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Stopping the Spin: Reforming the Rhode Island State Ethics Commission and the Revolving Door Statute

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INTRODUCTION

Long-time defense attorney and friend of the Patriarca crime family, Joseph A. Bevilacqua Sr., became Speaker of the House in the Rhode Island General Assembly in 1969.[1] In 1976, while serving as the Speaker, Bevilacqua arranged his own appointment as Chief Justice of the Rhode Island Supreme Court and, nine years later, resigned from that post in the midst of an impeachment relating to his continued connections with the mafia.[2] It is no surprise that, in the wake of this scandal and many others, the citizens of Rhode Island decided "to take the fox away from the chickens" by rewriting the state constitution and creating an Ethics Commission in 1986.[3] Among these reforms, Rhode Island passed "revolving

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1. *Joseph A. Bevilacqua Dies at 70; Rhode Island Judge Linked to Mob*, N.Y. TIMES, June 22, 1989, at D23.

2. *See* H. PHILIP WEST JR., SECRETS & SCANDALS: REFORMING RHODE ISLAND 1986-2006, at 1, 3 (2014); *see also* Robert Kramer, *Bevilacqua Frequented Motel Linked to Mob Crime*, PROVIDENCE J., April 12, 1985, at A-01.

3. *See* WEST JR., *supra* note 2, at 1–7 (quoting Robert Millette, Delegate, 1986 R.I. Const. Convention, Transcript of the Constitutional Convention Committee on Ethics 60 (May 22, 1986) (transcript available at the Rhode Island State Archives)).

door" statutes and created similar regulations to prevent sitting members of the General Assembly from entering well-paying public sector employment, including judiciary appointments.[4] Ethical governance in Rhode Island has since become a model for other states and, in 2015, Rhode Island ranked as having the best ethics enforcement agency in the United States by the Center for Public Integrity.[5] As testament to the efficacy of the "revolving door" statute, Joseph Bevilacqua was the last sitting member of the General Assembly of Rhode Island nominated and appointed to the Supreme Court—until last year.[6]

Thirty-four years after its establishment, a 2020 decision by the Rhode Island Ethics Commission (hereinafter, the Commission) challenges the integrity of that body and lends credence to Alexander Hamilton's warning that, "the pestilential breath of faction may poison the fountains of justice."[7] The danger of a captive judiciary, where political dealing determines the makeup and decisions of the courts—in addition to perennial scandals—led to the creation of the Commission and the conferment of its broad powers to ensure ethical governance.[8] The duty of enforcing good governance begins with the Commission and each decision it makes can have lasting effects.

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4. *See id.* at 178–79; G. Wayne Miller, *House OKs Revolving-Door Ban But Its Fate is Unsure in Senate, Which Had Passed Tougher Bill*, PROVIDENCE J., July 10, 1992, at A-08; 36 R.I. GEN. LAWS § 36-14-5(n)(1) (2022). Revolving door statutes are so named because they prevent, typically for one year after leaving office, sitting members of the General Assembly from being appointed to other government offices, boards, commissions, and the judiciary—i.e., going through a revolving door of well-paid government positions.

5. *See* Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 169 (2007); Paula A. Franzese & Daniel J. O'Hern, Sr., *Restoring the Public Trust: An Agenda for Ethics Reform of State Government and a Proposed Model for New Jersey*, 57 RUTGERS L. REV. 1175, 1192 (2005); *see also* Mike Stanton, *Rhode Island Gets a D+ Grade in 2015 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015), https://publicintegrity.org/politics/state-politics/state-integrity-investigation/rhode-island-gets-d-grade-in-2015-state-integrity-investigation/ [https://perma.cc/AFX9-HJQ3].

6. Steven Frias, *Opening the Revolving Door to the Supreme Court*, CRANSTON HERALD (May 13, 2020, 11:23 AM), https://cranstononline.com/stories/return-to-first-principles-opening-the-revolving-door-to-the-supreme-court,153233 [https://perma.cc/8SAK-HPSZ].

7. THE FEDERALIST NO. 81, at 121 (Alexander Hamilton) (McLean ed., Tudor Publ'g Co. 1947) (1788).

8. *See* WEST JR., *supra* note 2, at 3–5; *see also* R.I. CONST. art. III, §§ 7–8; R.I. GEN. LAWS §§ 36-14-8, -14 (2022).

This Comment argues that the decision by the Commission allowing then-Senator Erin Lynch Prata—sitting as chair of the Judiciary Committee—to seek nomination for the Rhode Island Supreme Court amounted to a distorted reading of the law and a departure from policy goals of the Commission. To provide guidance for future nomination decisions, the General Assembly must amend Rhode Island General Laws § 36-14-5(n)(3) to more clearly define that the exception for election to "constitutional offices" under that section does not apply to judicial appointments. Furthermore, Section 1.5 of the Rhode Island Code of Ethics must include a provision requiring that a new advisory opinion be published in instances where the Commission votes against the advice of its own staff attorneys.[9] These changes will not only allow future Commission members to make legally sound and constitutionally valid decisions but will also ensure accountability by committing the Commission's reasoning to public record.

In Part I, this Comment addresses the creation of the "revolving door" provisions with a discussion of Rhode Island Supreme Court decisions regarding the constitutionality of those provisions and the Commission's ability to enforce them. Part II closely examines Justice Lynch Prata's legal arguments in favor of her nomination and those of the Commission staff attorneys, who advised that the Commission enforce the relevant provisions to prevent her immediate nomination. Part III proffers potential solutions to the issues raised by the Commission decision. Finally, Part IV analyzes the constitutional limits on those solutions.

