Telephone Interview with Kathleen A. Sousa, Legal Assistant, Judicial Nominating Commission (Feb. 22, 1996).

berger's age and the secret court account.[81] Weisberger was approved unanimously in both chambers.[82] His swearing in as Chief Justice set off "intense competition for the open seat on the five-member court."[83]

D. *The First Associate Justice Vacancy*

The Nominating Commission received twenty-nine applications for the associate justice position. It selected twelve applicants to interview.[84] When asked why no women were interviewed, Chairman Michael Kelly responded that only two applied and neither was deemed qualified by the Commission. Kelly said that no blacks or Hispanics applied.[85] Commissioners asked applicants interviewed about a wide range of topics, includ-

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81. Russell Garland, *Legislature Must Approve Weisberger*, Prov. J. Bull., Feb. 11, 1995, at A3. Weisberger said he was unaware of improprieties in the court account until an investigation uncovered them. *Id.* While an associate justice, he received $3,369 from the secret fund to reimburse him for attending three conferences. Reimbursement for those expenses would have been proper from the appropriate account. *Id.*

However, auditors also found that Weisberger was reimbursed for an improper expenditure of $126.54 for a party for the cast and crew of an educational video Weisberger organized to commemorate the bicentennial of the United States Constitution. Weisberger testified that when he determined the reimbursement was improper he repaid the court for the cost of the reception. *Id.*; *see also* Russell Garland, *House Panel Grills Top Judge Nominee*, Prov. J. Bull., Feb. 18, 1995, at A5; Russell Garland, *Weisberger Undergoes 3rd Hearing*, Prov. J. Bull., March 8, 1995, at B4.

82. Russell Garland, *Justice Weisberger Confirmed*, Prov. J. Bull., March 15, 1995, at A1.

83. Russell Garland, *Justice Weisberger is Sworn in as Chief of R.I. Supreme Court*, Prov. J. Bull., Mar. 21, 1995, at B4. Many lawyers who applied for the associate justice position created when Justice Weisberger became chief justice had not applied for the chief justice vacancy out of deference to Weisberger. Russell Garland, *Weisberger Appointed High Court's Chief Justice*, Prov. J. Bull., Feb. 10, 1995, at A1.

84. The Commission chose to interview Superior Court Judges John Bourcier and Richard Israel, U.S. Magistrate Robert Lovegreen, and lawyers Kent Willever, Ronald DelSesto, William Dimitri Jr., Lauren Jones, Peter Lawson Kennedy, John MacFadyen, William Robinson III, and Ira Schreiber. Russell Garland, *11 in the Running for R.I. Supreme Court*, Prov. J. Bull., Mar. 24, 1995, at C4. Assistant United States Attorney Everett Sammartino was a last-minute addition. Russell Garland, *Judicial Panel to Trim Field*, Prov. J. Bull., Apr. 10, 1995, at A1. Judge Israel, Kent Willever, and Ira Schreiber were given the option to waive their interviews because the Commission had interviewed them only two months before for the chief justice vacancy. All three chose not to be interviewed again. Russell Garland, *Judicial Commission Begins Interviewing*, Prov. J. Bull., April 1, 1995, at A4.

85. *Judicial Panel to Trim Field*, *supra* note 84, at A6.

ing the death penalty, the Rhode Island Supreme Court's case management practices, and the O.J. Simpson trial. All were asked why they wanted to serve on the high court.[86]

Thirty-one witnesses asked to testify at the Commission's public hearing on the applicants.[87] Virtually all the witnesses testified in support of a particular candidate rather than in opposition to a candidate. Sixteen testified in support of Superior Court Judge John Bourcier. While most of the other witnesses testified in support of other candidates, Leslie Lopes, who testified for a minority judicial task force, turned to tell Judge Bourcier, who was present during her testimony, that she did not like what went on in his courtroom.[88]

The Commission thereafter voted to nominate Judge Bourcier, William Dimitri, Lauren Jones, and John MacFadyen.[89] Governor Almond ultimately selected Judge Bourcier from the list,[90] remarking that, "Judge Bourcier has a long and very distinguished career as an associate justice of the Superior Court and has won the respect and praise of his colleagues and the public during the

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86. *Id.*

87. Russell Garland, *Witnesses Weigh In for Judge Bourcier,* Prov. J. Bull., Apr. 11, 1995, at C5.

88. *Id.*

89. Russell Garland, *4 Nominated for High Court,* Prov. J. Bull., Apr. 14, 1995, at A1. The Commission had to vote twice to narrow the field to the three to five required. In the first round,

> Dimitri and MacFadyen received nine votes, Jones eight, Willever seven, Bourcier six, Lovegreen five and Israel one. Candidates who failed to get five votes were eliminated. The panel voted again, this time with each member allowed to vote for only four candidates. The second tally was Dimitri and MacFadyen nine, Jones eight, Bourcier seven, Willever two, and Lovegreen one.

Id. at A4.

90. Governor Almond delayed his choice beyond the ten days permitted by the statute. His legal counsel, Joseph Larisa Jr., reportedly told the press that "Almond has no qualms about ignoring the timetable of the law," because "the public wants a considered decision, not a hasty one." *Almond May Delay Choice Until Next Week,* Prov. J. Bull., Apr. 20, 1995, at A10. Before Governor Almond chose Judge Bourcier, the *Providence Journal Bulletin* wrote an editorial supporting the judge. While each of the four nominees was qualified to be on the supreme court, it wrote, Judge Bourcier matched the other candidates' skill and experience and "earned" a place on the supreme court with two decades of exemplary service on the superior court that deserved "to be acknowledged and rewarded." *Bourcier for Justice . . .,* Prov. J. Bull., Apr. 21, 1995, at A16.

years he has served on the bench."[91] Judge Bourcier encountered almost no opposition in the judiciary committees of the House and Senate,[92] and he was subsequently confirmed in both chambers.[93]

E. *Reactions to Judge Bourcier's Selection*

The process that resulted in Judge Bourcier's elevation to the supreme court received mixed reviews. Governor Almond expressed dissatisfaction, but to avoid detracting from Bourcier's selection he originally declined to offer specific criticisms. He emphasized that he had and would "always support merit selection."[94] Critics complained that Judge Israel was on the list to fill the chief justice vacancy but did not appear on the list to fill the subsequent associate justice vacancy.[95] Governor Almond was reportedly "upset that the commission did not include Superior Court Judge Richard Israel on the list."[96] The Governor subsequently complained in public that the Commission gave him a list of only four names to fill the vacancy.[97]

Charles Bakst of the *Providence Journal Bulletin* saw in Bourcier's selection cause for optimism. He wrote that "those who welcome the selection of Bourcier can take satisfaction in knowing

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91. Russell Garland, *Bourcier Named to High Court,* Prov. J. Bull., Apr. 29, 1995, at A1.

92. The vote was 13-1 in both committees. In the Senate Judiciary Committee Senator William Fitzpatrick registered the lone vote against Bourcier because of a demeaning comment Fitzpatrick said Bourcier had made several years before about a criminal defendant with AIDS. *State House Journal,* Prov. J. Bull., May 12, 1995, at C7. Representative Harold Metts registered the only vote against Bourcier on the House Judiciary Committee, citing Bourcier's "conservative views, his stance on the death penalty, and his stringent criminal sentences." Scott MacKay, *House Panel Approves Bourcier,* Prov. J. Bull., May 6, 1995, at A4.

93. Scott MacKay, *Bourcier Confirmed for High Court,* Prov. J. Bull., May 19, 1995, at B5.

94. *Bourcier Named to High Court, supra* note 91, at A1.

95. Jim Baron, *Almond's Choice Wasn't Nominated*, Pawtucket Evening Times, May 9, 1995, at A6 (theorizing that the Commission was controlled by legislative leaders who forced a Republican governor to select the Democratic Bourcier by including clearly less qualified candidates on the list who were there simply to "round out the field"). Scott MacKay, *Justice Shea to Retire,* Prov. J. Bull., May 27, 1995, at A1, at A5.

96. *Justice Shea to Retire*, supra note 95.

97. *Id.* at A1 (reporting that Governor Almond was upset that the Commission sent him only four names for the vacancy filled by Judge Bourcier); *Bourcier Confirmed for High Court, supra* note 93, at B5 (reporting that the governor planned to speak to the leaders in the General Assembly and perhaps introduce legislation to require the commission to provide five names to fill each vacancy).

that a Republican governor, handed four names by a screening panel that is at the heart of the new procedure, picked a Democrat."[98] The new process was a dramatic departure from the past, according to Bakst because Bourcier

> got nowhere in 1993 when he sought a high court seat under the old system for selecting members of that tribunal: election by the General Assembly, with no role by an outside screening panel or the governor. That Supreme Court seat went to Victoria Lederberg, a former legislator who was backed by House Speaker John Harwood. . . .
>
> Bourcier . . . said . . . that perhaps he had been naive, but he had thought the Assembly election would be an "open process." He had the Bar Association's top rating and media backing.
>
> But, in the old system, the House speaker was the key. Besides that, Bourcier says, "I'd never been in the General Assembly, so I couldn't go to anyone and say, 'Vote for me, you remember me.' Secondly, I'm on the bench. I can't go to lawyers who are in the General Assembly and say to them, 'I wish you'd vote for me.' "[99]

Bakst, however, was willing to speculate about possible political maneuvering in the future. He predicted that William Dimitri, a "GOP warhorse who worked for Almond in the office of U.S. attorney" would yet surface on the bench in the superior court seat that Bourcier vacated.[100]

F. *Another Supreme Court Vacancy*

Justice Donald Shea announced his retirement less than one week after Justice Bourcier took his place on the supreme court.[101]

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98. M. Charles Bakst, *New Selection Process the Charm for Bourcier,* Prov. J. Bull., May 7, 1995, at D1.

