

May 6, 2020

Jason Gramitt
Executive Director
R.I. Ethics Commission
40 Fountain Street
Providence, RI 02903

Re: Senator Erin Lynch Prata's Advisory Opinion

Dear Mr. Gramitt

Please accept these comments regarding State Senator Erin Lynch Prata's request for an advisory opinion related to her application to be a Rhode Island Supreme Court Justice. Neither R.I. Gen. Laws § 36-14-5 nor Ethics Commission Regulation 1.52 (36-14-5007) permit legislators to seek or be appointed to the Supreme Court until one year after he or she has left office. The exception to the revolving door prohibition in R.I. Gen. Laws § 36-14-5(o)(4) regarding "a state elected official ... seeking or being elected for any other constitutional office" does not apply to an appointment to be a Justice of the Rhode Island Supreme Court. Justices of the Rhode Island Supreme Court are not elected by the public and since 1994 they are no longer elected by the Grand Committee (the term for the Senate and House meeting as one body and voting jointly). Instead, under R.I. Const. Art. X, § 4, Supreme Court Justices are nominated by the Governor, from a list submitted by the Judicial Nominating Commission, and then confirmed by a vote of the Senate and House of Representatives, separately. Furthermore, the judicial merit selection amendment in R.I. Const. Art. X, § 4 is consistent with, and complements the revolving door prohibitions related to legislators seeking judicial appointments. Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5(n) and (o), and R.I. Const. Art. X, § 4 were all adopted at about the same time for the purpose of reducing the participation and influence of sitting legislators in the judicial selection process.

Lynch Prata's interpretation is inconsistent with the language of Regulation 1.52 (36-14-5007), R.I.G.L. § 36-14-5 (n) and (o) and Art. X, § 4. It completely ignores the history leading to and surrounding the adoption of Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5(n) and (o), and R.I. Const. Art. X, § 4. It is entirely inconsistent with how these legal provisions have been followed since their adoption about a quarter century ago. The Ethics Commission should interpret Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5(n) and (o), and R.I. Const. Art. X, § 4 in a harmonious manner rather than in way which would invalidate either Regulation 1.52 (36-14-5007) or R.I. Gen Laws § 36-14-5. Lastly, if Lynch Prata's interpretation is adopted, it will represent, at least, a partial return to the embarrassing judicial selection politics of an earlier era and may lead to further undermining of the revolving door ban for other judicial appointments in the future.

Justice Oliver Wendell Holmes Jr. once declared that in interpreting the law, "a page of history is worth a volume of logic."¹ The Rhode Island Supreme Court has cited Holmes's quote and interpreted constitutional provisions and laws by using "extrinsic sources" and looking to the "history of the times" and "the state of affairs as they existed" when the laws and constitutional

¹ New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

provisions were “framed and adopted.”² Likewise, when interpreting Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5, and R.I. Const. Art. X, § 4, it is necessary for this Commission to examine the historical events that surrounded and led to their adoption. For ten years from 1985 to 1994, Rhode Island was engulfed in a series of scandals related to Rhode Island Housing and Mortgage Corporation (RIHMFC), the Rhode Island Share and Deposit Indemnity Corporation (RISDIC), two Rhode Island Supreme Court Chief Justices Joseph Bevilacqua and Thomas Fay, Governor Edward DiPrete, and numerous pension abuses. The unethical conduct exposed by these scandals wrecked the state’s economy, cost taxpayers millions, and ruined public trust in government, including in the court system. Regulation 1.52 (36-14-5007), R.I. Gen. Laws § 36-14-5, and R.I. Const. Art. X, § 4 were reform minded responses to these scandals.

The 1986 Constitutional Amendments: Ethics and Judicial Merit Selection

In 1985, it was revealed that RIHMFC had granted low-interest mortgages to politically connected individuals while its Executive Director, Ralph Pari embezzled funds.³ In 1986, Rhode Island’s Chief Justice Joseph Bevilacqua resigned under the threat of impeachment pertaining to Bevilacqua’s connections to organized crime.⁴ In response to these scandals, a state constitutional convention proposed two constitutional amendments. One amendment created the Rhode Island Ethics Commission and gave it authority to adopt an ethics code. It was approved by the voters.⁵ A second amendment created a commission to nominate judges, but continued to allow Supreme Court justices to be elected by the Grand Committee. (At the time, Supreme Court judges were elected by the Grand Committee and lower court judges were nominated by the Governor with the consent of the Senate.) This amendment was rejected by the voters largely due to public mistrust over the General Assembly’s role in the selection of judges.⁶

The Adoption of and Challenge to Revolving Door Regulation

In 1991, after the RISDIC debacle, other scandals, and the failure of the General Assembly to adopt a revolving door ban, Commissioner Mel Topf urged the Ethics Commission to utilize its constitutional authority to adopt a regulation prohibiting state legislators from seeking or accepting state jobs, including judgeships, while they served in the General Assembly and for a year after they left office.⁷ In November 1991, despite opposition from House Speaker Joseph DeAngelis, Senate Majority Leader John Bevilacqua, and Governor Bruce Sundlun, but with support from Alan Flink, the President of the Rhode Island Bar Association, the Ethics Commission adopted Regulation 36-14-5007, the revolving door ban on legislators.⁸

In that same month, Governor Bruce Sundlun requested an advisory opinion from the R.I. Supreme Court as to whether the Ethics Commission had substantive legislative authority over

² Kass v. Retirement Board of the Employees’ Retirement System, 567 A.2d 358, 360 (R.I. 1989); City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995).