I. THE REVOLVING DOOR REGULATION AND STATUTE

The Rhode Island Constitution gave the Commission, from its inception in 1986, the power to "adopt a code of ethics" including "provisions on conflicts of interest, confidential information, use of position, contracts with government agencies and financial disclosure."[10] The Commission is made up of nine Commissioners, four appointed directly by the Rhode Island Governor and five appointed from lists of nominees submitted by the House Speaker, House Minority Leader, Senate President, and Senate Minority Leader to the

9. *See* 520-00 R.I. CODE R. § 1.5 (LexisNexis 2022) (formerly R.I. Ethics Comm'n Reg. 36-14-5000).

10. R.I. CONST. art. III, § 8.

Governor, who serve five year terms, but may continue serving until a new member is appointed.[11] These Commissioners cannot hold office, campaign, or contribute to a political party.[12] On its face, the Rhode Island Constitution allowed the Commission power to enact its own regulations which carried the full force of law, at least in the realm of ethics. However, the Commissioners refused to exercise this power at first because they feared the potential conflict with the powers of the General Assembly enumerated in the constitution, namely, that the General Assembly "pass all laws necessary to carry this Constitution into effect," and that "[t]he legislative power" was vested exclusively in the Senate and House of Representatives.[13] The absence of any action by the General Assembly towards adopting a strong revolving door legislation, coupled with a slew of scandals, prompted the Commission to test the waters.[14] Commissioner Mel Topf, a current Roger Williams University professor, advocated most vocally: "[w]e do not need the Supreme Court to advise us to do our duty. We do not need the Governor to ask the Supreme Court to advise us to do our duty. We need simply to do it."[15] After stern protest from the Governor's office, Commission Regulations 36-14-5006 and 5007[16] came into effect—followed

11. R.I. GEN. LAWS § 36-14-8(a) (2022).

12. *Id.* § 36-14-8(f).

13. *See* WEST, Jr., *supra* note 2, at 82–83; *see also* R.I. CONST. art. VI, §§ 1–2.

14. *See* WEST, Jr., *supra* note 2, at 80–84 & n. 12 (noting that the Commission decided it had the authority to write resolutions following a scandal involving then-Governor DiPrete's realty company receiving a two-million-dollar windfall from a zoning change and a failed House bill that would have prevented legislators from seeking or accepting other state employment for a year after leaving office).

15. *Id.* at 83.

16. Commission Regulations 36-14-5006 and 5007 now appear in the Rhode Island Code of Regulations and state:

> 1.5.1 Employment from Own Board (36-14-5006)
>
> No elected or appointed official may accept any appointment or election that requires approval by the body of which he or she is or was a member, to any position which carries with it any financial benefit or remuneration, until the expiration of one (1) year after termination of his or her membership in or on such body, unless the Ethics Commission shall give its approval for such appointment or election, and, further provided, that such approval shall not be granted unless the Ethics Commission is satisfied that denial of such employment or

swiftly by a Supreme Court challenge from Governor Bruce Sundlun.[17]

The 1992 Rhode Island Supreme Court advisory opinion focused primarily on the meaning of Article 3, Section 8 of the Rhode Island Constitution, which provides that the General Assembly establish an independent non-partisan ethics commission which, in turn, adopts a Code of Ethics.[18] Relying on the historic meaning of "adopt" and its use in other parts of the Constitution, the Supreme Court ruled that Article 3, Section 8 "was intended to bestow the power to enact substantive ethics laws upon the commission."[19] Furthermore, the court accepted the clear and abundant evidence of the 1986 Constitution framers' intent to establish the Commission with an independent ability to enact substantive ethics law.[20] The Supreme Court then noted not only that such legislative power would be "limited and concurrent" with the General Assembly, but also that the General Assembly was "limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the commission."[21]

The General Assembly, perhaps persuaded by the Supreme Court opinion and the continued pressure by constituents and advocates, passed a revolving door statute which had *similar* language.[22] An exception for "seeking or being elected for" a

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> position would create a substantial hardship for the body, board, or municipality.
>
> 1.5.2 Prohibition on State Employment (36-14-5007)
>
> No member of the General Assembly shall seek or accept state employment, not held at the time of the member's election, while serving in the General Assembly and for a period of one (1) year after leaving legislative office. For purposes of this regulation, "employment" shall include service as defined in R.I. Gen. Laws § 36-14-2(4) and shall also include service as an independent contractor or consultant to the state or any state agency, whether as an individual or a principal of an entity performing such service.

520-00 R.I. CODE R. §§ 1.5.1, 1.5.2 (formerly Rhode Island Ethics Commission Regulations §§ 36-14-5006, -5007).

17. WEST, Jr., *supra* note 2, at 84–86.

18. *In re* Advisory Op. to the Governor (Ethics Comm'n), 612 A.2d 1, 8 (R.I. 1992).

19. *Id.* at 8.

20. *Id.* at 9–11.

21. *Id.* at 14.

