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Essays

Rhode Island's New Judicial Merit Selection Law

Barton P. Jenks, III*

A recent study by the American Judicature Society (AJS)¹ identifies twenty-three states including Rhode Island in which supreme court justices are appointed by the governor from a small number of nominees recommended by a nonpartisan nominating commission.² In fourteen of these states the same procedure ap-

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1. American Judicature Society, *Judicial Selection in the States Appellate and General Jurisdiction Courts* (1986) (Revised Mar. 3, 1996) as augmented by American Judicature Society, *Judicial Merit Selection: Current Status* (Sept. 1995) [hereinafter collectively *AJS Study*] (on file with the *Roger Williams University Law Review*).

2. Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont and Wyoming. *AJS Study*, *supra* note 1. The 22 states other than Rhode Island and the legal bases for the use of nominating commissions in selecting supreme court justices and judges for intermediate appellate courts are as follows: Alaska (Ala. Const. art. IV, § 8; Ala. Stat. § 22.05.080 (1988)); Arizona (Ariz. Const. art. VI, §§ 36-37); Colorado (Colo. Const. art. VI, §§ 20, 24); Connecticut (Conn. Const. art. V, § 2; Conn. Gen. Stat. § 51-44a (1993)); Delaware (Exec. Order No. 3 *as amended* Exec. Order No. 10 (1993)); Florida (Fla. Const. art. V, § 11; Fla. Stat. Ann. § 43.29 (1995)); Hawaii (Haw. Const. art. VI, § 3-4); Indiana (Ind. Const. art. VII, § 9-10; Ind. Code Ann. § 33-2.1-4-1 et seq. (1996)); Iowa (Iowa Const. art. V, § 15; Iowa Code Ann. § 46.1 et seq. (1991)); Kansas (Kan. Const. art. III, § 5; Kan. Stat. Ann. § 20-119 et seq. (1995)); Maryland (Exec. Order No. 01.01.1995.10 *as amended* Exec. Order No. 01.01.1995.13 (1995)); Massachusetts (Exec. Order No. 319 (1991)); Missouri (Mo. Const. art. V, §§ 25(a)-(d); Mo. Sup. Ct. R. 10); Nebraska (Neb. Const. art. V, § 21; Neb. Rev. Stat. § 24-801 to 812 (1989)); New Mexico (N.M. Const. art. VI, § 35); New York (N.Y. Const. art. VI, § 2; N.Y. Judiciary Law § 62 (McKinney 1983 & Supp. 1996)); Oklahoma (Okla. Const. art. VII-B, § 3-4);

plies to the filling of vacancies on all other state courts³ and in the remaining nine states it applies to the filling of at least some lower court vacancies.⁴ The intention of merit selection laws is to promote the selection of judges based exclusively on merit rather than on the basis of political and other extrajudicial considerations. This "depoliticization" of the judicial selection process has long been the central goal of merit selection law proponents.⁵ In 1906, Roscoe Pound, who was later to become one of America's greatest law professor's and a founding member of the AJS said, "[p]utting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."⁶

By virtue of a law enacted in mid-1994,⁷ and the approval of a constitutional amendment by the state's voters in November of the same year,⁸ Rhode Island became one of the fourteen states with

South Dakota (S.D. Const. art. V, § 9; S.D. Codified Laws Ann. §§ 16-1A-1 to 16-1A-9 (1995)); Tennessee (Tenn. Code Ann. §§ 17-4-102 to 17-4-112 (1994)); Utah (Utah Code Ann. §§ 20A-12-101 to 20A-12-105 (1995)); Vermont (Vt. Const. art. II, § 32; Vt. Stat. Ann. tit. 4, §§ 601-608 (1988)); Wyoming (Wyo. Const. art. V, § 4; Wyo. Stat. § 5-1-102 (1992)); *see also* AJS Study *supra* note 1.

3. The fourteen states are those listed *supra* note 2, except Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota and Tennessee. AJS study, *supra* note 1.

4. Another eleven states use nominating commissions but only to fill midterm vacancies on some or all courts. They are Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota, Pennsylvania, West Virginia and Wisconsin. AJS study, *supra* note 1.

5. For a comprehensive discussion of state merit selection laws see Jona Goldschmidt, *Merit Selection: Current Status, Procedures and Issues*, 49 U. Miami L. Rev. 1 (1994).

6. Goldschmidt, *supra* note 5 at 6 (quoting from Pound's speech "The Causes of Popular Dissatisfaction with the Administration of Justice").

7. R.I. Gen. Laws § 8-16.1-1 et seq. (Supp. 1994).

8. The constitutional amendment drastically changed Sections 4 and 5 of Article X of the Rhode Island Constitution. Section 4 had provided for the election of Supreme Court justices by the Senate and House of Representatives in grand committee. R.I. Const., art. X, § 4 (amended 1994). As modified, it provides for the Governor to fill any Supreme Court vacancy by nominating, on the basis of merit, a person from a list submitted by an independent non-partisan nominating commission, and by and with the consent of the Senate and the House of Representatives, given separately, appointing such person to fill the vacancy. It further provides that the same procedure shall apply to the filling of vacancies in the Superior Court, Family Court, District Court, Workers' Compensation Court, Administrative Adjudication Court "or any other state court which the General Assembly may from time to time establish," except that with respect to such vacancies only the advice and consent of the Senate is required. Finally, Section 4 as modified pro-

merit selection laws of general application. The new law governs the composition, duties and powers of the state's judicial nominating commission, as well as the method of nominating and confirming judicial appointees.

The law is a dramatic departure from past procedure. Prior to the adoption of the new judicial selection procedure, Supreme Court justices were elected by the Rhode Island General Assembly in grand committee.⁹ Lower court judges were appointed by the governor subject to confirmation by the Senate.¹⁰

Although the new judicial selection procedure is flawed, it unquestionably is an improvement over its predecessor, which resulted in the General Assembly's election of two Supreme Court chief justices who were forced to resign from office under the threat of impeachment and another Supreme Court justice who was rated unqualified by the Rhode Island Bar Association.

