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Newsroom

Yelnosky and Field on R.I. Judicial Tenure

Professor Michael Yelnosky and Special Assistant Attorney General Michael W. Field '97 are extensively quoted in this front-page piece on R.I. judicial tenure.

From the Providence Journal: "[R.I. judges have life tenure but their applications for the job are private](#)" by Journal Staff Writer Tracy Breton.



PROVIDENCE, Jan. 9, 2011 —

Rhode Island is the only state that gives lifetime tenure to its judges with no mandatory retirement age.

And unlike some states where judges are appointed, rather than elected, there is no public performance review of jurists during their careers.

In Rhode Island, the public also has no right to know whether someone being considered or selected for a judgeship has ever been accused or convicted of a crime, how much debt they have, whether they are current on paying their taxes, have ever filed for bankruptcy, or are addicted to drugs or alcohol.

All of these things are the subject of inquiry by the state's [Judicial Nominating Commission](#), the "independent, nonpartisan" state body that screens candidates for the judiciary. But the answers, which are in a personal data questionnaire that is part of the judicial application process, are kept confidential and off-limits to public scrutiny.

The JNC adopted rules years ago making judicial applications secret, and the attorney general's office, in the first interpretation of the commission's policy, says that is OK.

According to an advisory opinion issued in the waning hours of the administration of former Attorney General Patrick C. Lynch, the judicial applications are not public records. The advisory opinion, written by **Special Assistant Attorney General Michael W. Field [RWU Law '97]**, was issued in response to a request by JNC Chairman Herbert J. Brennan for an interpretation of the state's Access to Public Records Act (APRA) as it relates to the applications.

Brennan asked the attorney general's office to weigh in on the issue in late September after a *Providence Journal* reporter sought access to the personal data questionnaire filled out by the state's newest Family Court judge, Karen Lynch Bernard, who, according to public land records, has a history of being delinquent in paying her federal and state income taxes. A federal tax lien for \$32,391 — which does not include interest or penalties — was put on Bernard's Warwick house 20 days after the JNC forwarded her name to then-Governor Carcieri for consideration. The lien was still there 16 months later when Carcieri nominated her and she was confirmed by the Senate to her \$144,861-a-year position. Land records also show that Bernard previously had a state tax lien on her house but it was removed in early 2000 — about eight months before Bernard applied for the first time for a judgeship.

In the advisory, **Field said** that “our mandate is not to substitute the Department's independent judgment concerning whether a requested document should be publicly disclosed, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions.” He said that “while policy considerations may be advanced to support both public disclosure and exemption, we do not write on a blank slate and simply provide guidance based upon the plain language of the APRA and our Supreme Court interpretation of the APRA.”

Field said current law clearly exempts from public disclosure questionnaires completed by judicial candidates as well as the accompanying investigative documents which include background checks by law-enforcement agencies and complaints filed with the Supreme Court's disciplinary counsel that don't result in sanctions. Field said the Supreme Court has decreed that the “unambiguous language embodied [in the APRA] makes it unmistakably clear the Legislature intended to limit the public's access not only to personal information contained in an employee's personnel file but also to any record that identified a particular employee.”

Based on his reading of the law, **Field said** he would not even identify the judge who was the subject of *The Journal's* public records request which he quoted from in his advisory. He redacted Bernard's name and referred to her merely as “the judge” in his written opinion.

Legal scholars who study the judicial nominating process in Rhode Island and elsewhere, along with open-government groups, say the newly issued advisory opinion should be a wake-up call for General

Assembly members to amend the state's public-records law. They say the public should be allowed to know more about the people who wear the black robes in Rhode Island, people who have the right to take away citizens' liberty, approve foreclosures, dock wages, order child support and alimony and terminate parental rights.

Stephen J. Ware, a professor of law at the University of Kansas, said that "a lifetime appointment to an important position of public trust warrants careful scrutiny by all concerned."



Michael Yelnosky, a professor at Roger Williams University

School of Law, said that while he believes Field's interpretation of the current public-records law "is reasonable" based on the "fairly broad protection from disclosure the state Supreme Court seems to be providing for records identifiable to an individual," the law should be amended.

