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Rhode Island's Judicial Merit Selection Process Merits Improvement: Response

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Rhode Island's Judicial Merit Selection Process Merits Improvement

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I want to thank Professor Yelnosky and the Roger Williams University School of Law for holding this Symposium. As mentioned by Dean Logan, when the law school was created over fifteen years ago, one of its hoped-for attributes was to provide a forum for seminars of this kind. Indeed, it was the intention of the founders for the law school to add its voice to the discussion and debate of significant legal matters presented in Rhode Island. The State greatly needs this input and it is very commendable that we are having this Symposium today.

This Symposium allows those of us who are interested in judicial reform to pull various issues together in the hope of revitalizing the system that was contemplated when the Constitution was amended in 1994. I bring a slightly different perspective because I have been involved in the merit selection process for about as long as anyone still active in the cause – about twenty-five years. This is a good ten years before the judicial merit selection law was adopted in 1994. Initially, I was involved with the Rhode Island Bar Association, which recognized a need for legal reform even before the various scandals of the 1980s and 1990s occurred. We recognized that judges should be selected on the basis of merit in order to ensure that cases would

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be heard by a nonpartisan and independent judiciary and thereby earn the trust and support of all citizens.

There were several Governors in the 1970s and 1980s who, pursuant to the advice of the Bar Association, adopted various screening procedures by executive orders. During that time, the Governor would send a list of attorneys to a Bar Association Committee that reviewed the candidates, graded them and submitted a report to the Governor for consideration. Sometimes the Committee's recommendations were followed, sometimes not. The Bar was not satisfied with this ad hoc system, but nevertheless accepted it for a time as being preferable to the existing manner of selecting judges—a system which appeared to make political connections the primary attribute in the choice process.

The preliminary catalyst for change came once the various judicial scandals occurred in the 1980s. Consequently, during the 1986 Constitutional Convention, an amendment was proposed that provided for the merit selection of judges, among other judicial reforms. The amendment was rejected in large measure for the reason that the Grand Committee's role in electing Supreme Court justices was to be retained.[1]

Under the system in place, judicial scandals continued to occur and the developing crisis was exacerbated by the Rhode Island RISDIC banking crisis. Voters were disenchanted with government as a whole. Those of us who had been in the reform movement knew that a crisis situation frequently gives rise to reform opportunities, and action was taken accordingly. The RIght Now Coalition, a broad-based community organization spearheaded by Common Cause and consisting of a variety of disparate community groups, including the Bar Association, was organized and soon became the moving party in seeking to change the existing method of selecting judges to one based on merit. The Bar Association and Common Cause were the primary negotiators in preparing various merit selection plans in consultation with the American Judicature Society, the preeminent national organization on the judicial merit selection process. Initially, the

1. The Grand Committee consisted of the House and Senate as one body which voted on the judicial candidates for the Supreme Court. Candidates submitted their names to the Grand Committee for consideration.

General Assembly was not agreeable to change, particularly a change that would weaken its hold on the judicial selection process. Negotiating the various proposals with the leaders of the General Assembly was very difficult and ultimately resulted in serious flaws in the system adopted, which I will enumerate later.

Those of us who have resided in Rhode Island most of our lives know that traditionally the legislature has been the de facto governing body in Rhode Island. Our Constitution provided for a relatively weak Governor. As a result, the legislature was formerly instrumental in selecting judges and making other key governmental decisions. Given the power vested in the General Assembly at that time, negotiations on the issue of merit selection were complicated. In particular, one of the most difficult issues involved the selection of Supreme Court justices, which were formerly elected by the Grand Committee. At that time, the Governor was not involved. As in most, if not all states, the House has far more members than the Senate. So, practically, the House controlled the selection of Supreme Court justices. Given that the Speaker is the most powerful position in the House, he wielded tremendous power in the process of selecting Supreme Court justices.

The judicial machinations that occurred in the 1980s and 1990s demonstrated what can happen under such a system. The Speaker himself became the Chief Justice in 1976.[2] His successor, promoted by the then Speaker, was appointed to become the Court's Chief Clerk.[3] Scandals arose in both instances.[4] Merit, obviously, was not a major consideration in either of the cited instances. It turned out that Rhode Island was one of only three states to select their Supreme Court justices in this manner. We thought we could and should do better. But the House was not ready to give up. Indeed, House leaders insisted upon maintaining its involvement in the process by requiring its advice and consent together with that of the Senate when Supreme Court justices were appointed. Some of us objected to dual confirmation, but the House was unbending; it took the position that refusal to

2. *See* Common Cause Rhode Island, Judicial Reform: Background and History, http://www.commoncauseri.org/wordpress/?page_id=54 (last visited May 12, 2006).