Part I of this essay describes the principal provisions of Rhode Island's new judicial selection law. Part II of this article critically assesses the law and makes suggestions for its improvement. In doing so, it will compare provisions of Rhode Island's law to similar provisions existing in the merit selection laws of other states. Part III provides a summing up.

vides that the powers, duties and composition of the judicial nominating commission shall be defined by statute. R.I. Const., art. X, § 4.

Section 5 authorized the General Assembly in grand committee to fill Supreme Court vacancies "until the next election," provided for "the judge then elected [to] hold office as here before provided," and empowered the Governor in case of impeachment or "temporary absence or inability" to appoint a person "to discharge the duties of the office during the vacancy caused thereby." R.I. Const. art. X, § 5 (amended 1994). In Section 5 as modified such provisions are omitted and replaced by the following single sentence: "Tenure of Supreme Court Justices - Justices of the Supreme Court shall hold office during good behavior." R.I. Const. art. X, § 5.

9. R.I. Gen. Laws § 8-1.1-1 et seq. (repealed 1994). When the General Assembly is in Grand Committee the members of the Senate and House vote together, rather than separately in their respective houses; however, the presence of a majority of all members of each house is required in order for a quorum of the Grand Committee to exist. See R.I. Const., art. IV, §§ 6-7.

10. The relevant statutory provisions were R.I. Gen. Laws § 8-2-2 (repealed 1994) (Superior Court), § 8-8-7 (amended 1994) (District Court), § 8-10-11 (Family Court), § 28-30-2 (Workers' Compensation Court) and § 31-43-1 (repealed 1994) (Administrative Adjudication Court).

I. THE LAW'S PRINCIPAL PROVISIONS

A. *Selection of Commission Members*

The new law provides for an independent nonpartisan judicial nominating commission consisting of four attorneys,¹¹ four "members of the general public" (non-lawyers),¹² and a ninth member who may be either an attorney or a non-lawyer.¹³ All are to be appointed by the governor. Four members, three attorneys and one non-lawyer, are to be persons entirely within the governor's discretion. However, the governor's choice of the remaining five members is restricted to persons nominated by General Assembly officers. The House Speaker, the Senate Majority Leader, the House Minority Leader and the Senate Minority Leader must each submit the names of at least three persons to the governor, with qualifications as follows: The Speaker's nominees must be attorneys; those of the Senate Majority Leader may be either attorneys or non-lawyers; and those of the House and Senate Minority Leaders must be non-lawyers. The governor must designate one commission member from each of these four panels and a fifth member from among four non-lawyers nominated by the Speaker and the Senate Majority Leader jointly.

In nominating commission members the four legislative leaders must "exercise reasonable efforts to encourage racial, ethnic and gender diversity within the commission," and the governor must exercise like efforts in choosing commission members.

Certain persons are disqualified from serving as commission members by reason of their positions or activities.¹⁴ Members

11. The term "attorney" is defined as a resident of Rhode Island who is licensed to practice law in the state and is a member in good standing of the Rhode Island Bar Association. R.I. Gen. Laws § 8-16.1-1.

12. The term "member of the general public" is defined as a resident of Rhode Island who is not a licensed member of any bar association. *Id.* A retired lawyer or judge could come within the definition.

13. In carrying out their duties the governor and the four legislative leaders must "exercise reasonable efforts to encourage racial, ethnic and gender diversity within the commission." R.I. Gen. Laws § 8-16.1-2(a)3.

14. No person may be appointed a commission member if he or she is, or within one year before appointment has been, a legislator, judge, elected official, candidate for any public office, the holder of any compensated federal, state or municipal public office (other than that of notary public) or the holder of elected office in a political party; and a commission member who becomes any of the foregoing may not continue to serve on the commission. Nor may more than one member or employee of a single law firm, or of a single corporation (whether for profit or not

serve for staggered four-year terms and until their successors are appointed and qualified.¹⁵ However, a member appointed to replace a commissioner who has ceased to be such before his or her term has expired, serves only for the balance of such term rather than for four years. Members, including those serving for less than a full term, are ineligible for reappointment when their terms expire. They receive no compensation but are entitled to reimbursement for their reasonable and necessary expenses. No member may be appointed a judge while serving or for a period of one year after his or her service ends.

Any vacancy in the commission apparently is to be filled in the same manner as the vacated position was originally filled although, because of poor draftsmanship, this intent can only be inferred.¹⁶ The governor is empowered to remove any commission member for neglect of duty, malfeasance in office or conviction of a criminal offense.

The commission's chairperson is to be appointed by the governor from among its members and is to serve "for the duration of his or her tenure." Five members of the commission are required for a quorum and at least five members of the commission must approve "all names submitted to the governor."

for profit), be a member of the commission; although not explicitly made clear, this prohibition appears intended to apply only to the simultaneous commission membership of two persons from the same law firm or corporation. *Id.* § 8-16.1-2(c).

15. The initial appointees serve for staggered terms as follows: (1) one of the attorneys who is a person of the Governor's choice and the appointee from the panel submitted by the House Minority Leader, one year; (2) one of the attorneys who is a person of the Governor's choice and the appointee from the panel submitted by the Senate Minority Leader, two years; (3) the non-lawyer who is a person of the Governor's choice and the appointee from the panel submitted by the Speaker and the Senate Majority Leader jointly, three years; and (4) one of the attorneys who is a person of the Governor's choice and the appointees from the panels submitted by the Speaker and the Senate Majority Leader acting individually, four years. *Id.* § 8-16.1-2(b)1 to 4. Thus, of the initial commission members two serve for one year, two serve for two years, two serve for three years and three serve for four years.

16. The law provides that vacancies other than those arising through the expiration of a term shall be filled for the unexpired portion of the term "in the same manner as vacancies due to the expiration of a term." However, it inexplicably omits to say how the latter vacancies are to be filled. *Id.* § 8-16.1-2(c).