99. *Id.* at D2.

100. *Id.* at D1. Bakst was wrong. *See infra* pp. 116-17 (describing nomination of Frank Williams to superior court).

101. *Justice Shea to Retire, supra* note 95, at A5. Moreover, Judge Bourcier's elevation created a vacancy on the superior court, and superior court Judge Paul Pederzani Jr. notified Governor Almond of his retirement. Tracy Breton, *Judge Pederzani, 69, Announces Retirement,* Prov. J. Bull., May 19, 1995, at B5. However, due to budget cuts the superior court vacancy created by Judge Pederzani's retirement may not be filled anytime soon. Russell Garland, John Mulligan, & Scott MacKay, *Political Scene,* Prov. J. Bull., June 19, 1995, at B3. For a discussion of the process that resulted in the nomination and confirmation of Frank Wil-

The Commission began its work to fill that vacancy in July, 1995.[102]

From among twenty-eight applicants the Commission selected thirteen for interviews. This time the list included two women.[103] The Commission had recently interviewed several of the thirteen for the position filled by Justice Bourcier. However, because the Commission had recently added two new members,[104] it decided to interview all thirteen.

The Commission simultaneously addressed concerns expressed by some that the voting procedure should be changed to try to assure that where five or more candidates have the support of a majority of the commissioners, the governor receives a list of five names to fill the vacancy. The Commission adopted changes on an interim basis[105] to increase the likelihood that five names would appear on each list provided to fill a judicial vacancy.[106]

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liams to fill the superior court vacancy created by Justice Bourcier's elevation *see infra* pp. 113-15.

102. Scott MacKay, *28 Lawyers, Judges, Seek Seat on R.I. Supreme Court,* Prov. J. Bull., July 22, 1995, at A10.

103. The Commission chose to interview Judges Mark Pfeiffer and Richard Israel of the superior court, William Dimitri, Jr., Kent Willever, Barbara Hurst, Margaret Curran, Peter Lawson Kennedy, William Robinson III, Everett Sammartino, Robert Flanders, John MacFadyen, Lauren Jones, and U.S. Magistrate Judge Robert Lovegreen. Scott MacKay, *List of Applicants for Supreme Court Pared to 13 Names,* Prov. J. Bull., Aug. 10, 1995, at B1, B4.

104. *See supra* note 17.

105. R.I. Gen. Laws § 42-35-3(b) (Supp. 1995).

106. Under the new procedure:

> 1) Each Commissioner shall have up to five affirmative votes and shall only be allowed to cast one vote per applicant/interviewee.
>
> 2) Initially, the Commissioners shall vote on all applicants who have been interviewed. The voting is completed after the first round when three, four, or five candidates receive at least five votes and no other candidates receive at least four votes.
>
> 3) If more than five applicant/interviewees receive a total of five or more votes in the first round, a second round shall be required only on those applicant/interviewees receiving five or more votes. Each Commissioner shall be allotted a total of five affirmative votes in any second round of voting.
>
> 4) If after the second round vote more than five applicant/interviewees receive five or more votes, then those five applicant/interviewees with the most votes among such applicant/interviewees 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 po-

In addition, Alan Flink, a new commissioner, sought an advisory opinion from the Ethics Commission on the propriety of a commissioner participating in voting on an applicant who is one of the commissioner's law partners. The Commission advised Flink that members of the Judicial Nominating Commission could not "participate and vote on matters concerning judicial applicants to whom they are associated as partners and/or associates employed by the same firm or as business associates."[107] The Ethics Commission reasoned that

> A public official's participation in matters involving a "business associate" would violate Code provisions which prohibit a public official from participating in matters when said public official has an interest, in this case based on the relationship of "business associate," which is in substantial conflict with the proper discharge of his or her duties in the public interest.[108]

After interviews and a public hearing the Commission nominated William Dimitri, Lauren Jones, John MacFadyen, Mark Pfeiffer, and Kent Willever for the vacancy.[109] The change in the voting procedure was responsible for creating the list of five names for the governor.[110]

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sitions to fill in such run-off vote and the applicant/interviewee(s) with the most votes shall be the remaining nominee(s).

5) A second round of voting is required if after the first round, there are three, four or five applicant/interviewees with five or more votes and one or more with four votes.

In the second round of voting, only those applicant/interviewees who received at least four votes in the first round would be included. The voting is completed after the second round when three, four, or five applicant/interviewees receive at least five votes.

Rules of Judicial Nominating Commission, *supra* note 70, § V. (Proposed Official Draft, Oct. 1995).

107. Rhode Island Ethics Commission, Advisory Opinion No. 95-67, (Aug. 16, 1995).

108. *Id.* at 4. Thus, Flink thereafter recused himself from consideration of William Robinson III, one of his partners at Edwards & Angell.

109. *Nominating Commission Chooses 5 Finalists for R.I.'s High Court,* Prov. J. Bull., Aug. 31, 1995, at B1.

110. In the first round of voting, Lauren Jones received nine votes, John MacFadyen received eight votes, William Dimitri received six votes, Judge Pfeiffer received five votes, with one abstention, Kent Willever received four votes, Robert Flanders received three votes, Judge Israel received three votes, with two abstentions, U.S. Magistrate Judge Lovegreen received two votes, and Barbara Hurst received one vote. Under the new voting procedure, Kent Willever joined Dimitri, Jones, MacFadyen, and Pfeiffer in a second round. Under the old rule the voting

The Governor selected Judge Pfeiffer.[111] Almost immediately questions were raised about the nomination because of reports that Judge Pfeiffer should have done more in his capacity as director of the Department of Business Regulation from 1986 to 1988 to pursue warnings of financial problems at some privately insured banks and credit unions.[112] Governor Almond responded that he had concluded Judge Pfeiffer was not to blame for the crisis caused by the subsequent failure of institutions insured by the Rhode Island Share and Deposit Indemnity Corporation.[113] Judge Pfeiffer was also criticized because as director he approved the sale of an insurance company to two businessmen, one of whom had filed a corporate bankruptcy, a personal bankruptcy and been convicted of illegal electronic surveillance of a business rival. That man allegedly participated in looting the insurance company as part of the biggest theft in Rhode Island history.[114]

G. *Judge Pfeiffer's Withdrawal, The 'New List' Controversy, and The Selection of Robert Flanders*

On the eve of his Senate Judiciary Committee hearings, in the face of expected legislative opposition based on his role in the state banking crisis, Judge Pfeiffer withdrew his nomination.[115] Governor Almond asked the Commission for at least one new name to go

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would have been completed and the list would not have included Willever's name. In the second round Dimitri received six votes, Jones received nine votes, MacFadyen received nine votes, and Judge Pfeiffer and Kent Willever each received seven votes. *Id.*

111. Russell Garland & Gregory Smith, *Governor Selects Pfeiffer for High Court,* Prov. J. Bull., Sept. 23, 1995, at A1.

112. *Id.* (discussing report of Rhode Island Share Deposit and Indemnity Corporation (RISDIC) Commission).

113. Tracy Breton et al., *Pfeiffer Withdraws Candidacy*, Prov. J. Bull., Oct. 12, 1995, at A1; *Governor Selects Pfeiffer*, *supra* note 110, at A1.

114. *Governor Selects Pfeiffer for High Court*, *supra* note 111 at A1.

115. *Pfeiffer Withdraws Candidacy, supra* note 113, at A1. In his letter informing Governor Almond, Pfeiffer wrote that "it has become apparent within the last few days that if I obtain the necessary votes for confirmation by the Senate, it will arise in the context of a divisive political debate." *Id.* Senate Majority Leader Paul Kelly and Judiciary Committee Chair Domenic DiSandro had met with Pfeiffer and informed him that his nomination "had the potential to reopen the wounds of the banking crisis" and that he "should be prepared for opposition from depositors who had their money frozen in the 1991 collapse of the institutions insured by the Rhode Island Share and Deposit Indemnity Corp." *Id.* Majority Leader Kelly later commented on Pfeiffer's withdrawal by saying that "[t]o turn around and say the Senate was going to reject him, I don't know how he could draw that conclusion.

with the remaining four on the list formerly forwarded to him. Joseph Larisa, his legal counsel, explained that the governor was "entitled to a full list of five names" because there were highly qualified candidates who were not originally chosen by the Commission.[116] He mentioned Judge Israel as an example, and Governor Almond himself volunteered that he considered "U.S. Magistrate Judge Robert Lovegreen and Assistant U.S. Attorney Margaret Curran highly qualified for the Supreme Court."[117]

While the Commission sought advice of its counsel,[118] Common Cause of Rhode Island publicly urged Governor Almond to select a nominee from the existing list of four names. Common Cause acknowledged that the statute was silent on the question of how to proceed in the event a nominated candidate withdrew. Nevertheless, according to Common Cause, the Governor's demand for a new list of five names or one name to round out the list of four had no statutory support. Common Cause reminded the Governor that the statute gives the Commission discretion to send the governor a list of "three to five names" for each vacancy. Five names are never required. The Governor's insistence on new names was even more damaging to the new selection process, Common Cause warned, because the Governor was publicly suggesting individuals whose names he wanted to see on the new list.[119]

The Senate hadn't even looked at him." Russell Garland, *Almond Asks Court for New List,* Prov. J. Bull., Dec. 4, 1995, at A1.

