

Fall 2010

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Recommended Citation

Marion, John (2010) "Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island," *Roger Williams University Law Review*: Vol. 15: Iss. 3, Article 7.

Available at: http://docs.rwu.edu/rwu_LR/vol15/iss3/7

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Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island*

John Marion**

INTRODUCTION

When Common Cause Rhode Island was founded in 1970, reforming judicial selection was not one of the organization's primary concerns. It was an organization primarily focused on limiting the influence of money in politics and bringing greater transparency to government.¹ However, for much of its existence the organization has dealt with the subject of how we pick judges in Rhode Island. Why? Because judicial selection stands at the nexus of power, money and politics, and as this Article discusses, Rhode Island has a long and sordid history that put reform at the center of the agenda.

This Article will focus on the reform of judicial selection in Rhode Island; why we have our current system, and what has happened to that system in the fifteen years since its implementation. The Article will begin with a brief history of the cycles of scandal and reform efforts that led to the initiation of the merit selection process in 1994, followed by a brief review of the

* Prepared for Presentation at the Symposium, "Judicial Selection in Rhode Island: Assessing the Experience with 'Merit Selection,'" November 13, 2009, Roger Williams University School of Law.

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1. For a look at the early history of the organization, see JOHN W. GARDNER, IN COMMON CAUSE: CITIZEN ACTION AND HOW IT WORKS (W.W. Norton 1971).

system that ultimately was put in place. From there, the Article will examine how the system is working today, with emphasis on attempts to modify the system by the executive and legislative branches, and draw conclusions about how the system is presently working. Finally, the epilogue will discuss what might be done to reinvigorate the system.

I. A HISTORY OF SCANDAL AND REFORM

Rhode Island has fully embraced the merit selection system for choosing judges. The State went from merit selection of no judges, to a process covering all judges for state courts.² This makes Rhode Island one of the last states to convert to this system, and one of the only to use it for all state courts.³ So why did Rhode Island jump into using a merit selection process with both feet? In a word: scandal.

“Rogue’s Island” as the State has sometimes been derisively called, has a long history of scandal.⁴ Indeed, the courts’ long history of patronage politics, particularly with the interference of the General Assembly, has made the judicial branch particularly ripe for scandal. Through the early part of the twentieth century, the judiciary served largely at the will of the General Assembly, and turnover in the legislative branch meant turnover in the judicial branch as well.⁵

The creation of our modern system of merit selection was the result of two waves of scandal. The first, spanning from roughly 1984-1986, centered on then Chief Justice Joseph Bevilacqua.⁶ At that time, the power to appoint members of the Supreme Court rested in the Grand Committee, which consisted of both chambers

2. Russell Garland, *R.I. Changes the Method of Selecting Its Judges*, PROVIDENCE J.-BULL., June 3, 1994, at A1.

3. AMERICAN JUDICATURE SOCIETY, JUDICIAL MERIT SELECTION: CURRENT STATUS tbl.1 (2010), available at http://www.judicialselection.us/uploads/Documents/Judicial_Merit_Charts_0FC20225EC6C2.pdf.

4. MARTY E. MARTIN, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 77 (1985).

5. MAUREEN MOAKLEY & ELMER CORNWELL, RHODE ISLAND POLITICS AND GOVERNMENT 109-10 (2001).

6. *The Chief Justice Resigns: A Look Back—Tracing the Highlights of His Private Life and His Public Career*, PROVIDENCE J.-BULL., May 29, 1986, at A17 [hereinafter *A Look Back*].

of the General Assembly sitting together.⁷ Chief Justice Bevilacqua was sitting Speaker of the House in 1976 when members of the very body he presided over put him on the Court.⁸ The Chief Justice's public associations with members of the mafia brought him to the attention of state and federal law enforcement, and in 1985, led to his suspension by the Commission of Judicial Tenure and Discipline.⁹ Despite the suspension, Bevilacqua continued to serve until the threat of impeachment led to his resignation in 1986.¹⁰

Simultaneous to the Bevilacqua story playing out in the media, Rhode Island was exercising its decennial option to have a constitutional convention. At that 1986 convention, the Committee on the Judicial Branch suggested replacing the then current arrangement, wherein the Governor appointed members of the inferior courts and the aforementioned Grand Committee chose members of the Supreme Court, with a merit selection system.¹¹ Question Two on the November ballot read:

Judicial Selection and Discipline

Shall a non-partisan independent commission be established to nominate judges for appointment by the general assembly in the case of supreme court vacancies and for appointment by the governor in the case of vacancies in other courts? Shall the commission have authority to discipline or remove all judges? Shall judges appointed hereafter be required to retire at 72 years of age? Shall the duty of the supreme court to give advisory opinions be abolished?¹²

7. John Kiffney, *The Chief Justice Resigns: A Look Ahead – New Process To Be Used To Select a Successor*, PROVIDENCE J.-BULL., May 29, 1986, at A1.

8. *A Look Back*, *supra* note 6.

9. Russell Garland, *The Bevilacqua Case: Board Censures Bevilacqua for 'Disrepute to Judiciary' – Chief Justice Agrees To Take 4-Month Unpaid Suspension*, PROVIDENCE J.-BULL., June 22, 1985, at A1.

