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A Response From the Field: One Practitioner's View

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I am presenting my comments after hearing the scholarly papers and the comments of speakers U.S. District Judge William Smith, Professor Emily Sack, and attorney Angel Taveras. First, the scholarly analyses presented here have measured and reported upon outcomes based upon the ultimate judicial appointments, comparing judicial appointments before and after the institution of merit selection. These analyses thus focus on the Governors' judgment and it is important to recognize that, since the inception of merit selection, we really only have had two Governors.[1]

I believe that the analyses of the demographics and qualifications of the judicial appointments under merit selection would be more informative if we had information about the full range of candidates who presented themselves for consideration. I

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1. Merit Selection was implemented in 1994, the last year of the term of Governor Bruce Sundlun, a Democrat. Since January 1995, Rhode Island has had only two Governors, Lincoln C. Almond (1995-2002), and Donald Carcieri (2003-), both Republicans.

believe that the practice of excluding information about all of the attorneys who apply for consideration prevents that review and clouds the analysis.

I am guided in my remarks by my frame of reference as a practicing attorney, which includes a concentration in the field of employment discrimination. One of the things that we face as a plaintiff's attorney in the employment area, when challenging a non-diverse workforce as the result of bias, is the excuse or the response, "well, no one else applied." If you can control the candidate pool, you affect the outcome. While I am not suggesting that there is any design by the Judicial Nominating Commission to control the pool, the pool may be functionally or practically controlled by the decisions of potential candidates not to participate in the process. Information about the candidates selected for interview discloses nothing about the qualifications or variety of the individuals who applied, but were not selected for interview, since the practice of the Judicial Nominating Commission is to keep those names confidential.

I start from the observation, based upon my employment law background, that, in terms of maximizing opportunity for the appointment of top-notch candidates, it is undesirable to control the candidate pool, keep the size of the pool small, or cause potential candidates to self-select out because they do not see any opportunity for success.

It is readily apparent that the members of the Judicial Nominating Commission, regardless of how they are selected, regardless of how many holdovers there are, are doing an unbelievable, insurmountable task with no resources. And I just wonder whether they need to object, as opposed to just keep trying to do it. Part of the problems facing them, it seems to me, are institutionalized in the format in which they are required to conduct the process, but some of them are not and should be reconsidered.

The Judicial Nominating Commission has determined that it will conduct an exhaustive background investigation on every candidate selected to be interviewed. That is a huge undertaking that requires substantial resources, and creates an imperative in favor of limiting the number of candidates to be interviewed. But I do not believe that there is anything in the statute that requires a background investigation on everyone to be interviewed.

The Judicial Nominating Commission requires compilation and disclosure of very intrusive personal and financial information in the initial application. It requires a substantial effort by the candidate to compile the information as well as a willingness to have it reviewed by a committee. Anecdotally, I would suggest that many otherwise interested and qualified candidates have elected not to submit an application, particularly where they have previously applied and not been selected for interview, or know of other seemingly qualified candidates who have applied but have not been selected for interview.[2] Here, as well, I do not believe that there is anything in the statute that requires the collection of this level of detail of personal and financial information so early in the process. This is the sort of information that could be required at a later stage.

I believe that these requirements, coupled with the seemingly small number of candidates selected for interview, have created practical deterrents to participation in the process by many qualified and interested attorneys. I do not believe that is desirable and I believe that the practices in place have, over time, deterred many qualified and interested attorneys from applying for judicial vacancies. Contrast the recent practice of interviewing twelve or fewer (usually seven) candidates with the first years of the Judicial Nominating process, when you had 28, 30, 36 people interviewed for vacancies.[3]

In her comments, Professor Sack raised a concern about a holdover effect from the pre-merit selection period.[4] I did some very unscientific work with the information from the Judicial

2. A disclosure: I have been through the process and speak, in part, from personal experience.

3. I disagree with the statement by past Chair Stephen Carlotti that disclosure of candidate names is unfair to the applicants because they lose clients. We have a track record – all these early names were publicized and then you would see these same candidates come forward again and again, undeterred. I would differentiate between an individual who has expressed an interest in a judgeship from one who has been appointed or nominated and is awaiting confirmation; in that instance, and I would think Judge Smith could probably speak to that, after you have been nominated by the President, while you are waiting for confirmation, your practice can be adversely affected.

4. *See* Emily J. Sack, *Judicial Selection in Rhode Island: Assessing the Experience with "Merit Selection": Response*, 15 ROGER WILLIAMS U. L. REV. 793, 797 (2010).

Nominating Commission's data, focusing on the Superior Court applications. In the first year of operation, there were four vacancies. Here, we were not provided the number of attorneys who applied for the vacancies, but 28 people were interviewed. For the second vacancy in 1995, 119 attorneys applied, and 30 people were interviewed. Now let me turn to the last two vacancies for which we have information. For one, early in 2009, there were 41 applications, which was a substantial increase from the number of recent applications. But there were only seven people interviewed. And the very last time a vacancy was announced for the Superior Court in 2009, only fourteen people applied and seven people were interviewed.

My take, in looking back through the data, and I have just looked at the Superior Court vacancies, is that instead of a holdover effect, there was this burst of enthusiasm when this process was first instituted and a large segment of our Bar felt that the floodgates were open. Consequently, a diverse and large group of attorneys applied at that time. I would suggest that they are just not applying anymore. While there are certainly a variety of factors at play, one cannot escape the deterrent of the process itself: it is a lot of work to prepare the application and if you are not getting any kind of ratification that anyone is taking you seriously as a candidate, you stop applying.

I would urge the Commission to think more globally about what it can do to increase the number of people who are applying by shortening the initial application, by pushing back the demand for very intrusive information and the background investigation to a later stage. Let us start with the information that is most important on the first pass: what are the candidate's qualifications in terms of what he or she presents as an attorney, not the detractions that may sink a seemingly qualified candidate,[5] but what are the good things about your candidacy that would make you a good judge. Further, we need to find ways to increase the number and diversity of candidates. Get them to come forward. Hear from them. If the Commission was not buried in paper,

5. In the federal system, the exhaustive background check is conducted upon the one individual identified as the candidate. This exhaustive review, to determine if there are reasons why an individual who otherwise presents as a highly qualified candidate could be excluded, should be limited to those who are presented for final consideration.

having to go through all of this background information right from the beginning, it would not be so burdened.

There is another respect where I do not believe that the Commission can make any changes. I respectfully disagree with the notion that the Governor should be limited in selection to only three to five names. At the end of the day, selection of judges is a political process, and I think it should remain political. The notion that a screening commission can identify the absolute best three to five candidates is a fiction. I think that a screening commission should be entrusted with determining all qualified candidates and then present that entire list to the Governor and the legislature to make the selection among all qualified candidates. If the Governor picks someone who is philosophically at odds with the electorate over and over again, then he or she will not be reelected. Here, instead, we have a nominating commission, selected undemocratically, narrowing the list of potential judicial candidates from whom the Governor and legislature can select.

I think the process should be changed at the statutory level and this is not an issue for the Judicial Nominating Commission, but I do think that the Judicial Nominating Commission can and should review and modify its practices to the fullest extent that it can accomplish without any legislative changes to open up what I would call the recruiting process so that more attorneys come forward to present their candidacy for judicial vacancies, to increase the number of attorneys applying, and to increase the transparency of the process so that the Bar and the public can make their own assessment as to the job that is being done.