

Fall 2010

## Reflections on Judicial Merit Selection, the Rhode Island Experience, and Some Modest Proposals for Reform and Improvement

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### Recommended Citation

Smith, William E. (2010) "Reflections on Judicial Merit Selection, the Rhode Island Experience, and Some Modest Proposals for Reform and Improvement," *Roger Williams University Law Review*: Vol. 15: Iss. 3, Article 3.

Available at: [http://docs.rwu.edu/rwu\\_LR/vol15/iss3/3](http://docs.rwu.edu/rwu_LR/vol15/iss3/3)

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# Reflections on Judicial Merit Selection, the Rhode Island Experience, and Some Modest Proposals for Reform and Improvement\*

Judge William E. Smith\*\*

## INTRODUCTION

The program “Judicial Merit Selection in Rhode Island: Assessing the Fifteen Year Experience with Merit Selection” takes a serious look at the Rhode Island merit selection process for judges and asks a deceptively simple question: “Is it working?” By creating a forum for this important discussion, Roger Williams University School of Law is performing an important service for the bench and bar. Professor Yelnosky should be complimented for putting together an excellent program that includes solid academic research, as well as commentary from the bar and bench. In producing a program like this, the law school is fulfilling one of the core missions envisioned at its founding: providing a forum for, and acting as an honest broker of discussion and debate for the improvement of the bench and bar in Rhode Island. I am proud to be a member of the adjunct faculty of the law school, and to be a part of this program.

My views about the judicial selection process are those of an

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\* This essay is an expanded version of comments delivered at the Symposium “Judicial Merit Selection in Rhode Island: Assessing the Fifteen Year Experience with Merit Selection.”

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outsider looking in. By this I mean that I have never been a candidate for state judicial office, nor have I been on the Judicial Nominating Commission (“JNC”). I do, however, have a perspective that I hope will have some value. It is a perspective that is unique in some ways, and, because it is grounded in my own life experiences my comments are, in part, a personal reflection.

I have been a member of the Rhode Island bar for more than twenty-two years. Thus, I have observed the selection process both pre-JNC and post-JNC (and practiced under both as well). For the past seven years, I have observed the work of the judiciary and the selection process as a sitting U.S. District Court Judge. Over these years, I have informally advised members of the JNC, governors’ staff members, judicial aspirants, and other interested parties on various issues regarding judicial selection and the work of the JNC. I have also been through two rigorous judicial selection processes of my own, first for the federal district court and then for the First Circuit Court of Appeals.

On the personal side, I witnessed the judicial selection process up close and personal: my late father was an early advocate and organizer of the judicial reform movement in Idaho in the late 1950s and early 1960s, and the first merit selection appointee in the Idaho Judiciary after the enactment of the modified “Missouri Plan” for judicial selection in 1969. And finally, as a member of the faculty at Roger Williams University School of Law, I spend considerable time studying and exploring with students the issue of what judges do and how they do it, and discussing the future of the law and judicial behavior.<sup>1</sup>

The goal of this essay is threefold: First, to provide some commentary on the papers presented in this program and give some decidedly unscientific views from my own experiences and observations about the impact of merit selection on the Rhode

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1. My course on Advanced Evidence deals primarily with the subject of expert and scientific evidence, and explores cutting edge issues of science and the impact these fields of study are having on the law and the courts. My course on Judicial Process: How Judges Think, explores issues of how judges make decisions, including traditional frameworks for judicial decision making, the effects of intuition, deliberation (and other topics from the field of modern cognitive psychology), collegiality and the writing process on the judicial decision making process.

Island judiciary. I will argue that while the empirical studies presented at this conference do not support the conclusion that merit selection has improved the quality of the judiciary, I believe important strides have been made; that in the past fifteen to twenty years, the Rhode Island judiciary has attracted numerous exceptional attorneys and public servants to its ranks; and some (but not all) of this progress can be attributed to merit selection. Second, I will argue that the process for judicial selection is inherently political in nature and selection of judges cannot and should not be separated from its roots in the political process. Third, with this premise in mind, I will attempt to address the issue of what can be done to further improve the quality of the judiciary and the process for selecting judges. In this regard, I will suggest some structural and process reforms that might assist in achieving the goal of creating and sustaining an exceptional judiciary. But first, some personal history.

#### I. MY JUDICIAL MENTOR

After serving in World War II, my father returned to his home state of Idaho and attended law school at the University of Idaho on the GI Bill. After working for a short time as a corporate in-house counsel and in a solo practice, my father began his judicial career as an elected probate judge in Boise, besting a seventy-something incumbent judge who had held the job for many years. My father used palm cards in his first race in the 1950s that touted him as young and energetic. When he ran for reelection in the next cycle, the palm card appeared like this:



RE-ELECT  
**W. E. SMITH**  
*Lawyer*  
 REPUBLICAN CANDIDATE  
 FOR  
 ADA COUNTY  
**Probate Judge**



*Seasoned — Responsible — Capable — Efficient*

W. E. Smith for Ada County Judge Committee . . . Blaine F. Evans, Chairman

In just one short term he had become “seasoned” as well as “responsible, capable and efficient”!

In those days, elections were partisan for the Probate Court position and he ran as a Republican. After his appointment by the Governor, in 1969, to the trial court of general jurisdiction, known as the District Court in Idaho, he ran every four years for reelection in non-partisan elections.

I remember as a child spending many fall days marching in parades, passing out political pamphlets, and watching speeches by my father to small community groups as he campaigned for reelection. I only recall one contested election and his reelection campaigns were always successful; but there nonetheless were times of significant family stress because his job was effectively on the line every election cycle. We all weathered these elections and he enjoyed a long and distinguished judicial career as both a Probate Court judge and trial court judge from 1960 until 1987, when he retired.

I recall from a very young age hearing about “court reform.” I admit that the concept did not mean much to me in those days, but I have since come to learn much more about what my father meant when he spoke about court reform and merit selection of judges as one of his most important achievements as a judge. In 1959 and 1960, my father chaired the “Inferior Courts Reform Committee” and drafted a constitutional amendment known as HJR 10,<sup>2</sup> which was adopted in 1962 by the Idaho Legislature.<sup>3</sup> HJR 10 was a proposal to amend the Idaho State Constitution to create a unified court system,<sup>4</sup> eliminating the constitutional status of justice of the peace and police courts.<sup>5</sup> The book, *Justice for the Times: A Centennial History of the Idaho State Courts*, notes:

Continuing the bar efforts of previous decades, Judge

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2. JUSTICE FOR THE TIMES: A CENTENNIAL HISTORY OF THE IDAHO STATE COURTS 159 (Carl Bianchi ed., 1990)[hereinafter JUSTICE FOR THE TIMES].

3. JUSTICE FOR THE TIMES, *supra* note 2, at 159. See Idaho Sec’y of State Election Div., <http://www.sos.idaho.gov/elect/stcon/amendmts.htm> (last visited Jan. 12, 2010) (noting that ratification took place in 1962).

4. See generally Idaho Sec’y of State Election Div., [http://www.sos.idaho.gov/elect/inits/hst60\\_70.htm](http://www.sos.idaho.gov/elect/inits/hst60_70.htm) (last visited Jan. 12, 2010) (stating that the purpose of the amendment was to eliminate probate courts as constitutional courts).

5. JUSTICE FOR THE TIMES, *supra* note 2, at 160.

Smith's committee and other officers and members of the Idaho State bar, enlisting the help of interested groups and citizens at large, were responsible for the approval of HJR 10 by the people on November 6, 1962. The passage of this constitutional keystone, after past failures, may have been the first clue that the ground was now fertile for court restructuring.<sup>6</sup>

Implementation of changes to the system were slow in coming in the 1960s after the passage of HJR 10, however, but eventually the Idaho legislature enacted a set of proposals that emerged from a series of citizens' conferences on the judiciary, which in turn had been inspired by the work of the American Judicature Society in South Dakota.<sup>7</sup> Among the proposals enacted by the legislature was a modified "Missouri Plan" for merit-based judicial selection.<sup>8</sup> (The modification allowed for merit selection for the initial appointment of district judges and Supreme Court justices, but retained nonpartisan elections after the initial appointed term.)<sup>9</sup> The package of bills approved by both the legislature and the Governor (after an initial veto) included the restructuring of the judicial districts in the state, created two new trial court judgeships and established the Idaho Judicial Council ("IJC"), the judicial selection panel under the new modified "Missouri Plan" system for merit selection<sup>10</sup> (the Idaho analogue to the Rhode Island JNC). Upon its creation, the IJC's first order of business was to recommend three candidates for each of the two newly created District Court judgeships.<sup>11</sup> My father, then still a probate judge in Boise, having been one of the leading proponents of court reform, and the drafter of the constitutional amendment that allowed for it, was included on the list of three candidates submitted to the Governor.<sup>12</sup> He was selected by the Governor for one of the open judgeships.<sup>13</sup> So it was that my father became the

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6. *Id.*

7. *Id.* at 164.

8. *Id.* at 165.

9. *Id.*

10. *Id.* at 167.

11. *Id.* at 170.

12. *See id.* at n.42.

