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Judicial Selection in Rhode Island: Assessing the Experience with “Merit Selection”: Response

Emily J. Sack*

We owe these presenters great thanks for providing us with such careful studies of judicial selection in Rhode Island. What the papers make clear, however, is that the results of the merit selection process over the past fifteen years are mixed at best.¹ This leads to several important questions that we must consider if we are to move forward in improving judicial selection and the judiciary in Rhode Island.

First, are we using the right measures? Are the studies using categories which capture the characteristics that we think demonstrate quality judging? The speakers have acknowledged that there are limits to the measurements that they have utilized. For example, as Mirya Holman notes, such characteristics as collegiality and efficiency, which likely are relevant, are not

* Professor of Law, Roger Williams University School of Law. I would like to thank Professor Michael Yelnosky and the editors of the Roger Williams University Law Review for their work in organizing this important Symposium.

1. See, e.g., Mirya R. Holman, *Measuring Merit in Rhode Island's Natural Experiment in Judicial Selection*, 15 ROGER WILLIAMS U. L. REV. 705, 727 (2010) (“[T]he change to a traditional merit selection system has had very few effects on traditional measures of judicial quality.”); Michael J. Yelnosky, *The Impact of “Merit Selection” on the Characteristics of Rhode Island Judges*, 15 ROGER WILLIAMS U. L. REV. 649, 656 (2010) (“[M]erit selection appears to have had little if any impact on several of the background characteristics I studied”). Professor Yelnosky notes that the percentage of the judiciary that previously served as legislators or counsel to a legislative leader significantly declined post-merit selection, which may be significant, since concern about influence of the legislature on the judiciary was a motivating factor for the change to a merit selection system. *Id.* at 654-55.

included in the studies.² In addition, there are qualities such as integrity, respect and judicial temperament that are difficult to capture quantitatively.

The question is whether there is a way to undertake a qualitative study which could assess these less objective, but highly important, components of effective judging. There would be some significant challenges in gathering helpful data from such a study. First, it would be difficult to devise a comparative experimental model for the study, which contrasts pre-merit selection views with post-merit selection views. Unlike the quantitative measures, less objective measures of judges are difficult to capture retroactively. In addition, a qualitative study would involve interviews with various constituencies in the court system, including members of the Bar. It likely would be difficult to convince attorneys who appear before the judges involved to speak openly and honestly about them. Despite guarantees of anonymity on the part of the researchers, many attorneys would fear that their statements would ultimately be attributed, and particularly in a small state like Rhode Island, any negative comments about the bench could be devastating to a legal career. To avoid being merely anecdotal, such a qualitative study would require numerous interviews, not only of attorneys, but also of litigants, court employees, and others who have contact with the judiciary. Assuming that it would be possible to identify these parties and gain their consent to participate, such a study would likely be very expensive and resource-intensive.

With all of these challenges, it is unlikely that such a comprehensive qualitative research study will be completed. Without that qualitative data, we need to do our best with the quantitative studies that we have. And of course, much in these studies is very helpful to our understanding of the results of merit selection. Some of the measures used are directly informative, such as the effect of merit selection on racial and gender diversity on the bench. Moreover, many of the measures are really proxies for the types of qualitative characteristics that we are trying to capture – intelligence, strength of legal analysis, decision-making

2. Holman, *supra* note 1, at 728; *see also* Rachel Paine Caufield, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765, 779-80 (2010) (noting that characteristics measuring quality of judges is “necessarily incomplete”).

skills, and integrity. Therefore, while the data with which we are working may not be comprehensive, and more qualitative information would no doubt enrich the research, I think it is reasonable for us to assume at this point that what the studies are telling us is true. But if it is true that there appears to be minimal or little change in most of the measures of judicial quality pre- and post-merit selection, that leads us to the important and most obvious issue, which is to explore why this should be the case.

Why has there been little change in judicial quality since Rhode Island adopted a merit-based process for selecting its judiciary? The speakers today have already given several possible explanations, and I will review them briefly. One answer is that merit selection is only as good as the people doing the selecting. As John Marion and others today have suggested, there may be serious problems with the way in which members of the Judicial Nominating Commission are named, along with its composition and process.³ If political patronage and cronyism infect the merit selection process, it will generate results similar to those produced by the more direct political patronage system that previously existed.

