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Newsroom

Yelnosky on Carcieri's Judicial Legacy

The Providence Sunday Journal heavily cites RWU Law Professor Michael Yelnosky in a front-page story on the judicial legacy of R.I. Gov. Donald Carcieri.

"Governor's legacy: More than most governors, Carcieri has shaped courts" by Katie Mulvaney, Journal Staff Writer

PROVIDENCE, November 14, 2010 — By the time Governor Carcieri leaves office in January, he will have named more judges than any other governor in recent history.

It's a surprising accomplishment for a governor who didn't realize his duties would include appointing judges when he came into office almost eight years ago. "If 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," Carcieri told a reporter last year.

He has named four out of five justices on the Rhode Island Supreme Court, in addition to installing the heads of the state Supreme, Superior and District courts. He is poised to name the next Family Court chief, and, if the Senate approves that nomination, Carcieri will have made history in Rhode Island by choosing women to lead the District and Family courts. For the second time in the state, he has placed a woman in command of Superior Court.

If the Senate convenes a special session and approves his latest picks, Carcieri will have put 34 new judges on the bench, 14 more than his predecessor and more than half of the state's 62 judges. The high turnover in the past few years can be attributed largely to retirements spurred by changes in the pension plan.

Carcieri's judicial legacy wins praise in some quarters, particularly for his nominations to the high court. "I think his choices have generally been very good," said now-retired Supreme Court Chief Justice Joseph R. Weisberger, who led the court for five years. "We've got a good, conscientious judiciary at all levels."

But others fault Carcieri for not adhering to the spirit of the 1994 law voters passed after two politically connected Supreme Court chief justices, Joseph A. Bevilacqua and Thomas F. Fay, resigned amid scandal.

Rhode Islanders at the time called for judges to be chosen based on merit, not political ties. The changes were meant to remove deal-making from the selection process by creating an independent, nonpartisan Judicial Nominating Commission to interview and vet applicants for the bench and by placing appointing authority in the governor's hands.

Some court watchers say Carcieri didn't do enough to keep politics out, a fact they say is evident in the number of nominees with links to state government. They argue that while some gains were made since the days when the General Assembly made judicial picks, room remains for improvement.

Common Cause Rhode Island characterized the governor's approach toward merit-based judicial selection as one of "benign neglect," with the governor appearing overly deferential to the General Assembly, said John Marion, executive director of the nonpartisan group that promotes honest and accountable government. The length of time the governor took to fill some openings left the impression, he said, that the vacancies for the lifetime appointments were being treated as chits to be traded for a political goal.

"No one could ever prove the trades," he said. But, "the evidence indicates that the General Assembly still has a role in the decision. ... It seems hard to fathom that a governor would appoint so many judges with close ties to the legislature."

Nominees with links to the legislature include District Court Judge Mary E. McCaffrey, a sister of Senate Judiciary Chairman Michael J. McCaffrey; Family Court Judge Karen Lynch Bernard, whose sister, Erin P. Lynch, sits on the Senate Judiciary Committee; and recent District Court nominee Colleen M. Hastings, who was a part-time assistant legal counsel to then Senate Majority Leader and now Senate President M. Teresa Paiva Weed. District Court Chief Judge Jeanne E. LaFazia, too, is married to George P. Mason, chief of staff to Senate Majority Leader Daniel Connors.



A review of merit selection in Rhode Island by **Michael J.**

Yelnosky, a professor at Roger Williams University School of Law, shows that 71.7 percent of 60 state judges had worked in state government when voters overhauled the selection process in 1994. Of Carcieri's 34 nominees, 47.1 percent, 16, had held positions in state government, he found.

In addition, 33.3 percent of judges before the 1994 changes had state legislative experience as opposed to 20 percent under Carcieri.

"I'd give him an average grade," **Yelnosky said** about the governor's nominees. Far more troubling, he said, is the disregard by Carcieri and other participants in the judicial selection process for the law that sets out a 21-day deadline for governors to send a nomination to the Senate and that limits the lengths of commission members' terms.

"It's hard to take seriously if they aren't playing by the rules," **Yelnosky said**.

He credited Carcieri for not naming former Senate President Joseph A. Montalbano to District or Superior Court seats. Some had speculated that Montalbano was a shoo-in for the Superior Court seat, but the Democrat's name was conspicuously missing when the governor announced a string of nominations in late October.

Selecting Montalbano would have undermined the intent of the merit-selection process, which is to ensure that legislative leaders do not move directly from the State House to the state bench, Marion said. "In that sense the revolving door isn't revolving as quickly, but clearly there is some revolving door between judges and the General Assembly."

There has been public acclaim for some choices, such as Chief Justice Paul A. Suttell, Marion said. "It's not like every nomination reflects solely political decisions."