10. John Kiffney, *The Chief Justice Resigns: The Hearings – Teitz Thinks Probe Led to Resignation: A Diligent Pursuit of Evidence*, PROVIDENCE J.-BULL., May 29, 1986, at A14.

11. PATRICK T. CONLEY, *LIBERTY AND JUSTICE: A HISTORY OF LAW AND LAWYERS IN RHODE ISLAND – 1636-1998* 459 (1998).

12. R.I. Secretary of State, Voter Information, State Referenda, Nov. 4, 1986.

This amendment failed on a vote of 147,587 to 126,535.¹³ The Providence Journal's description of the failure cited that, "the proposed system in reality would expand legislative selection powers while diluting those of the governor. We believe all judicial appointments should be initiated by the governor, subject to state Senate confirmation."¹⁴

Distrust of the General Assembly's role in the judicial selection process is a continuous theme of attempts to reform the system. This is ironic given that in colonial times the Assembly itself served as a court of last resort.¹⁵ And under the royal charter that was used to govern Rhode Island until the 1843 Dorr Rebellion, members of the General Assembly were also allowed to act as sitting judges.¹⁶

In 1986 an amendment was passed to create an independent Ethics Commission to replace the Conflict of Interest Commission that had been in place since 1976.¹⁷ The newly constituted Ethics Commission was able, according to a Supreme Court advisory opinion in 1992, to make its own modifications to the Code of Ethics.¹⁸ The Ethics Commission has been enforcing, and sometimes modifying, the Code of Ethics since 1987.¹⁹ One part of the Code that affects judicial appointment is the "revolving door" statute that prevents elected officials from taking state jobs for one year after they leave office.²⁰ This has proven to be a significant change in how business has been done in Rhode Island politics.²¹

13. R.I. BD. OF ELECTIONS, OFFICIAL COUNT OF THE BALLOTS CAST 445 (1986).

14. Editorial, *Voter Misgivings over the Amendments*, PROVIDENCE J.-BULL., Nov. 7, 1986.

15. DAVID S. LOVEJOY, RHODE ISLAND POLITICS AND THE AMERICAN REVOLUTION: 1760-1976 93 (1958).

16. MOAKLEY & ELMER, *supra* note 5.

17. John Kiffney, *O'Neil Leads Violet: Diprete, Licht, St. Germain Win – Question 14 fails; 8 Amendments Win, 5 Lose; Abortion Curb; Assembly Pay Hike Rejected*, PROVIDENCE J.-BULL., Nov. 5, 1985, at A1.

18. *In re* Advisory Opinion to the Governor (Ethics Comm'n) 612 A.2d 1, 13 (R.I. 1992).

19. Memorandum from Jason Gramitt to the R.I. Ethics Comm'n (Feb. 16, 2010) (on file with author).

20. R.I. GEN. LAWS § 36-14-5(o)(1) (2009); MOAKLEY & ELMER, *supra* note 5, at 110; Katherine Gregg, *High Court Hears Arguments: Ethics Law Attacked*, PROVIDENCE J.-BULL., Sept. 22, 1993, at A1.

21. Scott MacKay, *High Court Upholds Revolving Door Law*, PROVIDENCE

In the late 1980s and early 1990s another wave of scandal in the judicial branch prompted another round of reform. This time the scandal was more widespread, and pervaded the courts at several levels. It began with Family Court Judge John E. Fuyat's resignation after evidence surfaced that he had borrowed substantial sums of money from lawyers who had appeared before his court.²² In 1991 retired Superior Court Judge Antonio S. Almeida was charged with taking kickbacks from lawyers with business before his former court.²³

Then came the straw that broke the proverbial camel's back. In 1986, in the wake of the Bevilacqua scandal, Thomas Fay, former state legislator and then current Family Court Judge, was elected as Chief Justice of the Supreme Court with the support of his political ally, House Speaker Matthew Smith.²⁴ Fay proceeded to appoint Smith chief administrator and clerk of the courts. For six years Fay presided over the creation of a vast patronage system that resulted in a series of exposés in the Providence Journal titled "The Making of an Empire."²⁵ The articles led to the downfall of Smith and later Fay, and brought the Journal a Pulitzer Prize.²⁶

For reformers, the second wave of judicial scandal galvanized the political will necessary to finally pass merit selection of judges.²⁷ On the heels of the Rhode Island Savings and Deposit

J.-BULL., Nov. 16, 1993, at A1.

22. Tracy Breton, *Judge Fuyat's Money Borrowing Under Scrutiny*, PROVIDENCE J.-BULL., Oct. 13, 1989, at A1.

23. Tracy Breton, *Former Judge Charged with Accepting Bribe*, PROVIDENCE J.-BULL., July 22, 1991, at A1.

24. Thomas E. Walsh, *Selecting A New Chief Justice: General Assembly Elections - Judge Fay Rhode Island Chief Justice: Family Court Jurist, 45 Wins on First Ballot with Heavy Democratic Support*, PROVIDENCE J.-BULL., July 4, 1986, at A1.

25. Tracy Brenton, Dean Starkman, & John Sullivan, *The Making of an Empire: Chief Judge, Top Clerk Preside Over Network of High-Priced Patronage*, PROVIDENCE J.-BULL., July 25, 1993, at A1.