B. *Powers and Duties of Commission*

The commission is empowered "to adopt rules and procedures which aid in its selection of the most highly qualified nominees for judicial office."¹⁷ However, all meetings of the commission are to be subject to the state's open meetings law.¹⁸

In selecting the best qualified nominees for recommendation to the governor, the commission is to consider, but need not limit itself to the following factors: "intellect, ability, temperament, impartiality, diligence, experience, maturity, education, publications, and record of public, community and government service."¹⁹ In carrying out their duties the governor and the four legislative leaders must "exercise reasonable efforts to encourage racial, ethnic and gender diversity within the commission."²⁰ The commission must exercise like efforts to encourage such diversity in nominat-

17. R.I. Gen. Laws 8-16.1-2(e). Pursuant to such authority the commission has adopted "Uniform Rules of Procedure." Among other things, such rules (1) require the commission to investigate the fitness and qualifications of each candidate for judicial office "utilizing all sources reasonably available within the time [allowed to it to act]," (2) enumerate 26 criteria the commission is to consider in evaluating candidates, (3) authorize the commission to invite candidates to appear before it to respond to questions, (4) provide that only candidates who have been so interviewed shall be voted on, (5) specify a procedure involving multiple rounds of voting to be followed in narrowing down the number of candidates for a judgeship to not more than five nor less than three who are favored by at least five commission members, (6) provide for making public in alphabetical order, without any indication of commission preference, the names of nominees recommended to the governor, (7) provide for the submission to the governor of such names in alphabetical order without any indication of commission preference together with "a copy of all investigative information and documents relating to each nominee," and (8) specify 12 newspapers, including several in the Portuguese and Spanish language, in which judicial vacancies are to be advertised.

The rules further require that applicants for judicial office complete and sign under oath a lengthy "Personal Data Questionnaire" and a "Financial Statement" generally similar to the financial statement required of candidates for elective public office; in addition, such candidates are to supply copies of "Federal income tax returns." The rules also provide that the commission is to encourage written public comment on the qualifications of "interviewees" and, following public notice, shall entertain "oral comments" at a public meeting to be held before it votes on the candidates to fill a judicial vacancy. Uniform Rules of Procedure for the Judicial Nominating Commission (Jan. 19, 1995).

18. See R.I. Gen. Laws § 8-16-1-2(e) and R.I. Gen. Laws § 42-46-1 et seq. Although the judicial selection law makes no mention of the state's open records law, see R.I. Gen. Laws § 38-2-1 et seq., the commission's rules expressly recognize the applicability of such law to it.

19. R.I. Gen. Laws § 8-16.1-4(a).

20. R.I. Gen. Laws § 8-16.1-4(b).

ing candidates to fill judicial vacancies. Moreover, a separate provision, inserted into the law at the last minute, requires that in evaluating candidates for judgeships the commission shall "consider the candidate's sensitivity to historically disadvantaged classes, and may disqualify any candidate with a demonstrated history of bias toward any of these classes."²¹

C. *Confirmation of Governor's Judicial Appointees*

The governor must immediately notify the commission of any vacancy or prospective vacancy in a court. The commission is to advertise for each such vacancy, solicit prospective candidates, and consider names received from any source. Then, within sixty days after a Supreme Court vacancy occurs, it must "publicly submit" the names of not less than three, nor more than five, highly qualified attorneys to fill the vacancy.²² Within ten days after such public submission, the governor must nominate one of the persons on the commission's list to fill the vacancy.²³

Following the governor's designation of a nominee to fill a Supreme Court vacancy, the nomination is to be "forwarded forthwith" to the Senate and House. Each house is then allowed thirty days after receipt of the nomination to separately confirm the nominee.²⁴ In considering whether the governor's nominee to fill a Supreme Court vacancy should be confirmed, the judiciary committees of the Senate and House must separately conduct an investigation²⁵ and public hearing on the question of the nominee's

21. *Id.*

22. The commission's rules call attention to the fact that the attorneys nominated must satisfy the requirements of the Rhode Island Constitution concerning eligibility to hold state or local public office. See R.I. Const., art. III, §§ 1-2, 6.

23. Presumably a "public submission" takes place when the commission has delivered a list of its nominees to the governor and has publicly released the names of such nominees.

24. Although the time allowed for confirmation begins "after said submission," the law does not permit the Senate and House to "consider" the nomination until "after seven (7) calendar days of receipt of said nomination." R.I. Gen. Laws § 8-16.1-5(c). The intent of this provision is not clear. Does it mean that nothing can be done during the seven day period (for example, starting the investigation required by law) or does it only preclude formal deliberations? One might also ask whether this provision really is needed. At the very least, its intent ought to be clarified.

25. *Id.* § 8.16.1-5(d). In connection with its investigation concerning a nominee for judicial office, the judiciary committee of each legislative body involved in the confirmation proceeding is to be furnished "a report compiled by the state po-

qualifications; and each body is empowered to issue subpoenas and take testimony under oath.

If either body rejects the nominee, the commission must submit to the governor a new list of three to five candidates. This new list may include names previously submitted other than that of the rejected nominee. The governor must designate a nominee from the new list and submit the name to the Senate and House for confirmation as in the case of the original nomination. If the new nominee is rejected, the procedure is repeated until a nominee has been confirmed.

If a nominee to fill any judicial vacancy is neither confirmed nor rejected within the period of time allowed, the law provides that the governor must appoint "some other person" to fill the vacancy. If the General Assembly is not in session when a judicial vacancy occurs, the governor may fill the vacancy without the required confirmation but the appointee serves only until the General Assembly is next convened. The governor must then make a new appointment—presumably reappointing the incumbent—and have the appointee confirmed.