22. The revolving door statute states:

constitutional office was added because, as House Judiciary Chairman Jeffry Teitz explained, "getting a job through election is categorically different from a revolving door appointment."[23] That difference was not as clear to Senate Judiciary Chairman Thomas Lynch, who declared it "an open question" as to whether "seeking or being elected for" a constitutional office could allow a sitting member of the General Assembly to become a judge.[24] Before the judicial selection reforms of 1994, court vacancies were filled by "elections" in a Grand Committee made up of all sitting senators and representatives.[25] In response to the so-called open question, Senate Majority Leader John J. Bevilacqua stated that such a loophole "would fly in the face of the ethics reform everyone just supported."[26] This sentiment echoed an earlier statement by Rhode Island Bar Association President Alan Flick during public hearings for the Commission, declaring, "[t]he message from the state's ethical conscience should be clear and unambiguous: '[i]f you serve the

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> (1) No state elected official, while holding state office and for a period of one year after leaving state office, shall seek or accept employment with any other state agency, as defined in § 36-14-2(8)(i), other than employment which was held at the time of the official's election or at the time of enactment of this subsection, except as provided herein.
>
> (2) Nothing contained herein shall prohibit any general officer or the general assembly from appointing any state elected official to a senior policy-making, discretionary, or confidential position on the general officer's or the general assembly's staff, and in the case of the governor, to a position as a department director; nor shall the provisions herein prohibit any state elected official from seeking or accepting a senior policy-making, discretionary, or confidential position on any general officer's or the general assembly's staff, or from seeking or accepting appointment as a department director by the governor.
>
> (3) Nothing contained herein shall prohibit a state elected official from seeking or being elected for any other constitutional office.
>
> (4) Nothing contained herein shall prohibit the Rhode Island ethics commission from authorizing exceptions to this subsection where such exemption would not create an appearance of impropriety.

R.I. GEN. LAWS § 36-14-5(n) (2022).

23. WEST, Jr., *supra* note 2, at 171.

24. *See* Judy Rakowski, *Law May Permit Legislator to Become Judge High Court Vacancy Prompts Debate on Apparent Loophole*, PROVIDENCE J., July 20, 1992, at A-03; *see also* William Colleran, *Waiting for Doors to (Revolve) Open*, PROVIDENCE J., Sept. 20, 1992, at J-07.

25. WEST, Jr., *supra* note 2, at 3.

26. Rakowsky, *supra* note 24, at A-03.

legislature, concentrate on your legislative duties. Your office is not to be used as a springboard to other public employment.'"[27] While the Commission and the General Assembly clearly believed that the revolving door provisions prevented judicial nominations of sitting elected officials, one man remained unconvinced.

Governor Sundlun—who won reelection in 1992 on a reformist platform—questioned the enforceability of this new statute and the corresponding regulation after appointing his former executive counsel to the Superior Court.[28] In this new Advisory Opinion, Governor Sundlun first argued on the basis of the Equal Protection Clause of the Fourteenth Amendment, contending that the specific restrictions on elected officials made by these laws created an "unconstitutional classification" and must be subjected to a higher level of scrutiny by the court.[29] The Rhode Island Supreme Court rejected this argument, citing *Clements v. Fashing*, "[f]ar from recognizing candidacy as a fundamental right, we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'"[30] The one-year waiting period between sitting as a member of the General Assembly and being appointed to a new office represented a "*de minimis* burden on the political aspirations of a current office holder. A waiting period is hardly a significant barrier to candidacy."[31] Hence, the court applied a lower standard. "In order for the revolving-door legislation to pass constitutional equal protection muster, it must be shown that the legislation is rationally related to a legitimate state interest."[32] Determining that the years of scandals and political fiascos that plagued Rhode Island in preceding decades constituted a matter of public concern in which the state had a legitimate interest, the court concluded that, "*the revolving-door legislation is an effective device by which the public trust may be enhanced*."[33]

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27. WEST, Jr., *supra* note 2, at 88.

28. *Id*. at 198 (Governor Sundlun announced the nominations two days after his reelection).

29. *In re* Advisory from the Governor, 633 A.2d 664, 669 (R.I. 1993).

30. *Id*. at 670 (quoting Clements v. Fashing, 457 U.S. 957, 963 (1982)) (internal quotes omitted).

31. *Id*. (quoting *Clements*, 457 U.S. at 967) (internal quotes omitted).

32. *Id*.

33. *Id*. at 671 (emphasis added).

Failing to persuade the court with his primary argument, Governor Sundlun relied next on a due process challenge, contending that the revolving door statute and regulation were facial violations because they represented permanent and irrebuttable presumptions against potential nominees.[34] This argument was wholly rejected by the Supreme Court because Governor Sundlun did not specify "what deprivation of life, liberty, or property interest is unconstitutionally affected by the revolving-door legislation."[35] The court added that even if such an injury had been articulated, a due process challenge would have failed.[36]

Governor Sundlun based his final arguments on the separation-of-powers doctrine and "overbreadth" of the revolving door prohibitions. He argued that the governor's power to select appointments could not be limited by the intrusion of the General Assembly or the Commission.[37] Applying the test from *Chadha v. Immigration and Naturalization Service*, the court found that the statutes do not "disrupt his ability to carry out his duties."[38] Notably, the court specifically mentioned that the revolving door limits were applicable to appointments "*to the judiciary*, various commissions, and state agencies."[39] The court also addressed the potential for different readings of the statute and regulation. The court reiterated not only that the Commission has "concurrent power" to enact ethics laws, but also that, where any conflict between the statute and regulation exist, the laws "should be considered together so that they will harmonize with each other and be consistent with their general objective scope."[40] In its conclusion, the Supreme

34. *Id*. at 672 (citing Vlandis v. Kline, 412 U.S. 441 (1973)) (where the Supreme Court struck down a Connecticut law banning out-of-state students at Connecticut state universities from claiming resident status while attending, on the basis that a permanent irrebuttable presumption violated due process).

35. *Id.* at 673.

36. *Id*. (citing Okla. Educ. Ass'n v. Alcoholic Beverages L. Enf't Comm'n, 889 F.2d 929, 936 (10th Cir. 1989)) (holding that unless the state law "trammels" fundamental personal rights, the law only needs to have a reasonable relation to a legitimate purpose and there is a presumption that the state legislature acted within constitutional limits).