26. Dean Starkman & John Sullivan, *Chief Justice Fay Resigns: Attorney General Says Investigation To Continue*, PROVIDENCE J.-BULL., Oct. 9, 1993; Dean Starkman & John Sullivan, *Smith Quits As Probe Widens*, PROVIDENCE J.-BULL., Aug. 11, 1993; *The Pulitzer Prizes: 1994 Winners and Finalists*, <http://www.pulitzer.org/awards/1994>.

27. Russell Garland, *Campaign '94 Question 1: Judicial Reform - Voters To Have Say on Judicial Selection, Legislators' Pay; Scandal Prompted Merit Plan*, PROVIDENCE J.-BULL., Oct. 11, 1994, at C5.

Insurance Corporation (RISDIC) scandal earlier in the decade, judicial merit selection as a form of reform gained momentum.²⁸ The RighTNow! coalition, born of the RISDIC crisis, made merit selection the primary reform initiative.²⁹ Merit selection, rejected by the legislature in 1993, had new life in 1994's General Assembly session.³⁰ Such was the push (and confidence of its passage) for merit selection that the reform groups asked the current members of the judiciary to stay in their jobs until merit selection was put in place so that the Assembly could not put any more people on the bench.³¹

A variety of approaches to merit selection were proposed in late 1993 and 1994. Most involved panels of between nine and eleven members from a variety of different appointing authorities.³² The most significant disagreement concerned whether the Bar Association should have a formal role in the process.³³ The support of Governor Bruce Sundlun, one of the delegates to the 1986 constitutional convention that had originally supported merit selection, proved important in the renewed push.³⁴

In pushing for merit selection, a number of notable reformers, including Alan Flink, past president of the Rhode Island Bar Association, and Philip West, executive director of Common Cause, pressed the case in the media. They stood partially in opposition to the editorial page of the Providence Journal-Bulletin that called only for the elimination of the Grand Committee.³⁵ In

28. Wayne G. Miller, *Right Now! Urges Reform in Choosing Judges*, PROVIDENCE J.-BULL., Aug. 27, 1993; Elinor Mills, *Group Urges Judges Not Be Elected*, WESTERLY SUN, Aug. 27, 1993.

29. Miller, *supra* note 28; Mills, *supra* note 28.

30. Miller, *supra* note 28.

31. Garland, *supra* note 2.

32. Scott MacKay, *Agreement Near on Process for Picking Judges*, PROVIDENCE J.-BULL., Dec. 11, 1993; Scott MacKay, *Senate Panel Tackles Judicial Selections*, PROVIDENCE J.-BULL., Sept. 24, 1993, at A1; Sundlun *Endorses Judge-Selection Plan*, W. WARWICK TIME, Dec. 15, 1993; Russell Garland, *Judiciary Panel OKs Reform Bill*, PROVIDENCE J.-BULL., Mar. 9, 1994.

33. Scott MacKay, *Sundlun Backs Panel Choosing Judge Pool*, PROVIDENCE J.-BULL., Dec. 15, 1993, at C4.

34. *Sundlun Outlines Changes to Judge Selection Process*, WESTERLY SUN, Dec. 15, 1993.

35. *Accountability and the Bench*, PROVIDENCE J.-BULL., Dec. 19, 1993; *For Permanent Court Reform*, PROVIDENCE J.-BULL., July 27, 1993; *Reform*

West's words, merit selection would serve:

To take the politics out of picking judges.

To ensure that every individual elevated to serve as a judge is highly qualified.

To restore public confidence in a genuinely independent judiciary.

To protect the judiciary from future attempts at political manipulation.³⁶

Mr. Flink's language was a little more circumspect, when it suggested that, "[t]he creation of a merit selection system gives us the needed apparatus for reform by removing from the appointment process the overreliance on political considerations."³⁷ But his goal of a full merit selection system for all state judges was no less grandiose.³⁸

On June 2, 1993 Governor Sundlun signed into law a bill creating the Judicial Nominating Commission for all lower court judges in Rhode Island.³⁹ But to rid the process of the Grand Committee, the people would have to amend the Rhode Island Constitution.⁴⁰ That November the voters of Rhode Island faced Question One on the ballot:

Shall Article 10, Section 4 and Article 10, Section 5 of the State Constitution be amended and approved to read as follows:

Section 4. State Court Judges—Judicial Selection.—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 and consent of the senate, and by and

This Reform, PROVIDENCE J.-BULL., May 30, 1994.

36. Philip H. West, Jr., *Merit Selection Is the Solution to the State's Judicial Problems*, PROVIDENCE J.-BULL., Mar. 16, 1994.

37. Alan S. Flink, *The Real Merit of Selection*, PROVIDENCE J.-BULL., June 15, 1994.

38. *Id.*

39. Garland, *supra* note 2.

40. *Id.*

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

Section 5. Tenure of Supreme Court Justices—Justices of the supreme court shall hold office during good behavior.⁴¹

With 69.9% of the vote, Question One passed, and a full system of merit selection for all state judges in Rhode Island was enshrined in the Constitution.⁴² Use of the Grand Committee to choose Supreme Court justices was officially dead.