³ H. Philip West Jr, Secrets & Scandals, at 1-2 (2014).

⁴ Id., at 1, 3. In 1976, as the sitting House Speaker, Bevilacqua engineered his election by the Grand Committee to the Supreme Court.

⁵ Id., at 4-5, 7; see R.I. Const. Art. III, §§7 8; In Re: Advisory Opinion to the Governor (Ethics Commission), 612 A.2d 1, 2-3 (R.I. 1992).

⁶ Id., at 3, 7. John Marion, “Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island,” Roger Williams U. L. Rev, vol. 15, Issue 3, at 737-738 (2010); Alan Flink, “Rhode Island’s Judicial Merit Selection Process Merits Improvement: Response,” Roger Williams U. L. Rev, vol. 15, Issue 3, at 729 (2010).

⁷ West, Secrets & Scandals, at 82-83.

⁸ Id. at 84-89.

ethics. On June 10, 1992, the Supreme Court issued its advisory opinion. The Supreme Court first noted that the “years preceding the 1986 constitutional convention were marked by scandal and corruption at all levels of government” which “decimated the public’s trust in government.”⁹ The Supreme Court then declared that the state constitution gave “the commission the limited and concurrent power to enact substantive ethics laws” and that “the General Assembly is merely limited to enacting laws that are not inconsistent with, or contradictory to, the code of ethics adopted by the commission.”¹⁰

The Adoption of the Revolving Door Law and a Supreme Court Vacancy

While awaiting the Supreme Court’s advisory opinion on the Ethics Commission revolving door regulation, the House of Representatives moved forward with revolving door legislation. In March 1992, the House Judiciary Committee recommended revolving door legislation, but it exempted judgeship positions from the revolving door ban.¹¹ On May 19, 1992, the House of Representatives passed revolving door ban legislation, but a floor amendment to include judgeships in the ban was defeated by a 39-52 vote.¹² To help win passage of the revolving door bill, on the same day, the House passed a measure creating a screening panel for judgeships.¹³

State House political calculations dramatically changed after June 10, 1992 when the Supreme Court ruled that the Ethics Commission had the authority to adopt substantive ethics regulations such as Regulation 36-14-5007. On June 26, 1992, the Senate passed multiple revolving door bills, including S-2762, which was a comprehensive revolving door ban which applied to legislators seeking judgeships.¹⁴ On July 9, 1992, the House responded by passing revolving ban legislation, H-8542, which in “most respects” were “identical” to the Senate revolving door bill, S-2762, that prohibited legislators from seeking judgeships. However, the newly revised House bill exempted Sundlun’s two pending judicial nominees and did permit elected officials to seek and be elected to any constitutional office in what was codified as R.I. Gen. Laws § 36-14-5(o).¹⁵ House Judiciary Chairman Jeffry Teitz, who worked on the legislation, explained to Phil West, the lobbyist for Common Cause, that “election to a constitutional office is an entirely reasonable exemption” because the “notion of getting a job through election is categorically different from a revolving door appointment.”¹⁶ The Senate subsequently passed this legislation without modification.¹⁷

But the controversy was not over. A few days later, Supreme Court Justice Thomas Kelleher announced he was retiring. Teitz now interpreted the exemption to the revolving door law in R.I. Gen. Laws § 36-14-5(o) as permitting sitting legislators to be Supreme Court justices because Supreme Court justices are elected by the Grand Committee.¹⁸ The Senate Judiciary Chairman Thomas Lynch said it was “an open question” while Senate Majority Leader Bevilacqua

⁹ In Re: Advisory Opinion to the Governor (Ethics Commission), 612 A.2d at 11.

¹⁰ Id., at 14.

¹¹ “House panel Oks 3 government ethics bills” ProJo (4/10/1992).

¹² “House approves revolving-door jobs prohibition 75-18 sends bill to Senate” ProJo (5/20/1992).

¹³ Id.

¹⁴ “Senate sends 4 revolving-door bills to House” ProJo (6/27/1992).

¹⁵ “House panel Oks stringent revolving-door bill” ProJo (7/9/1992); “House Oks revolving-door ban” ProJo (7/10/1992).