37. *Id.* at 674.

38. *Id*. at 675 (citing Chadha v. Immigr. & Naturalization Serv., 462 U.S. 919 (1983)).

39. *Id*. at 675–76 (emphasis added).

40. *Id.* at 668 (citing R.I. Higher Educ. Assistance Auth. v. R.I. Conflict of Int. Comm'n, 505 A.2d 427, 428 (R.I. 1986)) (internal quotes omitted).

Court wrote in clear language that the revolving door statute and corresponding regulation do "not violate the Fourteenth Amendment, nor article 1, section 2, of the Rhode Island Constitution. Neither [do they] seriously impinge upon any branch of government."[41] The Rhode Island Supreme Court resoundingly answered the "open question" proposed by Senate Judiciary Chairman Lynch and Governor Sundlun: the revolving door provisions were enforceable and specifically applied to appointments of General Assembly members to the judiciary.

Since 1994, the Commission has published several advisory opinions in favor of allowing state employees or other government appointees to seek nomination to the judiciary.[42] However, those opinions do not signify that General Assembly members have been circumventing the statute; as Commission Staff Executive Director Jason Gramitt explains, "advisory opinions are the only visible advice we give. We get phone calls weekly asking us about ethics regulations, including the revolving door ban. When you tell them: '[n]o you can't, most people accept it."[43] While former General Assembly members still continue to fill many vacancies in Rhode Island courts—representing 20.4% of all Rhode Island judges in 2010—the ban on sitting members has remained in force.[44]

The only other challenge to the power of the revolving door provisions came in 1997, when Governor Lincoln Almond requested an advisory opinion from the Supreme Court.[45] Governor Almond questioned whether the Commission could prevent General Assembly members from being placed on state boards, agencies, and commissions.[46] The court answered with a slight modification to the Commission's power in these narrow categories: first, that its regulations are "subject to review by the judiciary" and second, that the

41. *Id.* at 678.

42. *See generally* R.I. Ethics Comm'n, Advisory Op. 2009-16 (2009); R.I. Ethics Comm'n, Advisory Op. 2013-31 (2013); R.I. Ethics Comm'n, Advisory Op. 2016-1 (2016).

43. Ellen Liberman, *Reporter: Revolving-Door Redux*, R.I. MONTHLY (Jan. 24, 2014), https://www.rimonthly.com/reporter-revolving-door-redux/ [https://perma.cc/WX6K-T4ET].

44. Michael J. Yelnosky, *The Impact of Merit Selection on the Characteristics of Rhode Island Judges*, 15 ROGER WILLIAMS UNIV. L. REV. 649, 655 (2010).

45. *In re* Advisory Op. to the Governor, 732 A.2d 55, 57 (R.I. 1999).

46. *Id.*

Commission "not act inconsistently with the constitution."[47] Yet, because these advisory opinions are not binding on the court, harder questions regarding the constitutional limits of the Commission in enforcing the Code of Ethics, particularly in the Commission's ability to prevent sitting members of the General Assembly from being appointed to the Supreme Court, remain unanswered.

II. GOING THROUGH THE REVOLVING DOOR

On April 28, 2020, then Senator Erin Lynch Prata (Chair of the Senate Judiciary Committee) and her legal representatives John Lynch Jr. and Francis Flanagan submitted a letter requesting an advisory opinion from the Commission on the issue of whether an incumbent state senator could seek nomination and appointment to the Rhode Island Supreme Court.[48] The letter's main argument rested on an interpretation of the exception to the revolving door statute at § 36-14-5(n)(3), which provides that "[n]othing contained [within this statute] shall prohibit a state elected official from seeking or being elected for any other constitutional office."[49] The argument followed the similar "open question" posed by Senate Judiciary Chairman Thomas Lynch in 1992 in that it asked if appointment to a "constitutional office," which Senator John Lynch believed to include the Supreme Court, was allowed by the exceptions to the revolving door statute.[50] Here, Senator Lynch Prata argued that because the Supreme Court is a "constitutional office"—as stated in *Gorham v. Robinson* and Article 10 Section 1 of the Rhode Island Constitution—it is not subject to either the revolving door statute or corresponding regulation.[51]

The next line of argument was that the revolving door provisions infringed on the governor's constitutional power to "fill any vacancy" in the Supreme Court.[52] This argument relied in part on a previous Commission advisory opinion, where a sitting member

47. *Id*. at 68.

48. Letter from Erin Lynch Prata, R.I. State Senator, to Jason Gramitt, Exec. Dir., R.I. Ethics Comm'n 1 (Apr. 28, 2020) (on file with the *Roger Williams University Law Review*).

49. *Id*. at 3 (citing R.I. GEN. LAWS § 36-14-5(n)(3)).

50. Rakowsky, *supra* note 24, at A-03.

51. *Id*. at 1 (citing Gorham v. Robinson, 186 A.2d 832 (1936)) (note the term "constitutional office" is not defined in any part of R.I. Gen. Laws).

52. *Id*. at 4 (quoting R.I. CONST. art. X, § 4).

of the House of Representatives was allowed to accept the governor's appointment to the position of Secretary of Health and Human Services.[53] In that case, the Commission decided that it did not have authority to infringe on the governor's constitutional appointment power for state boards, agencies, and commissions, citing the 1999 Supreme Court Advisory Opinion.[54] Thus, Senator Lynch Prata argued that preventing her nomination and appointment would be a similar infringement on the governor's appointment power for "constitutional offices."[55] She bolstered this argument with a similar holding from the court in *Inman v. Whitehouse*, which ruled on remand from the Supreme Court that the revolving door provisions could not restrict the Grand Committee from selecting one a member of the General Assembly to fill a vacancy in the office of Secretary of State.[56] In sum, Senator Lynch Prata argued that no revolving door restrictions apply for sitting members of the General Assembly seeking appointment to the Supreme Court and any restrictions that could apply would infringe on the constitutional powers of the Governor.