II. FIFTEEN YEARS OF ATTACKS ON MERIT SELECTION

With the inauguration of a system of merit selection for all state judges, and with all of those same judges receiving lifetime appointments with no mandatory retirement age, Rhode Island created a system that would ideally lead to the most independent judiciary in the nation.⁴³ Once the voters passed the necessary constitutional changes, the “independent nonpartisan judicial nominating commission” (JNC), created by statute in June of 1994, was officially in charge of nominating all judges to the

41. R.I. Secretary of State, Voter Information, State Referenda, Nov. 8, 1994.

42. *Voters Reform Judiciary, Trim Legislature Size*, PROVIDENCE J.-BULL., Nov. 11, 1994.

43. Rhode Island was the last state to embrace a merit selection for judicial appointment. It was also one of the few to move to the commission process for all judges at once. See AMERICAN JUDICATURE SOCIETY, CHRONOLOGY OF SUCCESSFUL AND UNSUCCESSFUL MERIT SELECTION BALLOT MEASURES, http://www.judicialselection.us/uploads/documents/Merit_selection_chronology_1C233B5DD2692.pdf.

executive.⁴⁴

From the beginning of the JNC's now fifteen-year history, there have been patterns of behavior that have repeated themselves. The first form of behavior is the political branches acting to undermine the process by putting politics before merit. The second pattern has been the political branches seeking to undermine and circumvent the process by seeking changes to what was initially established. The final pattern involves the JNC itself setting rules that do not provide for maximum transparency.

First, it is necessary to explain the institutional structure that was adopted. The enabling legislation created a nine-member JNC, with a mix of lawyers and non-lawyers. Appointing authority was vested in a variety of actors. The Governor receives four direct picks, and also makes selections from lists submitted by the Speaker of the House, the Senate President, the minority leaders of both houses, and a joint list of the Speaker and the President.⁴⁵ Furthermore, the statute encourages that the appointing authorities make, "reasonable efforts to encourage racial, ethnic, and gender diversity within the commission."⁴⁶

The original statute required that "[w]ithin forty-five (45) days of any vacancy the commission shall publicly submit the names of not less than three (3) and not more than five (5) highly qualified persons for each vacancy to the governor."⁴⁷ The Governor was required to pick from the list within ten days in cases of Supreme Court vacancies, and within seven days from lists for lower courts.⁴⁸ For the Supreme Court, the Senate and House must then provide advice and consent, and for all inferior courts, only the Senate's approval is necessary.⁴⁹

A. Political Branches Acting Political

From the very first efforts to select individuals for the bench, the system revealed that politics was not completely removed from the selection of judges. Any system of judicial selection, other

44. See generally R.I. GEN. LAWS § 8-16.1-2 (1994).

45. *Id.*

46. *Id.*

47. *Id.* at § 8-16.1-6.

48. For nominations and appointments to the Supreme Court, see *id.* § 8-16.1-5. For all lower court nominations and appointments, see *id.* § 8-16.1-6.

49. R.I. GEN. LAWS § 8-16.1-6 (1956).

than direct election by voters, will involve the political branches of government. However, more than other merit selection states, Rhode Island's system allows the General Assembly an outsized role.⁵⁰ Not only does the leadership of the General Assembly help pick the Commissioners, the Senate gives advice and consent to all nominees, and for nominees to the Supreme Court, the House must also provide advice and consent.⁵¹

Within four months of the creation of the merit selection system, the Senate rejected one of Governor Sundlun's picks, John Rotondi, Jr., for a position on the family court.⁵² Even more startling was the rejection of one of Governor Almond's early choices for Supreme Court, Margaret Curran, by the House Judiciary Committee, in a move that observers at the time said was a power play by House leadership.⁵³ In the Curran case there were no witnesses in opposition to her nomination, and legislators cited only youth and lack of experience as reasons behind the rejection, even though others on the list (and Court) had similar ages and qualifications.⁵⁴ In what would seemingly become another problem for the merit selection process, opponents of Curran's nomination cited Governor Almond's lack of lobbying on behalf of her nomination partially for its failure.⁵⁵

A dispute related to the consequences of the withdrawal of the Governor's nominees prior to their confirmation by the Assembly illuminates some of the concerns with the General Assembly being involved in judicial selection.⁵⁶ The Court took as its premise that "the reason and spirit underlying both the constitutional provision

50. Katie Mulvaney, *Judicial-Selection Process Debated*, PROVIDENCE J.-BULL., Nov. 14, 2009, at A5.

51. AMERICAN JUDICATURE SOCIETY, MODEL JUDICIAL SELECTION PROVISIONS (2008), available at http://www.judicialselection.us/uploads/documents/MJSP_ptr_3962CC5301809.pdf [hereinafter MODEL JUDICIAL SELECTION PROVISIONS].

52. Russell Garland, *Analysis: A New Process of Nominating Judges Tested*, PROVIDENCE J.-BULL., Sept. 26, 1994.

53. Scott MacKay, *House Leaders Flex Muscles*, PROVIDENCE J.-BULL., Jan. 30, 1997, at A1.

54. Jonathan D. Rockoff, Scott MacKay, & Russell Garland, *House Panel Rejects Curran Nomination*, PROVIDENCE J.-BULL., Jan. 23, 1997.