Days after Pfeiffer withdrew his nomination, the *Providence Journal Bulletin* reported that one of his ex-wives, Judith Crowell, had written to the Senate Judiciary Committee disclaiming allegations she had previously made in a signed affidavit that the judge "physically abused" her and "engaged in other conduct which had caused [her] to be reasonably in fear of him." In the letter to the Committee Crowell's lawyer asserted that Crowell did not dispute signing the affidavit, but "ha[d] no specific recollection of actually having signed the papers" and "categorically denie[d] having been abused by Pfeiffer." Tracy Breton, *Pfeiffer's Ex-Wife Withdrew Allegations of Physical Abuse,* Prov. J. Bull., Oct. 21, 1995, at A3.

116. Russell Garland, *Almond Wants New List of Court Candidates,* Prov. J. Bull., Oct. 13, 1995, at B1.

117. *Id.* Governor Sundlun had interpreted the selection law differently. One year before, when Workers' Compensation Court Judge John Rotondi withdrew his nomination to the family court after the Senate Judiciary Committee voted against him, Governor Sundlun had selected another name from the existing list. *See supra* at pp. 95-96.

118. Russell Garland, *Panel to Weigh Request for New List of State Supreme Court Candidates,* Prov. J. Bull., Oct. 17, 1995, at B5.

119. Russell Garland, *Common Cause Chides Almond on Court Nominees List,* Prov. J. Bull., Oct. 20, 1995, at B1; Letter from Michael J. Yelnosky, Chair, Judi-

Mr. Larisa responded that the Governor "strongly disagree[d] pretty much in the entirety with the position of Common Cause."[120] He suggested several reasons that the governor was entitled to a new list of five nominees. First, if a nominee is rejected by the legislature the statute provides that the governor shall receive a new list.[121] Treating a withdrawal in the face of legislative opposition in a different manner would, Larisa explained, give the legislature the power to whittle a list down through inaction until its favored nominee was selected.[122] Second, Larisa reiterated that there were other nominees who were highly qualified who did not appear on the original list.[123] He emphasized that Governor Almond had not ruled out the possibility of nominating one of the four nominees he originally passed over, and he defended Almond's decision to specifically identify individuals he deemed highly qualified to sit on the court. Larisa asserted that Governor Almond's

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cial Reform Committee and H. Philip West Jr., Executive Director of Common Cause of Rhode Island to Honorable Lincoln C. Almond (Oct. 18, 1995). In the interest of full disclosure, please note that I drafted that letter.

The *Newport Daily News* also had advice for the Governor. It wrote that notwithstanding the legal question involving the interpretation of the statute, "there is little doubt that the four remaining candidates have excellent credentials, though they may lack the political ties the governor might prefer. A fifth name is not needed." *Appointment to Court Must Be on Merit,* Newport Daily News, Oct. 17, 1995, at A7. The *Daily News* urged Governor Almond to select Kent Willever from that list.

> Willever has never been involved in Rhode Island politics. He has never been a legislator, a state department head, a political crony, a campaign worker. His experience is legal and judicial. He was legal counsel for the Naval War College and served as chief judge of the 13-member U.S. Navy-Marine Corps Court of Criminal Appeals, the Navy's equivalent of the Supreme Court. Before the days of merit selection, his name never would have been considered as a potential judge by any governor.
>
> But times have changed, and Rhode Islanders, fed up with insider scandals (we assume the governor remembers the demise of former Chief Justice Thomas Fay and the Matty Smith scandal), called for reform. The appointment of Willever would demonstrate that reform is real.

Id.

120. Garland, *supra* note 118, at B1.

121. R.I. Gen. Laws § 8-16.1-5(c) (Supp. 1994).

122. Letter from Joseph Larisa, Jr., Executive Counsel to Governor Lincoln Almond, to Philip West Jr., Executive Director, Common Cause of Rhode Island (Oct 21, 1995).

123. *Id.*

expression of his preferences did not interfere with the Commission's duties.[124]

The Commission's counsel ultimately concluded that the only time the selection statute clearly required the Commission to create a new list was if the governor's nominee was rejected in the legislature. "Since the commission is a creature of statute," he "suggest[ed] that the commission take no action."[125] The commissioners voted eight to one to refuse the Governor's request for a new list, and they recommended that the Governor ask the supreme court for an advisory opinion to resolve the matter.[126] Governor Almond requested an advisory opinion from the supreme court on November 1, 1995.[127]

On January 5, 1996, the supreme court ruled that the governor was entitled to a new list.[128] The court declared that the new selection process was intended to "reduce the role of the Legislature, to expand the role of the Governor, and to require that the commission specify three to five candidates on the basis of merit."[129] The Court then proceeded to interpret the relevant statutory provision with that purpose in mind. Section 8-16.1-5(c) provides that

> Each nomination shall be forwarded forthwith to the senate and to the house of representatives . . . . The senate and the house of representatives shall . . . separately consider the nomination, *but if either house fails within thirty (30) days after . . . submission to confirm said nominee, the governor shall appoint some other person to fill said vacancy* and shall submit his or her appointment to the senate and to the house of representatives . . . . *If the nominee is rejected by either house, the commission shall submit a new list of three (3) to*

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124. *Id.*

125. Russell Garland, *Panel Denies Almond a New Judge List,* Prov. J. Bull. Oct. 25, 1995, at B1.

126. *Id.* The dissenter was Alan Flink, Governor Almond's lone appointment to the Commission, who would have acceded to the Governor's request because "[w]henever th[e] process is interrupted, the only way to ensure the genuineness of that process is maintained is to start again." *Id.*

127. In re Request for Advisory Opinion from the Governor (Judicial Nominating Commission), Supreme Court Order 95-619-Mp (Nov. 14, 1995).

128. In re Advisory Opinion to the Governor, 668 A.2d 1246 (R.I. 1996). The court heard from Governor Almond in support of his request and from the Speaker of the House in opposition. Russell Garland, *Court Hears Arguments On Judge Candidates List,* Prov. J. Bull., Dec. 5, 1995, at B1.

129. *In re Advisory Opinion to the Governor*, 668 A.2d at 1249.

> *five (5) candidates to the governor* . . . . Any new list may include but need not be limited to the names of any candidates who were previously submitted to the governor by the commission but who were not forwarded to the senate and to the house of representatives . . . .[130]

The Court concluded that to preserve the intent of this provision it must be read to "require a 'new list' from the commission in the event that any person's nomination [1] is rejected by legislative vote or [2] is not acted upon by the Legislature or [3] is withdrawn in the face of legislative opposition."[131] Otherwise, the court wrote, the legislature could "control the appointment process by acting on a nomination only when the Governor nominates the candidate on a given list who represents the preferred choice of the legislature."[132]

The Court explicitly stated that the Commission could fulfill its responsibility to provide the governor a new list "by submitting . . . three, four, or five names that may include none, some or all of the names that have been submitted previously."[133] It suggested that the Commission could review its selections and "maximize the opportunity to present candidates to the governor."[134]

On January 16, 1996, the Commission met to consider how to provide the governor with the new list required. It voted to consider the twelve remaining candidates who were interviewed for the position rather than to reopen the process. After deliberating, the Commission forwarded a list to Governor Almond that included the four names originally sent to him to fill the vacancy — Lauren Jones, William Dimitri, John MacFadyen, and Kent Willever — plus Robert Flanders, who, along with Judge Israel, was the sixth highest vote-getter when the vacancy was previously filled, with three votes.[135]

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130. R.I. Gen. Laws § 8-16.1-5(c) (Supp. 1994) (emphasis added).

131. *In re Advisory Opinion to the Governor*, 668 A.2d at 1250.

132. *Id.* at 1250. The court's exclusive concern seemed to be the possibility that the legislature might in this way assert undue control over the nominating process. Thus, it concluded that the statute did not require a new list when a nominee withdrew because of death of disability. In that case the governor would be required to select a different nominee from the same list, *id.* at 1247, even if only two names remained on that list.

133. *Id.* at 1250.

134. *Id.*

135. *See supra* note 109. This time the voting went as follows. In the first round, Lauren Jones received nine votes, William Dimitri and Kent Willever re-

Governor Almond passed over the same four candidates he rejected when he nominated Judge Pfeiffer. He nominated Robert Flanders.[136] At 46, Flanders, a Republican, would be the youngest member of the court.[137] Flanders was unanimously recommended by the House Judiciary Committee.[138] M. Charles Bakst, who applauded the Flanders appointment, criticized that Committee for failing to ask Flanders any questions about his service as assistant legal counsel to former Governor DiPrete, who is now under a corruption indictment. Bakst also noted the Committee's failure to ask Flanders about his role as legal counsel to the Solid Waste Management Corporation, whose executive director was allegedly terminated for resisting attempts by members of the corporation to engage in patronage hiring. Bakst suggested that it was important for the public to have any concerns about Flanders dismissed before he took the bench.[139] Members of the Judiciary Committee explained that they did not question Flanders about those issues because there was no evidence that he was involved in any misconduct.[140] The Senate Judiciary Committee thereafter questioned Flanders more closely about these matters.[141] He was easily confirmed in both the House and Senate.[142]

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ceived seven votes, Robert Flanders and John MacFadyen received six votes, William Robinson III received four votes, with one abstention, Judge Israel received three votes, and U.S. Magistrate Lovegreen received two votes. All those with fewer than four votes were eliminated.