¹⁶ West, Secrets & Scandals, at 171.

¹⁷ “Senate panel Oks strong revolving-door legislation ProJo (7/11/1992); Assembly finally hits finish line” ProJo (7/14/1992); West, Secrets & Scandals, at 178.

¹⁸ “Law may permit legislator to become judge” ProJo (7/20/1992).

declared that even if it was legal it would be inappropriate for a sitting legislator to go to the Supreme Court because “it would fly in the face of the ethics reform everyone just supported.”¹⁹ Also, Ethics Commissioner Topf asserted the authority of the Ethics Commission and threatened to file a complaint against any legislator who sought the judgeship.²⁰ Despite Teitz’s interpretation, in spring of 1993, at the Grand Committee meeting, no one was nominated or elected to fill the Supreme Court vacancy who was either a sitting legislator or had been a member of the General Assembly within the past year.²¹

The Court interprets the Revolving Door Law and Revolving Door Regulation

While the revolving door prohibition was being adhered to in the election of new Supreme Court Justice, the legality of R.I. Gen. Laws § 36-14-5(n) and (o) as well as Regulation 36-14-5007 were being challenged at the Supreme Court. Although Governor Sundlun had signed the revolving door legislation, after he was reelected he challenged its legality along with the Ethics Commission revolving door regulation.²² On November 15, 1993, the Supreme Court issued an advisory opinion indicating that the “revolving-door legislation addresses the imbroglio of public officials who use their present positions and contacts as unfair bargaining tactics in gaining future employment.”²³ The Court determined that R.I. Gen. Laws § 36-14-5(n) and (o) as well as Regulation 36-14-5007 were valid. The Court stated that although R.I. Gen. Laws § 36-14-5(n) and (o) were “less constrictive than the regulations,” they “are not inconsistent.”²⁴ The Court expressed a preference “to interpret statutes that relate to the same subject matter so that each may be given its full effect.”²⁵ The Court determined that “the statute and the regulations are not inconsistent but are compatible.”²⁶

The Court went onto interpret the “specific exclusion for seeking election to state constitutional office” in R.I. Gen. Laws § 36-14-5(o).²⁷ The Court decided to construe the statute consistently and harmoniously with how the Ethics Commission had interpreted Regulation 36-14-5007. The Court noted that the Ethics Commission interpreted Regulation 36-14-5007 to permit “public officials to seek elective office” which is subject to a “popular vote” and then cited cases related to “ballot access.”²⁸ The Court concluded that “public positions to which the revolving-door legislation applies are appointed positions or are positions elected from a state or a municipal governing body. They are not positions that are elected by the general electorate.”²⁹ The Court had the opportunity to interpret R.I. Gen. Laws §36-14-5(o) as permitting sitting legislators to seek to be elected by the Grand Committee to the office of a Supreme Court Justice, but it did not. Instead, the Court limited the exclusion in R.I. Gen. Laws § 36-14-5(o) to “positions that are elected by the general electorate,” and even stated that the revolving door ban applied to “positions elected from a state … governing body.” At the time of this decision, the entire Supreme Court membership was composed of individuals who were former legislators who had been

¹⁹ Id.

²⁰ Id.

²¹ West, Secrets & Scandals, at 241-244; R.I. House Journal (4/29/1993).

²² Id., at 198-200.

²³ In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d 664, 671(R.I. 1993).

²⁴ Id., at 669.

²⁵ Id.

²⁶ Id.

²⁷ Id., at 670, 676.

²⁸ Id., at 670.

²⁹ Id.

selected through the Grand Committee process, and none of them decided the process they went through was covered by the exclusion in R.I. Gen. Laws § 36-14-5(o).

The Fay Scandal and Judicial Merit Selection Amendment

In Rhode Island history, the pace of government reform is usually set by the speed at which scandalous behavior is exposed. While the Supreme Court was interpreting ethics laws, the Supreme Court was also being rocked by an ethics scandal. In July 1993, a scandal involving Chief Justice Thomas Fay and Matthew Smith, a top court administrator was revealed. In 1978, Fay had gone from being Chairman of House Judiciary directly to a judgeship in the Family Court. In 1986, House Speaker Matthew Smith helped Fay get elected by the Grand Committee to the position of Chief Justice of the Supreme Court. Subsequently, Fay appointed Smith to a top administrative post in the courts. The Providence Journal exposed how Fay and Smith had used their offices to benefit themselves, their business associates, and their political cronies.³⁰ Some of their activities were criminal. Smith resigned his position in August 1993, and in October 1993, Fay resigned under the threat of impeachment.³¹