55. Scott MacKay & Russell Garland, *Nomination Fight Reflects Struggle for Power*, PROVIDENCE J.-BULL., Jan. 26, 1997, at A1.

56. Elliot Krieger, *Panel Must Give Almond New List of Court Nominees*, PROVIDENCE J.-BULL., Jan. 6, 1996, at A3.

and the statute, *viz.*, that legislative control of judicial appointments be reduced and that executive power of appointment enhanced.”⁵⁷ The Court ruled that the General Assembly’s public opposition prior to a vote would be tantamount to exercising its power to reject a nominee and could force a nominee to withdraw, without going through the process of Advice and Consent.⁵⁸

B. Neglecting and Undermining the System

The second trend in the history of the merit selection system has been the political branches undermining the process, both by neglect and through deliberate attempts to circumvent the system. Neglect has come in the form of ignored deadlines and a changed pool.⁵⁹ The end-run around the system has come in the form of the explosion of a new class of judicial officers not subject to merit selection: magistrates.⁶⁰

The process of merit selection has never properly worked in Rhode Island. There have been problems with nominations being made to the JNC, problems with the lists that the Commission has produced, and problems with all of the principals meeting the timeline.⁶¹

The original enabling statute read, “[n]o member shall be reappointed to the commission; provided, however, that each member shall continue to serve until his or her successor is appointed and qualified.”⁶² Since early on in the history of the JNC, nominations have not been made to replace Commissioners whose terms have expired after four years.⁶³ In one instance the

57. *In re Advisory Opinion to the Governor (Judicial Nominating Comm’n)* 668 A.2d.1246, 1249 (R.I. 1996).

58. *Id.* at 1250.

59. Katherine Gregg, *Almond Misses Deadline To Nominate Judge*, PROVIDENCE J.-BULL., Oct. 11, 1997, at A3; Katie Mulvaney, *Senate Panel To Consider Extending Law That Expanded Judicial Pool*, PROVIDENCE J., June 4, 2009, available at http://www.projo.com/news/content/JUDICIAL_NOMINATING_06-04-09_QBEJD35_v11.3cd73d2.html.

60. Common Cause Education Fund, *Unpublished History of Magistrate Selection in Rhode Island* (Nov. 16, 1997) (on file with author).

61. For an example of missed deadlines, see Gregg, *supra* note 59. For an example of delays in the process, see Tracy Breton, *New Judge Selection Held Up By Character Checks*, PROVIDENCE J.-BULL., Nov. 12, 1999, at B1.

62. R.I. GEN. LAWS § 8-16.1-2 (1994).

63. Katherine Gregg, Russell Garland, John E. Mulligan & Scott MacKay, *Political Scene: Who Says No to a \$3,100 Raise?*, PROVIDENCE J.-

Commissioner sat for eleven years, almost three full terms.⁶⁴ A chronic lateness has plagued the appointing authorities over the years, so much so that at one point two-thirds of the Commissioners were sitting despite expired terms.⁶⁵ And even when the legislative leaders have created lists, Governor Carcieri has taken over a year to choose.⁶⁶ The neglect in making appointments is more than a mere worry about the legitimacy of the Commission, it has been demonstrably detrimental to the process itself, causing a deadlock in voting for one Supreme Court vacancy.⁶⁷

When nominations have been made they have undermined the statute. In several instances there have been reappointments, despite the express language in the original statute.⁶⁸ No appointment epitomized the problems of holdovers and reappointments more than that of Commissioner Gerard Visconti, who was reappointed in 2000, despite having previously served on the Commission for the first year after its inauguration.⁶⁹ He then sat until 2007 because the Governor failed to replace him on the expiration of his term. Mr. Visconti served the equivalent of eight years spread over the course of two appointments.⁷⁰

In several instances we have seen appointments that are so closely associated with the political branches as to call into

BULL., Sept. 29, 1997, at B1, B3.

64. Katie Mulvaney, *Two Appointed to Judicial Nominating Commission*, PROVIDENCE J.-BULL., Oct. 3, 2009, at A5.

65. Katie Mulvaney, *Six on Judgeship Panel Serving Under Expired Terms*, PROVIDENCE J.-BULL., Feb. 24, 2009.

66. Katherine Gregg, Liz Anderson, & Edward Fitzpatrick, *Political Scene - High Tech Entrepreneur Returning to Politics with State GOP*, PROVIDENCE J.-BULL., Jan. 3, 2005, at B1.

67. Edward Fitzpatrick, *R.I. High Court Candidates Cut to 5 Finalists*, PROVIDENCE J., Apr. 29, 2005, available at http://www.projo.com/news/content/projo_20040429_jnc29.2a240b.html#.

68. R.I. GEN. LAWS § 8-16.1-1(c) originally read, "No member shall be reappointed to the commission." Despite that directive, Governor Carcieri appointed Commissioner June Tow, who had previously served from 1998-2002, to a new term in 2007. As a result, the language in the statute was subsequently changed to read, "No person shall be appointed at any time to serve more than one term as a member of the commission." See also Edward Fitzpatrick, *Judicial Panel's Makeup Blasted*, PROVIDENCE J.-BULL., Mar. 16, 2007, at B1.