II. ASSESSMENT OF RHODE ISLAND'S LAW

Although the new judicial selection law appears to be generally regarded as a great improvement over the law previously in effect it unfortunately is seriously flawed. Commenting on an editorial calling attention to the law's flaws and principal provisions written by this author²⁶ and printed in the *Providence Journal*

lice in conjunction with the attorney general's office indicating the determinations and findings of [their] investigations concerning the background of [such] nominee." The report is to include, but not be limited to, whether the nominee has ever (1) been convicted of or pleaded guilty to a misdemeanor or felony in Rhode Island, any other state or any foreign country, (2) filed a personal bankruptcy petition or an assignment for the benefit of creditors in any such jurisdiction, (3) been a partner, 10% shareholder or office holder in any sole proprietorship, partnership or corporation which, while such affiliation existed, was "involved in bankruptcy or receivership actions as a debtor or because of insolvency," or (4) had a civil judgment rendered against him or her, in Rhode Island, any other state or any foreign country, arising out of an allegation of fraud, misrepresentation, libel, slander, professional negligence or any intentional tort. *Id.* §§ 8-16.1-5(e)-(e)3. In addition to receiving the foregoing information, the judiciary committee must require each nominee to submit a financial statement "to determine his or her compliance with the provisions of [the state's Code of Ethics]." *Id.* § 8-16.1-5(g).

26. See Barton P. Jenks, III, *The Flaws in Rhode Island's New Judicial Selection Process*, Prov. J. Bull., Feb. 14, 15, 1995 at A9, A11.

Bulletin, a distinguished professor of law with a special interest in judicial selection stated, Rhode Island's judicial selection law "appears to be a model of what not to do in creating a nominating commission system."²⁷

For purposes of this critique, the law's flaws can be divided into what may be called conceptual flaws and flaws of execution. Conceptual flaws are those relating to the law's basic design. Flaws of execution, on the other hand, pertain to provisions in the law which are defective either because their implications were not fully thought out or, in several instances, because of inept or careless drafting.

A. *Conceptual Flaws*

The most striking aspects of the new law are the degree to which it provides for the involvement of legislators in the judicial selection process and its denial of any voice to the state's lawyers in choosing members of the nominating commission.

A majority of the commission's nine members will always be persons recommended to the governor by legislative leaders. By way of comparison, in only seven of the other twenty-two merit selection states do legislators have any involvement in choosing commission members²⁸ and in all but one of such states they choose less than a majority of such members. Having only the governor and legislative leaders involved in choosing the commission's members creates the risk that political considerations and cronyism will be factors in some of their choices, and members chosen on the basis of such factors may well allow the same factors to influence their own judgment. There is no reason to believe that the present leaders of the two parties in the House and Senate are not committed to nominating as commission members only persons of high quality and integrity. However, there is no guarantee that future leaders would be equally as committed to recommending to the governor only the best qualified lawyers available for judges. There is also no guarantee that future legislative leaders will not

27. Letter from Daniel J. Meador, Professor-Emeritus, University of Virginia School of Law to Barton P. Jenks, III (March 28, 1995) (copy on file with the *Roger Williams University Law Review*). Professor Meador formerly headed the University of Virginia Law School Graduate Program for Judges.

28. These states are Arizona, Connecticut, Hawaii, New Mexico, New York, Tennessee and Vermont. See AJS study, *supra* note 1.

try to influence their representatives on the commission. The concern of the law should be to avoid politicizing the process.²⁹ This is what Rhode Island has moved away from and it should be wary of encountering the same problems. Unfortunately, the new law fails to alleviate these concerns because having only the governor and legislative leaders involved in choosing the commission's members creates the risk that political considerations and cronyism will always be factors in some of their choices; and members chosen on this basis may well allow the same factors to influence their own judgment.

Additionally, the denial of any voice to Rhode Island's lawyers in choosing the nominating commission's lawyer members is a serious mistake.³⁰ Lawyers must try lawsuits and defend persons accused of crimes before the judges appointed by the governor. They would appear to be more qualified than politicians to judge the qualifications of their peers. Also, one might suppose that practicing lawyers would have special insight into the qualifications needed on the bench and the persons available to assume a judicial role. In ten of the twenty-two merit selection states the state's lawyers or the bar's leadership choose all of the lawyer members,³¹ and in another six the lawyers or bar leadership choose some of the lawyer members.³² The AJS recommends that all lawyer members be chosen by the state's lawyers or bar leadership.

Former Governor Sundlun has stated that the Rhode Island Bar Association

was not included as a selector of commission members because there was concern that it had largely become a special-interest group controlled by the personal political opinions of its presidents, rather than the broad general public interest

29. See *supra*, text accompanying note 6. See generally Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?* 23 Fla. St. U. L. Rev. 1 (1995) ("[T]he goals should be to limit, to the extent feasible, the impact of partisan politics and to minimize the effect of other political considerations on the process.") *Id.* at 38.

30. The Rhode Island Bar Association and the RIGHT NOW organization made the modest recommendation that two members of the commission be chosen from among eight attorneys recommended to the governor by the Bar Association. This recommendation was rejected by the judicial selection law's drafters.

31. Alaska, Florida, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota and Wyoming. See AJS Study, *supra* note 1.

32. Arizona, Delaware, Hawaii, New Mexico, Tennessee and Vermont. See AJS Study *supra* note 1.

... [and that] with the Bar there is no accountability, as there is with elected officials.³³

One may question whether Governor Sundlun's harsh assessment of the Bar Association is justified. But even if it were, the concerns expressed might be alleviated by having the Bar's members choose by ballot vote the lawyer members of the commission as is done with respect to all or some lawyer members in nine other states.³⁴ With regard to accountability, it seems very unlikely that fear of rejection by the voters will cause legislative leaders to choose only the best qualified people available as their nominees for commission membership.

The new law does not even require political impartiality in the selection of commission members. The only suggestion that such impartiality is intended is its single reference to the commission as independent and nonpartisan. An express requirement of political impartiality in the selection of nominating commission members and in the recommendation of judicial candidates by the commission should be inserted in the law.³⁵

In sharp contrast, the laws of fifteen of the other merit selection states contain provisions intended to preclude political favoritism in the selection of nominating commission members.³⁶ For example, the laws of Alaska and Iowa provide that commission members shall be chosen "without regard to political affiliation" and "without reference to political affiliation" respectively. Kansas has a similar requirement but it is limited to the non-lawyer members chosen by the governor; the lawyer members are chosen by the state's lawyers, whose motivations in casting their votes cannot effectively be subjected to scrutiny. Hawaii's law mandates that its commission "shall be selected and shall operate in a wholly nonpartisan manner."