This scandal led to the adoption of a merit-based judicial selection amendment to the state constitution.³² Along with the formation of a commission to create a list of potential judicial nominees from whom the Governor could choose, it eliminated the role of the Grand Committee for election of Supreme Court Justices. This change further reduced the role of legislators in the selection of judges. The elimination of the Grand Committee's role was strongly opposed by the leadership of the House. At one point, the House wanted the confirmation to be done by the House and Senate meeting as one body as in the Grand Committee.³³ Eventually, the House accepted that, for Supreme Court justices, the Senate and House would each be given the power confirm a nominee separately. For all other judges, it would only be Senate confirmation. In November 1994, the amendment for judicial merit selection was overwhelmingly approved by the voters.³⁴ Once the election by the Grand Committee was eliminated from the process for selecting Supreme Court nominees, any possible interpretation that R.I. Gen. Laws § 36-14-5(o) permitted sitting legislators to seek to be "elected" by the Supreme Court was closed.

Judicial Selection complying with the Revolving Door Prohibition

With both the revolving door prohibition and merit selection process in place, there have been eight vacancies on the Rhode Island Supreme Court. None of them have been filled by a sitting state legislator or one who had been out of office for less than one year. Also, there appears to be no record of any sitting legislator or one who had been out of office for less than one year being interviewed for a Supreme Court vacancy by the Judicial Nominating Commission. During that time period, there undoubtedly have been powerful legislators with judicial aspirations, but when Supreme Court vacancies arose, apparently, none of them decided that R.I. Gen. Laws § 36-14-5(o) allowed them to seek the position.³⁵ It does not appear that any sitting legislator has even

³⁰ West, Secrets & Scandals, at 257-262.

³¹ Id., at 259, 262.

³² Id., at 275, 278-279, 285-287, 290; John Marion, "Judging How We Pick Judges: Fifteen Years of Merit Selection in Rhode Island, Roger Williams U. L. Rev, vol. 15, Issue 3, at 739-740.

³³ West, Secrets & Scandals, at 278-279, 285.

³⁴ Id., at 681. see R.I. Const. Art. IV, §4.

³⁵ For example, in 2004, a vacancy on the Supreme Court arose but Senate President Joseph Montalbano did not seek the position. Currently, Montalbano is a justice of the Superior Court, and complied with the revolving door requirements to obtain his current position.

requested an advisory opinion from the Commission as to whether he or she could seek a judgeship during this entire time period. For a quarter-century, spanning eight Supreme Court vacancies, and numerous attorneys in the General Assembly leadership, no sitting legislator attempted to ignore the revolving door ban and seek a Supreme Court judgeship. The behavior of an entire generation of legislators in relation to judicial vacancies suggest that the adoption of the revolving door regulation in 1991, the revolving door law in 1992, with the approval of the merit selection amendment in 1994, closed the legal ability of any sitting legislator to seek any judicial vacancy.

R.I. Gen. Laws § 36-14-5(o)(4) does not apply to Supreme Court vacancies

Lynch Prata's main legal argument is that Supreme Court justice vacancies are encompassed by R.I. Gen. Laws § 36-14-5(o)(4), which exempts from the revolving door ban "a state elected official ... seeking or being elected for any other constitutional office." In 1992, right after the passage of the revolving door law, there was a difference of opinion among lawmakers as to whether R.I. Gen. Laws § 36-14-5(o)(4) encompassed Supreme Court vacancies. But, in 1993, the Supreme Court interpreted R.I. Gen. Laws § 36-14-5(o) consistently with how the Ethics Commission interpreted Regulation 36-14-5007, which only exempted legislators from the revolving door ban for an office elected by the public.³⁶ The Court concluded that "public positions to which the revolving-door legislation applies are appointed positions or are positions elected from a state ... governing body. They are not positions that are elected by the general electorate."³⁷ The Court made no exception for Supreme Court vacancies elected by the Grand Committee. Lastly, a constitutional amendment in 1994, approved by the voters, eliminated the election of Supreme Court justices by the Grand Committee entirely. Now, Supreme Court justices are nominated by the Governor, from a list provided by the Judicial Nominating Commission, and confirmed by the Senate and House, separately. Therefore, the language in R.I. Gen. Laws § 36-14-5(o) cannot be construed in any way as applying to Supreme Court vacancies because Supreme Court nominees are not elected by anyone, neither the public nor the Grand Committee.

Lynch Prata has argued in her request for an advisory opinion, that a Supreme Court justice is a "constitutional office." This is irrelevant and dangerous. Even if the office of a Supreme Court justice is a constitutional office, it is still not an office to which someone is elected, and therefore, R.I. Gen. Laws § 36-14-5(o)(4) does not apply. Furthermore, the Supreme Court has used the term "constitutional office" nine times in its opinions, and seven times, the reference was to a general officer elected statewide such as Attorney general or Lieutenant Governor.³⁸ In 1993, the Supreme Court mentioned the term "constitutional office" as used in R.I. Gen. Laws § 36-14-5(o) and went on to interpret R.I. Gen. Laws § 36-14-5(o) as only applying to an office elected by the general electorate.³⁹

The other case was Gorham v. Robinson, which is cited by Lynch Prata. In Gorham v. Robinson, there is a passing reference to "constitutional office" but it comes when discussing the decision of another state court.⁴⁰ The focus in Gorham was whether district courts were

³⁶ In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d at 670.