69. Jonathan D. Rockoff, *Lawyer Visconti Picked To Head Judicial Panel*, PROVIDENCE J.-BULL., Dec. 22, 2000, at B1, B4.

70. Fitzpatrick, *supra* note 68, at B3.

question whether they qualify as “independent.”⁷¹ Sharon Burgess, a neighbor of House Speaker John Harwood, kept a seat on the Commission years past the expiration of her term.⁷² In a more recent instance, current Speaker William Murphy’s law partner was placed on the Commission.⁷³ If those who crafted the legislation sought to expressly prohibit two members of the Commission from being from the same law firm, it is reasonable to infer that they did not intend for Commissioners to be law partners with legislative leadership.⁷⁴ Yet another instance saw a top lawyer for the State, possibly in conflict of the statute’s prohibition against public officials, be placed on the Commission.⁷⁵

The final way in which the political branches have neglected both the institution of the JNC and the process it carries out has been through the disregard for deadlines set out in the statute.⁷⁶ The original statute called for the Governor to choose from Supreme Court lists within ten days, and lists from the lower courts in seven days.⁷⁷ Those provisions were understandably changed to twenty-one days early in the life of the merit selection process. Despite the change, a wholesale disregard for the deadline has persisted.⁷⁸

Governor Carcieri has termed the deadline to be “merely advisory” through his surrogates, and in several instances has waited over one year to make appointments.⁷⁹ In seeming contradiction to his concern that twenty-one days is too restrictive, the Governor has seen fit to interview candidates prior to the list being produced.⁸⁰ Governor Carcieri has gone so far as to express an indifference to the process of selecting judges altogether, saying

71. *Id.*

72. Jonathan D. Rockoff, *Burgess to remain on judicial panel*, PROVIDENCE J.-BULL., Nov. 18, 2000.

73. Mulvaney, *supra* note 64.

74. See R.I. GEN. LAWS § 8-16.1-2 (1994).

75. Fitzpatrick, *supra* note 68.

76. Gregg, *supra* note 59.

77. See statutes cited *supra* note 48.

78. Gregg, *supra* note 59; Katie Mulvaney, *List of Judicial Vacancies in R.I. Grows; Help Wanted*, PROVIDENCE J.-BULL., Jan. 13, 2009, at A1.

79. *Carcieri Will Leave Imprint on Courts, Selection Process*, PROVIDENCE J.-BULL., Sept. 13, 2009, at A3.

80. Katie Mulvaney, *Carcieri Criticized on Early Judge Interviews*, PROVIDENCE J.-BULL., June 5, 2009, at B1.

“[i]f you’d [told] me when I came into this job that I’d be appointing a lot of judges, I’d have said, ‘What’s that?’ I mean, it’s not even a part you focus on.”⁸¹

The JNC itself came under criticism over a decade ago for taking longer than the proscribed time to create lists for the Governor.⁸² The apparent glut of nominees led to background checks by the state police slowing down the process.⁸³

Whether or not missed deadlines and interpretations represent willful attempts to undermine the system is debatable. It is beyond dispute that efforts have been made to alter the system in a way that undermines its original intent.⁸⁴

A specific example is the creation of an expanded pool from which the Governor can choose, instead of the three to five names as originally written.⁸⁵ This change in the law, referred to as the “five-year look-back” has dramatically expanded the pool, particularly given the recent glut of vacancies.⁸⁶ While some agree with this approach, it clearly goes against the best practices as advocated by the American Judicature Society.⁸⁷

But the most dramatic effort to undermine the system of merit selection in Rhode Island has been the explosion of the number and duties of magistrates in the state.⁸⁸ In 1994, there were five “masters” in the judicial branch in Rhode Island.⁸⁹

81. *Time To Move on Consolidation, Judges*, PROVIDENCE J.-BULL., Jan. 25, 2009, at D1.

82. Gregg, *supra* note 59.

83. Tracy Breton, *New Judge Selection Held Up By Character Checks*, PROVIDENCE J.-BULL., Nov. 12, 1999, at B1.

84. The model merit selection system advocated by the American Judicature Society calls for commissions with staggered terms and provides small lists to governors. Neither of these are occurring in Rhode Island due to the breakdown in the system. For model provisions see MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 51.

85. See Noah Schafer, *Plan To Change Way Judges Picked Earns R.I. Judicial Nominating Commission’s Support*, R.I. LAW. WKLY., Mar. 5, 2007, at 1, 12.

86. Mulvaney, *supra* note 59.

87. See MODEL JUDICIAL SELECTION PROVISIONS, *supra* note 51; Julia Reischel, *A Quick Word with ... Stephen J. Carlotti*, RHODE ISLAND LAWYERS WEEKLY, Sept. 28, 2009.

88. Common Cause Education Fund, *supra* note 60. For a look at one attempt to reform this system, see Katherine Gregg, *Bill Would Overhaul Magistrate Selection*, PROVIDENCE J.-BULL., Apr. 21, 2005, at B1.