In the second round Lauren Jones received nine votes, John MacFadyen received eight votes, William Dimitri, Robert Flanders, and Kent Willever received seven votes, and William Robinson III received four votes, with one abstention. Robinson was eliminated. Russell Garland, *New List of Finalists for Supreme Court Received by Almond,* Prov. J. Bull., Jan. 17, 1996, at B1.

136. Russell Garland, *Almond Nominates Flanders for Seat on Supreme Court,* Prov J. Bull., Jan. 27, 1996, at A1.

137. *Id.* Flanders was a partner at the law firm of Flanders & Medeiros. Previously he was a member of the law firm of Edwards & Angell. He served on the Barrington Town Council, was a part-time legal adviser to former governors Edward DiPrete and Bruce Sundlun, prosecuted Workers' Compensation Court Judge Robert Arrigan before the Commission on Judicial Tenure and Discipline, and has been legal counsel to the Solid Waste Management Corporation. *Id.*

138. *House Panel Favors Flanders*, Prov. J. Bull., Feb. 14, 1996, at B4.

139. M. Charles Bakst, *Flanders Set Out on Supreme Course*, Prov. J. Bull., Feb. 11, 1996, at D1.

140. *Id.*

141. Russell Garland, *Flanders Wins Confirmation as a Justice*, Prov. J. Bull., March 1, 1996, at A1, A8.

142. *Id.*

II. THE FINAL SUPERIOR COURT VACANCY

After the Commission had created the list from which Judge Pfeiffer was originally selected, it turned its attention to the superior court vacancy created by Judge Bourcier's elevation.[143] Approximately 130 applicants responded to the notice of vacancy. The Commission selected thirty for interviews.[144] After those interviews the Commission held its public hearing. Because of the large number of candidates, the Commission limited the testimony at the hearing by permitting only one witness per candidate. The large number of candidates also prompted another change to the Commission's voting procedure.[145]

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143. The Commission had focused on the supreme court vacancy first, even though the statute gives the Commission only forty-five days to fill a superior court vacancy. R.I. Gen. Laws § 8-16.1-6(a) (Supp. 1994). Chairman Kelly, noting Governor Almond's willingness to ignore the statutory time limits in order to deliberate thoroughly, felt comfortable doing the same. *See supra* note 90.

144. Russell Garland, *30 Make Candidate List,* Prov. J. Bull., Oct. 5, 1995, at B1. Those thirty were William Brody, Margaret Curran, Anthony DiGioia, William Dimitri, a prior commission nominee for supreme court, Richard Galli, Richard Gonella, a prior commission nominee for superior court, Roberto Gonzalez, a Providence Housing Court Judge, District Court Judge Walter Gorman, a prior commission nominee for superior court, Barbara Hurst, District Court Master Joseph Ippolito, Peter Lawson Kennedy, Lynette Labinger, Sandra Lanni, a prior commission nominee for superior court, Jeffrey Lanphear, James Leavey, Nicholas Long, Kenneth Madden, a prior commission nominee for superior court, David Martin, a prior commission nominee for superior court, Susan McGuirl, a prior commission nominee for superior court, John McMahon, a prior commission nominee for family court, District Court Judge Patricia Moore, a prior commission nominee for superior court, Workers' Compensation Court Judge Debra Olsson, Joseph Roszkowski, a prior commission nominee for family court, James Ryan, Lidia Sanchez, Mark Smith, Michael Stone, Stephen White, Kent Willever, a prior commission nominee for the supreme and superior courts, and Frank Williams, a prior commission nominee for superior court. *Id.* Roberto Gonzalez subsequently withdrew, and Bennett Gallow was added. Russell Garland, *Panel to Weigh Request for New List of State Supreme Court Candidates,* Prov. J. Bull., Oct. 17, 1995, at B5.

145. The Commission was concerned that the votes could be spread among too many candidates to select three to five with at least five votes, the minimum number required under the statute. The voting procedure was amended by interim rule to address this possibility. The new rule provides that:

> 6) In the event there are more than ten applicants/interviewees who are initially voted upon and after the initial vote less than five applicants/interviewees 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 the case of a tie) applicants/interviewees who have the most votes after such preliminary vote. Thereafter the procedure set forth [for voting in all other instances] shall apply to all subsequent votes.

Uniform Rules, *supra* note 70, § V, ¶ 6.

The Commission thereafter met for its public vote. At the time of the vote, William Dimitri and Kent Willever were on the list to fill the supreme court vacancy pending the supreme court's opinion on whether Governor Almond was entitled to a new list after Judge Pfeiffer's withdrawal. They were also being considered by the Commission for this superior court vacancy. Some concerns were expressed about the propriety of having candidates' names appear simultaneously on lists for two vacancies. For example, if Willever or Dimitri were on lists for both courts, the governor could name one of them to the superior court, reduce the number of names remaining on the supreme court list, and reignite the "new list controversy."[146] Nevertheless, the Commission decided to conduct its vote.[147]

Neither Dimitri nor Willever was selected for the superior court vacancy. Richard Gonella, Sandra Lanni, David Martin, Frank Williams, and Kenneth Madden were the five nominees.[148] All five had previously been nominated by the Commission for su-

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146. Russell Garland, *Nominating Commission Lists 5 For Superior Court Seat,* Prov. J. Bull., Nov. 2, 1995, at B1. This scenario was not addressed by the Supreme Court in its Advisory Opinion. *See supra* pp. 110-111.

147. *Id.*

148. *Id.* In the first round of votes, David Martin received eight votes, Sandra Lanni received six votes, Richard Gonella received five votes, and Frank Williams received five votes, with one abstention, William Dimitri, Kenneth Madden, and James Ryan received four votes, Richard Galli and Kent Willever received two votes, and Margaret Curran, Anthony DiGioia, District Court Judge Walter Gorman, and Jeffrey Lanphear received one vote.

Thus, William Dimitri, Richard Gonella, Sandra Lanni, Kenneth Madden, David Martin, James Ryan, and Frank Williams moved into a second round of voting. In that round, Martin received nine votes, Gonella received seven votes, Lanni received six votes, Williams received six votes, Madden and Ryan received five votes, and Dimitri received four votes. Commissioner Peter McGinn voted for Williams in the second round although he had abstained in the first. McGinn concluded that there was no actual conflict presented by the fact that his law firm had been counsel to the Rhode Island Housing and Mortgage Finance Corporation, which was chaired by Mr. Williams. McGinn's firm had obtained a one-year contract through a public bid and the contract had been granted to another firm thereafter. In the first round McGinn's abstention had no impact on the result, but in the second round, if he had again abstained, Williams would have been forced into a run-off with Madden and Ryan. Thus, McGinn concluded that abstention under those circumstances would have been "the equivalent of a negative vote." *Id.* at B4.

After the second round, Dimitri was eliminated. Gonella, Lanni, Martin and Williams were placed on the list to be sent to the governor. A final run-off vote took place between Madden and Ryan. Madden became the fifth name on the list when he received five votes, and Ryan received three. *Id.*

perior court vacancies.[149] The Governor selected Frank Williams from that list.[150] Williams won the unanimous support of both the Senate Judiciary Committee and the full Senate.[151]

III. Some Preliminary Observations

This detailed history of the work of the Nominating Commission hopefully provides context for my conclusion that the new judicial selection process represents a real step toward restoring public confidence in the judiciary. In considering this conclusion, it is important to remember how judges were previously selected in Rhode Island. Grand Committee selection of supreme court justices and gubernatorial selection of lower court judges virtually assured a major role for partisan politics. This selection regime restricted the pool of candidates considered for judicial vacancies. The leaders in the House and Senate and the governor were likely to favor political allies. Talented and committed lawyers from the "wrong" party or who shunned politics and emphasized their law practices or other pursuits were overlooked.[152] There was reason to conclude that the best possible candidates were not considered or selected. The new selection process reduces the likelihood, although it cannot eliminate it, that unqualified individuals will be appointed to the bench for partisan political purposes.[153] It increases the likelihood that the best candidates from all backgrounds will be considered and selected for judicial vacancies.

Most significantly, the public can now actively participate in and scrutinize the selection process. A highly visible selection pro-

149. *Id.* at B1.

150. Scott MacKay, *Almond Fills Slot on Superior Court,* Prov. J. Bull., Nov. 11, 1995, at A1.

151. Stephen Heffner, *Solicitor to Step Down to Assume Judgeship,* Prov. J. Bull., Nov. 29, 1995, at C1; Russell Garland, *Judiciary Panel Backs Williams,* Prov. J. Bull., Nov. 17, 1995, at B1. The only testimony offered against Williams during his judiciary commitee hearings was from three residents of Hopkinton, a community he once served as town solicitor. They criticized various actions he had taken while representing the town that they believed showed that Williams was "governed by avarice and hubris." *Id.* at B1.

152. *See, e.g., supra* pp. 105-106 (discussing Judge Bourcier's experience with the Grand Committee).