³⁷ Id.

³⁸ See e.g. State v. State Troopers Assn., 187 A.3rd 1087, 1100 (R.I. 2018); State v. Lead Industries Assn., Inc., 951 A.2d 428, 470 (R.I. 2008); and In Re: Advisory Opinion to the Governor (Lieutenant Governor Vacancy) 688 A.2d 288, 290 (R.I. 1997).

³⁹ In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d, at 670.

⁴⁰ 186 A. 832, 846 (1936).

“constitutional courts.”⁴¹ The majority decided that “our districts courts are constitutional courts … but the judges of those courts are not protected in their compensation and tenure as are the judges of the Supreme Court.”⁴² Meanwhile, the dissenters asserted that district courts “are constitutional courts because they are ordained and established by the General Assembly with constitutional sanction.”⁴³ If the Ethics Commission decided that a judgeship in a “constitutional court” like the Supreme Court is a constitutional office covered by R.I. Gen. Laws § 36-14-5(o), despite the fact that it is not an office to which someone is elected, there is a danger that vacancies for other courts could also be deemed to be “constitutional offices” since these courts are expressly mentioned in Art. X, § 4 and expressly permitted by Art. X, §§ 1, 2. Other sitting legislators could claim that judgeships in these lower courts are constitutional offices since these courts are “constitutional courts” and then seek an appointment to a lower court judgeship. This is one example of how Lynch Prata’s interpretation, if taken to its logical conclusion, could erode both the ethics code and laws covering judicial vacancies that have been followed for the last quarter century.

The Inman decision is not applicable

Lynch Prata argues that Superior Court decision in *Inman v. Whitehouse*⁴⁴ indicates that her appointment to the Supreme Court is not prohibited by the revolving door ban. This is incorrect. In *Inman*, a Superior Court judge determined that Edward Inman, a sitting legislator, could be elected by the Grand Committee to fill the vacancy in the office of Secretary of State because Regulation 36-14-5007⁴⁵ could not trump R.I. Const. Art. IV, § 4, which permits the Grand Committee to elect someone to fill a vacancy in the office of secretary of state. The facts of this case are very different. Inman was elected by the Grand Committee to a vacancy in a general officer position. A vacancy to the Supreme Court is not filled by election by the Grand Committee. Instead, it is an appointment. The Governor nominates an individual who must be confirmed with the consent of the Senate and House. A vacancy in the office of Secretary of State, an elected position, and in a vacancy in the Supreme Court, a lifetime appointed position, are filled in two very different ways under the state constitution.

R.I. Const. Art. IV, § 4 which allows the Grand Committee to fill vacancies in the offices of Secretary of State, Attorney General and General Treasurer was adopted in 1900; well before the creation of Ethics Commission in 1986, its adoption of Regulation 36-14-5007 in 1991, and the revolving door law R.I. Gen. Laws § 36-14-5(n) and (o) in 1992. Therefore, a Superior Court judge could have assumed that the constitutional provision and the Ethics Commission regulation were somehow in conflict. However, that is not the case with merit selection amendment, Art. X, §4. The merit selection process in Art. X, § 4, which covers all judges, including Supreme Court judges, was adopted in 1994, soon after the adoption of the Regulation 36-14-5007 and the revolving door law R.I. Gen. Laws § 36-14-5(n) and (o). In fact, a review of history would show that the adoption of revolving door prohibitions and merit selection of judges was part of the same

⁴¹ Id. In *Gorham*, the dispute was whether district court judges who had a six-year term could have their terms terminated after three years. The majority determined they could be terminated after three years. The majority determined they could be terminated after three years. The dissenters believed the judges could not be terminated prior to the end of their six-year term.

⁴² Id., at 850.

⁴³ Id., at 864 (Capotosto dissenting).

⁴⁴ *Inman v. Whitehouse*, No. 01-1256 (R.I. Superior Court 1/17/2001)

⁴⁵ Strangely, there was no discussion or interpretation of R.I.G.L. §36-14-5(n) or (o) in the *Inman* decision.

reform movement that swept Rhode Island in the early 1990s. A goal of the revolving door prohibitions and the merit selection amendment was the same: to minimize the participation and influence of legislators in the judicial selection process.