89. Common Cause Education Fund. *supra* note 60.

Fifteen years later they have acquired a new name (magistrates) and have proliferated in number and duties. Currently there are twenty-one magistrates in a variety of courts in Rhode Island.⁹⁰ An even more dramatic expansion was proposed and rejected during the reorganization of the traffic tribunal.⁹¹

There are two reasons that magistrates have undermined the purpose of the merit selection process. First, they are not subject to being chosen by the JNC. They are subject to a variety of selection processes, with the presiding justice of their respective courts often making the selection.⁹² Second, they have been filled with appointees that are clearly linked to the political branches of government.⁹³

Magistrates do not try cases, but perform seemingly all other functions of judicial officers in the state of Rhode Island.⁹⁴ The continued swelling of their ranks, at the initiation of the General Assembly, indicates a desire of that branch to remove a significant part of the judicial branch from the merit selection process.⁹⁵ Repeated attempts to put magistrates under the merit selection process have failed, although on two occasions a bill went as far as passing the state Senate.⁹⁶

C. The JNC's Failure to Insulate

One matter that has not been mentioned so far is that the JNC itself is an institution, with processes of its own. Those processes were created by the JNC early in its life, and have been the subject of debate over the course of its existence.⁹⁷

90. Katie Mulvaney, *Advocates Push To Revamp Magistrate-Selection Process*, PROVIDENCE J.-BULL., Mar. 8, 2009.

91. Christopher Rowland, *Traffic-Court Plan Swells Judicial Ranks*, PROVIDENCE J.-BULL., Apr. 15, 1999.

92. Common Cause Education Fund, *supra* note 60.

93. Mulvaney, *supra* note 90.

94. Katherine Gregg, *Bill Would Convert Magistrates into Judges*, PROVIDENCE J.-BULL., Jan. 23, 2002, at B1.

95. Magistrates' positions are created by statutes initiated and approved by the General Assembly.

96. Liz Anderson, *Senate Approves Magistrate's Bill*, PROVIDENCE J.-BULL., May 14, 2003, at B6.

97. For a look at the early history of the JNC, see Michael J. Yelnosky, *Rhode Island's Judicial Nominating Commission: Can "Reform" Become Reality?*, 1 ROGER WILLIAMS U.L. REV. 87, 88 (1996). For a look at one of the skirmishes over the rules of the JNC, see Katherine Gregg, *Judicial Panel*

One of the stated goals for creating the JNC was to remove political manipulation from the process of selecting judges by opening the process to public scrutiny. With the removal of political manipulation, it was hoped that not only would better judges come out of the process, but trust in the process would increase.⁹⁸

The Commission has gone a long way to opening up the process. By its choice the interviews conducted are public meetings, and testimony, both written and oral, is taken. This is a credit to the Commission, and to the media that has covered hundreds of hearings over the last fifteen years. There have been attempts to limit the information the Commission receives.⁹⁹ At one point the Chair of the Commission suggested that perhaps the votes should be conducted in private.¹⁰⁰

However, there are three ways in which the Commission has not been as forthcoming as it might be. First, it rejected a proposal backed by Governor Almond in 2001 that would ban Commissioners from having discussions about applicants outside of the confines of the public comment hearing.¹⁰¹ The vote, a four-four tie, suggests that there was at least some support for the idea that a prohibition on this type of communication was necessary.¹⁰² And public comments about the overwhelming contacts that the Commissioners receive have been noted publicly.¹⁰³ Former JNC Chair, Michael A. Kelly, accused then Governor Almond's deputy legal counsel of meddling, saying, "[y]our private conversations with the recent gubernatorial appointees to the commission along with their blatant actions to further the candidacy of a candidate the governor has publicly stated he would like to see on the list of nominees, is creating an appearance of impropriety and undue

Rejects Limits on Political Ties, PROVIDENCE J.-BULL., Dec. 18, 2001.

98. West, *supra* note 36.

99. Edward Fitzpatrick, *Lynch: Judicial Commission Erred in Withholding Letters*, PROVIDENCE J.-BULL., Aug. 20, 2008, at A1, A4.

100. Edward Fitzpatrick, *Top Lawyer Bypassed for Supreme Court*, PROVIDENCE J., Apr. 25, 2004, available at http://www.projo.com/news/content/projo_20040425_jnc25.26a416.html#.

101. Gregg, *supra* note 97.

102. See Jonathan D. Rockoff, *Judicial Panel Considers Rule To Squeeze Politics from Process*, PROVIDENCE J.-BULL., Dec. 11, 2001, at B3.

103. Katherine Gregg, *Judicial Panelist Criticizes Almond Aide*, PROVIDENCE J.-BULL., Dec. 4, 1996, at B1.

influence on the commission by the governor's office."¹⁰⁴

The second way has been the ad hoc reporting of the number of applicants. The Commission has never had uniform reporting of any statistics related to its work, as suggested by Michael Yelnosky.¹⁰⁵ It appears from news reports that information regarding the number of applicants has varied historically.

Finally, we have seen the Commission seek to change past practice and withhold letters submitted on behalf of applicants when requested by the media.¹⁰⁶ The Attorney General ruled that the letters are indeed subject to the Access to Public Records Act.¹⁰⁷

CONCLUSION

In hindsight, reformers were too optimistic when they promised that merit selection would remove the politics from picking judges.¹⁰⁸ The best we can hope for is that the politics are minimized, and that merit becomes one of the chief factors considered in selection. That is the standard to which the system in Rhode Island should be held.