Secondly, we need to learn more about the characteristics of the pool of applicants since merit selection has been in effect. The applicant pool naturally can impact the quality of the nominees who emerge from the process, and a pool that does not vary significantly from pre-merit selection potential candidates, will not produce significantly different nominees. If this is a possible explanation, then we must consider why it may be that the pool of potential candidates has not changed, or not changed enough, to impact the results of the process. Alternatively, if the characteristics of the applicant pool have in fact changed, but these characteristics are not reflected in the nominees that actually emerge from the selection system, we then need to focus on the process by which applicants are evaluated and ultimately selected. This involves learning more information about both the Rhode Island Bar and about the pool of applicants for judicial appointments, in order to compare both of these groups'

3. John Marion, *Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island*, 15 ROGER WILLIAMS U. L. REV. 735, 751-52 (2010).

characteristics to the candidates actually nominated for judgeships. Unfortunately, publicly available information about both the composition of the Bar and the judicial applicant pool is currently limited.⁴ We have to know more about the breadth and depth both of the Rhode Island Bar, and of the judicial applicant pool, to understand the results of the judicial selection process.

For example, Michael Yelnosky's study demonstrates that both before and after the merit selection system was implemented, over half of the Rhode Island judiciary graduated from just two law schools, Suffolk University School of Law and Boston University School of Law.⁵ To better understand the meaning of that finding, it would be helpful to know what percentage of the Rhode Island Bar, as well as what percentage of the judicial applicant pool, graduated from these law schools. Professor Yelnosky also finds that a relatively low percentage of the judiciary, both pre- and post-merit selection, attended what his study designates as elite law schools.⁶ Does this correlate with the make-up of the Bar itself? Does it track the composition of the applicant pool? Do the characteristics of the applicant pool vary significantly from those of the Bar as a whole? The interpretation of this finding from Professor Yelnosky's study would be very different, depending on the answer to these questions. It would be very helpful to be able to compare data from these three separate groups: the Bar as a whole, the judicial applicant pool, and those actually selected to become judges. This comparison would enable us to track the different phases of the judicial selection process and to better identify where, if at all, merit selection is not

4. See, e.g., Marion, *supra* note 3, at 751 (noting that Commission does not uniformly report statistics on applicants); Yelnosky, *supra* note 1, at 653 (Rhode Island Bar association does not maintain records of racial or ethnic background of its members).

5. Yelnosky, *supra* note 1, at 651, 654 (pre-merit selection, the percentage of judges who attended either of these schools was 61%, while post-merit selection, the percentage was 51.9%). However, the percentage of those attending each of these schools shifted. Pre-merit selection, the percentage of judges who attended Boston University School of Law was 32.2%, and the percentage who attended Suffolk University School of Law was 28.8%; post-merit selection, these numbers had changed to 14.8% and 37%, respectively. *Id.* at 651, 653-54.

6. See Yelnosky, *supra* note 1, at 654 (pre-merit selection, 16.9% of the judiciary attended an elite law school, while post-merit selection, this percentage declined to 11.1%).

working as devised.

Another issue to explore concerning the applicant pool is its size. If, as has been suggested today, the size of the pool has been quite small in recent years, this will provide fewer opportunities to increase diversity and improve the quality of our judiciary. We need to explore why the number of applicants might be small. Stephen Carlotti suggested that the length and detail of the application that is required by the process may deter applicants. I have not seen the application itself, but based on my knowledge of the application process in the federal system and in other states, I do not find that explanation convincing. In my experience, the judicial selection process in many jurisdictions requires highly detailed and long applications, which include a great deal of personal disclosure, and there does not seem to be the same level of deterrence that is proposed as an explanation here.