153. *See* Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues,* 49 U. Miami L. Rev. 1, 4 (1994) (stating that "merit selection" is a preferable system to judicial elections for enhancing public confidence in the courts even though it will not completely eliminate politics from judicial selection).

cess is crucial to restoring public confidence in the judiciary. Restoring that public confidence is essential because our legal system depends so heavily on voluntary compliance with judicial decisions. The Judicial Nominating Commission's proceedings give Rhode Islanders their first real opportunity to view the previously secret judicial selection process.

A. *The Composition of the Commission and the Role of Partisan Politics*

The composition of the Judicial Nominating Commission was conceived to try to reduce the influence of partisan politics by balancing the power of 1) the two political parties, 2) the executive and legislative branches, and 3) lawyers and non-lawyers. The power to nominate members of the Commission is distributed among the governor, the majority party in both houses, and the minority party in both houses. At least four of the members of the Commission must be lawyers, and at least four must be non-lawyers.[154] The role of partisan politics in judicial selection may be relieved because lawyer and non-lawyer members of the Commission nominated by the chief executive and both parties in the legislative branch must work together to select the most highly qualified nominees.[155] A specific statutory provision requiring commissioners to act impartially, as suggested by Barton Jenks, may further help to minimize political considerations in the nominating process.[156]

I also generally agree with Mr. Jenks that it may be more appropriate for the chair of the Commission to be selected by the other members of the Commission rather than the governor.[157] However, as a result of former Governor Sundlun's defeat soon after the Commission was formed, the current Chair, Michael Kelly, was not named by Governor Almond. Thus, the governor has not

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154. *See supra* p. 88 (descibing the composition of the Commission).

155. The Commission should seek to maintain this balance in all of its work. Thus, it should use subcommittees to screen applications only where absolutely necessary to complete its work on time. Where subcommittees are necessary, they should replicate the composition of the Commission as a whole. For example, when forming subcommittees the Commission should consider the number of lawyers and non-lawyers and the number of appointees traceable directly to the governor and the various legislative leaders.

156. *See* Jenks, *supra* note 4 at 71.

157. Jenks, *supra* note 4 at 72; R.I. Gen Laws § 8-16.1-1(e) (Supp. 1994).

"captured" the Chair, which I assume is Mr. Jenks's primary concern. Kelly's term is due to expire just before the next gubernatorial election. Thus, in the future the chair may also have been named by a different governor then the one in office at a particular time. Moreover, there is no guarantee that an elected chair will not be one of the governor's appointments. Nevertheless, election of the chair by the other members may "depoliticize" the chair and help the Commission function free of gubernatorial influence.[158]

Jenks also asserts that the "denial of any voice to Rhode Island's lawyers in choosing the nominating commissions' lawyer members is a serious mistake."[159] However, the issue is not quite as simple as his unequivocal condemnation suggests. The Rhode Island bar is quite involved in the new selection process because a majority of the members of the Commission are members of that bar. Jenks is correct that the legislature rejected proposals to give the Rhode Island Bar Association the power to recommend lawyers to the governor to fill seats on the Commission. However, it is not clear that the presence of members selected by the bar association, a group that admittedly has knowledge of the pool of qualified judicial candidates in the state, would necessarily help selection focus on merit and not partisan politics.[160]

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158. Mr. Jenks has also suggested that barring a commissioner from serving more than one full term or the uncompleted term of the commissioner he or she replaced is problematic because "it may be difficult for the appointing authorities to find people of high quality who are willing to serve on the commission." *See* Jenks, *supra* note 4 at 77; § 8-16.1-2(c). However, the prohibition on multiple terms may prevent concentration of power in incumbent commissioners. Until there is evidence to support Jenks's contention that it will be difficult to find qualified commissioners, the prohibition should stand.

Jenks's suggestion that former commissioners should be barred for longer than one year from appearing before the commission as judicial candidates is well taken. *See* Jenks, *supra* note 4 at 75; § 8-16.1-2(c) ("no members shall be eligible for appointment to a state judicial office during a period of time he or she is a commission member and for a period of one year hereafter."). Unless that prohibition is extended to four years, absent recusals there could be commissioners passing on the nomination of a candidate with whom they served on the commission. The one year prohibition seems to be based on Rhode Island's one year "revolving door legislation" prohibiting former legislators from taking judicial office within one year after leaving the legislature. R.I. Gen. Laws § 36-14-5(e)(4) (1990 & Supp. 1995).

159. Jenks, *supra* note 4 at 70.

160. *See* Goldschmidt, *supra* note 152, at 536 (quoting Allan Ashman & James J. Alfini, *The Key to Merit Selection: The Nominating Process* 71 (1974) ("a merit plan 'can create its own brand of . . . both party and bar politics.' "); Bruce Sundlun, *Selection Law Works*, Prov. J. Bull., March 13, 1995, at A15 (asserting that the

Moreover, experience has shown that increasing the number of lawyers on the Commission can be problematic in a state as small as Rhode Island. On the one hand, trial lawyers may be the best qualified to identify the attributes of a successful judge. However, those same lawyers can have conflicts of interest that might impair their work on the Commission. The conflict exists where commissioners have to evaluate judges they are appearing before or will likely appear before in the future. If the commissioners must recuse to avoid the conflict, the judicial aspirant is less likely to garner the minimum five votes needed to be recommended to the governor.[161] Sitting judges, who due to their expertise may be well suited for higher judicial office, may be handicapped by the presence of active litigators on the Commission.

To date, the Commission's informal practice is for lawyers to recuse from considering a judge if the lawyer has a case pending before that judge. This process seems consistent with R.I. Gen. Laws section 36-14-5(a), which prohibits a public official from having "any interest, financial or otherwise, direct or indirect . . . which is in substantial conflict with the proper discharge of his or her duties . . . in the public interest."[162] A lawyer member of the Commission with a case before a judge has an interest (the financial or professional interest in assuring that the client will get a fair hearing before that judge) that could be in substantial conflict with the proper discharge of the duty to select highly qualified candidates to fill the judicial vacancy. Put simply, a lawyer member of the Commission might conclude, in the exercise of independent judgment, that the judge is not highly qualified. The public duty to not vote for the judge would be in substantial conflict with that lawyer's interest in a fair hearing before the judge. The problem could arise even when the lawyer member of the Commission does not have a case pending before a sitting judge applying to the Com-

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Rhode Island Bar Association was not included as "a selector of commission members because there was concern that it had largely become a special-interest group controlled by personal political opinions of its presidents, and not the public interest.").

161. *See supra* note 147 (explaining that according to one lawyer commissioner an abstention is the same as a no vote). The Commission is currently attempting to formulate rules for voting that will minimize the disadvantage to judges who are applicants for vacancies on other courts who may not, because of conflicts of interest, be considered by some members of the Commission. It has not yet formulated a viable solution.

162. R.I. Gen. Laws § 36-14-5(a).

mission. Lawyers may think twice before deciding not to support a judge they may appear before in the future.

The Ethics Commission's reasoning in support of its conclusion that the lawyer members of the Nominating Commission could vote on Justice Weisberger's application even though they had cases pending before him seems to ignore this genuine conflict. The Ethics Commission reasoned simply that Justice Weisberger could recuse himself when a lawyer member of the Nominating Commission appeared as an advocate and that commissioners merely "recommend" names to the governor.[163] Moreover, the Ethics Commission did not apply this reasoning when it concluded that a lawyer member of the Nominating Commission cannot participate in considering a law partner's application for a judicial vacancy.[164] The partner could also recuse if he or she was subsequently named to the bench, and commissioners always vote only to recommend names to the governor.

The conflict permitted by the Ethics Commission in the Weisberger matter is even more problematic when a trial judge is involved because that judge may be the sole arbiter of the dispute involving the lawyer member of the Nominating Commission. These difficult ethical problems would only be exacerbated if more active litigators were named to the Commission. One way to avoid some of these problems would be for the appointing authorities to nominate to the Commission retired attorneys or attorneys without active litigation practices.[165]

Finally, Mr. Jenks's focus on the decision not to give the bar association the power to select commissioners ignores the fact that nothing precludes the bar association from commenting to the Commission, the governor, or the legislature on the relative merits

163. Advisory Opinion No. 95-10, Rhode Island Ethics Commission (Apr. 5, 1995).

164. Advisory Opinion No. 95-67, Rhode Island Ethics Commission (Aug. 16, 1995).

165. There may be other reasons the number of lawyer members of the Commission should not be increased. "Non-lawyer commissioners . . . often offer the relatively clear eye of a concerned outsider, a perspective sometimes difficult for attorneys to appreciate. [I]n addition . . . non-lawyer commissioners can lend important credibility to a process that otherwise would be . . . perceived to be dominated by insiders from the legal system." *Enhancing Federal Judicial Selection*, 73 Judicature 64 (Aug./Sept. 1988).

of applicants.[166] The Commission conducts public hearings expressly for that purpose.