The governor was notoriously late in nominating judges, sometimes leaving openings lingering for a year. State law specifies that the governor should forward a nomination to the Senate within 21 days of receiving a list of finalists from the Judicial Nominating Commission. The governor's office, however, concluded, as his predecessor did, that the 21-day deadline was advisory.

"This is not an ambiguous statute," **Yelnosky said**. "The more unfilled positions he has the more deals the governor can cut."

Amy Kempe, spokeswoman for the governor, acknowledged that the governor almost always let the 21 days pass in order to interview candidates to get a read on their judicial philosophy and to review their record. The judicial selection process, she said, was at times eclipsed as a priority by union unrest, natural disasters and budget woes. "It takes time, and he puts a lot of thought and consideration into it," Kempe said.

Kempe defended all the governor's nominees as extremely qualified. They were chosen, she said, after a careful review and interview process. The governor, she said, is proud of his record, particularly for elevating female judges to high-level positions. "He's made very wise choices."

"They are not political," Kempe said. "And they are not chits."

Carcieri also successfully pushed for the General Assembly to pass a law allowing him to pick judges based on lists of finalists forwarded by the Judicial Nominating Commission over the past five years. Without that change, the governor could choose a nominee only from the current list of three-to-five finalists submitted by the Judicial Nominating Commission. Common Cause and other advocates of the merit system argued that the five-year "look-back" was an end-run around the process.

Kempe said the look-back law empowered the governor to choose judges from a larger, highly qualified pool.

Joseph S. Larisa, who served as Governor Almond's chief of staff, asserted during a panel discussion on merit selection last fall that a perception that the "one, one, one" arrangement in which the governor, the House and the Senate each get a judicial pick remained alive under Carcieri's leadership.

"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," Larisa is

quoted as saying in a recent *Roger Williams Law Review* article. [EDITOR'S NOTE: The issue released in Nov. 2010; the reference is to a symposium titled, "Judicial Selection in Rhode Island: Assessing the 15-Year Experience with 'Merit Selection.'"]

The problem frustrates the goal of getting the best and brightest judges, said Larisa, who assisted Almond in picking judges during the first years of the revamped selection process.

Arthur C. Barton, a close observer of the appointment process who once led a good government group, credited Carcieri for fine Supreme Court selections but acknowledged that politics seemed to come into play with some of the lower-court nominees "from time to time."

"It's only to be expected in a political process," Barton said, adding "just because they're being bartered doesn't mean they're not qualified."

He noted that Carcieri's nomination of his own former chief of staff, Brian P. Stern, to the Superior Court might have spurred some to believe Stern was "being rewarded for good service to the governor."

"There's less politics, but there's clearly still politics at play," Barton said. Still, he said, the true test of the quality of the state's newest judges will come with time.

Carcieri's appointments to the independent, nonpartisan commission itself, too, appeared laced with political links. He appointed State House lobbyist Richard M. McAuliffe Jr. at the recommendation of Senate President Paiva Weed and House Speaker Gordon D. Fox. At the behest of former House Speaker William J. Murphy, he named Norman Landroche Jr. to replace William P. Rampone, who sat for years beyond the expiration of his term. A former Democratic state representative, Landroche practices with Murphy's law firm. He also selected his own former chief of staff, Jeffrey Grybowski, to sit on the nine-member panel.

"Clearly, he hasn't invested a lot in making good appointments to the JNC," Marion said.

Kempe dismissed such criticism, saying the governor could not be held responsible for names recommended to him by the legislative leaders.

Whether and when the Senate might convene a special session to take up the governor's seven pending nominations remains unclear, according to Senate spokesman Greg Pare. The General Assembly is not scheduled to be back in session until January, at which time newly elected senators would take their seats.

What remains unknown, too, is whether the sitting Senate, should it convene, would support names forwarded by a governor whose days in office are numbered and with whom state legislators often had strained relations. If the Senate doesn't confirm a judicial nomination within 90 days, the governor must forward another nomination to the Senate for its advice and consent. In that case, the nomination would fall to the new governor, Lincoln D. Chafee.

During his campaign, Governor-elect Chafee called on Garcieri to hold off on naming new judges. "I believe that these appointments should be considered by a new governor and a new General Assembly, not made at the end of your term, and presented to a lame-duck General Assembly," Chafee wrote in a letter to Garcieri.

Chafee, through his spokesman Michael Trainor, declined to comment on the issue last week.

BY THE NUMBERS: The Nominations

Source: RWU School of Law Prof. Michael J. Yelnosky

* Number of nominations: 34

* Number awaiting Senate confirmation: 7

* Percentage of women: 35.3%

* Percentage non-white: 8.8 %

* Born in Rhode Island (out of 32): 81.3 percent

* Received undergraduate degree in R.I.: 47.1 %

* Attended Suffolk University Law School: 47.1 %

* Previously worked in state government: 47.1 %