The Commission staff attorneys drafted an advisory opinion in response to the request letter which enumerated the faults and weaknesses of Justice Lynch Prata's argument. The draft opinion reiterated the restrictions of the revolving door statute and noted its three potential statutory exceptions, while also stressing that no exceptions existed under *the regulation*.[57] The statutory exception under § 36-14-5(n)(2) did not apply to the facts because a Supreme Court vacancy is not a "senior policy-making" office or a "discretionary" position as described by the exception.[58] The draft opinion argued that the § 36-14-5(n)(3) exception did not apply because a Supreme Court vacancy is not an elected position and emphasized that the Commission did not need to reach the question of whether the Supreme Court is a "constitutional office."[59] The remaining exception, § 36-14-5(n)(4), allows the commission to make an exemption

53. *Id.* at 3–4 (citing R.I. Ethics Comm'n, Advisory Op. 2010-54 (2010)).
54. *Id.* at 4.
55. *Id.* at 3.
56. *Id.* (citing Inman v. Whitehouse, No. 2001-1256, 2002 WL 169197 (R.I. Super. Ct. Jan. 17, 2002)).
57. R.I. Ethics Comm'n, Draft Advisory Op. 3 (June 2, 2020).
58. *See* R.I. GEN. LAWS § 36-14-5(n)(2) (2022).
59. R.I. Ethics Comm'n, *supra* note 57, at 3.

to the revolving door statute, "where such exemption would not create an appearance of impropriety."[60] The staff argued that the original purpose, at least in part, for the creation of revolving door provisions was the "widespread belief" that elected officials entering lifetime appointments to the judiciary had an appearance of impropriety.[61] Furthermore, the Commission staff attorneys believed this appearance of impropriety was "especially true" when, as was the case with Justice Lynch Prata, her nomination would require hearings before the Judiciary Committee of which she was chairperson.[62] Having argued thoroughly against any possible statutory exception, the draft opinion turned to Justice Lynch Prata's argument that *Inman* limited the enforcement ability of the Code of Ethics.

The Commission staff attorneys distinguished *Inman* by the fact that the plaintiff in that case sought election by Grand Committee, whereas judicial vacancies require appointments by the governor.[63] Further, the staff argued that the unrestricted authority of the Grand Committee in selecting replacement officials is not relatable to the governor's restricted authority to select from a "small pool" of individuals after approval by the Judicial Nomination Committee.[64] Lastly, and most notably, the Commission staff attorneys argued that the revolving door regulations were not intended to restrict the governor's appointment power, but instead are restrictions on sitting elected officials' ability to seek state employment.[65]

Letters from government advocacy groups and concerned citizens added further support to the staff argument.[66] Rhode Island lawyer and former counsel to the Rhode Island Public Utilities Commission, Steven Frias, submitted a lengthy rebuke of Justice

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 6.
64. *Id.*
65. *Id.*
66. *See, e.g.,* Letter from Steven Frias to Jason Gramitt, Exec. Dir., R.I. Ethics Comm'n (May 6, 2020); Letter from John Marion, Exec. Dir., Common Cause R.I., to Jason Gramitt, Exec. Dir., R.I. Ethics Comm'n (May 15, 2020); Letter from H. Phillip West, Jr., to Marisa Quinn, Chairperson, R.I. Ethics Comm'n (May 22, 2020).

Lynch Prata's arguments which centered not only around the sordid history of politically motivated judicial nominations, but also the long-established legal framework and policy goals in making these decisions.[67] The Executive Director of Common Cause Rhode Island, John Marion, submitted a letter reiterating the purpose and proper reading of the revolving door statute and regulation.[68] Furthermore, H. Philip West Jr., the author of *Secrets and Scandals*, upon which this Comment relies heavily for crucial historic context, submitted a letter to Commission Chairperson Marisa Quinn to remind the Commission of that context and the dangerous precedent this decision could create.[69] Despite the well-reasoned and persuasive arguments of their staff attorneys and concerned citizens, the Commission voted 5-2 against adopting the draft advisory opinion.[70]

III. ANALYSIS, PROPOSED CHANGES, AND POLICY GOALS

A. *The Ethics Commission Misread the Revolving Door Exception*

The deliberations by the Commission on June 2, 2020, highlight fundamental misunderstandings of the language, use, and objectives of the revolving door provisions.[71] The first question posed by Commissioner Corrente was whether a position on the Supreme Court is a "constitutional office."[72] This question was irrelevant to the Commission because the exception under § 36-14-5(n)(3) only applies to *elected* offices, not appointments to the judiciary. Moreover, the 1993 Advisory Opinion from the Supreme Court specifically noted that a temporary one-year prohibition on appointments to the judiciary branch created by the revolving door statute is

67. Letter from Steven Frias to Jason Gramitt, *supra* note 66.

68. Letter from John Marion to Jason Gramitt, *supra* note 66.

69. Letter from H. Phillip West, Jr. to Jason Gramitt, *supra* note 66.

70. Katherine Gregg, *Ethics Commission Rejects Staff Advice, Opens Door for Sen. Lynch Prata to Potentially Get Supreme Court Seat*, PROVIDENCE J. (June 2, 2020, 6:11 AM), https://www.providencejournal.com/story/news/politics/2020/06/02/ethics-commission-rejects-staff-advice-opens-door-for-sen-lynch-prata-to-potentially-get-supreme-cou/42407471/ [https://perma.cc/M43Y-YH4M].