13. *Id.* Our family history includes a story about an earlier opening on the District Court for which my father had been a contender, and to which

first judge in the Idaho judiciary selected pursuant to the merit selection process. I remember like it was yesterday, being summoned from my elementary school classroom in 1969 to walk the three blocks from the school to the state capitol where he was sworn in on the steps. He took office as a state District Court judge exactly forty years ago.<sup>14</sup>

Although I did not realize it until much later, my father was not only a very important role model for me in life and the law, he was in fact my earliest and most important mentor as a judge. From my earliest childhood, I watched and learned from a good judge doing the work he loved, and believed in so strongly, in a highly ethical, workmanlike, intelligent and compassionate manner. On countless days, after school, I would walk the three blocks from St. Joseph's elementary school to the county courthouse (which was next to the state capitol) in order to wait for a ride home. I would occasionally sit in the courtroom and watch trials or motion hearings or sentencings; or, I would plop down in the big reclining chair in his office (part of the standard issue equipment for trial judges in those days because juries often deliberated long into the night). As I did homework, I would watch my father work at his desk, surrounded by open volumes of the Idaho State Reports, writing decisions in fountain pen on a yellow legal pad just as I am penning this essay today. In the evenings over dinner with my mother, my two older brothers and younger sister, especially as we grew older, the discussion often turned to the law.<sup>15</sup> As my brothers and I entered "liberal"

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the former Governor apparently promised an appointment. The story goes that my uncle (my mother's brother), a prominent Boise physician, was infuriated at the Governor, whom he had known since college, when he failed to follow through with the appointment choosing someone else instead. My uncle drove to the state capitol several blocks from his office to confront the Governor. The Governor escaped from his office by running down a little-used back staircase and getting away in his car. It must have been quite a scene! To my knowledge, though they both lived to their nineties, the two never spoke again.

14. See generally JUSTICE FOR THE TIMES, *supra* note 2, at 170, n.2.

15. All four of us pursued legal careers: The oldest, Steve, after graduating from Georgetown, spent some time as a journalist before returning to law school at Tulane and becoming a civil litigator. He now practices in Boise a couple of blocks from the old county courthouse. Tom, after Cornell and Oxford as a Rhodes Scholar, went on to Yale Law School and a career as a legal academic. And my sister, Trish, the only one of us to attend the University of Idaho, went on to Georgetown Law and a career as

“Eastern” colleges (much to my father’s chagrin), the exchanges at the holidays frequently became heated. But along with the stimulation of these legal discussions were underlying themes of devotion to public service, strict fidelity to the law, and living a life according to the highest standards of ethical behavior. I will never forget my father warning me that I must behave better than other kids in school because my conduct was a reflection on him. And while I must admit that I did not always heed this advice, I avoided serious problems and the larger point he was making stuck with me.

We are all the products of our life experiences. I believe in my own case, being the son of an exceptional and devoted state trial judge and public servant is probably the single most important ingredient why I sought to become a judge, and in what kind of judge I am today. No doubt my parochial lower school education, Jesuit college and law school experiences, fifteen years as a practicing attorney at a large sophisticated law firm, my own lifelong involvement in, and enjoyment of politics, and other important mentors, both lawyers and judges, were (and continue to be) important influences too. But my sense of devotion to the law, dedication to public service, and ethical behavior, which are the cornerstones for a judge, were given to me by my father. And for this I am forever grateful.

I tell this personal story of childhood experiences for several reasons that relate to this commentary. First, while I did not realize it at the time, my childhood experience planted a seed in me – it allowed me to see myself as a judge, to believe I could do the work well, and to develop the ambition to pursue it when the opportunity arose. As I will explain more below, planting seeds with talented young lawyers must be part of building a great judiciary for the future. In my case it happened by chance of birth; one of the challenges for the future is to move beyond chance and institutionalize the cultivation of exceptional candidates for the judiciary. Second, these experiences taught me, from a very early age, that there is an inextricable connection between politics, public service, and the judiciary. This connection has always been a part of our system and it always will be. I believe this fact is not something to lament, but rather a reality to be both embraced and cultivated. And third, my father was a very



good judge, but I do not mean to idolize him as if he were Learned Hand or Oliver Wendell Holmes. He was neither, and neither am I. So as I look at the Rhode Island state judiciary in the context of merit selection, I view it through the prism of my father's and my own judicial careers. Our Rhode Island judiciary is fundamentally comprised of smart, hard working and ethical judges who are getting the job done much like my father did during his twenty-seven years of service. It is a judiciary that is substantially improved from when I became a member of the bar in 1987.

## II. CAN EMPIRICAL RESEARCH TELL US ANYTHING ABOUT THE SUCCESS OF MERIT SELECTION?

The papers presented at this conference by Professor Yelnosky,<sup>16</sup> Mirya Holman, a Ph.D. candidate from Claremont University and Research Associate at Duke University Law School,<sup>17</sup> and Professor Rachel Caufield, Associate Professor at Drake University and a Research Fellow at the American Judicature Society,<sup>18</sup> attempt to evaluate whether the merit selection process has improved the quality of the judiciary utilizing empirical research methods.<sup>19</sup> While I have some doubts about the ultimate usefulness of empirical research in this endeavor, I do think there are some constructive observations contained in these papers. These observations, however, only scratch the surface and do not consider information that could be highly relevant to the inquiry. In sum, the studies are useful as far as they go in their overall assessment; raise more questions

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16. See Michael J. Yelnosky, *The Impact of "Merit Selection" on the Characteristics of Rhode Island Judges*, 15 ROGER WILLIAMS U. L. REV. 649 (2010).

17. See Mirya R. Holman, *Measuring Merit in Rhode Island's Natural Experiment in Judicial Selection*, 15 ROGER WILLIAMS U. L. REV. 705 (2010).

18. See Rachel Paine Caufield, *What Makes Merit Selection Different?*, 15 ROGER WILLIAMS U. L. REV. 765 (2010).

19. A fourth paper by John Marion, Executive Director of Common Cause, focuses more on the historic underpinnings of and perceived problems with the Rhode Island merit selection system. See generally John Marion, *Judging How we Pick Judges: Fifteen Years of Merit Selection in Rhode Island*, 15 ROGER WILLIAMS U. L. REV. 735 (2010). I will provide no critique of that paper in these pages, but will refer to some of his observations and conclusions.

than they answer; and leave plenty of room for further research and debate.

In his paper, Professor Yelnosky compares the 1994, pre-merit selection cohort of judges to a merit selection cohort.<sup>20</sup> He concludes that under merit selection, fewer judges attended Rhode Island undergraduate institutions and more attended Suffolk Law School (37% vs. 28.8%).<sup>21</sup> Professor Yelnosky notes specifically that Boston University Law School educated 32% of the 1994 cohort, but only 14.8% of the merit selection judges.<sup>22</sup> He contends that these changes may reveal a shift in quality because Boston University is a more highly ranked law school than Suffolk.<sup>23</sup> Professor Yelnosky's concern, however, is not just about quality – he also suggests this shift may represent greater “homogen[ization]” of the judiciary,<sup>24</sup> although just what effect “homogenization” has on the judiciary is difficult to know.

While it could be that the increase in the number of Suffolk graduates represents a slight slippage in quality,<sup>25</sup> I would make three counter points for consideration: First, the analysis contains no examination of individual academic performance of the judges, and law school itself is at best only a partial proxy. As both a partner in a large law firm that hired numerous associates, and as a judge who has hired law clerks from a wide variety of schools (including Suffolk, Roger Williams, University of Connecticut, Boston University, Boston College, University of Kansas, Notre Dame, Northwestern University and Cornell, just to name a few), I can attest that the top graduates from all of these law schools are very closely matched in skill and ability. And, as Roger Williams University School of Law knows so well, often financial incentives are used to attract top performing students to attend third or fourth tier law schools in lieu of more highly ranked schools. Thus, a judge who was a top graduate at Suffolk would not represent a lower quality data point as compared to a middle-

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20. See generally Yelnosky, *supra* note 16.

21. *Id.* at 653-54.

22. *Id.* at 654.

23. See *id.* at 656-57.

24. *Id.* at 656.

25. Professor Caufield's paper appears to take the opposite view regarding whether law schools attended can tell us anything about quality. See generally Caufield, *supra* note 18.

of-the-road graduate of Boston University (or Harvard for that matter).

Second, it is not unusual that regional schools will draw students who know they want to practice in the geographic area served by that school. A majority of judges in Idaho were and are educated at the University of Idaho, just like my father was in the 1940s and 50s. I am sure the same is true in many states with strong regional schools. Students choose schools based on many things, including affordability, local alumni contacts and convenience (Suffolk has a night program, for example). So, the increase in Suffolk graduates could be the result of many factors unrelated to academic ability.

Finally, knowing so many of these judges, I cannot help but believe that if a survey were taken of the bar rating intellectual ability, work ethic, judicial temperament, etcetera,<sup>26</sup> Suffolk graduates, on average, would rate just as high (or maybe higher) than judges who attended other schools. (I will discuss below several reform proposals that could make such surveys even more valuable.)