Another possible explanation might be something I would term a "holdover effect." Our current system may or may not still be affected by political cronyism, but let us assume for these purposes that it is not. However, in considering the size of the applicant pool, it is equally important to understand how potential candidates *perceive* the current process. Even if the current system has changed, it may take a long time for eligible potential candidates to believe and have faith in the new process. If potential applicants believe that the system is tainted and that selection is not truly based on merit, then they may be discouraged from applying for judicial positions. The number of applicants may be low, and the best candidates in particular may be deterred from applying if they consider that the system has not really changed. If this is a misimpression, then we can hope that it is only a matter of time before the "holdover effect" dissipates and the number and quality of applicants increase. However, we also have to consider whether the size of the applicant pool reflects not just a perception, but a reality about the selection process. If in fact the system has not truly changed and is not actually based on merit, this may explain the small number of applicants. Whether the problem is one of appearance or reality, the small size of the applicant pool is a real concern, and something that must be carefully monitored and examined.

For all of these reasons, the lack of change in judicial quality that the studies have found may indicate that our current merit

selection system is not working as well as we would like. We then need to examine whether there may be some changes in the selection process that could have the impact for which the reforms in Rhode Island were designed. There has been a lot of discussion today about the role of politics in the judicial selection process. As a preliminary matter, I want to stress what has been stated by other participants here, that politics *per se* is not the problem. Politics is an integral part of all judicial selection processes, either an electoral system or some type of merit selection system. I believe that there is nothing at all wrong with that, and in fact politics is a necessary component, if we want some type of accountability in the process. However, there is a difference between politics, and political patronage and cronyism.

As one example of an alternative process which could provide some guidance in Rhode Island, I want to consider the federal judicial selection system. As we all know, Article III judges are nominated by the President and confirmed by the Senate. The phase of the federal selection process on which I wish to focus is not confirmation, which, particularly in the case of Supreme Court nominees, often involves dramatic televised hearings before the Senate Judiciary Committee. Instead, I want to discuss the part of the process that occurs before any hearings, when Senators identify potential judicial candidates, whose names they then submit to the President for consideration and possible nomination. In addition, I am concentrating not on Supreme Court nominations, which are selected more directly by the President, but on candidates for the lower federal courts, where home state Senators have more involvement in the selection process. There are a variety of systems for the selection of these lower court judicial candidates, but most common is that the Senator of the party to which the President belongs is given the responsibility of identifying and submitting potential nominees to the President. It is clearly a political process in that the Senator's political party has a significant impact in determining his or her role in selection. However, that doesn't mean that the process necessarily involves political cronyism.

Though Senators utilize many different systems, the growing trend has been for Senators to formalize the process by using some type of nominating committee, or advisory panel, to screen potential candidates. For example, Senators from seventeen

states use nominating committees to evaluate candidates for federal judicial positions.⁷ Other states have established similar procedures, such as Virginia, where Senators ask state bar associations to provide recommendations for federal court vacancies.⁸

Moreover, in many instances, these nominating committees and advisory panels are quite nonpartisan. In Colorado, Senators have formed a bipartisan ten-member advisory panel.⁹ In Illinois, Senator Durbin has formed three bipartisan committees to screen and recommend candidates for federal judicial positions in the Northern, Central, and Eastern Districts of the state.¹⁰ The Senators from Ohio created two bipartisan judicial advisory commissions to recommend candidates for U.S. District Court judgeships.¹¹ Specifically to avoid conflicts of interest, commission members residing in the Southern District of Ohio evaluate applicants for the Northern District, while members residing in the Northern District screen Southern District applicants.¹² In Vermont, Senators Leahy and Sanders have assembled a nine member panel to recommend candidates for federal judgeships in the state.¹³ Each Senator appoints three of those members and the remaining three are appointed by the Vermont Bar Association. This Vermont Judicial Selection

7. These states include: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. *Federal Judicial Selection: Federal Judicial Nominating Commissions*, AMERICAN JUDICATURE SOCIETY, available at http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm (last visited Feb. 24, 2010).

8. *Id.*

9. *Id.*

10. Press Release, *Durbin Announces Bipartisan Screening Committees for Federal Judges, U.S. Attorneys, and U.S. Marshalls*, April 27, 2009, available at <http://durbin.senate.gov/showRelease.cfm?releaseId=312019>.

11. Press Release, *Brown, Voinovich Announce Nomination Process for U.S. District Judgeships*, April 27, 2009, available at http://brown.senate.gov/newsroom/press_releases/release/?id=92033778-d2c0-496b-bba3-8dd961eb41f5.