You cannot allow the political branches to have any say in the selection of judges and at the same time remove the politics. And to remove the political branches entirely would be to make judicial selection completely unaccountable to the people.¹⁰⁹ In the case of Margaret Curran, the Rhode Island House simply protested its partial removal (the elimination of the Grand Committee) by rejecting a nominee from a Governor of the other party. Margaret Curran was by all accounts a qualified person who otherwise might never have made it before the General Assembly, and that in and of itself may be a victory.¹¹⁰

104. *Id.*

105. Michael J. Yelnosky, *A Noncynical Look at Judicial Reform*, PROVIDENCE J.-BULL., Mar. 21, 1995.

106. Edward Fitzpatrick, *AG Asked To Rule on Access to Letters*, PROVIDENCE J.-BULL., July 18, 2008, at B1, B3.

107. Fitzpatrick, *supra* note 99.

108. West, *supra* note 36.

109. No system of picking judges is truly independent of the political branches; all provide a role for elected officials in at least some of the following: selection of commissioners, selection of judges from the commission's list, and the advice and consent of judicial picks.

110. See Scott MacKay & Russell Garland, *Nomination Fight Reflects*

Certainly, beyond the isolated incident of an individual, how is the system performing? The institution and processes of merit selection have never really had a chance to establish the independence that is part of its mandate. It has suffered from neglect, both wanton and benign over the fifteen years of its existence.

Indeed there are aspects of the system in Rhode Island that are highly admirable. Most notable is the openness. It is actually a shame that more citizens do not participate in the process by attending hearings, and testifying. The JNC has an admirable record in complying with the open meetings laws, and widely advertises for judicial vacancies.¹¹¹

What is most problematic, however, is the continued effort to undermine both the institution and process through neglect and change. The change in the statute that allows governors to choose from past lists generated by the JNC undermines the best practices, as mentioned previously. The disregard of successive governors of the timeline for selecting from the Commission's list suggests a lack of respect for the process that was created in 1994.

The lack of respect for deadlines has damaged the institution itself. Commissioners sitting far past the expiration of their terms undermine the concept of rotation and prevent the staggered terms, that were part of the initial legislation, from ever taking hold.

Finally, the creation of an entire separate class of judicial officers in the form of magistrates subverts the will of the voters who were looking to change the selection process for the judicial branch.

Certainly the merit selection process in Rhode Island does not live up to the hype suggested by reform advocates fifteen years ago. No system could, quite frankly. Has it produced a better

Struggle for Power, PROVIDENCE J.-BULL., Jan. 26, 1997, at A1 (contemporary coverage suggesting Curran was simply a victim of political circumstance). Ms. Curran's subsequent career as the United States Attorney from Rhode Island, which required U.S. Senate Confirmation, suggests her inexperience and qualifications might not have been so weak. See John E Mulligan, *Curran Confirmed as US Attorney By Senate*, PROVIDENCE J.-BULL., Oct. 22, 1998, at B1.

111. See Office of the Secretary of the State, Open Meetings, http://sos.ri.gov/openmeetings/?page=view_entity&id=106 (last visited June 18, 2010) (archive of notices and minutes of JNC meetings).

class of judges? That is a conclusion is for others to draw. Has it created a process that is better than the Grand Committee? Certainly. Could it be improved? Unquestionably.

EPILOGUE: MODEST PROPOSALS FOR CHANGE

What can be done to get the institution and process of merit selection to work as intended? Reforms are necessary, both in the statute establishing the JNC, and within the rules of the Commission itself.

The first change would be to do away with never ending terms for Commissioners. Unfortunately the legislature currently does not see this as necessary at this time.¹¹²

Ending the five-year look-back would also restore the process to what it was intended to be. Certainly not requiring those who remain eligible for up to five years after their initial application to recertify the contents of those applications in some manner undermines the idea that the list is fresh and the most highly qualified candidates at that point in time are being put forward.

Putting teeth into the twenty-one day rule for the Governor would certainly be a helpful change. Separation of powers issues, however, may prevent Rhode Island from following best practices in this regard and giving some other appointing authority the ability to make selections from the list.

By putting magistrates under merit selection the legislature could restore faith that the selection of judicial officers is not guided by the need to provide patronage.

The Commission itself could change rules that govern its behavior. Most radically, it could prevent Commissioners from having outside contact about applicants. And it could disclose the names of all candidates, thus allowing the public to decide if it granted interviews to only the most qualified. More simply, it could produce an annual report summarizing the characteristics of applicants and noting who received interviews and ultimately made lists.

112. A bill (S 428) introduced in the 2009 session of the General Assembly to remove members of the commission after the expiration of their terms was passed only after a floor amendment removed the relevant language. See STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, JOURNAL OF THE SENATE. Vol. 136, No. 62 (RI 2009), available at <http://www.rilin.state.ri.us/journals09/senatejournals09/sjournal6-24.pdf>.

Some have suggested the creation of a separate structure to “rate” applicants, akin to the ABA’s rating system in the federal courts. This belies the entire point of having a JNC. It is for the Commission to determine merit. They are provided with all of the necessary information to do so, and are theoretically capable of acting on that information.

Merit selection is very much a work in progress in Rhode Island. Hopefully, when another fifteen years have passed, we can see a much more mature and secure system. And even more, hopefully the years of scandalous judicial behavior are long over.