Having said this, there may be good reason to worry about whether we are attracting the best and brightest of the bar to state judicial service. In building a quality judiciary, we should seek judges with a variety of skills and backgrounds, and should value diversity. Diversity in education and experience, in my view, makes for a stronger judiciary. The federal court experience, both nationally (which I describe in detail elsewhere in this essay) and locally, supports this view. In my court, the law schools of the judges going back seventy years are as follows:

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26. Aspen Publishers/Wolters Kluwer Law & Business produces a publication that compiles information of this type about federal judges called *THE ALMANAC OF THE FEDERAL JUDICIARY* (2010).

Judge	Dates of Service	Law School
Hartigan	1940-1951	Columbia
Leahy	1951-1953	Georgetown
Day	1954-1985	Harvard
Pettine	1966-1982	Boston University
Selya	1986- present	Harvard
Boyle	1977-1992	Boston College
Lagueux	1986-present	Harvard
Torres	1987-2006	Duke
Lisi	1994-present	Temple
Smith	2002-present	Georgetown <sup>27</sup>

While the sample size may not be statistically significant, the comparison with the state judiciary is striking. (It is noteworthy too that both Judges Lagueux and Torres were Superior Court judges before joining the federal bench.) It is worth asking, what is the source of this “prestige gap”? Is it the nature of the work, which may be considered more complex and challenging, at least on the civil side? The salary, which is somewhat higher? Is the political process (selection by the Senator(s) and/or President) somehow more selective? Is the ABA process (discussed in more detail below) a quality filter? Is it simply the fact that there are fewer positions? Or, is it that federal court practice tends to attract practitioners with a more academic/big-firm/sophisticated practice orientation? I certainly do not have the answers to these questions, but I expect some combination of these factors (and probably others) is at play here.<sup>27</sup> The difference in the law schools attended by state and federal judges is difficult to ignore and may be worth further study.

Professor Yelnosky also notes a reduction in the percentage of judges that have worked in state government (from 77% in 1994 to 55.6% under merit selection).<sup>28</sup> If this finding is meant to suggest a decline in the political connectedness of judges, I am not sure it does. For example, it does not appear that this analysis accounts for judges who previously worked in city government or have family connections in state government (this is Rhode Island after all!). For example, on the Rhode Island Supreme Court, Justice

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27. It may be interesting to explore as well the schools attended by Federal Bar Association members as compared to the larger Rhode Island Bar Association.

28. Yelnosky, *supra* note 16, at 655.

Flaherty was Mayor of Warwick<sup>29</sup> and his brother is a long time member of the General Assembly;<sup>30</sup> and Justice Robinson was a member of the East Greenwich School Committee,<sup>31</sup> and his father was a legendary Deputy Commissioner and Commissioner of Education in the 1950s and 1960s.<sup>32</sup> Further, Justice Goldberg was not only an assistant attorney general, but a former town solicitor<sup>33</sup> as was retired Chief Justice Williams.<sup>34</sup> I would expect that if these kinds of experiences are factored in across the judiciary, it would reveal that the judicial merit selection cohort has just as much “experience” in government, and is just as “political” in this sense, as the pre-merit selection cohort.

Professor Yelnosky also characterizes the reduction in appointments from the ranks of the General Assembly (from 33% to 20.4%) as the “most promising” finding in his study.<sup>35</sup> I would question this conclusion for several reasons. First, as I note above, the political experience of appointees may simply be more varied now than before; the fact that judges did not serve in the General Assembly or on its staff does not mean those judges are less “political.” Second, there is no objective basis in his analysis upon which to compare the “quality” of judges who have served in the General Assembly versus those who have not. Anecdotally, I can confidently say that some of the best judges to have served in Rhode Island judiciary also served in the General Assembly. Former Chief Justice Weisberger<sup>36</sup> and current Chief Justice

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29. Rhode Island Sec’y of State, Public Information, <http://www.sos.ri.gov/govdirectory/index.php?page=DetailJudge&rid=2259> (last visited Jan. 26, 2010).

30. Town of Warwick, State Government Officials Representing Warwick, Rhode Island, <http://www.warwickri.gov/> (follow link to City Government, Elected Officials) (last visited Jan. 26, 2010).

31. RI.gov, <http://sos.ri.gov/govdirectory/index.php?page=DetailJudge&rid=2261> (last visited Jan. 26, 2010).

32. RHODE ISLAND GOVERNMENT OWNER’S MANUAL 99, (Office of Secretary of State A. Ralph Mollis, 2007-2008) (obtainable through the S. Ct. library).

33. THE AMERICAN BENCH, JUDGES OF THE NATION 2117 (Gina L. Pratton, et al. eds., 2010).

34. THE AMERICAN BENCH, JUDGES OF THE NATION 2162 (Marie T. Finn et al. eds., 2009).

35. Yelnosky, *supra* note 16, at 657.

36. THE AMERICAN BENCH, JUDGES OF THE NATION 2085 (Marie T. Finn et al. eds., 1993-94) (stating that C.J.(ret.) Weisberger served in the General Assembly from 1953 to 1956).

Suttell<sup>37</sup> both come immediately to mind. Others, like Judge Indeglia<sup>38</sup> and Judge Torres,<sup>39</sup> also served in the Assembly, before appointment to the state bench. And exceptional judges (often from the more prestigious schools) have served as Governors' counsel (former Justice Robert Flanders and Judge Judith Savage for example).<sup>40</sup>

The sentiment expressed by Professor Yelnosky, however, is understandable, and the paper presented by John Marion, Executive Director of Common Cause, trumpets the case for "de-politicization."<sup>41</sup> The indelible impression left by the scandals involving former Chief Justices Bevilacqua and Thomas Fay and former House Speaker and Court Administrator Matthew Smith, the bribery case involving Judge Almeida, and the ethics inquiry of Judge Fuyat of the Family Court are hard to forget. However, I think it is too easy to blame political involvement as the culprit and the elimination of politics as the cure. In all of these scandals the core problem was character, not politics. So I must take issue with Professor Yelnosky and Mr. Marion as to their goal of de-politicization of judicial selection. We will never completely remove politics from judicial selection, nor should we try. Rather, the better goal is to raise and maintain the quality of members and staff of the General Assembly (and the Governors' office) who may become judicial aspirants; elect governors who are ethical and care about and understand the importance of the judiciary; and, focus on quality filters at the JNC level that would again make distinguished General Assembly service a positive credential, not a scarlet letter.

The paper presented by Mirya Holman also contains a number of interesting conclusions.<sup>42</sup> Holman examines the issue of whether merit selection has made a difference by creating three

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37. THE AMERICAN BENCH, JUDGES OF THE NATION 2122 (Gina L. Pratton et al. eds., 2010) (stating that C.J. Suttell served in the General Assembly from 1983 to 1990).

38. *Id.* at 2118 (stating that Judge Indeglia served in the General Assembly from 1984 to 1989).

39. *Id.* at 2123 (stating that Judge Torres served as a state representative from 1975 to 1980).

40. THE AMERICAN BENCH, JUDGES OF THE NATION 2217-18, 2224 (Marie T. Finn et al. eds., 2004-2005).

41. See generally Marion, *supra* note 19.

42. See generally Holman, *supra* note 17.

sample cohorts: one pre-merit selection; one a hybrid of merit and non-merit selection judges; and one post-merit selection.<sup>43</sup> Holman concludes that merit selection has had no overall effect on the “productivity” of the Rhode Island Supreme Court as measured by the total number of opinions published in each cohort.<sup>44</sup> Moreover, her data confirms what many observers would probably guess: that the most significant individual “producers” on the court have been retired Chief Justice Weisberger,<sup>45</sup> retired Justice Flanders and retired Chief Justice Williams.<sup>46</sup> But does this “productivity” reflect higher overall quality? Holman’s data does not tell us much about this important question. Moreover, the data does suggest that Chief Justice Weisberger, by measure of citations by out of state courts, appears to be the most influential Justice to have sat on the Court in modern times.<sup>47</sup> Justice Weisberger has enjoyed a national reputation for decades and he has been, for many years, an instructor at the National Judicial College in Reno, Nevada.<sup>48</sup> (In fact, my father attended the College in 1968 and again several years later, and Justice Weisberger was one of his instructors on both occasions.)

Holman also notes that the average opinion length has increased under merit selection and that this may be a sign of improved performance.<sup>49</sup> She recognizes, however, that such a conclusion would be highly speculative.<sup>50</sup> Length alone, as any judge who has read hundreds of briefs knows, does not necessarily harbingers higher quality. Holman attempts to draw some conclusions about “independence” of the various cohorts from data

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43. *Id.*

44. *Id.* at 713-14.

45. Holman notes that Justice Weisberger’s production of opinions appears to dip in the middle cohort. *Id.* at 714. I would suggest this was due to his assumption of the Chief Justice’s duties after the resignation of Chief Justice Fay.

46. *Id.* at 719.

47. *Id.* at 716.

48. The National Judicial College, [http://www.judges.org/givingnews/givingstory\\_0509.html](http://www.judges.org/givingnews/givingstory_0509.html) (last visited Jan. 12, 2010) (stating that C.J. (ret.) Weisberger served on the NJC faculty from 1966-1999).

