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The Merit Selection Continuum: Response

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The Merit Selection Continuum

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Constitutional Judicial Merit Selection was passed in November 1994, the same day newly elected Governor Lincoln Almond took office. It was also the same day Governor-elect Almond hired me to serve as his Executive Counsel. A few years later, I became Chief of Staff. In these roles, I was intimately involved in the first eight years of merit selection, sitting through over one hundred candidate interviews as the Governor and I met with each candidate sent to us by the Judicial Nominating Commission ("JNC") for every court vacancy in the Family, District, Superior and Supreme Courts. Further, during the infancy of merit selection, I brought on behalf of the Governor a Supreme Court case vindicating the Governor's right to a "new list" when the House or Senate announces a "de facto" rejection without actually voting. My observations here stem from my experience inside the State House for the first eight years of merit selection and watching closely from outside the State House as a private legal practitioner during the last eight years.

The process of merit selection has always been a continuum with pure merit on one side and pure politics on the other. The ideal of its framers was all merit and no politics – or at least selection mostly on merit with little politics. This was to represent a change from mostly politics and less merit, especially with respect to the former Grand Committee Supreme Court

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selection process (where the entire House and Senate jointly selected by majority vote of the combined houses), which was controlled by the leadership in the larger House of Representatives. When two branches of government are involved in the process, however, no judicial selection system can ever be completely devoid of politics. At the same time, it is almost impossible to have a completely political system where someone is picked by political sponsors for various reasons with absolutely no merit. The goal, from the beginning of merit selection, was to have the most merit and the least amount of politics in the selection system.

To provide a vivid example of the ways politics had defined judicial selection in Rhode Island prior to the enactment of merit selection, consider the Almond Administration's first meeting with House leadership to discuss judicial selection. During that meeting, the Governor and I learned of an alleged "one, one, one" agreement. As it was explained, the "one, one, one" agreement provided that the Governor, the Senate, and the House each got to pick one judicial nominee by turn. I joked with the leadership that I was unable to find this policy in the statute. Of course, the pertinent statutes did not in any way contemplate such an arrangement. Consequently, Governor Almond, to his great credit, and to the dismay of many key political figures, disregarded the alleged "one, one, one" policy and never sought the name of the preferred nominee from legislative leadership before making any of his nominations.

With these types of political policies that defined judicial selection in Rhode Island prior to the passage of the new system, one can surely observe that the merit selection process is an improvement. This is particularly true with respect to the Supreme Court. After all, there is little closer to the completely political side of the continuum than having the Speaker of the House alone effectively picking the Supreme Court justices through his voting control of the Grand Committee, as was the case under the prior system. While there certainly was some merit in some of those selections (with former Chief Justice Weisberger's original selection to the Supreme Court being a prime example), one can see how politics could play a predominant

role in that process, as was addressed by John Marion.[1] Changing Supreme Court selection from Grand Committee to the JNC, Governor and legislative advice and consent, therefore, is an improvement.

In assessing the current merit selection system, a crucial component for consideration is the application process. After all, in order to get the best and brightest seated on the bench, Rhode Island needs the best and the brightest to apply for judgeships. As it has been alluded to throughout this Symposium, deciding to apply to be on the court has been a very difficult decision over the past fifteen years. As Mr. Carlotti mentioned in his presentation, the application process is extremely arduous and demanding. Indeed, the application requires a candidate to provide a plethora of personal information. The level of detail demanded is incredible, and requires the candidate to commit many hours to reconstruct his or her life. This is just the beginning of the difficulties. If the candidate is in private practice (and most are) they usually will face difficulty in retaining current clients and attracting new ones based upon an overarching concern that their attorney may be promoted to the bench.

When applying for a judgeship, candidates have certain expectations. First and foremost, applicants need to know that they are going to be considered on their merits, for better or worse. In due course, reasonable commissioners or the Governor may disagree about whether an applicant is best for the position. In my assessment, however, a fundamental problem has arisen in the current system post-Almond Administration – that is, despite the merit selection process in place, judicial applicants over the last few years have needed a political sponsor in the administration or in the legislative leadership in order to have success in the process. The perception and, to a large extent, the reality is that the "one, one, one" deal alluded to earlier, whereby the Governor, the House and the Senate each take turns for judicial selections, is back in effect.