"I think that more disclosure than is presently required would be a good thing" for the judicial screening process, **Yelnosky said**. "Where the line gets drawn, reasonable people can absolutely, positively disagree on — how much financial disclosure, for example." He said he was concerned that in vetting Bernard for her Family Court judgeship, no one who played a part in her selection process — not the JNC nor the governor who sat on the nomination for so long — was aware of the tax lien. [Bernard told *The Journal* that in listing her debts for the JNC, she disclosed that she owed more than \$10,000 to the IRS.]

Yelnosky said there are some things, such as tax returns and medical information, that should remain confidential but that it's important for the public to know more about a judicial nominee's background — whether he or she is a financial deadbeat or has ever been accused of domestic violence, for example. You can mandate disclosure "without unnecessarily invading someone's privacy and discouraging people from applying," he said.

Rosanna Cavanagh, executive director of the New England First Amendment Coalition, called the attorney general's advisory opinion "an example of why it is time for Rhode Island to overhaul its overly

restrictive APRA statute and begin to give more weight to the public's interest." But Steven Brown, executive director of the Rhode Island affiliate of the ACLU, said bills have been introduced for decades to do away with the broad public records exemptions in the law but that they have gone nowhere. He said that based on Field's opinion of the current law, "the commission could keep secret the name of any candidate not ultimately forwarded to the governor" as a finalist.

Rhode Island is among a number of states, including all of those in New England, where judges are appointed. But in some other states, after judges are appointed or elected, they face performance reviews after time on the bench, anywhere from 4 to 15 years. The reviews range from legislative reconfirmation to reelection by voters to having to reapply all over again for their judgeships.

The JNC was created by law in 1994 to take politics out of the judicial selection and create a more merit-based system. This came in the wake of the resignations of two chief justices, Joseph Bevilacqua and Thomas Fay, who stepped down in disgrace; the imprisonment of a Superior Court judge, Antonio S. Almeida, for soliciting and accepting bribes from a lawyer in return for favorable decisions and court appointments, and a scandal involving a Family Court judge, John E. Fuyat, who was forced off the bench and prosecuted after it was disclosed that he was soliciting hundreds of thousands of dollars in loans from lawyers, many of whom appeared before him in court. Fuyat's lawyer told the sentencing judge that Fuyat told him "the screening process with respect to his candidacy [for a judgeship] should have been more thoroughly done" in 1984 when former Gov. J. Joseph Garrahy appointed him to the bench.

The earlier process had the General Assembly electing Supreme Court justices from a field nominated by legislators. Judges on the lower state courts were nominated by the governor and subject to Senate confirmation.

The JNC's current screening process has been criticized by many "for the degree of political influence at play," the commission's chairman concedes. But the process in Rhode Island is relatively open compared with some other states where interviews and voting on candidates are private, as is the identity of applicants.

A few states destroy applications after their submission. But there are other states, such as Arizona, that are much more open than Rhode Island in their judicial selection processes, opening applications to public inspection and, sometimes, even the nominating group's deliberations.

The JNC in Rhode Island releases a short list of names of people who apply for judgeships — only those it chooses to interview. It conducts public interviews of those candidates, allows public comment on them and releases the tally of votes for each candidate interviewed, disclosing whom each commissioner voted

for. It declined for a time to release letters of recommendation submitted for candidates, deeming them private — until the attorney general advised in 2008 that it should not withhold letters unless they contained “personal or medical information.”

The JNC has always kept confidential the entire 18-page questionnaire that every judicial candidate must fill out, though candidates can choose to release them.

John Marion, executive director of Common Cause Rhode Island, says the public interviews appear to make the process open but that they are basically “love fests. Some of the questions make me nauseous.”