Art. X, § 4 did not invalidate revolving door prohibitions in law or regulation

Lynch Prata argues that Art. X, § 4 is a “constitutionally authorized procedure” and therefore, her appointment is not subject to the revolving door prohibition. Essentially, Lynch Prata is arguing because the judicial merit selection amendment in Art. X, § 4 is a “constitutionally authorized procedure,” it invalidates laws or regulations that restrict in anyway a gubernatorial appointment made through that process. This is an erroneous and dangerous argument. Reasonable limitations can be placed on a governor’s constitutional appointment authority. For example, in 2004, the voters approved a variety of constitutional amendments to establish separation of powers. One of those amendments expanded the governor’s appointment powers under Art. IX, § 5. However, the House of Representatives argued that General Assembly still had the authority to require legislators to be appointed to the Coastal Resources Management Council (CRMC). The Supreme Court rejected this argument, but indicated that the General Assembly could still place limitations on a governor’s ability to appoint members to the CRMC. Specifically, the Court noted that because the General Assembly has the authority to pass laws pertaining to natural resources it could pass laws to “provide specific criteria with respect to CRMC membership composition and qualifications.”⁴⁶ If, after the separation of powers, the General Assembly still has the constitutional authority to place restrictions on who can be appointed to the CRMC, then the General Assembly and the Ethics Commission certainly still have the constitutional authority to impose revolving door ethics restrictions on sitting legislators becoming judges after the adoption of the judicial merit selection amendment.

Reasonable statutory restrictions can also be placed on appointments to bodies expressly mentioned in the state constitution like the Supreme Court. For example, Art. X, § 4 does not state that Supreme Court nominees must be attorneys. But, R.I. Gen. Laws § 8-16.1-4(a) requires that a nominee be an attorney licensed in Rhode Island and a “current member of the Rhode Island bar association in good standing.” Also, R.I. Gen. Laws § 8-16.1-2(c) prohibits any members of the Judicial Nominating Commission from being “eligible for appointment to a state judicial office during the period of time he or she is a commission member and for a period of one year thereafter.” Furthermore, under R.I. Gen. Laws § 8-16.1-5(g) Supreme Court nominees are investigated to determine their “compliance with the provisions of chapter 14 of title 36,” the Code of Ethics. Therefore, there exists various reasonable ethical restrictions on those seeking to be appointed to the Supreme Court. If a one-year revolving door prohibition on Judicial Nominating Commission members seeking a judicial appointment is permissible so should a one-year revolving door prohibition on legislators seeking a judicial appointment.⁴⁷

⁴⁶ In Re: Advisory Opinion from the House of Representatives (CRMC), 961 A.2d 930, 943 (R.I. 2008).

⁴⁷ There are restrictions on the appointments to other bodies specifically mentioned in the state constitution. For example, the Ethics Commission is specifically mentioned in Art. III, § 8 and there are restrictions on being appointed to this body in R.I. Gen. Laws § 36-14-8. Specifically, there is a prohibition on the appointment of anyone who “held elective public office or have been a candidate for elective public office for a one year period prior to appointment.” The Judicial Nominating Commission is specifically mentioned in Art. X, § 4, and there are restrictions on being appointed to this body in R.I. Gen. Laws § 8-16.1-2. Specifically, a member cannot be a “legislator, judge, or elected official, or be a candidate for any public office, or hold any compensated … public office or elected office in a political party during his or her tenure or for a period of one year prior to appointment.”

When the Supreme Court interprets different constitutional provisions and laws, they attempt to harmonize them.⁴⁸ For example, the Supreme Court has already determined that Regulation 36-14-5007 and R.I. Gen. Laws § 36-14-5(n) and (o) should be interpreted harmoniously.⁴⁹ The Supreme Court has noted that “repeals by implication are disfavored by the law.”⁵⁰ Furthermore, the Court has indicated that a law cannot be deemed unconstitutional unless it can be shown beyond a reasonable doubt that it violates a specific constitutional provision.⁵¹ Also, in interpreting constitutional provisions and laws, the Supreme Court does use “extrinsic sources” and looks to the “history of the times” and “the state of affairs as they existed” when the laws and constitutional provisions were “framed and adopted.”⁵² From the language of the merit selection amendment, it is clear that it did not either explicitly or implicitly limit or repeal to the revolving door prohibitions in law. The merit selection amendment was not adopted to invalidate revolving door ban on legislators becoming judges. It was designed to complement it. The “primary motivation for the switch to merit selection” was “reducing the influence of the General Assembly on the judiciary.”⁵³

The intent behind both the revolving door ban and merit selection was to reduce the participation and involvement of sitting legislators in the judicial selection process. In 1986, voters rejected a merit selection amendment primarily because it allowed the Grand Committee to elect Supreme Court justices. Eight years later, in 1994, they voted for a merit selection amendment after it reduced the influence of legislators in the judicial selection process by eliminating the role of the Grand Committee. In 1994, the public did not vote in favor of the merit selection amendment because they wanted to invalidate the revolving door prohibition directed at legislators. Instead, they voted for it because they wanted to reduce the ability of legislators to insert themselves in the judicial selection process.