49. Holman, *supra* note 17, at 721.

50. *Id.* at 727.

compiled on the number of dissents.<sup>51</sup> Holman relies on the work of scholars such as Stephen Choi, Mitu Gulati, and Eric Posner that attempts to measure independence by calculating the ratio of the number of times a judge dissents against a so-called co-partisan (a judge of the same political party) to the number of dissents against an opponent party judge.<sup>52</sup> Based on this measure, Holman suggests the hybrid court cohort was the most independent and the merit selection cohort the least independent.<sup>53</sup> (In fairness, she notes that even the merit selection cohort is highly independent compared to other state supreme courts, citing the Choi, Gulati and Posner 2009 research.)<sup>54</sup>

This analysis tells us very little of real value, however, because it ignores the peculiar reality of Rhode Island politics and the personal dynamics of the Court. First, as anyone who has toiled in the Rhode Island political fields at all knows, the labels Republican and Democrat mean little when it comes to how the men and women of the Rhode Island Supreme Court view the issues. Republican justices may be liberal or conservative depending on the issue; Democratic justices may be the opposite. Consider the fairly recent case of *Chambers v. Ormiston*<sup>55</sup> as a case in point. This case considered the question of whether the Rhode Island Family Court could consider a same sex marriage of two persons lawfully married in another state for purposes of granting a divorce.<sup>56</sup> The Court's majority said it could not.<sup>57</sup> Two of the three majority justices (Robinson and Flaherty) are Democrats; the two dissenting Justices favoring recognition of the gay marriage are Republicans (Suttell and Goldberg). Party label in this case is virtually meaningless when it comes to assessing the work (and independence) of the Court on what is clearly a hot button social issue. More interesting it seems to me is the effect of religious and social views and other potential influences, and the

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51. *Id.* at 725-26.

52. *Id.*

53. *Id.* at 726.

54. *Id.* (citing Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, J.L. ECON. & ORG. (forthcoming)).

55. 935 A.2d 956 (R.I. 2007).

56. *Id.* at 958.

57. *Id.*



degree to which the judges are influenced by and/or able to check such views.<sup>58</sup>

The second factor that is not accounted for in Holman's empirical analysis is what I will call the "Flanders effect." It is well known that during his eight years on the court, former Justice Flanders dissented frequently.<sup>59</sup> And because the court included at least two other Republican justices during most of that time, all of these dissents likely would be counted as indicators of "independence." In reality, however, the high number of dissents by Justice Flanders did little to make the Court "independent" in any meaningful political or ideological sense. Rather, his dissents emerged more from his strong views about the correctness of his own opinions, and his unwillingness to accommodate other justices' views. Holman recognizes this possibility and notes that some scholars refer to this as "cantankerousness."<sup>60</sup> I do not necessarily ascribe to that characterization – I only point out that the data that drives her conclusion is a result of one uncompromising justice expressing his strongly held views in dissenting opinions. While this might show that this one justice was quite "independent" in some sense, I do not think it tells us much about the overall political independence of the Court, or more importantly for our purposes here, about the effect of merit selection on the independence of the Court. In the end, Holman's study buttresses Professor Yelnosky's conclusion that none of these empirical measures of judicial performance clearly point to improvement as a result of the merit selection process.<sup>61</sup>

The paper presented by Professor Rachel Caufield seems to confirm that no hard and fast conclusions can be drawn from the available data that merit selection improves the quality of the

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58. I am not suggesting the result in *Chambers* was dictated by religious views; rather, this and other factors (including political backgrounds) that may influence judicial decision making has been and continues to be fertile ground for study. See generally Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007). This is a topic we consider in my course on Judicial Process: How Judges Think.

59. See generally Westlaw.com, <http://web2.westlaw.com> (search of Rhode Island case law reveals that Justice Flanders authored forty-nine dissents during his tenure on the Court).

60. Holman, *supra* note 17, at 713.

61. See generally *id.*; Yelnosky, *supra* note 16.

judiciary.<sup>62</sup> What she does conclude is that merit systems in general produce a more diverse judiciary than either appointive or elective systems<sup>63</sup> (although there are studies that reach the opposite conclusion); and that appointive judges tend to be less likely to be tied to the state by birth, and more likely to have been educated at prestigious law schools.<sup>64</sup> Professor Caufield argues that the result of gender and racial diversity is a positive effect, but that diversity of background and prestigious law school education is not as important.<sup>65</sup> So, while Professor Yelnosky suggests that the school at which a judge received his or her law school education might be an indicator of quality,<sup>66</sup> Professor Caufield seems to suggest it is of no consequence.<sup>67</sup> If nothing else, this illustrates that there is no clear consensus on the most effective methods of measuring the quality of judicial selections.

On the issue of productivity and influence, Caufield concludes that elected judges seem to write more opinions, but in terms of influence (as measured by citations by other courts) it is a mixed bag – the leading courts use appointive, elective and merit selection systems.<sup>68</sup>

From all the data she examines, Professor Caufield jumps to a conclusion that may not be supported by the data. She says that while it is unclear which system produces the “best” judges, it is clear that there are fewer ideological forces at work among merit selection judges than those selected by election or appointment.<sup>69</sup> I agree that data she cites would indicate that elected judges are more inclined to take positions that are popular with the public (this, of course, makes sense); but I do not see support for this conclusion in her data as it applies to appointed judges. Moreover, the claim that merit selection judges are less subject to ideological or political influences in their decision making is a sweeping (and unsupported) conclusion that fails to consider the wide range of factors at play in judicial decision making. What influences

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62. *See generally* Caufield, *supra* note 18.

63. *Id.* at 789.

64. *Id.* at 781.

65. *Id.* at 781, 784.

66. *See* Yelnosky, *supra* note 16, at 657.

67. *See* Caufield, *supra* note 18, at 781.

68. *Id.* at 786-87.

69. *Id.* at 784-86.

judicial decision making is a field that has intrigued political and social scientists for decades,<sup>70</sup> and one that is currently receiving renewed attention from legal and social science academics.<sup>71</sup> It is a complex and interesting field, and one to which I devote substantial attention in my teaching. There are so many influences at work in the process of judicial decision making, however, I question whether the data exists to support Professor Caufield's broad conclusion that merit selection judges are less prone to such influencing factors.<sup>72</sup> No question, however, the issue deserves further study.

Professor Caufield's final conclusion that merit selection systems seem to have resulted in more ethical judges by measure of judicial discipline complaints<sup>73</sup> is the one point in all of these papers with which I agree completely. And this arguably is the single most important contribution the merit selection system has made to the quality of the judiciary in Rhode Island.

My own assessment of the merit selection process in Rhode Island is admittedly unscientific. As a practitioner and observer I think the judiciary and the public generally have been well served by the process. First, Rhode Island has not endured an ethical scandal in the judiciary since the Fay/Smith debacle and the Almeida conviction in the 1980s. This alone is significant progress. Moreover, in the 1980s there were trial judges in the Superior Court that, to put it bluntly, were neither competent nor ethical, by almost any measure. Some of my first experiences as

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70. See, e.g., WALTER F. MURPHY, *THE ELEMENTS OF JUDICIAL STRATEGY* (1964).

71. See, e.g., LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997); FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS*, Stanford University Press (2007); RICHARD A. POSNER, *HOW JUDGES THINK*, Harvard University Press (2008).

72. The revival in the study of the "science" of judicial decision making has attracted a number of scholars who attempted to utilize empirical research methods in their work. These efforts yielded mixed results at best in my view. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUDGES MAKE* (Congressional Quarterly Inc. 1998); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 *J. LEGAL STUD.* 257 (1995); Harry T. Edwards & Michael Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 *DUKE L.J.* 1895 (2009); Jeffery M. Chemerinsky & Jonathan L. Williams, *Measuring Judges and Justice*, 58 *DUKE L.J.* 1173 (2009).

73. Caufield, *supra* note 18, at 789.

an attorney in Rhode Island were before some of these judges, and I frankly wondered what I had gotten into by moving here. I think it is fair to say that those days are gone.

In addition, while not directly related to merit selection, the reform of the Workers' Compensation Court and the restructuring of the Traffic Tribunal, and its placement within the District Court, have both markedly improved the judicial system in Rhode Island. Improvements to the system, such as these, and the selection of quality judges, require political leaders (governors and General Assembly leaders) who make the courts a priority. Both Governors Bruce Sundlun and Lincoln Almond took the responsibility seriously and initiated (along with legislative and judicial leaders) structural reforms to improve the system. Both Governors also appointed a number of very well qualified judges during their tenure under both the old system and the merit selection system. Governor Carcieri has shown less interest in the courts, but nevertheless has made some fine, if somewhat delayed, selections. Merit selection then, in my view, has been one part of a process of improvement of the Rhode Island judiciary that has been ongoing for twenty years and continues to this day.

But even as the judiciary has seen improvement over these years, there are reasons for concern. Merit selection only works if the political leaders and their appointees allow it to work. Most observers of the system probably would say that merit selection has not lived up to the hopes and expectations that were placed on it. Perhaps some of those expectations were too great. Or, perhaps other factors (unrelated to the process) are responsible. It is worth considering all possibilities, and John Marion's paper for this conference covers many of these issues quite well.<sup>74</sup>

One of the most frequently heard criticisms of the process is that it has pushed the politics below the surface and that the JNC offers convenient political cover for the usual players who seek to influence the system. Members of the JNC would deny that their process is infiltrated by political influence. But, even if this is true, some recent appointments would tend to support the contention that political influences are present in the JNC process and that the deal making of the past between the Governor and General Assembly is still alive and well once candidates emerge out of the JNC process.