This problem is so pervasive that many prospective applicants who lack a "political godfather (or godmother)" have refused to apply, believing that doing so would be a waste of time and effort.

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1. *See* John Marion, *Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island*, 15 ROGER WILLIAMS U. L. REV. 735 (2010).

This problem severely frustrates the goal of getting the best and the brightest to apply and eventually be appointed to the courts. Although, as highlighted earlier, the merit selection process has brought about some beneficial change, this is an area where politics triumphs over merit and as such, cries out for improvement. The improvement, however, lies not within the rules, but rather those governmental actors who implement them.

There is an important distinction to be made. Up to this point, I have addressed the "merit selection" system in place today. In my view the system itself accomplishes about half the goal of ensuring that the best and the brightest lawyers serve in the judiciary. Accomplishing the other half of the goal, I suggest, requires looking to the actors implementing the system. There may be a tremendous republic or democratic system in place with terrible elected leadership or, conversely, a dictatorship with the benevolent leader who is just and fulfills the needs of his people. In one, the system is sound but the leaders are poor, and in the other the system is flawed but its leadership is sound. Similarly, the merit selection system may be great in theory, but the process may fall short because the members of the Commission, the Governor, or the leadership of the House or Senate have a different agenda than pure merit selection. The point is that the greatest system in the world will not work if the people implementing it act inconsistent with its goals. If you have players committed to merit selection, however, and they strive to keep the politics out, the system in place is designed to let politics stay out.

To further keep politics out of the selection process, the Commission should reconsider a ban on ex parte communications with outsiders that the Almond Administration proposed, but was defeated on a 4-4 vote in 2001. The Handbook for Judicial Nominating Commissioners published by the American Judicature Society advocates for such a rule and there is no sound reason it should not be the law in Rhode Island.[2] All recommendations for or against any applicant should be heard by the entire Commission (in the form of letters and/or testimony)

2. MARLA N. GREENSTEIN, AM. JUDICATURE SOC'Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 10-12 (Kathleen M. Sampson ed.) (2004).

and not an individual member in off the record comments, or even worse, in the form of lobbying by the legislature. Indeed, one member of the Commission routinely brought in a list of names provided by the leadership listing for whom he was to vote. In addition, those outside the process frequently contact Commission members to support or oppose certain candidates. This type of nominating politics has no place in merit selection. Either all ex parte communications should be outlawed, or at a minimum, each should be disclosed to all Commission members.

In a final note, I would like to address briefly the issue relating to the time the Governor has to make a final judicial appointment once a list has been provided from the Judicial Nominating Commission. I was the one who offered the legal opinion that the Governor's time limits proscribed by statute were advisory and not mandatory. That opinion, however, was never intended to give the Governor unlimited time; rather, even an advisory statute requires good faith in its execution and a valid reason to be given for extending the deadline.

Many circumstances for extension on what was then a very short deadline may be valid. For example, the Governor may be unable to interview all the prospective candidates in time. In this case, it seems logical that the statute would be advisory, granting the Governor additional time for consideration. Likewise, when the legislature is out of session near the end of the year and would not return until January, it is reasonable not to rush a decision since the nomination would not be taken up for an extended period regardless of the date it was made.

Post-Almond Administration, however, the Governor has entirely disregarded the statutory time proscriptions and, seemingly without justification, has taken many months (and even a year) to nominate a judge. Clearly this is problematic. Going forward, in order to clear up this ambiguity, I recommend that the legislature enact a statute clarifying that the Governor's time limit for consideration is mandatory, and not advisory, unless good cause is shown.

In summation, my opinion is that the current judicial selection system is an improvement over its predecessor (especially with the end to the Grand Committee), but I believe that much work still needs to be done to move the system more toward merit and less toward politics.