Eleven of these fifteen states require a degree of political balance within their nominating commission. In ten of them no more

33. See Governor Sundlun, *Selection Law Works*, Prov. J. Bull., Mar. 13, 1995.

34. Hawaii, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma and Vermont. See AJS Study, *supra* note 1.

35. The states are Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Nebraska, New Mexico, New York, Oklahoma, South Dakota, Utah and Vermont. *Id.*

36. Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Iowa, Kansas, Nebraska, New Mexico, New York, Oklahoma, South Dakota, Utah and Vermont. *Id.*

than a specified portion of the commission members, or in some cases of those chosen by certain appointing authorities, may belong to the same political party; such specified portion is either one-half or a bare majority.³⁷ The eleventh state, New Mexico, requires that appointments to its commission "shall be made in such manner that each of the two largest political parties [as defined in the law] shall be equally represented on the commission."

Rhode Island's new law politicizes the commission chairmanship by having the governor choose the chairperson rather than allowing the commission members to make the choice. It is also deficient in failing to address the possibility that the chairperson may temporarily be unavailable to act. In comparison, the law establishing the state's Ethics Commission³⁸ provides for an initial chairperson and vice chairperson to be chosen by the governor and act for one year, after which the commission itself is to elect its chairperson and a vice chairperson. In most of the other merit selection states the chairperson is not appointed by the governor.

The commission's chairperson is chosen by its members in nine states.³⁹ In seven states the supreme court justice serving as a commission member (usually the chief justice) serves as chairperson.⁴⁰ The governor chooses the chairperson in four states, Delaware, Maryland, Massachusetts and Utah. In Kansas the choice is made by the state bar and in New Mexico the Dean of the University of New Mexico Law School serves *ex officio* as chairperson but does not vote except in the event of a tie.⁴¹ All

37. The ten states are Arizona, Colorado, Connecticut, Delaware, Nebraska, New York, Oklahoma, South Dakota, Utah and Vermont. See AJS study *supra* note 1. The limitation is one-half of the commission members in Connecticut, Nebraska, Oklahoma (but limited to the governor's appointees), New York (limited to the governor's appointees and, separately, to those of the Chief Justice of the Court of Appeals) and Utah. *Id.* The limitation is a bare majority of the commission members in Arizona, Colorado, Delaware and Vermont (but limited in the last-mentioned state to the three members elected by the house of representatives and, separately, to the three members elected by the senate). *Id.* In South Dakota no more than two of the three members appointed by the state bar president may be of the same political party and the two members appointed by the governor cannot be of the same party. *Id.*

38. R.I. Gen. Laws § 36-14-1 et seq.

39. Connecticut, Florida, Hawaii, Missouri, New York, Oklahoma, South Dakota, Tennessee and Vermont.

40. These states are Alaska, Arizona, Colorado, Indiana, Iowa, Nebraska and Wyoming.

41. See Goldschmidt, *supra* note 5.

these methods are preferable to having the governor choose the chairperson in that they ensure that the leadership of the commission will be independent. Rhode Island's law is deficient to the extent it has not provided a means to ensure similar independence.

As noted above, the new law requires that supreme court nominees be confirmed not only by the Senate but also separately by the House.⁴² In all other states requiring the confirmation of judicial appointees such confirmation is the exclusive province of the state's senate. In Rhode Island, moreover, no other appointments by the governor requiring Senate confirmation also require House confirmation. Even appointees to the federal bench require only confirmation by the U.S. Senate, although, like judges in Rhode Island, federal judges serve for life. Although Senate confirmation is appropriate, the requirement that Supreme Court appointees be approved not only by the nominating commission, the governor and the Senate but also by a fourth authority, the House, is both unreasonable and demeaning to nominees.

The requirement that the Senate and House judiciary committees conduct separate investigations and public hearings on the qualifications of Supreme Court appointees is even less defensible. Putting aside the fact that dual confirmations result in unnecessary duplication of effort, multiple investigations and hearings involve extra financial costs; and the state can ill afford outlays of money solely so that the House can be seen as acting independently of the Senate. The former judicial selection law required investigations and public hearings concerning the credentials of nominees for election to the Supreme Court but they were to be conducted by a single committee made up of the members of the Senate and House judiciary committees.⁴³

One of the most objectionable features of the new law, without counterpart in the law of any other merit selection state, is the provision that if the Senate (or, in the case of an appointment to the Supreme Court, the House) neither confirms nor rejects a judicial appointee of the governor within the time allowed for it to act, the governor must appoint someone else to fill the vacancy. If the appointee is in any way controversial, such provision permits legislators to stall until the time for action runs out and thereby avoid

42. This is obviously a holdover from the days of the Grand Committee. See *supra* note 8 and accompanying text.

43. R.I. Gen. Laws § 8-1.1-2 (repealed 1994).

having to cast a vote on the appointee that may offend a substantial group of their constituents. It is also grossly unfair to appointees who have undergone exhaustive scrutiny by the nominating commission and have had to make available to the public details about their lives that they might well have preferred to keep private.⁴⁴ The provision is especially pernicious when an appointee to the Supreme Court is to be considered for confirmation by the Senate and House, for even if one of the houses were to vote to confirm the appointee the other's inaction within the time allowed would deny the appointee confirmation.

Permitting the commission to disqualify a candidate for bias against a historically disadvantaged class of persons is unnecessary, for it could and should do so even if the law did not authorize it. However, requiring it to consider a candidate's sensitivity to historically disadvantaged classes inappropriately injects the concepts of political correctness and affirmative action into the nomination process. Presumably an otherwise qualified candidate who can show that he or she has supported minority causes (for example, by contributing to the United Negro College Fund) or feminist causes is to be preferred to a candidate with better professional credentials who cannot demonstrate active support for any such causes.