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74. See generally Marion, *supra* note 19.

Adding to this perception are the various process distortions of recent years: JNC members serving long past their terms; candidate lists that live on for five years after the opening for which they are created under the so-called “look-back” provisions;<sup>75</sup> and the long delays in filling vacancies by the Governor, who has deemed the statutory time lines “advisory.”<sup>76</sup> Moreover, as Mr. Marion points out, the most egregious emasculation of the judicial selection process is the creation and expansion of duties for magistrate judges.<sup>77</sup> Mr. Marion notes there are currently twenty-one magistrates in the various courts and more were proposed (but rejected) for the Traffic Tribunal.<sup>78</sup> The attorneys selected for magistrate positions have more demonstrable connections to the General Assembly and, as he notes, this indicates a creeping political infiltration of the judiciary.<sup>79</sup>

There have also been some low points in the confirmation process in which political influences trumped merit. The legislative ambush of Margaret Curran,<sup>80</sup> a highly qualified nominee to the Supreme Court, was clearly the most egregious example since the adoption of merit selection. In the Curran case, the General Assembly sought to teach the Governor a lesson about power sharing in judicial selection. No lesson was taught; Governor Almond proceeded to nominate judges as he saw fit, and the judiciary was deprived of someone who would have been an excellent judge. Having endured my own legislative slap down (both of Rhode Island’s Senators “blue slipped”<sup>81</sup> my nomination to

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75. R.I. GEN. LAWS § 8-16.1-6(a)(4) (2010) (to be repealed effective Jun. 30, 2010).

76. Edward Fitzpatrick, *Nominations to Bench Come at End of Session*, PROVIDENCE J., June 24, 2008, at B2, available at [http://www.projo.com/news/content/judicial\\_roundup\\_06-24-08\\_3NAK5IT\\_v43.3e80772.html#](http://www.projo.com/news/content/judicial_roundup_06-24-08_3NAK5IT_v43.3e80772.html#).

77. Marion, *supra* note 19, at 748-49.

78. *Id.*

79. *See id.* at 749.

80. Jonathan D. Rockoff, *Cool Wind, Cold Reception Mark Nomination*, PROVIDENCE J.-BULL., Jan. 26, 1997, at A15.

81. See Brannon P. Denning, *The “Blue Slip”: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001), for a detailed history regarding and explanation of the “blue slip” process. After “a judicial nomination is made, the chair of the Judicial Committee sends ‘blue slips’ (so called because of the color of paper used) to the senators of the

the First Circuit<sup>82</sup>) I can say from experience that these political power plays go with the territory, and you have to be willing to roll with the punches in this business. But the manner in which the Curran nomination was handled by the General Assembly was outrageous and marked the lowest ebb in the fifteen-year history of the merit selection system.

The perceptions created by these events, regardless of how accurate they may be, have two negative consequences that cannot be ignored. First, and most regrettably, they tend to undermine the public's confidence in the quality and integrity of the judicial selection process; and second, they discourage highly qualified attorneys from applying. My own review of the list of applicants over the fifteen years of merit selection leads me to believe that the pool of candidates has declined in both the number and the quality of applicants in recent years. This of course is just one observer's highly subjective and unscientific impression, but I am confident that others who have carefully followed these things over the years would agree with this view. (Having said this, the group of five applicants selected by the JNC for the opening on the Supreme Court, recently filled by Justice Indeglia, was a very highly talented and academically credentialed group, which is very encouraging.)

One of the goals of this fifteen-year retrospective is to think about changes to the system that could improve the quality of the judiciary. I will now turn to this subject, but first will reiterate two principles that inform my views: First, as I stated above, politics, public service and the judiciary are inextricably intertwined and they always will be. It is a fool's errand to try to change this fact; rather, the goal should be to work with and manage this reality. Second, improving the quality of our judiciary should be viewed as a long-term process: there is no simple fix. Fostering improvement requires looking at the system

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nominee's home state. If even one senator declines to return the slip, then the nomination is dead in the water, or further action will be extremely difficult, depending on which practice the committee chair decides to follow." *Id.* at 76.

82. And while less of a public spectacle than the Curran case, my case involved ludicrous public and private justifications and accusations from Rhode Island Senators to the effect that I was a "stalking horse for Bush ideology," a member of the Federalist Society and a hand maiden of Vice President Cheney. See, e.g., Whitehouse Voices Concerns Over Bush's Judicial Nominee, Providence J., (Dec. 17, 2007).

as a whole, with all of its complexity and nuances. It involves structural reform of the judiciary itself (such as we saw with the Worker's Compensation Court and Traffic Tribunal) and process reform in judicial selection; and it requires making the courts and the judiciary a priority of our two elected branches. With these principles in mind, I will shortly recommend for consideration several possible structural and process reforms that could help improve the judiciary over the long term. Some of my suggestions may be counter-intuitive, and perhaps controversial, but I believe they (and others) deserve serious consideration.

### III. THE JUDICIAL SELECTION PROCESS AT THE FEDERAL LEVEL

Before I outline proposals for structural and process reforms, let me describe briefly the judicial selection process on the federal side, using my own direct experience as an example. I will argue that there are lessons for the Rhode Island merit selection process that can be learned from the federal system.

The first step in the judicial selection process for the District Court is receiving the endorsement from the U.S. Senator of the President's political party (or, if there is no Senator, the highest elected office in the state of the President's party).<sup>83</sup> In my case, the Senator was someone whom I had served as legal counsel and staff director over a combined period of eight years. Even with that background however, there was a competitive process of interviews and evaluations of a number of contenders. The list of aspirants was kept close to the vest, but I know there were several highly qualified contenders. Senators have many different methods of selecting candidates, and some are more inclined toward political involvement than others; some use selection committees; and some rely on trusted advisors.<sup>84</sup> Whatever the

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83. See Rachel Brand, *Judicial Appointments: Checks and Balances in Practice*, 33 HARV. J.L. & PUB. POL'Y 47 (2010); see generally U.S. Courts, <http://www.uscourts.gov/Common/FAQS.aspx> (last visited Jan. 12, 2010) (stating that nominees' names are frequently recommended by Senators who belong to the President's political party).

84. Professor Caufield has outlined some of these procedures in her presentation, and argues that the federal system is moving in the direction of merit selection by the adoption of these committees by Senators. See generally Caufield, *supra* note 18. There may be some trend in this direction, but my own view is that the process continues to have a decidedly political flavor.

initial process, after receiving the endorsement of the Senator, the name is provided to the White House. Presidents have taken different approaches to this process over the years. Some Presidents have required three names for each position in order to preserve the Constitutional prerogative that “the President shall nominate”; others have required only one name; in some administrations Senators’ views have been given less consideration with respect to court of appeals nominees than district court nominees.<sup>85</sup> After the White House settles on a prospective nominee, usually the individual recommended by the Senator, what follows is an extensive series of background investigations by the FBI, the White House Counsel’s Office and the Department of Justice Office of Legal Policy (OLP).<sup>86</sup> These investigations require answering detailed questionnaires, and in my case, a substantial interview at the White House with the Deputy Counsel and several Justice Department attorneys. Once nominated, the Senate Judiciary Committee Questionnaire is filled out and submitted to the Senate Committee. The Senate questionnaire is very detailed and comprehensive. It seeks extensive information regarding the candidate’s legal practice; cases litigated; opposing counsel; judges before whom the candidate has appeared; community involvement and other matters. The American Bar Association (ABA) review process picks up with the Senate questionnaire.<sup>87</sup> This independent evaluation<sup>88</sup> begins with a personal interview by the evaluator,

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85. See Brand, *supra* note 83, at 48 (noting that in an attempt to achieve balance “between senators’ wishes and the President’s constitutional prerogatives, President George W. Bush asked home-state senators to recommend at least three names for each district court vacancy[,]” and that “[r]ecent presidents have tended to be less deferential to home-state senators’ wishes regarding circuit court nominations.”).

86. See generally America.gov, <http://www.america.gov/st/usg-english/2008/May/20080522224217eafas0.5669672.html> (last visited Jan. 12, 2010) (stating that the Department of Justice subjects each judicial nominee to rigorous scrutiny).

87. See AM. BAR ASS’N., STANDING COMM. ON THE FED. JUDICIARY, WHAT IT IS AND HOW IT WORKS, available at [http://www.abanet.org/scfedjud/federal\\_judiciary09.pdf](http://www.abanet.org/scfedjud/federal_judiciary09.pdf) for a detailed explanation of the Committee’s rating process.