3. *See id.*

4. *See id.*

include the House was a deal-breaker. Therefore, RIght Now compromised and the measure of the compromise came quickly. Shortly after the Merit Selection Constitutional Amendment was passed, the House underscored its continued participation in the selection of Supreme Court justices by arbitrarily rejecting the appointment of a very qualified female attorney.

The second major stumbling block was the composition of the Judicial Nominating Commission ("JNC"). RIght Now proposed that the majority of the members should be selected by the Governor, since she/he had the final authority to make and be ultimately accountable for judicial appointments. Conversely, it was felt by some that the balance of the members should be selected by the Bar Association since members of the Bar[5] and their clients together comprised the public interest group most directly affected by a judicial merit selection system. Legislation was required to implement the Constitutional Amendment. Once again the General Assembly (both Houses) insisted they be directly involved in the selection of JNC members. As a result, another compromise was made and the proposed appointments by the Bar Association became the appointments of the majority and minority leadership of the General Assembly.

Looking back at it now, I say without any reservation, those two compromises led to an ill-conceived merit selection system. The leadership of the General Assembly has, from the inception, consistently failed to comply with the law and replace their appointees at the end of their terms leading to holdovers, tantamount to reappointments, which were prohibited by the law. Consequently, this resulted in a failure to maintain a rotating Commission expressly required by the law. The foregoing gives rise to the perception that the JNC is not operating in a nonpartisan and independent manner as required by the law and the main purpose for the adoption of the merit selection plan in the first place. If the merit selection system does not work as intended, it does not mean we do not have competent and qualified judges. Rather, it means that the system designed to instill confidence in the citizens of Rhode Island – that their judiciary was selected in a nonpartisan and independent manner

5. All Rhode Island attorneys are required to belong to the Bar Association.

based solely on merit – has not materialized as hoped for.

The proof of the pudding, if one is looking for proof, is the fact that the number of judicial applicants has diminished over the years, creating the impression that "political sponsorship" is a prerequisite for an applicant to have a meaningful opportunity to be on the JNC's list submitted to the Governor. The relations most applicants have with various political bodies, as office-holders or as employees of state or municipal entities, furthers that impression. It appears that applicants who do not enjoy some kind of political relationship are in short supply. That is the way it was prior to merit selection, and unfortunately many of us believe the selection system has not materially changed. Recently, for a vacancy in the Superior Court, there were seven applicants, six of whom were either members of the Attorney General's department or had some connection with politics. Rachel Caufield, one of the speakers and a recognized authority on judicial merit selection, pointed out (and many now agree) that if we do not know who has applied to the JNC, the public has no idea who has or has not been considered. Full disclosure would allow a comparison among the applicant pool to help determine whether there is validity to the required political sponsorship accusation. It is therefore recommended that the JNC consider disclosing the names of *all* applicants, not just those who are interviewed.

In conclusion, the merit selection process should be reviewed for the primary purpose of eliminating involvement of the General Assembly in the process, with the exception of confirmation of appointments by the Senate. We are led to believe that in no other State where merit selection has been adopted does the legislature play such an active role as it does in Rhode Island.[6] The House must be eliminated from the Supreme Court advice and consent process.[7] Further, the appointees to the JNC should be made by the Governor and some person(s) or body other than members of the General Assembly, preferably the Bar Association.

6. The General Assembly should confine itself to its constitutionally designated duties – legislating; it should not be involved in the judicial selection process other than the traditional role of the Senate to give its advice and consent to judicial appointees.

7. Traditionally, in our system of governance the role of giving advice and consent to executive appointments is confined to the Senate only.

I realize these two suggestions are tall orders, but they are at the heart of making the judicial merit selection system work as intended. There is one more important suggestion. As I have said, the Rhode Island Bar Association was one of the propelling forces for the initiation and acceptance of a merit selection system. It should become a player again. The Bar and its clients should have the most interest in a merit-based judicial selection process; and the members of the Bar have collectively the most knowledge about the lawyers most deserving to be elevated to the various courts in Rhode Island. Involvement by the Rhode Island Bar Association is therefore essential if the judicial selection process is to operate as the voters intended when the Constitution was amended.