The merit selection laws of several other states seek to promote racial, ethnic and gender diversity⁴⁵ but none of them requires that sensitivity to historically disadvantaged classes be considered in evaluating a candidate's fitness for judicial office.⁴⁶

44. See note 17, *supra* for a description of the type of information candidates for nomination must provide.

45. The Arizona law provides that the commission's makeup "shall, to the extent feasible, reflect the diversity of the population of the state" and the Tennessee law mandates that the appointing authorities "shall appoint persons who approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender." In Florida at least three of the commission members must be "a member of a racial or ethnic minority group or a woman" and in Iowa "no more than a simple majority of the members appointed shall be of the same gender." See Goldschmidt, *supra* note 5.

46. Professor Yelnosky suggests that the commission's rules should require it "to publish an annual report of the race, ethnicity, and gender of the pool of applicants considered by the Commission in the previous year." Michael J. Yelnosky, *Rhode Island's Judicial Nominating Commission: Can "Reform" Become Reality?*, 1 R.W.U. L. Rev. at 87 (1996). Assuming that requiring such an annual report is within the commission's rulemaking power, see *supra* text accompanying note 15, a

Seven of the ten other states which disqualify nominating commission members from being appointed as judges for a period of time beyond the time of their service on the commission specify a period of at least two years.⁴⁷ In Rhode Island, the period of disqualification is for one year after the end of a member's term on the commission, even if this results from resignation rather than expiration of the member's term.

The one year period of disqualification provided for in the Rhode Island law is too short. If a former commission member were to become a candidate for judicial appointment shortly after the period of his or her disqualification had ended, the almost certain result would be that a majority of the commission members called upon to consider the candidate's qualifications would be persons with whom the candidate had served on the commission. If the commission voted to recommend the candidate to the governor it could be accused of favoritism. Alternatively, it might decline to recommend the candidate, notwithstanding his or her outstanding qualifications for fear of being accused of favoritism. The most likely result, however, would be that the candidate's former colleagues would consider it necessary to recuse themselves from con-

proposition which is not entirely free of doubt, the desirability of having such a report is open to serious question.

If the report does no more than provide information about the pool of *applicants*, it should be unobjectionable. However, Professor Yelnosky's use of the word "considered" suggests that he contemplates a report providing more information. Thus, a truly informative report would identify with respect to each court vacancy the race, ethnicity and gender of not only all applicants for the position but also those interviewed by the commission and those recommended to the governor. The requirement of publishing such a detailed report, if that is what Yelnosky has in mind, would increase the pressure on the commission, already existing by reason of the law's language, to establish a *de facto* quota system in recommending candidates to fill judicial vacancies.

If the commission were to successfully resist such pressure and the result was underrepresentation of minorities among candidates interviewed or recommended to the governor, some political leaders from the minority community and other prominent members of such community who make it a practice to publicly condemn what they see as discrimination could be expected to charge the commission with racial discrimination. This would force the commission to defend itself against baseless charges and would exert even more pressure on it to employ a quota system in interviewing judicial candidates and recommending them to the governor.

47. The seven states and their periods of disqualification are as follows: Colorado (three years), Connecticut (two years), Florida (two years), Hawaii (three years), Indiana (three years), Oklahoma (five years), and Tennessee (two years). See Goldschmidt, *supra* note 5.

sidering his candidacy and, doing so, would make it impossible for the candidate to receive the five votes of approval needed in order for him to be recommended to the governor. A situation with the consequences just described should not be allowed to arise.

The one year disqualification period should be replaced with a period of at least two and preferably three years. Also, as is done in Connecticut and Delaware, the former commission member should be barred from even being considered for judicial appointment during the period of disqualification. If the General Assembly is unwilling to change the one year period it should at the very least bar the commission from even accepting an application for judicial appointment from a former commission member before the one year period has ended.

B. *Flaws of Execution*

The new law contains numerous errors that could be remedied by simple amendments. For example, the time allowed for the governor to choose from among the nominating commission's nominees is a mere ten days for Supreme Court vacancies. This is significantly shorter than the time allowed in any other merit selection state.⁴⁸ It is inadequate to permit the governor and his or her legal advisers to investigate and consider the qualifications of each nominee, because of their many other responsibilities. A consequence is that on more than one occasion the governor has failed to meet the deadline.⁴⁹

Fifteen of the other merit selection states impose a time limit for action by the governor. The time allowed ranges from fifteen to sixty days, with sixty and thirty days being by far the most common period.⁵⁰

The General Assembly should enact an amendment to the law allowing the governor at least 30 days to choose among the com-

48. See AJS Study, *supra* note 1.

49. Perhaps recognizing that it, rather than the governor was at fault, the General Assembly has ignored the violation of the time limit imposed by it. See Yelnosky, *supra* note 41. He points out that "both Governors Sundlun and Almond have ignored the statutory time limits to give themselves more opportunity for deliberation." *Id.*

50. The times allowed are as follows: 60 days - Arizona, Florida, Indiana, Kansas, Missouri, Nebraska and Oklahoma; 45 days - Alaska; 30 days - Hawaii, Iowa, New Mexico, New York, Utah and Wyoming; and 15 days - Colorado. See Goldschmidt, *supra* note 5.

mission's nominees in order to allow an appropriate amount of time for reflection. At the same time it should consider dealing with the contingency of the governor failing to act within the time allowed by providing, as the laws of many states with a time limit do, that in such event the Chief Justice or Acting Chief Justice of the Supreme Court, rather than the governor, shall choose one of the commission's nominees.⁵¹

Unlike their counterparts in a number of other merit selection states, Rhode Island commission members are ineligible to be reappointed when their terms end. Therefore, when a member fails for any reason to complete his or her term of office, the person appointed to serve out the remainder of the term cannot be reappointed no matter how short the period of service has been. Similarly, the four initial members of the commission who serve for one or two years, cannot be reappointed. Barring such members from being reappointed makes little sense, especially since it may be difficult for the appointing authorities to find people of superior quality who are willing to serve on the commission.