88. During the Bush administration, the ABA process began after nomination. See Am. Bar Ass’n Standing Comm. on the Fed. Judiciary, Frequently Asked Questions on the Federal Judiciary (Mar. 2009), <http://www.abanet.org/scfedjud/home.html>. It has now been moved back to



who is typically the Circuit Representative on the ABA's Standing Committee on the Federal Judiciary. He or she is usually a highly regarded practitioner from another jurisdiction within the Circuit. He asks detailed questions about practice, cases litigated, etc., and requests samples of the nominee's writing. From there the investigator conducts interviews of members of the bar, judges and community leaders. If there are criticisms or concerns, the nominee is given an opportunity to respond. The investigator then submits a confidential report to the Standing Committee, which then votes on a rating. The Committee has three ratings: "well qualified"; "qualified"; and "unqualified".<sup>89</sup>

I received a rating of "qualified" for the district court from the Committee. This is the rating I expected given the nature of my practice primarily as a labor and employment attorney without a great deal of federal court experience, but a very good academic record, a sophisticated practice, and good reviews from lawyers, judges and arbitrators. The process for my nomination to the Court of Appeals was similar, except it was the President that selected me for nomination, without senatorial endorsement (which no doubt explains why I was never given a confirmation hearing). Importantly, for our purposes here, the White House and the ABA once again conducted a substantial review. This time the Committee had well over one hundred published opinions to review and many lawyers and judges to interview regarding my qualifications. The result of the ABA Committee review was a rating of "well qualified" for the circuit court.

I review this process here in some detail because I think it represents the great strength of the selection/evaluation process in the federal court system. There is no doubt that the process has a political dimension – every federal judge has a story about how he or she got to the position. But, there is also an extensive evaluation of qualifications that acts as a quality control check on the political process. Between the White House, Department of Justice, Senate and ABA, there are virtually no rocks left unturned. And, of these, the ABA review is potentially the most

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White House pre-nomination evaluation under the Obama administration. *Id.*

89. See Am. Bar Ass'n Standing Comm. on the Fed. Judiciary, <http://www.abanet.org/scfedjud/ratings.html> (last visited Dec. 3, 2009).

non-partisan, and the most comprehensive with respect to qualifications for the position.<sup>90</sup>

The federal court selection process contains multiple potential check points for quality. For example, if a Senator pushes a candidate who clearly is not qualified, the White House and the Department of Justice investigative process can reveal the problems and the President can refuse to nominate the candidate; if the White House pushes a candidate who is not qualified, the Senate can stand in the way. Both of these checks, however, require the political courage of an office holder to stand up for the principal of quality over politics or “political correctness.” If either the President or the Senate is unwilling to muster the courage to do so, of course, these checks will not work. This concern is perhaps most acute when the same party controls the White House, the Senate and the Senators from the state where the seat is located, and where the party in control enjoys a filibuster proof majority. (This of course has been the current state of affairs, at least until the recent election of Scott Brown to the Seat formerly

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90. The ABA process is likely not completely a-political, and there is a history of criticism of the Committee as liberal dominated. One oft-cited example is the recommendation of “not qualified” of Judge Richard Posner of the Seventh Circuit in the 1980s. See White House Brings ABA Back Inside Judicial Nominations Process, <http://legaltimes.typepad.com/blt/2009/03/obama-brings-aba-back-inside-judicial-nominations-process.html> (last visited May 20, 2010). However, it was my impression in both of my nominations that the evaluation by the First Circuit investigator was very objective and not at all political; my sense is that to the extent political considerations (or pressure) enter the system it may be through the Committee voting process. Because that process is confidential, this is difficult to evaluate. My own view is that the Committee as a whole probably leans to the liberal side of the spectrum – that is, more critical of conservative presidential nominees, such as Judge Posner, and more forgiving of liberal presidential nominees. The recent investigation and rating of Judge O. Rogeriee Thompson, nominee for the First Circuit who received a “majority qualified/minority unqualified” rating, may be a case in point. Judge Thompson was given two investigations, by separate investigators within the Circuit. According to the Standing Committee’s rules, this only occurs if the first review indicates that a rating of unqualified is likely. See generally AM. BAR ASS’N, *STANDING COMM. ON THE FED. JUDICIARY, WHAT IT IS AND HOW IT WORKS* 6 (2009), available at [http://www.abanet.org/scfedjud/federal\\_judiciary09.pdf](http://www.abanet.org/scfedjud/federal_judiciary09.pdf). It appears that somewhere in this process the Committee as a whole landed on the majority qualified/minority unqualified rating. Unfortunately, it is not apparent whether this change resulted from sincere reconsideration of her qualifications or from political influence exerted by the White House or interest groups.

held by Senator Edward Kennedy.) In all cases, and particularly where one party is in total control, the ABA can and must act as an honest broker, an objective evaluator of a candidate's qualifications. Of course, the ABA's role is only advisory: to the Senate during the Bush Administration; to the White House and the Senate in the Obama administration.<sup>91</sup> So in the end, the process ultimately depends on the integrity of the ABA process, and the willingness of both branches,<sup>92</sup> or at least one, to give the ABA's views serious consideration.

The value of the ABA's carefully calibrated process – if it is utilized as intended, and not politically manipulated – is that it

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91. Am. Bar Ass'n Standing Comm. on the Fed. Judiciary, Frequently Asked Questions on the Federal Judiciary (Mar. 2009), <http://www.abanet.org/scfedjud/fjcfaq.pdf>.

92. Democrats in the Senate excoriated the Bush administration for expelling the ABA from the White House Nomination process. See e.g. *Judicial Nominations Hearing* (Feb. 25, 2004) (statement of Senator Patrick Leahy, Ranking Member, Senate Judiciary Comm.). Now the Obama administration has reinstated it. See Am. Bar Ass'n Standing Comm. on the Fed. Judiciary, Frequently Asked Questions on the Federal Judiciary (Mar. 2009), <http://www.abanet.org/scfedjud/fjcfaq.pdf>. It is probably too early to tell whether either the administration or the Senate will give serious consideration to the ABA Standing Committee's evaluation now that the Democrats appear to have near complete control of the judicial selection process. There are indications, however, that they will not. See, for example, *Support for R.I. Judge not Unanimous*, PROVIDENCE J., Oct. 25, 2009, in which Senators Jack Reed and Sheldon Whitehouse issued a joint statement saying that "[t]he ABA plays a limited advisory role, and has nowhere near the familiarity with judicial candidates that we do in Rhode Island." More recently (as this essay was going to print), Senator Reed commented "as I look closer at this whole process[,] . . . I've had serious questions about whether [the ABA review process is] an effective way to rate a judge." John E. Mulligan, *Senate Panel to Vote on Rhode Islander Nominated to Federal Bench*, PROVIDENCE J., Jan. 21, 2010. Moreover, Senator Whitehouse, for his own part, speculated that the ABA process was weighted toward a "big-firm, corporate law" view of judges and does not value other kinds of service. *Id.* These are disturbing statements. They demonstrate a willingness to disregard and even denigrate the most thorough and independent evaluation of qualifications for the position if it results in a rating not to the Senators' or President's liking. Given the enormous amount of work that goes into the ABA evaluative process, literally dozens of comprehensive interviews of attorneys, judges and community leaders, reading thousands of pages of decisions or briefs (if such exist) and lengthy, probing interviews of the candidate, this casual dismissal of the ABA's review is at best distressing, and at worst insulting to the reviewers and to those in the legal community that participate in the review process.

can potentially prevent the nomination or confirmation of an unqualified candidate and actually increase the likelihood that highly qualified (as opposed to minimally or barely qualified) candidates will obtain these positions. If the White House or a Senator believes a marginal candidate, who may be a political friend, or have a political angle on the job, would not secure a "well qualified" or "qualified" rating, he or she could be dissuaded from further pursuing the position, or turned down with adequate political "cover." Moreover, the system also acts to increase the quality of candidates through self-selection. That is, more marginal candidates are discouraged from applying because they will not want to endure a process that may result in a low rating; and more highly qualified candidates are encouraged to apply because the system appears to value quality as well as politics.

The thoroughness of the federal process, while not perfect and no doubt subject to manipulation, has much to teach us in considering possible reforms to the system of merit selection of judges in Rhode Island. I believe it could be possible to create a system, within the current structure of the JNC, that would mirror the best attributes of the federal system, including an ABA-like evaluation process.<sup>93</sup> Such a system would not remove politics from the process, but could serve to increase the quality control checks on political influences, and, in turn, increase the quality of the applicant pool for vacancies.

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93. Pennsylvania, Washington and Ohio, for example, each have a rating system. American Judicature Society, *Judicial Selection in the States*, <http://www.judicialselection.us/>. In Pennsylvania, a judicial evaluation commission "rates appellate judicial candidates standing for retention as either 'highly recommended,' 'recommended,' or 'not recommended.'" *Id.* In addition, the Judicial Evaluation Commission reviews investigative reports on each candidate, interviews each candidate and rates each candidate for appellate judicial office. *Id.* Ratings are made public via news releases and the state bar association's website. *Id.* In Washington, the King County Bar Association has a Judicial Screening Committee that rates candidates for "appointment or election to the County Municipal, District and Superior Courts and to state appellate courts for contested elections." *Id.* In Ohio, the Columbus Bar Association rates candidates for contested judicial positions in Franklin County. *Id.* The bar there bases its rating of "highly recommended," "acceptable," or "not recommended," on candidates' interviews and written responses to questions. *Id.*

#### IV. SUGGESTIONS FOR STRUCTURAL REFORM OF THE JUDICIARY AND JUDICIAL SELECTION PROCESS IN RHODE ISLAND

Could we make the Rhode Island judiciary better than it is now (which is better than it was twenty years ago) by enacting changes to the structure of the judiciary and/or by modifying the selection process of the JNC? I believe the answer is yes. And if we think about this as a long-term process – that is, we strive to make changes that will allow us, twenty years from now, to look back and say that these changes really did improve the quality of the judiciary – rather than thinking of only short term fixes to immediate problems, we will have a better chance of success. While the ideas that follow are just a few of my own thoughts, they primarily are meant to be discussion starters.<sup>94</sup> Others no doubt will have different and better ideas.