“When you go, you don’t learn a whole lot beyond a resumé,” **Yelnosky concurred**. “One of the things you don’t learn is much of what’s in that application that may be relevant. For example, I’ve never been at an interview where there have been questions about somebody’s financial situation,” except an occasional inquiry as to whether the bad economy makes a judicial position “more attractive” than the practice of law. He said he also wants more openness in the selection process, to know “right from the get-go who’s applied, every applicant for every position. There’s no way we can trust them saying these are the six best if we don’t know who the other five are.”

Malia Reddick, director of research and programs for the American Judicature Society, said the trend nationally “is toward more openness/transparency in the nominating process.” While it is less common for states to make judicial applications public, 11 states do, some right from the moment of filing.

In Nevada, commissioners may remove “unduly sensitive material” deemed to have “little or no relevance” to a candidate’s qualifications. In New Hampshire, applications are kept secret until the governor nominates someone.

That’s similar to what happens with federal judgeships, **Yelnosky points out**. Most of an application for the federal bench becomes public record, he noted, when a candidate goes before the Senate Judiciary Committee.

That might be a good compromise for Rhode Island, Yelnosky said. Finalists’ applications could be disclosed but not those for candidates who have no chance of getting a judgeship.

Asked whether state **Attorney General Peter F. Kilmartin [RWU Law '98]** would support a change in the law to provide for more open judicial applications, Amy Kempe, his spokeswoman, said, “We’re not going to get into what he would support and what he wouldn’t support.” Advisory opinions “are not reflective of

who sits in the office,” she said, but the attorney general’s interpretation of state law and court interpretation of state law in response to a specific question that is posed.

Brennan, the JNC chairman, says he knows that the just-issued advisory opinion by the attorney general’s office “squarely places one’s right to privacy against the public’s desire and right to know. And yes, sunlight is the best disinfectant. It is, however, not the commission’s purview to act independently on privacy issues but to strictly follow statute, and in this case, the legal opinion of our attorney general.

“Of paramount concern here is the safety of our sitting judges,” said Brennan. “These folks are calling balls and strikes every day, rendering decisions that alter people’s lives immeasurably and often adversely. The judges deserve to return home to their families at the end of the day in safety and relative anonymity. A release of the entire application and supporting documentation, which is quite robust, would place personal information that would otherwise not be readily gathered, in full public view.”

Annette Corallo, program manager for the Arizona Judicial Nominating Commissions, says that in her state, the public can view a judicial application within a day or two of the deadline for submission. The completed applications are posted on the Internet. The Arizona Supreme Court mandated public disclosure of applications by court rule in 2005.

“Judicial vacancies are very competitive so potential applicants with items that may be questioned by the public in their backgrounds may choose not to apply or they enter the process knowing there could be media focus on those items,” she said. “By being able to see the applications, the public can have confidence in the quality of the candidates being nominated and appointed.”

The only information not made public is a candidate’s personal phone and residence information, Social Security number and people named as references. Candidates are asked financial questions, which are public, but don’t have to submit tax returns as part of the application. Once someone becomes a judge, he or she has to file annual financial disclosure reports.

Rhode Island judges must file annual reports with the Office of Chief Justice if they receive any non-judicial compensation for outside activities or services. The reports are public record.

Florida’s judicial applications, which are public from the moment they’re filed, ask for a lot more detail than the questionnaire the Rhode Island JNC uses. Florida asks, for example, whether a judicial applicant is a kleptomaniac, compulsive gambler, suffers from insomnia or hyperactivity, engages in pedophilia, exhibitionism or voyeurism or has a problem with “spending money profusely with extremely poor judgment.”

BY THE NUMBERS: The R.I. Judiciary

Key facts about Rhode Island judges who after serving on the bench for 20 or more years qualify for pensions that can amount to 100 percent of their salary.

*** Number of full-time judges in Rhode Island (not including magistrates): 65**

*** Current pay for state judges: \$139,425 - \$212,388**

*** Minimum years of service needed to qualify for judicial pension at age 65: 10 Years**

*** Number of judges collecting state pensions: 41**

*** Number of retired judges getting 100 percent pensions: 23**

Source: *Rhode Island Judiciary*

For full story, click [here](#).