The law should be amended to permit a member serving for the unexpired balance of a predecessor's term to be reappointed for a full term if the unexpired balance does not exceed a specified duration (e.g., two years or thirty months). Serious consideration should also be given to allowing members to serve for two full terms so long as they are not consecutive.

The requirement that the commission comply with the state's open meetings law should be modified, if not reconsidered. Under that law meetings to consider candidates for judgeships must be public except for discussions of the "character or physical or mental health" of such candidates.⁵² The term "character" is susceptible of

51. The ten states in which the chief justice of the supreme court is to be substituted for the governor are Arizona, Colorado, Indiana, Iowa, Kansas, Nebraska, New Mexico, Oklahoma, Utah and Wyoming. In Hawaii and Missouri, the nominating commission itself acts in lieu of the governor. *Id.*

52. Section III of the Uniform Rules of Procedure of the Judicial Nominating Commission specifies that judicial candidate interviews shall be conducted in open session except that "[t]hose portions of an interview in which confidential information would be discussed may be held in closed session at the discretion of the Commission or at the request of the interviewee." The general requirement that interviews be conducted in public conforms to the requirements of the open meetings law. However, the exception to such general requirement cited above is nowhere authorized in the open meetings law and appears to be an unwarranted expansion of the commission's authority to discuss in private the "character or

being construed either broadly or narrowly, so the exception provides no assurance that highly personal information about a candidate (for example, a bitter divorce, traffic violations, having been a defendant in a law suit or a past bankruptcy) will not be disclosed to the general public.

The open meetings law also permits discussions of "job performance" to be conducted in private if those whose job performance is to be reviewed do not object and Professor Yelnosky argues that this exemption serves as a basis for interviewing candidates for judicial office in executive session. The exemption undoubtedly is intended to protect employees of state and local government agencies whose performance is being evaluated or questioned from having their privacy invaded and being exposed to possible public embarrassment. It cannot reasonably be interpreted as extending to the qualifications of lawyers who seek judicial office.

The use in the law of the words "job performance" implies a preexisting relationship of some kind between the person whose job performance is being reviewed and the reviewing authority, and there is no such relationship between the commission and applicants for judicial office. Had the law intended to create an exemption for the interviewing of applicants for employment one would expect it to have included "qualifications for employment" or "employment qualifications" among the subjects permitted to be discussed in closed session. Moreover, lawyers are *professionals* and do not perform "jobs" as that term is commonly understood but instead *practice law*.

Rhode Island's open meetings law is one of the strictest in the country. The likely result of full compliance with its requirements will be to deter some well qualified lawyers from becoming candidates for judgeships, inhibit commission members from asking candidates tough questions for fear of causing them public embarrassment, and inhibit candid discussion among the commission members about the relative merits of candidates.

Probably because of these considerations thirteen merit selection states provide that for the most part the proceedings and records of their nominating commissions must be kept confidential

or, in a few cases, that the commission's deliberations and voting are to be confidential.⁵³

It unquestionably is desirable that the commission be able to conduct its deliberations in private but it does not follow that it is free to do so. Nothing in the Open Meetings Law exempts the commission's deliberations from the requirements of the law, and it is stretching the meaning of "character" beyond all reason to say that deliberations concerning the relative merits of candidates are an issue of character and, therefore, can be conducted in executive session.⁵⁴

53. In nine states the nominating commission's proceedings and records are for the most part required to be kept confidential. These states are Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New York, Utah and Vermont and in another four states its deliberations concerning the merits of candidates and its voting on candidates are kept confidential. These states are Florida, Iowa, Nebraska and Tennessee. See Goldschmidt, *supra* note 5.

54. Professor Yelnosky cites an Unofficial Opinion from the Attorney General's office as support for his view that the commission can rely on the "job performance" exemption as authority for it to interview applicants for judicial office in closed session. Yelnosky, *supra* note 41 at 125. The Opinion is a letter responding to a letter from the editor of the *Westerly Sun* and does not purport to speak for anyone other than the Special Assistant to the Attorney General who signed it (thus, it uses language like "It is *my* opinion," "I believe" and "I do not feel"). It is unpersuasive insofar as it addresses the applicability of the open meetings law to the *Westerly Town Council's* consideration of candidates for the position of Town Manager. Referring to the Town Council's interviewing of such candidates in closed session, the opinion letter says:

The Council reviewed applications and, by a majority vote of the Council, selected certain individuals for an interview. According to Mr. Turo [previously identified as Legal Counsel to the Council] "the purpose of the interview is to determine the qualifications of the applicant to serve as Town Manager." Indeed, the primary goal of job interviews is for both interviewers and interviewees to discuss the *job performance*, character, or physical or mental health of the applicants (emphasis added). Consequently, it is my opinion that the Council's discussions with the applicants concerning their *employment qualifications* were appropriate for closed session under the Open Meetings Law (emphasis added). I believe that 42-46-5 (a) (1) of the Open Meetings Act contemplates job interviews and permits public bodies to hold such interviews in closed session.

The trouble with the quoted language is that it *assumes*, without giving any reasons, that "job performance" is intended to refer not only to government employees but also to applicants for government employment and, as to such applicants, can be construed as "employment qualifications." Lacking any reasoned foundation and having no official status, the opinion is entitled to little if any respect.

Moreover, candidates for a Town Manager position are not professionals, so even if the unofficial opinion were valid as to nonprofessionals, it does not follow that it would be valid for professionals like applicants for judicial office. As is

Notwithstanding the lack of clear authority for its action, the commission has adopted a rule permitting it to conduct its deliberations in private, perhaps in reliance upon its general rulemaking power.⁵⁵ However, it can rely upon that power only by disregarding a well established principle of statutory construction. The very same paragraph in the law which gives the commission rulemaking authority also requires that it comply with the Open Meetings Law. The rulemaking authority is general whereas the requirements of the Open Meetings Law are very specific. Adherence to generally accepted rules of statutory construction therefore requires that when the application of general provision would conflict with a specific provision pertaining to the same subject matter, the specific provision must prevail.⁵⁶

It is unlikely that the commission's interpretation of its authority will undergo legal challenge for the result achieved is desirable, but had the law's drafters done their job properly, the commission's authority to act in closed session could not be questioned. The drafters could easily have given the commission authority to override the requirements of the Open Meetings Law within specified limits without doing violence to the principles of open government.⁵⁷

pointed out in the text preceding this footnote, the practice of law is not commonly thought of as a "job."