##### A. Structural Reform Requiring Legislative Changes

For starters, I am advocating that the Governor propose, and the General Assembly enact, legislation to create a formal review commission to evaluate suggestions and make recommendations for the reform and improvement of the judicial branch and of the judicial selection process. The committee should be given one year to issue a report with recommendations for changes and draft legislation to implement those changes. What follows are several suggestions for consideration by the proposed Review Commission.

##### 1. Raise Judicial Pay Incrementally at the Superior Court and Supreme Court Levels.

While many citizens believe judicial salaries are high enough already, a National Center for State Courts survey shows that as of June 2009, Rhode Island ranked fifteenth in judicial pay of general trial court judges and nineteenth in pay of Supreme Court justices.<sup>95</sup> It seems clear that higher pay yields a higher caliber of applicants for the positions.<sup>96</sup> The higher pay for federal judges

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94. Unless otherwise stated, I propose all of these changes as prospective changes to apply to new judgeships as openings occur.

95. NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES (2009), available at [http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISO\\_ROOT=/judicial&CISOPTR=288](http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISO_ROOT=/judicial&CISOPTR=288).

96. See *Judicial Security and Independence, Hearing Before the U.S.*

attracts state trial court judges and Supreme Court justices to leave for these positions. We have seen this locally (Judges Torres and Lagueux), and I am familiar with numerous cases in other states where judges have moved from state supreme courts and trial courts to federal district courts and even magistrate and bankruptcy judgeships.<sup>97</sup>

Moreover, one of the disincentives faced by successful attorneys who would make excellent judges is the pay cut required to take the job. I have had many conversations with outstanding attorneys encouraging them to consider applying for either state or federal judgeship openings. Invariably I get two responses: "I don't have any political connections" and "I can't take the pay cut." The pay problem is more acute now than ever before for at least two reasons. First, the gap between high earning attorneys and judges has grown dramatically over the past forty years<sup>98</sup> and college tuition costs have increased over one hundred percent over the same period.<sup>99</sup> Since most lawyers attempt to make the move to the judiciary in their mid-forties to mid-fifties, college expenses are a major concern. Moreover, the federal courts have suffered a

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*Senate Comm. on the Judiciary* (2007) (statement of Associate Justice Anthony M. Kennedy) (stating that low salaries of federal judges posed two primary dangers: (1) "some of the most talented attorneys cannot be persuaded to come to the [federal] bench"; and (2) "some of our most talented and experienced judges are electing to leave it.")

97. It is also true, however, that in the 1990s both federal Magistrate Judges Lovegreen and Martin applied for state court vacancies. Application to Judicial Nominating Commission (on file with JNC). The pay was likely more comparable and other factors (such as the attractiveness of a lifetime appointment) may have been considerations.

98. See generally AM. BAR ASS'N & FED. BAR ASS'N, FEDERAL JUDICIAL PAY EROSION: A REPORT ON THE NEED FOR REFORM (2001). In 2001, partners at major law firms typically received annual compensation over \$500,000 while the annual salary of federal district court judges was \$145,100. *Id.* at 13, 19. Justice Anthony Kennedy testified in 2007 that "[b]etween 1969 and 2006, the real pay of district judges declined by about twenty-five percent," while "[d]uring the same period, the real pay of the average American worker increased by eighteen percent." *Judicial Security and Independence, Hearing Before the U.S. Senate Comm. on the Judiciary* (2007) (statement of Associate Justice Anthony M. Kennedy). See also AM. BAR ASS'N & FED. BAR ASS'N, FEDERAL JUDICIAL PAY EROSION 11 (2001) (noting that from 1969 to 1999, pay for private workers increased 420.6%, while pay for district judges increased 253.1%).

99. AM. BAR ASS'N & FED. BAR ASS'N, FEDERAL JUDICIAL PAY EROSION 9 (2001) (stating that the cost of a college education increased 111.3% from 1969 to 1999).

number of recent resignations for pay reasons<sup>100</sup> and there is a concerted ongoing push to increase federal judges' pay as well.<sup>101</sup>

I do not argue for a commensurate pay increase for the other courts because the specialized nature of family and workers' compensation courts will draw from a bar that makes somewhat less on average in income, so the parity between private practice and the court is likely to be closer. The same is likely true of the district court and the attorneys who comprise the applicant pool for these slots. (I admit, however, that I have not done any research to test this hypothesis, so if it turns out to be incorrect then appropriate adjustments should be made as called for.) Moreover, by limiting increases to Superior and Supreme Courts, the budget impact could be minimized.

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100. In 2007, Utah federal judge Paul Cassell left the bench to rejoin academia, citing concerns over judicial pay as a factor in his decision. Peter Lattman, *Judge Paul Cassell Resigns, Bemoaning Low Judicial Pay*, WALL ST. J. LAW BLOG, Sept. 21, 2007, available at <http://blogs.wsj.com/law/2007/09/21/judge-paul-cassell-resigning/>. In 2006, Judge Michael Lutting resigned from the U.S. Court of Appeals for the Fourth Circuit to take a position at Boeing. Like Casell, Lutting cited money as a factor in his decision to resign, stating that his two children were nearing college age. David Stout, *Judge Who Was Considered for Highest Court Resigns*, N.Y. TIMES, May 10, 2006, available at <http://www.nytimes.com/2006/05/10/washington/11luttigcnd.html?ex=1304913600&en=dc3d28dddadb7af8&ei=5090&partner=rssuserland&emc=rss>. More recently, Judge Stephen Larson resigned from the federal judiciary, also citing concerns regarding judicial compensation and his ability to continue to support his family. Ashby Jones, *With Larson's Resignation, Judicial Pay Back in the News*, WALL ST. J. LAW BLOG, Sept. 17, 2009, available at [http://blogs.wsj.com/law/2009/09/17/with-larsons-resignation-judicial-pay-backinthenews/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+wsj%2Flaw%2Ffeed+%28WSJ.com%3A+Law+Blog%29](http://blogs.wsj.com/law/2009/09/17/with-larsons-resignation-judicial-pay-backinthenews/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj%2Flaw%2Ffeed+%28WSJ.com%3A+Law+Blog%29).

101. See, e.g., *Judicial Security and Independence, Hearing Before the U.S. Senate Comm. on the Judiciary* (2007) (statement of Associate Justice Anthony M. Kennedy).

## 2. Consider Fixed Renewable Terms for Judgeships and Incorporate the Magistrate Judgeships into the Merit Selection Process.<sup>102</sup>

Rhode Island is the only state that provides lifetime appointments for all judicial officers (except Traffic Court judges).<sup>103</sup> Lifetime appointments have real benefits in terms of preserving judicial independence and avoiding the unseemliness and sometimes perverse results of judicial elections. In the federal system, Article III judges, who are those appointed to the court of appeals and the district court, enjoy lifetime tenure.<sup>104</sup> However, there are numerous judges in the federal judicial system who do not have lifetime tenure. Federal magistrate judges serve eight-year renewable terms;<sup>105</sup> federal bankruptcy judges serve fourteen-year renewable terms;<sup>106</sup> numerous Article I (Executive Branch) judges, such as immigration judges and administrative law judges, are hired for specific terms.<sup>107</sup> These are very important and responsible positions where the judges, in some cases, are doing work equivalent to that of an Article III judge. This model works because the positions work below the Article III level, so the need for the independence provided by lifetime tenure is not present. Nevertheless, these positions can be, and frequently are, career positions because renewal is the norm for a well performing judge. (For example, Judge Arthur Votolato in Rhode Island is the longest serving bankruptcy judge in the

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102. See generally Katie Mulvaney, *Selection of Magistrates Overhaul Sought*, PROVIDENCE J., Jan. 19, 2010, at A5 (discussing bill sponsored by Rep. Donna Walsh that would incorporate magistrate judges into the merit selection process).

103. American Judicature Society, *Judicial Selection in the States, Methods of Judicial Selection*, available at [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state). Some states, such as Massachusetts and New Hampshire, provide appointment to a specific age, typically 70. *Id.*

104. Federal Judicial Center, *How the Federal Courts Are Organized: Federal Judges and How They Get Appointed*, <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/183> (last visited May 24, 2010).

105. *Id.*

106. *Id.*

107. See Federal Judicial Center, *Federal Courts Outside the Judicial Branch*, [http://www.fjc.gov/history/home.nsf/page/courts\\_special\\_fcotj.html](http://www.fjc.gov/history/home.nsf/page/courts_special_fcotj.html) (last visited May 24, 2010).