The Ethics Commission has never indicated that the merit selection amendment in Art. X, § 4 invalidated in any way the revolving door ban in either statute or in regulation. In at least three advisory opinions, the Ethics Commission interpreted and applied the revolving door statutory restrictions in relation to pursuits of judgeships.⁵⁴ Also, the Ethics Commission stated in a General Advisory Opinion 2009-04 that “in addition to the prohibition on state employment found at R.I. Gen. Laws § 36-14-5(n), Commission Regulation 36-14-5007 prohibits members of the General Assembly from seeking or accepting state employment, other than that held at the time of election to office, for their term of office and for one year after leaving office.” In that opinion, the Commission did not indicate there was an exception to Regulation 36-14-5007 for judgeships because of the merit selection amendment.⁵⁵ There is no reason now for the Commission to change

⁴⁸ In Re: Advisory Opinion from the House of Representatives (CRMC), 961 A.2d 930, 935-936, n.7 (R.I. 2008); In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d at 671.

⁴⁹ Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d at 671.

⁵⁰ In Re: Advisory Opinion from the House of Representatives (CRMC), 961 A.2d at 935-936, n.7.

⁵¹ Riley v. R.I Department of Environmental Management, 941 A.2d 198, 204-205 (R.I. 2008)

⁵² Id. at 205.

⁵³ Michael Yelnosky, “The Impact of ‘Merit Selection’ on the Characteristics of Rhode Island Judges” Roger Williams U. L. Rev, Vol. 15, Issue 3, at 657 (2010).

⁵⁴ See e.g. A.O. 2009-16, Brian Stern; A.O. 2013-1, Richard Licht; and A.O. 2016-1, Timothy Williamson.

⁵⁵ In A.O. 2010-54, the Ethics Commission did indicate that a legislator could be appointed by a Governor to be Secretary of Health and Human Services. However, the primary reason the Ethics Commission permitted the appointment was because it was cabinet-level appointment that “fits neatly” into an exception to the revolving door ban in R.I.G.L. § 36-14-5(n)(2). The Ethics Commission also referenced the Supreme Court advisory opinion in 1993

its interpretation and decide that the merit selection amendment in Art. X, § 4 invalidated, in some way, either revolving door ban on legislators in statute or in regulation.

If the Ethics Commission were to determine that merit selection appointments Art. X, § 4 are exempt from Regulation 36-14-5007 and R.I.G.L. § 36-14-5(n) and (o), there could be far reaching negative consequences. Art. X, § 4 encompasses not only appointments to the Supreme Court but other lower court judicial appointments. Justice Benjamin Cardozo once discussed the “tendency of a principle to expand itself to the limit of its logic.”⁵⁶ If Lynch Prata’s interpretation is taken to its logical conclusion, it could open the door to many other sitting legislators who want to become a judge. It could undermine the ethics code and could cause the judiciary to revert it back to an earlier scandal plagued era.

Impact and Importance of the Revolving Door Ban on Judicial Appointments

The revolving door prohibitions in statute and regulation, coupled with the merit selection amendment, has had a beneficial impact on the judiciary. “Rhode Island has not endured an ethical scandal in the judiciary since the Fay/Smith debacle.”⁵⁷ Also, judgeships are now held by fewer former legislators than in the past. Prior to 1994, approximately one-third of all judges had either been legislators or had served as counsel to a legislative leader, but by 2010, it had gone down to about 20 percent.⁵⁸ In 1992, all five Supreme Court justices had been former legislators. Four of them had gone from the legislature directly to a judgeship and the other justice had gone from the legislature to the governor’s office and then to the bench.⁵⁹ Today, there are only two justices on the Supreme Court who were former legislators and they went from the legislature directly to a lower court judgeship before 1992.

Although politics undoubtedly still plays a role in judicial selection in Rhode Island, the combination of the judicial merit selection process and the revolving door prohibition together reduce the obvious politicization and ethical conflicts of the past. In fact, some have argued that the revolving door ban on legislators seeking judgeships has played a more important role than the merit selection process for improving the judicial selection process. Stephen Carlotti, Chairman of the Judicial Nominating Commission, explained “the biggest single change in Rhode Island is not the creation of the Judicial Nominating Commission. The biggest change is the enactment of the ‘revolving door rule.’”⁶⁰ With the revolving door rule, he stated “we solved a multitude of problems. There is no person more powerless than a former office holder. No one has to pay any attention to a former Speaker of the House.”⁶¹

The revolving door ban on sitting legislators seeking judgeships exists because of the tremendous potential for ethical abuses by sitting legislators in pursuit of a judgeship for themselves. The “revolving-door legislation addresses the imbroglio of public officials who use

in which the Court determined that Regulation 36-14-5007 and R.I.G.L. § 36-14-5(n) were valid and should be read in harmony.