B. *Expanding the Pool of Judicial Applicants*

The new selection system is also an improvement because all members of the bar are encouraged to and may apply for judgeships, and the Commission must consider all applicants. The Commission must advertise all judicial vacancies before it takes any other steps to fill them. In an attempt to reach all segments of the state's population, the notice of vacancy appears in twelve different publications. Some Commissions in other states actively encourage or require commissioners to recruit qualified applicants. While that may be another way to try to find the best judicial candidates, commissioners must remain impartial if they recruit an applicant, and all applicants must be subject to the same scrutiny.[167]

The notice of vacancy published by Rhode Island's Commission specifically encourages applications from qualified men and women of all races and ethnic backgrounds. A judiciary that reflects the ethnic and gender diversity of the state is important for public confidence.[168] Although it may be too early to say anything definitive about this issue, it certainly appears that "merit selection" is not an obstacle to diversity.[169] Second, some studies suggest that it is

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166. In fact, Justin Holden, the president of the bar association, testified in support of Justice Weisberger during Weisberger's confirmation hearings in the House. He testified that the Bar Association's House of Delegates agreed Weisberger was "the best possible candidate." Russell Garland, *House Panel Grills Top Judge Nominee*, Prov. J. Bull., Feb. 18, 1995, at A5.

167. Goldschmidt, *supra* note 153, at 28.

168. *See id.* at 67-8 (explaining that because "nominating commissions are the cornerstone of the merit plan, it is essential the citizens perceive the commissions as reflecting the ethnic and gender diversity of the jurisdiction involved.").

Mr. Jenks's suggestion that the statute improperly contains an "affirmative action" or "political correctness" provision certainly is belied by the outcome of the selection process to date. *See* Jenks, *supra* note 4 at 74. Only one African-American and two women have been selected to fill judicial vacancies. The language he objects to simply gives the Commission authority to "disqualify any candidate with a demonstrated history of bias toward [historically disadvantaged classes]." R.I. Gen. Law § 8-16.1-4(b) (Supp. 1994). This seems a wise directive to Commissioners. Moreover, the Commission has not viewed that language as mandatory. For example, Judge Gilbert T. Rocha, who had opposed fair housing legislation as a legislator, was not disqualified by the Commission, and he was named to the family court. *See supra* note 48.

169. Goldschmidt, *supra* note 153 at 41.

the selection method most likely to produce a diverse judiciary. In one study, "the data revealed that of the five major methods of judicial selection in the United States, the largest proportion of African-Americans (32%) and women (35%) attained judicial office through a merit plan."[170]

The early results of Rhode Island's new selection process are not very encouraging in this regard. Only one African-American was selected for a vacancy, and he was already a sitting judge.[171] Only two women were selected.[172] Public pressure, participation and scrutiny may help. For the first associate justice vacancy on the supreme court, no women were selected by the Commission for interviews. A reporter publicly asked the Chair of the Commission to explain why.[173] Just two months later, when the Commission screened applicants for a second associate justice position, it selected two women for interviews. Moreover, interested groups and individuals can nominate candidates to the Commission or try to identify highly qualified women and minorities and encourage them to apply.[174] The appointing authorities should try to name women and minority group members to the Commission.

In addition to considering applicants of all races and genders, the Commission must consider applicants of all professional backgrounds. Partisan political activity is no longer an admission ticket. By contrast, in the past neither the governor nor the Grand Committee had any obligation to consider all qualified candidates. One person who would not likely have been considered under the old selection regime is Kent Willever, whom the Commission nominated for vacancies on the superior and supreme courts. He is well qualified, but he is a political outsider.[175]

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170. *Id.* at 67. However, Rhode Island's Grand Committee process resulted in the selection of two women for positions on the five-member supreme court.

171. *See supra* p. 94 (discussing Judge Edward Clifton's elevation to Superior Court).

172. *See id.* (discussing the selection of Netti Vogel for superior court and Elaine Bucci for district court).

173. *See supra* p. 101.

174. *See supra* p. 102 (mentioning Leslie Lopes of Rhode Island's minority judicial task force).

175. *Appointment to Court Must Be On Merit*, Newport Daily News, Oct. 17, 1995, at A7. *Cf.* M. Charles Bakst, *New Selection Process the Charm for Bourcier*, Prov. J. Bull., May 7, 1995, at D1 (explaining that Judge Bourcier would not have been selected by the House Speaker under the old system for selecting supreme court justices).

A fair response is that Kent Willever is not on the bench. Neither governor selected him. In fact, several observers of the process have noted that for the most part the judges actually selected through this new process would likely have been selected in the past.[176] Even if that view is correct,[177] there is still cause for optimism. First, the experience with similar selection systems in other states shows "a high level of general satisfaction . . . among attorneys, trial and appellate judges and women state court judges."[178] Moreover, it is undeniable that individuals have been nominated by the Commission who would not have received consideration in the past. That is a necessary first step to reform. With increased public scrutiny and pressure, a governor could be held accountable for picking only political allies from the Commission's lists,[179] and the legislature could be held accountable for wielding its confirming authority to serve partisan political ends.[180] Real improvement in the quality of the State's judiciary will require all participants in the process to commit to selecting judges based on merit and not partisan politics.

Finally, even if many of the same individuals are appointed under the new selection process, there may nevertheless be benefits. The public may have more confidence in the process. Moreover, judges selected under the new system will not be able to trace their good fortune exclusively to the legislature or the governor, to whom they might therefore feel an allegiance.

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176. *See, e.g., The Usual Suspects,* Prov. J. Bull., Aug. 11, 1994, at A14.

177. *See* Goldschmidt, *supra* note 153, at 2, 41, 44 (reviewing study examining the education and decisions of judges selected in a "merit plan" and noting the lack of "hard" evidence that "merit selection" plans result in the selection of better judges).

178. *Id.* at 58 (noting need to collect opinion data from "the general citizenry").

179. *Id.* at 15 (noting that final appointments must be made by a governor who is politically accountable).

180. Thus, the *Providence Journal Bulletin's* suggestion that the new process is problematic because there is little accountability is incorrect. For example, Governor Almond might be asked to explain why he passed over Lauren Jones, John MacFadyen, William Dimitri and Kent Willever three separate times. The new selection system may actually make the governor and the general assembly more accountable then they were under the old selection regime. For example, it appears that no member of the General Assembly was voted out of office because of Chief Justice Fay's selection.

C. *Public Oversight and Participation*

The public's opportunity to observe and participate is another important improvement in the selection process. The public can comment on the applicants throughout the Commission's selection process, either in writing or at the public hearing. The Commission's rules and regulations could go further and require the Commission to actively solicit comments from members of the bar or others who have information relevant to a particular applicant's fitness for judicial appointment. The applicant questionnaire already requires applicants to name members of the bar with whom they have professional contact, and the Commission could contact those lawyers by mail or by telephone. However, if the Commission cannot assure those lawyers that their comments will be confidential,[181] those comments may not be sufficiently frank to be helpful.

The public could observe and participate in the selection process earlier if the Commission released the names of all those who applied for a vacancy, and not just those it selected for interviews. The Commission decided not to disclose the names of all applicants to protect the reputations of lawyers not selected for interviews. That practice may violate the Access to Public Records Act.[182] According to Unofficial Opinion No. OM94-01 of the Attorney General's Office,[183] the names of all applicants are "public records" any member of the public has the right to inspect or copy.[184]

Under the Access to Public Records Act, "all records maintained or kept on file by any public body . . . shall be public records and every person shall have the right to inspect and/or copy such records . . . ."[185] Section 38-2-2(d) exempts certain records from the

181. The confirmation hearings involving Judge Rotondi suggest the legislature has the power to subpoena correspondence from a member of the public sent to the Commission. *See supra* pp. 94-95, R.I. Gen. Laws § 8-16.1-5(d) (Supp. 1994); § 8-16.1-6(d) (giving judiciary committees "the power upon majority vote . . . to issue witness subpoenas, subpoenas duces tecum, and orders for the production of books, accounts, papers, records and documents.").

182. R.I. Gen. Laws §§ 38-2-1 to 38-2-13. The Open Meetings Law is irrelevant to this question. It "governs only the public's right to be notified of and attend meetings of public officials. Access to public information is governed by . . . the Access to Public Records Act." Department of Attorney General, Unofficial Opinion No. OM94-01, at 2 (Jan. 6, 1994) [hereinafter Unofficial Opinion].

183. *See* Unofficial Opinion, *supra* note 182.

184. *Id.* at 2.

185. R.I. Gen. Laws § 38-2-3(a).

access requirement. Section (d)(1) exempts "information in personnel files maintained to hire . . . any employee of a public body; *provided, however, with respect to employees, the name . . . shall be public.*"[186] The Attorney General's Office has interpreted this proviso to mean that the names of individuals considered for employment by public bodies are "public records." It opined that "if the [Westerly] Town [Council, in interviewing individuals for the position of Town Manager] created and maintains a list of names of the applicants under consideration, that list . . . may be subject to the mandatory disclosure requirement."[187]

This result is not unmistakably mandated by the language of the statute, but it is good policy. Without knowing who has applied to the Commission for interviews, the public cannot comment on all applicants. Perhaps more importantly, the public has no way of knowing and evaluating the criteria Commission members are using to screen applicants. For example, without access to the names of all applicants, the public cannot determine whether the Commission is adhering to its statutory mandate to exercise "reasonable efforts to encourage racial, ethnic, and gender diversity within the judiciary of this state."[188]

Assuming that the Access to Public Records Act does not require the Commission to make the names of applicants for judicial vacancies public, and the Commission continues to believe that releasing those names will harm applicants not selected for interviews, there may still be some way to satisfactorily balance the interests at stake. The Commission's application form could notify applicants that their names will be made public unless they elect to have the Commission keep the fact of their application confidential. This might assure the maximum amount of public comment on all applicants while minimizing the risk that applicants will be discouraged from applying for fear that their reputations will be harmed if they are not selected for an interview. Applicants who expect public support, might prefer the opportunity to have the

186. *Id.* § 38-2-2(d)(1) (emphasis added).