71. *See* Minutes of the Open Session of the Rhode Island Ethics Commission 3–4 (June 2, 2020).

72. *Id*. at 3.

constitutional.[73] The Court made no mention of exceptions for Supreme Court appointments.[74] This rehash of Senator John Lynch's "open question" is as meritless in 2021 as it was in 1992 because it is violative of clear legislative intent and is unsupported by precedent. Commissioner Corrente then asked if there could be a potential disjunctive meaning in the 5(n)(3) exception, because the statute reads, "seeking *or* being elected for any other constitutional office."[75] Enforcing the statute based on a grammatical ambiguity would not only contravene the intent of the revolving door legislation because it is clear that the statute was meant to limit sitting legislators from immediately entering other state employment, including the judiciary, but also because the exception immediately preceding 5(n)(3) makes specific reference to appointments and is omitted from the 5(n)(3) exception.[76] Furthermore, such a reading begs the question of why the statute would allow sitting legislators to *seek* state employment but would deny their appointment to that office. The construction most aligned with legislative intent is that the exception does not permit appointment to the judiciary as a sitting legislator.

Following the "constitutional office" line of argument, Legal Counsel for the Commission, Herbert DeSimone, stated that Justice Lynch Prata would have been subject to the revolving door provision if she were seeking appointment to a lower court, but because the Supreme Court is a "constitutional office," the exception applies.[77] Again, the Commission did not need to reach a conclusion as to what is or is not a constitutional office and the term is not defined elsewhere in the statute, but even accepting *arguendo* that the Supreme Court is such an office, the idea that the statute would

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73. *In re* Advisory from the Governor, 633 A.2d 664, 675-76 (R.I. 1993).

74. *See id.* at 74.

75. Minutes of the Open Session of the Rhode Island Ethics Commission, *supra* note 71, at 3–4 (emphasis added).

76. Email from Mel Topf, Professor & Former Comm'r, R.I. Ethics Comm'n (Nov. 12, 2021, 9:55 AM) (on file with author) (when asked in an interview for this Comment whether the Ethics Commission was ever bound by such a strict interpretation of a disjunctive "or" in the revolving door statute, former Commissioner Mel Topf explained, "No the Commission is not bound to that interpretation, even if it were more than just Justice Lynch Prata's opinion. I know of no legal basis requiring such a narrow interpretation.").

77. Minutes of the Open Session of the Rhode Island Ethics Commission, *supra* note 71, at 4.

prevent appointments to lower courts and allow appointments to the highest court defies reason. The Rhode Island Supreme Court is the penultimate, and more typically, the final arbiter of Rhode Island constitutional and legal interpretation.[78] That a statute would halt the appearance of impropriety in appointments to lower courts, but endorse the same appearance of impropriety in the highest court beggars belief and undoes a generation-long effort to reform the judicial selection process.[79] In response to a final question by Commissioner Palumbo, Justice Lynch Prata's counsel asserted that application of this restriction on a "constitutional office" would impinge on the Governor's appointment power.[80] The 1993 Advisory Opinion answered in the negative whether the temporary restriction on legislators seeking positions in the judicial branch amounts to an infringement on the governor's power of appointment under Article IX, Section V.[81] Yet, according to the Commissioners, that advisory opinion was not the final word on the matter.

When the revolving door statute can be read in a way that "contradicts" the Commission regulation and violates the "general objective scope" of the statute, that reading would be invalid according to the 1993 Supreme Court Advisory Opinion. The Court in 1993 emphasized that where the statute and regulation appear to disagree, they should be read together to "harmonize" enforcement.[82] Thus, because the Commission's regulation does not include exceptions like the one created by § 36-14-5(n)(3), it follows that an application and enforcement of the statute which is contradictory to the regulation would not be "harmonious." Moreover, interpreting the statute in a way that violates its own policy objectives and creates an "appearance of impropriety" should make that interpretation difficult to support if challenged. Unfortunately, the Commission—unlike the legislature or governor—does not have the ability to question or adapt that interpretation by requesting an Advisory

78. *See* R.I. CONST. art. X, §§ 1–2.

79. John Marion, *Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island,* 15 ROGER WILLIAMS U. L. REV. 735, 752–53 (2010).

80. *See* Minutes of the Open Session of the Rhode Island Ethics Commission, *supra* note 71, at 4.

81. *In re* Advisory from the Governor, 633 A.2d 664, 668–69 (R.I. 1993).

82. *Id.* at 668–69 (citing R.I. Higher Educ. Assistance Auth. v. R.I. Conflict of Int. Comm'n, 505 A.2d 427, 428 (R.I. 1986)).

Opinion under Article X, Section III of the Rhode Island Constitution.[83]

B. *Amending Rhode Island's Revolving Door Statute*

The first recommended amendment to § 36-14-5(n)(3) would close any possible disjunctive reading of the statute. The statute currently reads: "[n]othing contained herein shall prohibit a state elected official from seeking or being elected for any other constitutional office."[84] The "or" in this sentence could easily be changed to "and" and close the disjunctive reading of the statute. Furthermore, a clause should be inserted for clarity regarding the word "election." Thus, the amended statute would read: '[n]othing contained herein shall prohibit a state elected official from seeking and being elected for any other constitutional office, not to include gubernatorial appointments.' This change would not alter the meaning of the statute but would close the possibility of reading the statute as disjunctive or reading "election" to include the judicial selection and appointment process. Such an amendment could be made by the House and Senate. There are currently two other amendments to § 36-14 unrelated to the revolving door provisions being considered during this session.