55. See *supra* note 17 and accompanying text.

56. 73 Am. Jur. 2d, *Statutes*, § 257 ("Where there is in the same statute a specific provision, and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control . . ."); 82 C.J.S., *Statutes*, § 347(b) ("Unless a legislative intention to the contrary clearly appears, special or particular provisions control over general provisions, terms or expressions."). The full applicability of the open meetings law still leaves the nominating commission ample room to adopt rules that do not conflict with the requirements of such law.

57. Professor Yelnosky states that "if applicant interviews may take place in private consistent with the Open Meetings Law, deliberations about the relative merits of the 'job performance, character or physical or mental health of a person or persons' would seem to do so as well." Yelnosky, *supra* note 41. A major weakness of this argument is that it relies upon the proposition that the "job performance" exemption serves as a basis for conducting individual applicant interviews in private, although as is indicated there is good reason to believe that such exemption is limited to government employees whose performance is to be evaluated and cannot be applied with respect to applicants for judicial office.

Yelnosky buttresses his argument with the statement that "[p]rivate deliberations are a staple of merit selection systems nationally, and Mr. Jenks agrees that they seem essential to encourage the robust, full and frank debate necessary for the commissioners to identify the most qualified candidates." Yelnosky, *supra* note

Another deficiency in the law, apparently resulting from inept or careless drafting, is its provision that if a judicial appointee of the governor is not confirmed within the time allowed, the governor must appoint "some other person" in his or her place. Read literally, the quoted words can be construed as meaning anyone of the governor's choice but reasonably interpreted they must mean one of the remaining nominees recommended to the governor by the commission. However, the latter interpretation results in an injustice: Formal rejection of an appointee entitles the governor to a full new panel of nominees from which to choose, whereas rejection of the nominee through failure to act within the time allowed limits the governor's choice to less than a full panel of nominees. If construed in this way, the legislators with the authority to confirm or deny confirmation to the appointee could conceivably force the governor to select a particular nominee by refusing to act on any other name sent to it by the governor.

Fortunately, the Rhode Island Supreme Court has recently issued an advisory opinion requiring that whenever an appointee of the governor is not confirmed because of formal rejection, de facto rejection through failure of the confirming authority to act within the time allowed, or the appointee's voluntary withdrawal of his or her candidacy for confirmation the governor is entitled to a full panel of nominees from which to choose a new appointee.⁵⁸

41. All very true. However, the fact that private deliberations are a common practice nationally and are highly desirable does not serve to make them permissible under the open meetings law.

Rhode Island was one of the last of the fifty states to enact an open meetings law and, notwithstanding the opportunity the General Assembly had to borrow from the best of the other forty-eight state laws, its law is one of the most poorly drafted. Had it been well drafted, there could be no controversy over whether applicant interviews and deliberations about the relative merits of applicants can be conducted in executive session. The remedy for the law's deficiencies is not tortured interpretations to find in the law meanings that its language does not justify, but instead is amendment of the law to eliminate the deficiencies. For example of an carefully crafted open meetings law see Colo. Rev. Stat. § 24-6-401 *et seq.*

58. In re Advisory to the Governor (Judicial Nominating Commission) 668 A.2d 1246 (R.I. 1996). The advisory opinion, signed by the four sitting members of the Court, was issued in response to a request by the by Governor Almond after a Supreme Court appointee withdrew his candidacy during the confirmation proceeding. The Court distinguished in its opinion between appointees whose confirmation is rejected formally or de facto or who withdraw their candidacy and appointees whose death or disability during the confirmation proceeding precludes their being confirmed. With regard to the latter appointees, the Court expressed

Another error is the law's failure to specify how the successors of commission members whose terms expire shall be chosen. It could easily have said that successors shall be chosen in the same manner as the members they replace. Until the omission is rectified by amendment of the law, the law will, out of practical necessity, undoubtedly be construed as saying what it does not say but should have said.

Finally, a provision in the law whose implications were not fully thought out by its drafters is the authority given to the governor to remove a commission member for "conviction of a criminal offense." On its face the provision seems reasonable. However, it would prevent the governor from removing a member upon his or her indictment for a serious crime, such as fraud or embezzlement. It is unthinkable that a person under indictment for such a crime should be able to continue participating, perhaps for many months, in choosing the state's judges. The law should be amended to permit the governor to suspend or remove a commission member who has been charged with a felony or perhaps the suspension or removal should be made automatic. The governor might also be given discretionary authority to suspend a commission member who has been charged with a misdemeanor.

CONCLUSION

Although Rhode Island's new judicial selection procedure appears to be working reasonably well, it has been in effect only since the latter part of 1994, a relatively short period of time. Because of its flaws there can be no assurance that it will continue to work well in the future.

The legislators involved in drafting the law not only had a considerable amount of pertinent data supplied by the AJS but also had access to the merit selection laws of other states. However, they appear to have given scant attention to these sources of infor-

the opinion that the governor's choice of their replacements is limited to the remaining members of the existing panel of nominees recommended by the nominating commission. The only reason given for making the distinction is that "the integrity of the judicial selection process would be maintained by the Governor's selection of a different nominee from the same list that contained the deceased or disabled nominee." *Id.* at 1250. The validity of the distinction made by the Court is open to question and the judicial selection law should be amended to provide that whenever an appointee is not confirmed, for whatever reason, the governor is entitled to have a full panel of nominees from which to make another appointment.

mation. Partly as a result, Rhode Island's judicial selection law is badly flawed in a number of important respects, and in the words of Professor Daniel Meador "appears to be a model of what not to do in creating a nominating commission system." It is hoped that the General Assembly will address the law's defects at the earliest possible moment.