187. Unofficial Opinion, *supra* note 182.

188. R.I. Gen. Laws § 8-16.1-4. For example, in assessing why no minority lawyers were selected for interviews for the first Supreme Court associate justice vacancy, the public left to rely only on Chairman Kelly's remarks to a reporter that "no blacks or Hispanics applied." *Jucicial Panel to Trim Field*, *supra* note 84, at A6.

public comment on their application without fear of damage that may be caused if they are not selected for an interview.[189]

More importantly, to give the public some assurance that the Commission is fulfilling its statutory mandate to encourage racial, ethnic, and gender diversity in Rhode Island's judiciary, the statute could require the Commission to publish an annual report of the race, ethnicity, and gender of the pool of applicants considered by the Commission in the previous year.[190] The Commission could require this information anonymously from all applicants.

One of the most significant features of the new selection system that increases public participation is the public interview. Under the Commission's rules all candidate interviews take place in public session, unless confidential matters must be discussed. These interviews can give the public important insights into an applicant's character, personality, philosophy, and qualifications.

Mr. Jenks suggests that the Commission's work is too public. He believes that public interviews are unwise because they "will deter some well-qualified lawyers from becoming candidates for judgeships."[191] However, "the public should have little confidence in the judicial potential of any candidate who does not accept the opportunity for public scrutiny of his or her qualifications."[192] Morever, Jenks's criticism ignores perhaps the greatest attribute of the new selection process. It opens to the public a process that was previously shrouded in secrecy.

It does not appear that the Open Meetings Law requires public interviews.[193] Nevertheless, the Commission should continue to

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189. *Cf.* Scott MacKay, et al., *Violet Considers Race, Chaffee's Nobel Case*, Prov. J. Bull., Oct. 16, 1995, at B1, B3 (reporting that Arlene Violet volunteered that she did not make the Judicial Nominating Commission's first cut when she applied for a superior court vacancy).

190. Connecticut's Judicial Nominating Commission is required by statute to report to the legislature "the statistics regarding the race, gender, national origin, religion and years of experience as members of the bar" of all candidates for judicial office. Conn. Gen. Stat. § 51-44a (m) (Supp. 1995).

191. Jenks, *supra* note 4, at 77-78.

192. *Judicial Panel Starts Off On Wrong Foot*, Newport Daily News, July 19, 1994, at A7.

193. "All meetings of the commission shall be subject to the open meetings law. . . ." R.I. Gen. Laws § 8-16.1-2(e) (Supp. 1995). The Open Meetings Law, R.I. Gen. Laws §§ 42-46-1 to 42-46-9, declares that "[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public pol-

conduct interviews in public because in most instances the public's interest in hearing a candidate answer questions outweighs the candidate's privacy interest. Moreover, "sunshine diminishes partisan politics and enhances the possibility that the [Commission] will bring neutral criteria to the debate."[194] If Commission members wish to explore sensitive matters in the interviews, as they undoubtedly sometimes will, the Commission can go into closed session for part of the interview. Although some matters may be discussed in some interviews that should be shielded from public view, that is not a legitimate reason for closing the entire interview. If interviews are closed, speculation and suspicion will be aroused encouraged.

The *Providence Journal Bulletin* has hinted that the commission process is suspect because commission deliberations about the relative merits of the candidates are private.[195] Mr. Jenks has argued that the Commission's decision to conduct its deliberations in private sessions is "almost certainly [an] incorrect interpretation of its authority."[196] However, if applicant interviews may take place in private consistent with the Open Meetings Law,[197] deliberations about the relative merits of the "job performance, character, or

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icy." *Id.* § 42-46-1. Its general requirement is simple: "Every meeting of all public bodies shall be open to the public unless closed pursuant to [statutory exception]." § 42-46-3.

A majority of the members of the public body may vote to close a meeting to discuss a matter that fits within one of the statutory exceptions. *Id.* § 42-46-4. Section 42-46-5(a)(1) permits a public body to close a meeting for "discussions of the job performance, character, or physical or mental health of a person or persons." *Id.* § 42-46-5(a)(1).

In Unofficial Opinion No. OM94-01, the Attorney General's Office concluded that the Town Council of Westerly had the right under Section 42-46-5(a)(1) to conduct interviews with Town Manager candidates in closed session because the purpose of the interviews was to "discuss the job performance, character, or physical or mental health of the applicants." Unofficial Opinion, *supra* note 182 at 2. However, the Open Meetings Law simply gives the Commission the discretion to interview the applicants in closed session, it does not *require* it. R.I. Gen. Laws § 42-46-5(a). In fact, the statute assumes that public business should "be performed in an open and public manner." *Id.* § 42-46-1.

194. *Enhancing Federal Judicial Selection*, 73 Judicature 64, 118 (Aug/Sept. 1989) (disagreeing with suggestion that, in order to "depoliticize" the process, federal court nominees should not appear before the senate judiciary committee).

195. *The Usual Suspects*, Prov. J. Bull., Aug. 11, 1994, at A14.

196. Jenks, *supra* note 4 at

197. *See supra* note 189.

physical or mental health"[198] of candidates may as well. Mr. Jenks acknowledges that holding discussions about candidates in closed session helps to promote the candid discussions of potentially difficult personal issues that are necessary to select the best applicants.[199] Private deliberations are a staple of "merit selection" systems nationally[200] because they encourage free and open discussions. The Open Meetings Law appears to give the Commission the freedom to decide that in the interest of candor, discussions about the qualifications, character, and fitness of particular applicants should be closed to the public. Deliberations are the only step in the Commission process that is not open to the public.[201] The Commission has struck an appropriate balance.[202]

However, it appears that under the Open Meetings Law, all applicants have the right to insist that discussions about their job performance, character, or mental health be held at an open meeting.[203] The judicial selection statute may need to be amended to specifically permit closed sessions in all instances to discuss the relative merits of candidates.

The public can also participate in the process by testifying at the Commission's public hearings. Members of the public, lawyers and non-lawyers alike, have commented on various applicants, and many interested members of the public and media have attended the hearings. This pre-selection public scrutiny and participation is essential to public confidence. Thus, the Commission should not, as it did with the last superior court vacancy, cut the hearings short by imposing an arbitrary one witness per candidate rule.[204] All members of the public should have the opportunity to offer tes-

198. The Commission is currently considering the impact on its work of the proscription in the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990) of preemployment inquiries about a job applicant's disability. Id. § 12112(d)(2)(A). *See generally* Goldschmidt, *supra* note 153, at 58-65.

199. *See generally*, Jenks, *supra* note 4 at 77-79.

200. Goldschmidt, *supra* note 153, at 16, 34.

201. *Id.* at 34.

202. *Id.*

203. R.I. Gen. Laws § 42-46-5(a)(1) (providing that a public body may hold a meeting closed to the public for discussions of the job performance, character, or mental health of a person, "*provided that such person . . . may require that the discussion be held at an open meeting.*") (emphasis added)

204. *See supra* p. 113.

timony, both favorable and unfavorable, with respect to any candidate being considered by the Commission.[205]

D. *The Voting Procedure*

Requiring commissioners to register their preferences in public also assures an important measure of accountability. Any interested individual can observe or review the votes of commissioners to attempt to detect political favoritism or bias.

Governor Almond has, I think unjustly, criticized the Commission's voting procedure because he would like the Commission to send him the maximum number of five candidates for each judicial vacancy. The governor's criticism should be considered in light of the Commission's actual performance. Of the nine lists the Commission has created to fill judicial vacancies, only three have had fewer than five names.[206] Moreover since the Commission changed its rules in response to Governor Almond's public complaints about receiving only four names to fill a position on the supreme court,[207] the governor has received five names for each vacancy.[208]

The Governor's insistence on receiving five names also ignores the fact that for each judicial vacancy, the Commission by statute must nominate "not less than three (3) nor more than five (5) highly qualified persons,"[209] and that "[a]ll names submitted to the governor by the commission shall be approved by at least five (5) members of the commission voting in favor of each selection."[210] It makes sense to write rules, as the Commission has, that would result in a list of five candidates when a majority of Commission members find there are five or more highly qualified candidates. However, to the extent that the Governor is attempting to force the Commission to produce a list of five when a majority can only agree that three or four are highly qualified, his actions are contrary to the language of the statute. The statute gives each commissioner

205. It is too early in the public hearing process to conclude that the hearings are a meaningless exercise in which the candidates simply try to outdo each other by orchestrating a large showing of support.

206. *See supra* pp. 93, 102.

207. *See supra* p. 105.

208. *See supra* pp. 106, 112, 114.

209. R.I. Gen. Laws § 8-16.1-5(a) (supreme court vacancies); *id.* § 8-16.1-6(a) (lower court vacancies).

210. *Id.* § 8-16.1-2(d).

the independent right to decide that no more than three applicants meet the highest standards. While Governor Almond has repeatedly asserted that he supports "merit selection," his position on this issue makes clear his desire, which is likely to be shared by every governor, for the greatest number of options to fill each vacancy.[211]

E. *Gubernatorial Selection and Legislative Confirmation*

Governor Almond's preference for a judicial selection system that gave him more power is also evident from his comments in the face of Judge Pfeiffer's withdrawal. That withdrawal left the Governor with a list of four candidates to choose from. Even assuming the Governor genuinely believed that an important statutory interpretation question was presented when he thereafter requested a new list, his public suggestion of names he wanted to see on the new list seemed inconsistent with the Commission's statutory responsibility to independently screen applicants and the Governor's

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211. Russell Garland & Scott MacKay, *In 96, Almond Says He Needs to Deliver*, Prov. J. Bull., Dec. 31, 1995, at A1, A15 (reporting Almond's comments that "the governor, who is answerable to the people, [should] make the appointments from as wide a list as he can get.").