⁵⁶ Benjamin Cardozo, The Nature of the Judicial Process, at 51 (1921).

⁵⁷ Judge William E. Smith, “Reflections of Judicial Merit Selection, the Rhode Island experience, and Some Modest Proposals for reform and Improvement”, Roger Williams U. L. Rev, Vol. 15, Issue 3, at 681(2010).

⁵⁸ Michael Yelnosky, “The Impact of ‘Merit Selection’ on the Characteristics of Rhode Island Judges” Roger Williams U. L. Rev, Vol. 15, Issue 3, at 655 (2010).

⁵⁹ R.I. Manual 1991-1994, at 353-357.

⁶⁰ Stephen Carlotti, “General Response” Roger Williams U. L. Rev, Vol. 15, Issue 3, at 661 (2010).

⁶¹ Id., at 661-662.

their present positions and contacts as unfair bargaining tactics in gaining future employment.”⁶² Specifically, the revolving-door prohibition on state legislators exists to hinder legislators from trading their votes on legislative matters to gain a judgeship for themselves. Currently, legislators can use their influence to promote their personal friends and political allies to obtain a judgeship. While this is inappropriate to many, it does not, in general, clearly violate the ethics code because the legislator does not directly financially benefit from the selection of his or her friend or ally to the bench under R.I. Gen. Laws § 36-14-5(d). However, if a state legislator uses his or her office to get himself or herself to get nominated or confirmed to judgeship it would violate R.I. Gen. Laws § 36-14-5(d). A sitting legislator seeking a judgeship creates an appearance of impropriety and creates the obvious opportunity for unethical behavior.

Rhode Island history is rich with scandals over the unseemly scramble for spoils in which sitting legislators go through the revolving door to the bench.⁶³ But, perhaps the most blatant example of a sitting legislator using the power of his office to get himself a lifetime position involved Chief Justice Edmund Flynn. In 1935, Lieutenant Governor Robert Quinn, Governor Theodore Francis Green and other Democrats had come up with a plan to seize control of the Senate, vacate the Supreme Court, and dominate state government. But the plan almost went awry when House Majority Leader Edmund Flynn insisted on being made Chief Justice of the new Supreme Court. Flynn “let it be known that unless he were made Chief Justice, there would be a great deal trouble pushing the Governor’s contemplated reforms through the House of Representatives.” As one Green administration official stated: “He held a gun to our heads.” In the end, Flynn was given the spot.⁶⁴ The most important political event in 20th century Rhode Island history, the Coup of 1935, was only able to go forward after a powerful sitting state legislator was given the position of Chief Justice. The revolving door ban is designed to prevent this sort of unethical conduct by sitting legislators from happening again. Why would the Ethics Commission want to interpret the law to go back in some way to the way it was? Rhode Island history records House Speaker Joseph Bevilacqua as the last sitting legislator to go directly to the Supreme Court. He should remain the last.

Conclusion

This is not about preventing Senator Lynch Prata from ever becoming a judge. It is about requiring her and other legislators to wait at least a year after they leave the General Assembly before they can seek to become a judge. Being required to leave the General Assembly for one year is not much to ask of someone before you bestow the honor of a lifetime appointment.

This is not about the qualities or qualifications of Senator Lynch Prata to be a judge. This is about requiring all legislators to follow an ethical requirement: the revolving door prohibition. If Lynch Prata is permitted to seek and be appointed to the Supreme Court, legislators who are more powerful and less principled than her, more questionable and less qualified than her will seek a seat on the Supreme Court in the future.

In recent years, Rhode Island has seen powerful legislators, who were attorneys, engage in unethical conduct. If the revolving door to the Supreme Court is open to these type of legislators, one can imagine the type of unethical lengths they would go to secure themselves a position at the

⁶² In Re: Advisory Opinion to the Governor (Revolving Door) 633 A.2d at 671.

⁶³ Steven Frias, “The rush to be a Rhode Island judge” ProJo (9/24/14); Steven Frias, “Going backwards on ethics in R.I.” ProJo (10/7/15).

⁶⁴ Erwin Levine, Theodore Francis Green: the Rhode Island Years, 1906-1936, at 179 (1963).

Supreme Court if they wanted it. Furthermore, once the Ethics Commission interprets the law to permit sitting legislators to seek a Supreme Court appointment, undoubtedly other legislators will seek to extend that interpretation to other courts. The more often the revolving door swings open for legislators, the more likely the trading of votes for judgeships will creep back into the legislature. Rhode Island cannot move forward by going backwards on ethics. The ambitions of one State House politician should not be allowed to undo the accomplishments of a generation of reform.

The philosopher George Santayana famously declared that: “Those who do not learn history are doomed to repeat it.” I have tried my best to present the history; it is the choice of the Ethics Commission whether they want to repeat it.

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