United States, having served in that position for over forty years.<sup>108</sup>) The model of fixed renewable terms could be adopted for the Rhode Island judiciary at all levels below the Supreme Court. This proposal would not only increase the quality of applicants at the outset, but would ensure ongoing quality performance, an issue that the current system does not address at all. Fixed terms also would provide some predictability about when judgeships may open up, which in turn might allow attorneys thinking about potentially applying to plan accordingly. An attorney who may be in his mid- to late-fifties could see the opportunity of a ten-year stint as a trial judge as a very nice way to finish his career and use his experience for the betterment of the system.<sup>109</sup>

The proposal has merit as well because lifetime tenure is not required to ensure independence for any of the lower courts. I would, however, keep lifetime tenure for the Supreme Court for two reasons. First, as the court of last resort, it is important to preserve maximum independence. Second, given the proposal below to make the Court the re-appointing authority for judges seeking to renew their terms, the Court should be insulated from any outside pressure from the other branches.

The fixed term proposal also allows for an enhanced role for the JNC. The JNC could be charged with conducting a performance review and analysis of judges beginning one year prior to the renewal date. The JNC could be given the task of issuing a recommendation of “renew” or “not renew” to the reappointing authority, which, I would argue, should be the Supreme Court. Combining this process with a system of ongoing performance evaluation, similar to what is done at the federal level, would allow the reappointing authority to urge non-highly performing judges to consider not reapplying. In this respect the JNC would also act as a counter force or check on any possible bias based on personal animosity or political views by the Supreme Court against a judge up for renewal. Finally, renewable terms would act as a check against those whose

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108. See David McPherson, *Judge Expects Bankruptcy Filings to Pile Up*, PROVIDENCE J., Mar. 20, 2005, at F1.

109. This proposal could also have the effect of increasing the age and the experience of applicants, and decreasing the pension costs for judges. However, this proposition requires further research.

performance becomes poor because of laziness, boredom or otherwise. Knowing that performance is being reviewed on an ongoing basis, and formally at renewal, will incentivize better performance.

### 3. Establish Intermediate Appellate Panels.

This proposal is modeled on the Bankruptcy Appeal Panels (BAP) in the federal system and the workers' compensation court appeals panels in the Rhode Island Worker's Compensation Court. Appeal panels could be composed of two superior court judges and one judge from either the Family or Worker's Compensation Court. The panels could hear cases diverted by the Supreme Court, and appeals could be taken by certiorari to the Supreme Court. This proposal would have several benefits at virtually no cost. First, it could broaden the experience of participating Family and Worker's Compensation Court judges, which could make them more attractive candidates for the Superior or Supreme Courts. Further, because eighty percent of appeals to the Supreme Court currently come from the Superior Court, applicants to the Supreme Court from the Family and Workers' Compensation Courts are at an experience disadvantage. There could be some very qualified judges on these courts who would make fine Supreme Court justices if given the opportunity to broaden their skills and experience. Second, it would allow participating judges to develop and broaden their writing skills, which in turn would improve analytic skills and serve as a platform to showcase abilities that might not otherwise be allowed to shine.<sup>110</sup> Third, these panels would lighten the load of the Supreme Court allowing for more time for Supreme Court justices to write on the more complicated cases that come before them. Finally, the overall production of opinions between the Supreme Court and the intermediate appellate panels would be greater than what the Supreme Court currently produces, allowing for more development of the common law. These appellate panels could be used as needed by the Supreme Court; thus, if the caseload would

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110. I know my own experience sitting with the First Circuit Court of Appeals by designation (and authoring eleven opinions for the Court) made me an attractive candidate to the White House for the Court and assisted the ABA evaluators in analyzing my qualifications.

not justify their utilization, there would be no obligation to do so, and in any event, no cost either way.

4. Increase the Court's Budget to Allow for "Elbow" Law Clerks<sup>111</sup> for All Superior Court Judges and Clerk Pools in the Family and Worker's Compensation Courts.

If writing opinions is valued along with the thoroughness of research (as I think it should be), then law clerks are essential. Judges at all levels have simply too many pressing tasks to allow for the kind of thoughtful, reflective analysis needed to regularly write substantial opinions from scratch. We should encourage more expository opinion writing by judges; to do this, judges need elbow law clerks to assist them. Moreover, elbow law clerks serve another critical function as sounding boards for judges. This too is a critical need in a position where frequently there is no one to bounce ideas off. I believe, based on my own experience, that a judge's analytic process is enhanced by access to an elbow clerk, who is generally a young attorney of great ability and enthusiasm who can act as a judge's researcher, drafter, sounding board and gut checker.

There is another critically important reason to consider this suggestion. Law clerk positions allow for mentoring, which is critical to building the bench for the long term. If we are going to take seriously the idea of building a quality judiciary for the long term, we must embrace mentoring as one of the most important keys to success.

5. Restore Term Limits to JNC Members.

In his paper, Mr. Marion describes the problem of JNC members serving long past their appointed terms.<sup>112</sup> This process could be fixed by a simple amendment to the statute that provides that if a slot is not filled by the nominating authority, the appointment reverts to a different default authority, such as the Chief Justice of the Rhode Island Supreme Court or the Governor. The possibility of losing the right to choose a JNC member should serve as sufficient incentive to eliminate this problem.

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111. Elbow law clerks work in chambers, one-on-one with a specific judge, not as part of a clerk pool.

112. Marion, *supra* note 19, at 745-46.

6. Repeal the “Look Back” Provision.

The five-year look back provision<sup>113</sup> was viewed as a reform needed to decrease repeat applications and the log jams associated with them, and to increase the Governor’s flexibility in selecting nominees. The provision was well intentioned, but has had several unintended consequences. One result has been a decrease in the number of applicants for each new judicial position; another is an increasingly large pool from which the Governor may nominate. As the pool increases in size and the number of new applicants decreases, the quality control effect of the JNC is reduced as it pumps more and more aspirants into the pool.

7. Consider Restructuring the Appointing Authorities for JNC Members.

The current system includes significant legislative control over JNC appointments. The Commission I propose should consider proposals to restore this power to the Governor (with possible Senate confirmation). Further, while I am not endorsing this suggestion, another consideration is to include a Judicial Officer (the Chief Justice or his/her designee) on the Commission. The involvement of a Justice in the process could serve to better inform the Commission regarding the qualifications of nominees and requirements of the position. (The question of whether the presence of the Chief Justice would cause attorney members to be less frank however, must also be considered.)

8. Create an ABA-like Review Commission to Make Recommendations to the JNC.

Above I describe the role of the ABA Standing Committee on the federal judiciary in the federal court nomination and confirmation process. I believe a similar process could and should be created for state court judgeships. There are several ways this could be accomplished. One possibility is to task the obligation to the Rhode Island Bar Association, and particularly to the bench/bar committee for the court in which the opening exists. This may be problematic however because of the closeness of the bar of each court. A second possibility is to create a standing committee of eminent members of the bar much like the ABA

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113. R.I. GEN. LAWS § 8-16.1-6(a)(4) (to be repealed effective Jun. 30, 2010).

Standing Committee on the federal judiciary with a defined geographic and practice-based diversity. Appointment could come from either the bar or the Supreme Court. A third option would be to give the task to the Judicial Tenure and Discipline Commission, which is comprised of highly regarded judges and attorneys. Whichever vehicle is chosen, one member could be given the role of investigator and the full Commission could vote, just as with the ABA Standing Committee. The model of the ABA Standing Committee, and the procedures it utilizes, is well tested. It could work for the Rhode Island judiciary just as it does (most of the time) for the federal judiciary.

#### B. Other Reforms

As noted above, review of the applicant data for the past fifteen years appears to indicate the number and quality of applicants has declined. (I acknowledge that this is a purely subjective observation, but I know it is shared by many observers.) If both of these facts are true, however, it is a cause for concern, and it should be the subject of investigation.

Whatever the cause, there may be things that the JNC could do now to improve the applicant pool. These initiatives would not require new legislation, but could be implemented immediately by the Commission. There also may be initiatives that the JNC, the bar, and Roger Williams University Law School could undertake to invest for the future of the Judiciary. For what they are worth, here are several suggestions:

1. Take the JNC Formal Process out to the Legal Community.

The JNC process is mysterious to many, even in the bar. The current Chairman of the JNC, Dr. Herbert Brennan, has suggested that the JNC engage the legal community by taking its proceedings out of the Government office building, and into the community. For example, meetings could be scheduled at Roger Williams University School of Law, or at town halls around the state. Taking the process to the public and to the bar will serve to open up the process and de-mystify it.

2. Engage the Bar in an Informational Meeting at the Annual Bar Association Meeting.

Another suggestion of Dr. Brennan, and his predecessor, Stephen Carlotti, is for the JNC to be part of a moderated session at the annual Bar Association meeting to inform members informally (and on their own "turf") about the JNC process and what the individual members of the commission look for in candidates. This session could include former members of the commission as well as judges who have been through the process.

The above outlined suggestions for reform are intended to spur discussion and debate. I am sure other, even better, proposals are out there, and all ideas should be considered. A well constituted Commission with appropriate resources and time would be able to sort through the various suggestions and produce a legislative proposal for the future of the courts which could make Rhode Island a national model.

#### CONCLUSION

Fifteen years of judicial merit selection has helped to improve the Rhode Island judiciary. There is much more that can be done, especially if we are willing to embrace the challenge and think creatively. This Symposium should be a starting point for, not an end to, the discussion.