The second recommended amendment to § 36-14-5(n)(3) would more clearly define the "constitutional offices" for which the exception applies. To better inform Commissioners and potential office seekers and to encourage uniformity of interpretation and application, the Rhode Island legislature should adopt a definition of "constitutional offices" as those offices which are created by the articles of the Rhode Island Constitution. This definition could be included with other definitions under § 36-14-2, again with a simple majority vote. This would mean that the Rhode Island Supreme Court is a constitutional office, but when included with the changes to § 36-14-5(n)(3), it would eliminate confusion as to what is and is not allowed under the revolving door provisions.[85]

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83. R.I. CONST. art. X, § 3 (Mel Topf suggested in his interview that the Ethics Commission could attempt to sue in Superior Court to invalidate the statute that is in conflict with the regulation).

84. R.I. GEN LAWS § 36-14-5(n)(3) (2022).

85. *See id.*

New procedures should be created to help better inform the public of the Commission's reasoning. When the Ethics Commission was originally established, the Commissioners made a determination upon request from petitioners *before* the staff of the Commission were asked to write a draft opinion.[86] Currently, Commissioners are presented with a draft advisory opinion created by their attorneys, and then vote on whether or not to adopt the advisory opinion.[87] If the draft opinion is accepted, it is entered as a binding decision for the Commission on that subject.[88] If the draft opinion is rejected, the draft opinion and related documents are made public, but there is no binding decision made by the Commission.[89] Furthermore, under the current system, the justifications and legal reasoning of the Commission remain unknown and unpredictable if the draft opinion is not adopted. This Comment proposes that a more formalized system be adopted akin to the original procedure. Under this new procedure, if the draft opinion is rejected by the Commission, a new opinion must be drafted and approved so long as the advisory opinion request is maintained by the petitioner. An example of what such statutory language could look like is, "[i]n the maintenance of accountability and predictability in the enforcement of these provisions, where the Commission's vote on an Advisory Opinion rejects the Draft Opinion of its staff, a new Advisory Opinion providing legal reasoning must be approved, provided the Advisory Opinion request is maintained by the petitioner." Such a change in the procedure of the Commission may require legislative statutory amendment and a two-thirds vote of the Commission members to change the rules or regulations of the Commission.

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86. Email from Mel Topf, *supra* note 76 ("AOs were handled very differently. In my time [on the Commission, 1988-1994], an official seeking an AO would send the request and documents to the Commission in advance. The request would be on the agenda for the next meeting, where the official would appear and discuss the request. The Commission would deliberate and vote on what advice to give. Based on that, the legal staff would then write up the AO. In other words, the commissioners decided the advice, and the staff would write the AO based on the decision. There was of course little opportunity for dispute since what the staff wrote was based wholly on the commissioner's discussion and vote.").

87. R.I. GEN. LAWS § 36-14-11(b) (2022); *see also* 520-00 R.I. CODE R. § 2.7(E) (LexisNexis 2022).

88. R.I. GEN LAWS § 36-14-11(c) (2022).

89. *See* 520-00 R.I. CODE R. §§ 2.1–2.2, 2.7(E) (LexisNexis 2022).

C. *The Proposed Changes Will Further the Commission's Policy Goals*

These changes to the revolving door provisions would achieve ideal policy goals. The Commission is committed to ensuring that Rhode Island public officials adhere to the highest standards of ethical conduct and avoid the appearance of impropriety.[90] Keeping the Rhode Island judiciary independent of the General Assembly must be a crucial part of that policy goal. A Brennan Center for Justice study on judicial selection reform found that minimizing opportunities for "political self-dealing and special interest influence" is crucial for maintaining fair and independent courts and public confidence in those courts.[91] Thus, it is crucial that the statutes and regulations are unambiguous as to their meaning and effect to reduce those opportunities. Closing the potential for a disjunctive reading of the revolving door statute exception would help ensure that the "open question" about "constitutional offices" would be more completely answered and assist in comprehensive and predictable enforcement of the Code of Ethics. Likewise, defining what a constitutional office is could clear up any confusion as to which offices are included in the § 36-14-5(n)(3) exception, and may simplify cases where an appearance of impropriety exists. Furthermore, *Choosing State Judges: A Plan for Reform* specifically notes that the preliminary procedures of judicial selection are where judicial nominations begin to gain or lose legitimacy in the eyes of the public.[92] The Commission is the first filter to this nomination process and thus has an outsized effect on the legitimacy of the court.

One potential area for future reform suggested by the study is to ensure that more commissioners are chosen by General Assembly than by the Governor and that the public have greater oversight of the procedure.[93] Not only would this increase confidence in the Commission's role as a non-partisan body, but could also provide a

90. R.I. GEN. LAWS § 36-14-1 (2022).

91. Alicia Bannon, *Choosing State Judges: A Plan for Reform*, BRENNAN CTR. FOR JUST. (Oct. 10, 2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Choosing_State_Judges_2018.pdf [https://perma.cc/5EX3-4LJJ].

92. *Id.*

93. *Id.*

greater opportunity to include diverse voices and encourage more intersectional decision making.