Legislation has been introduced in the Senate this session to amend the selection statute to require the Commission to provide at least three names to the governor for each judicial vacancy, but to put no ceiling on the number the Commission could recommend for a vacancy. 96-S 2657, Jan. Sess. (1996). Not surprisingly, Governor Almond has supported this amendment. He has argued that the five name ceiling is "artificial" and "preclude[s] many highly qualified court applicants from a chance." Letter from Joseph Larisa, Jr., Executive Counsel to Honorable Domenic DiSandro, III, Chairman, Senate Judiciary Committee (March 25, 1996). While the number five may not be magic, "the number should be sufficiently low so that the commission nominates only the most qualified candidates." Goldschmidt, *supra* note 153, at 15 (quoting from the American Judicature Society, Model Judicial Selection Provisions (1984 revised 1994)). Without the upper limit, marginal candidates might be added to the list to avoid stigmatizing candidates left off. Lifting the ceiling could open the door to the kinds of political selections the statute was intended to eliminate, *id.* at 22-23, because each commissioner would have an unlimited supply of yes votes to use to make deals. Governor Almond's other argument in support of his amendment is surely disingenuous. His counsel has argued that as the statute is presently written, "some members of the Commission may feel they are to submit only three names." *Id.* I am quite certain that the five lawyers, the doctor, the biology professor, the blood transfusion specialist and the vice-president for human resources on the Commission understood the statute's requirement that they submit to the governor a list of "not less than three (3) and not more than five (5) highly qualified persons for each vacancy." R.I. Gen. Laws § 8-16.1-5 (Supp. 1994).

obligation to select from that list. While one might disagree with the Commission's assessment of the relative merits of the candidates, in ordering the Commission to provide at least one new name the governor was asking it for its sixth choice, and the candidates he backed publicly, Margaret Curran and U.S. Magistrate Judge Robert Lovegreen, had received zero and two votes respectively when the Commission reviewed their applications just weeks before.[212]

The Governor's intentions became clearer when, even though he had insisted that his request for a fifth name did not mean he was dissatisfied with the remaining four names on the list, he chose Robert Flanders, the sixth candidate, to join the court. It is incumbent on all participants in the new selection process to recognize that the Nominating Commission, the Governor, and the members of the General Assembly *share* responsibility and authority for selecting judges and that all participants in the process should exercise their responsibility at all times in the public interest.[213]

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212. *See supra* note 109.

213. Governor Sundlun, who like Governor Almond supported merit selection, also did the Commission no favors in the summer of 1994 when the Commission commenced its work. Rather than notifying it of one vacancy or one set of vacancies at a time, the governor asked the Commission to begin filling all the existing vacancies at once. The Commission had not yet created rules and regulations to govern its work, and it had only 45 days to fill those vacancies. Moreover, after Governor Sundlun selected many sitting judges to serve on other courts, which created more vacancies to fill, he asked the Commission to begin to fill the vacancies immediately, even before his initial selections were confirmed. After he named Workers' Compensation Judge John Rotondi to fill a position on the family court he notified the Commission immediately that it should create a list to fill the vacancy on the workers' compensation court that would be created by Rotondi's confirmation. The Commission screened applications, interviewed eleven candidates, and selected three to send to the governor for nomination. The governor nominated George Salem. However, when Judge Rotondi subsequently withdrew before his confirmation vote, the vacancy on the workers' compensation court did not materialize. The Commission's work to fill that vacancy was a waste of time that could have been avoided if the governor had simply waited until the outcome of Judge Rotondi's confirmation hearing. *See supra* pp. 95-96 and note 58.

Thus, the Commission operated without much reflection or deliberation in the summer of 1994. It performed extremely well under the circumstances. It did not have time to reflect until after this large first set of vacancies was filled. That reflection proved productive, as it resulted in several genuine improvements in the process. *See supra* p. 99.

Perhaps Governor Sundlun was motivated by real concern about filling judicial vacancies, many of which had been held up for several months during the legislative process that resulted in passage of the new judicial selection law. Perhaps

The public's opportunity to comment on candidates does not cease after the Commission publishes the list of nominees it sends to the governor. Before the governor makes a selection the public can debate the relative merits of the nominees. Mr. Jenks correctly suggested that the time period for the governor to select a nominee from that list should be increased from the current seven days for lower court vacancies and ten days for Supreme Court vacancies. A simple amendment to the statute can solve this problem.[214] An increase in these periods would not only give the governor more time to deliberate, it would provide an increased opportunity for interested parties to comment on the relative merits of the candidates, either publicly in the newspapers or by contacting the governor. "By providing the opportunity for public participation, the governor also fosters public confidence in the final appointment."[215] Moreover, both Governors Sundlun and Almond have ignored the statutory time limits to give themselves more opportunity to deliberate. The law should be changed to reflect that reality.

Mr. Jenks identified the requirement of separate confirmation by the House and Senate of supreme court nominees as a serious flaw in the system.[216] Granted, the house confirmation requirement was a political compromise necessary to garner support for the judicial selection statute. However, in return for separate confirming power the House gave up its constitutional control over the selection of supreme court justices. One needs to consider this historical background in evaluating the House's desire to maintain some role in the selection of supreme court justices.[217]

Whether or not the House's insistence on maintaining some role for itself in judicial selection is ideal, it seems the people of Rhode Island got much more in the process than they lost. While there may be some duplication of effort in separate confirmations,

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he simply wanted to fill as many vacancies as he could before he was replaced by a new governor. Regardless, his headlong rush resulted in a frenzied summer for the commissioners. *A New Process of Nominating Judges Tested, supra* note 27, at A3 (reporting that the Commission faced a "daunting task" when it began its work).

214. For example, 96-S 2657, Jan. Sess. 1996 would give the governor thirty days to make a selection. *Id.*

215. Goldschmidt, *supra* note 153, at 17.

216. Jenks, *supra* note 4 at 73.

217. In only two other states, Virginia and South Carolina, does the legislature control selection of supreme court justices. Goldschmidt, *supra* note 153, at 13.

supreme court vacancies are infrequent, notwithstanding the experience of the last several months, and they are enormously important. It is not unreasonable for both legislative bodies to confirm an individual who will be appointed for life to one of five seats on the state's highest court. As the confirmation proceedings involving Judge Rotondi and Judge Pfeiffer demonstrated, the legislature may debate issues during confirmation that the Nominating Commission and the Governor did not believe should disqualify a candidate. Legislative confirmation is the important democratic check on the judiciary, which in all other respects is intentionally insulated from representative forces.

Mr. Jenks correctly criticizes as poorly drafted the provisions of the statute that address the procedures to be followed in the event a candidate selected by the governor is not confirmed.[218] In fact, that poor draftsmanship required the governor to seek an advisory opinion from the supreme court to determine how to proceed subsequent to Judge Pfeiffer's withdrawal. The supreme court's decision has resolved the ambiguity. The commission must provide a new list to the governor if 1) a nominee withdraws, 2) the legislature fails to act, or 3) the nominee is rejected. If the nominee dies or becomes disabled before confirmation, the governor must select from the original list.[219]

However, as Mr. Jenks points out, the statute does not address the question of how to proceed in what appears to be the unlikely event that the governor fails to select a name from the list forwarded by the commission. Mr. Jenks suggests that the statute should provide that in such a circumstance the chief justice or acting chief justice of the supreme court should choose from the list.[220] However, the new selection statute creates a system of shared power among the legislature, the governor, and the commission. It would seem more consistent with that scheme if, in the event the governor elects not to fulfill his or her obligation, the list

218. Jenks, *supra* note 4 at 81.

219. In re Advisory Opinion to the Governor, 668 A.2d 1246, 1250 (R.I. 1996). The Lieutenant Governor has introduced legislation this term that provides that in the event the confirming authority fails to confirm a nominee or if a nominee withdraws for any reason, the governor must select from the remaining names on the list, unless only two names remain. Any new list must have three to five names and may include one or both names from the original list passed over by the governor. 96-S 2656, Jan. Sess. (1996).

220. Jenks, *supra* note 4.

moves to the legislature, with the nominee to be selected by the senate in the case of the lower courts and the grand committee in the case of the supreme court.

CONCLUSION

I have watched the Commission at every step. Its rules and regulations are the product of its attempts to fulfill the statutory obligation to select highly qualified candidates for Rhode Island's courts. In trying to adopt procedures that will help them accomplish their goal, the Chair and the other members of the Commission have considered the comments of any organization or interested citizen who took the time to offer them. There is every reason to believe they will continue to do so. There are obviously areas where the statute and the Commission's rules and regulations should be changed, and the discussion about proposed changes is helpful. The most important thing interested people can do is participate in and observe closely the new judicial selection process to assure that, as often as possible, the best judges are selected to serve on Rhode Island's judiciary. A process has been put in place that looks like it can accomplish the goal. Interested citizens should to seize the opportunity to participate in and improve the process.