12. *Id.*

13. Press Release, *Leahy And Sanders Announce Merit Commission To Screen Candidates For Federal Judgeships In Vermont*, Feb. 26, 2009, available at http://leahy.senate.gov/press/press_releases/release/?id=5a2e215f-f0c9-4f80-a1a7-a6fada8d3adf.

Commission, which is described as nonpartisan, appears to represent a variety of legal constituencies.¹⁴ The membership of the Commission includes corporate lawyers, a plaintiffs' lawyer, representatives from public interest organizations, a Justice on the State Supreme Court, the former president of the Vermont Bar Association, and the Dean of Vermont Law School. There are three female and six male members.¹⁵

Wisconsin's federal nominating commission has been in existence since 1979.¹⁶ The eleven member commission is chaired by the Dean of either the University of Wisconsin Law School, or Marquette University Law School, depending on where the vacancy is located. The two Deans co-chair the commission to consider candidates for a position on the Seventh Circuit Court of Appeals.¹⁷ Two members of the commission are appointed by the State Bar of Wisconsin.¹⁸ When both Senators are of the same political party as the President, each Senator appoints four members to the nominating commission for federal judicial vacancies. However, when only one Senator is of the same party as the President, that Senator appoints five members, while the Senator of the other party appoints three members. When both Senators belong to a political party different from that of the President, each Senator appoints two members, and the most senior elected official in the state from the President's party appoints four members.¹⁹

Of course, the federal system differs from the state judicial selection process, but there may be components of the federal system from which Rhode Island could borrow. These examples from the various federal nominating committees reveal a depth of representation from the public interest sector, as well as the

14. *Id.* It was not possible to determine the race or ethnicity of the membership based on the information provided.

15. California's committee includes a retired federal judge, a former state appellate judge, the President of the Hispanic Bar Association, corporate lawyers, public interest lawyers, and a law professor.

16. Press Release, *Kohl, Feingold Announce Activation of Wisconsin Federal Nominating Commission*, Aug. 6, 2009, available at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=3020.

17. *Id.*

18. *Id.*

19. *Id.*

corporate bar. There is a range of constituencies represented and as far as can be determined, there appears to be diversity in membership in a number of areas. The membership of the commissions is not appointed solely by the political branches. Bar associations have a role in the process and there is use made of former judges or judges from other systems, as well as deans from area law schools. All of these aspects of the examples in the federal system could be replicated in Rhode Island. This could create a nominating commission that truly was nonpartisan, representative and diverse in many ways, and which also appeared to be so. Even within a political process, a judicial selection system does not have to be entirely politically-based, and it can make room for a variety of voices. While the make-up of a nominating commission does not necessarily dictate the characteristics of the judicial candidates it puts forward, clearly it can impact the selection process. In addition, it has the potential to change the perception of the system, as well as strengthen the confidence that the Bar and the public have in the judicial selection process.

The studies produced by the panelists today demonstrate that it is very difficult to break free from the taint of political corruption and patronage in judicial selection – whether actual corruption or patronage continues or not. Politicization has very long and indirect consequences, even where it no longer is prevalent and a judicial selection system has been reformed. As I have explained, it may create a “holdover effect” which impacts the number and quality of applicants interested in pursuing a judicial position. It may even impact the depth and quality of the Bar as a whole, because attorneys may be less interested in practicing in a jurisdiction where the judiciary is perceived to be the product of such patronage. The quality and diversity of the Bar then in turn affects the quality of judicial candidates. Therefore, political patronage, whether existing in reality or perception, creates a cycle in judicial selection from which it can be difficult to escape.

It is critical that the judicial selection process have both legitimacy and the appearance of legitimacy. This is important not only to ensure the quality of our judges, but more broadly, to guarantee that the public has confidence in the entire process of government. Our governmental system rests upon public

acceptance of judicial decision-making,²⁰ which can only be assured when judicial selection is fair and is perceived to be fair. This lends urgency to our responsibility to investigate the meaning of the findings from the studies discussed today. We need to obtain more information on the process as it is actually working and we need to address both the real and the perceived flaws of the current system now – to strengthen our judges, our Bar, and the public's support.

20. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *HARV. L. REV.* 1787, 1787 (2005).