IV. POTENTIAL CONSTITUTIONAL BARRIERS

Courts often explore the constitutional effect of the language used in the laws and regulations of the federal and state governments to determine whether there is an overreach of the checks and balances between the three fundamental branches of government—legislature, judiciary, and executive. Here, the separation of powers doctrine may prevent enforcement of the amended regulation on nominations to the Supreme Court on the basis that the Commission would be unconstitutionally weakening the appointment power of the governor, but such a determination would infringe on the limited constitutional objective of the Commission to "adopt" a Code of Ethics.[94] Professor Patrick T. Conley is a fount of knowledge about the Rhode Island State Constitution and an outspoken critic of the revolving door provisions. His most scathing critique of the Commission is that the separation of powers within the Rhode Island Constitution makes the Commission redundant and the revolving door provisions, "moralism run rampant."[95] From this perspective, the Commission—as an appointed, quasi-legislative, quasi-judicial, quasi-executive body—runs afoul of the constitutionally established powers of the other branches of government. This view was somewhat bolstered by *In re Advisory Opinion to the Governor (Rhode Island Ethics Commission—Separation of Powers)*, where a majority of justices determined that the Commission's interpretation of its enabling clause in Article III, Section 8 was likely subject to stricter scrutiny.[96]

However, Rhode Island voters in 2016 approved amendments to the Constitution to protect the revolving door provisions for state legislators and their appointees on state boards and commissions that the Supreme Court ruled was unconstitutional in that case.[97]

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94. R.I. CONST. art. III, § 8.

95. PATRICK T. CONLEY, NEITHER SEPARATE NOR EQUAL: LEGISLATURE AND EXECUTIVE IN RHODE ISLAND CONSTITUTIONAL HISTORY 134–35 (1999).

96. PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 149 (2011); *In re* Advisory Op. to the Governor, 732 A.2d 55, 60 (R.I. 1999).

97. R.I. CONST. art. III, § 8; *see* Alex Kaufman, *R.I. Ethics Commission Jurisdiction over Assembly is Restored*, PROVIDENCE J. (Nov. 9, 2016, 9:02 PM),

Furthermore, the Commission power to create and enforce temporary prohibitions for legislators seeking or being appointed to offices was supported in the 1992 and 1993 advisory opinions, which have not since been reconsidered. The crux of the constitutionality of this power is in the *temporary* nature of these restrictions. The proposed amendments to the revolving door statutes and Commission procedures offered in this Comment would not change that temporary nature of these prohibitions, but instead simply create more clarity in what is and is not permitted by the statutes and regulations—in keeping with explicit policy goals and the past thirty-five years of successful enforcement.

Alternatively, opponents to the proposed amendments might argue that allowing the Commission to screen candidates from the Supreme Court judicial nomination process is an unconstitutional delegation of the nomination power of the General Assembly. Nondelegation doctrine is the mirror of the separation of powers doctrine and is usually focused on limiting the legislature's ability to transfer its powers to other branches of government.[98] Yet, such an argument fails firstly because the limited and temporary power of the Commission to exclude nominees from the selection process is rooted not in a legislative act, but within the Rhode Island Constitution itself.[99] Secondly, the revolving door regulations are not the sole creation of an overpowered constitutionally created agency, but are mirrored in purpose—if not in language—by statutes passed by the General Assembly.[100] As noted in *Almond v. Rhode Island Lottery Commission*, "delegation of legislative functions is not a per se unconstitutional action. Instead, it is the conditions of the delegation—the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse—that [are] examine[d] in determining the

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https://www.providencejournal.com/story/news/politics/2016/11/09/ri-ethics-commissions-jurisdiction-over-assembly-is-restored/24590393007/ [https://perma.cc/4M49-VTQB].

98. *See Nondelegation Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

99. R.I. CONST. art. III, § 8; *see also* Almond v. R.I. Lottery Comm'n, 756 A.2d 186, 194 (2000) (where the Supreme Court upheld the establishment of the Rhode Island Lottery Commission and noted that the Court is not privileged to second guess the delegates to the 1986 constitutional convention).

100. *Compare* 520-00 R.I. CODE R. § 1.5 (LexisNexis 2022) *with* R.I. GEN. LAWS § 36-14-5(n) (2022).

constitutionality of a delegation of power."[101] Here, the proposed changes only reinforce a functionality which should have existed from the very creation of the revolving door provisions. Furthermore, these slight alterations do not greatly expand the scope or potential for administrative abuse of the current statutes and regulations. If anything, by providing more clear definitions of what offices are covered by the revolving door statutes, the proposed amendments set bright line boundaries to the Commission's power to enforce those statutes.

CONCLUSION

This Comment is not intended to assess the caliber and qualifications of Justice Lynch Prata, who is, by all accounts, a dedicated public servant, and a valuable asset to the Rhode Island judiciary. It is likewise not intended to judge the merits and qualifications of the members of the Commission, who undoubtedly serve with the best interests of Rhode Island and its citizens in mind while making difficult and multifaceted decisions. Instead, this Comment is focused on the forever unfinished work of reform, the sometimes slow and incremental changes that can create a monumental difference for our continued confidence in the legal system.

The proposed changes to the statutory language and Ethics Commission procedures will protect the integrity of Rhode Island government and will enhance public trust in its institutions. Burdened by a scandal-laden history, Rhode Island was one of the first states to create an independent ethics commission through constitutional amendment and remains one of only a handful of states that have robust ethical enforcement.[102] The Commission has a duty to enforce the Code of Ethics and related statutes in a manner that is in keeping with their constitutional mandate. The power entrusted to the Commission should include changing procedures, regulations, and advocating for legislative reform when an area of ethics requires more definition or where the Commission reaches an outcome that is at odds with stated policy goals. The challenging work required to maintain ethical government in Rhode Island is a burden that the Commission could be better equipped to handle.

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101. *Almond*, 756 A.2d at 192.

102. *See* WEST JR., *supra* note 2, at 1–7.