

JUDICIAL SELECTION COMMISSION STEERING COMMITTEE REPORT

2021

A Report to the Legislature of the State of Hawaii



Prepared by the House Majority Staff Office
Hawaii State House of Representatives
415 S. Beretania Street
Honolulu, Hawaii 96813

TABLE OF CONTENTS

Contents

Introduction	1
Background	3
Origin of the Judicial Selection Commission in Hawaii	3
1978 Constitutional Convention	3
Constitutional Framework for Judicial Selection in Hawaii	4
Judicial Appointment	4
Judicial Retention	5
Qualifications	6
Judicial Selection Commission	6
Rules of the Judicial Selection Commission	7
General	7
Abuse of Position	7
Confidentiality	8
Conflicts of Interest	8
Application and Petition	9
Investigation and Interview	9
Voting: Applicants	10
Voting: Petitioners	11
Transmittal to the Appointing Authority	11
Discussion	12
Transparency and Confidentiality	12
General Information	12
Deliberations	12
Disclosure of Applicant Names	13
Selection of Nominees	14
Merit Principles	14
Written Standards	15
Number of Nominees	17

TABLE OF CONTENTS

Composition and Operations of the Judicial Selection Commission _____	18
Composition of the Commission _____	18
Operations of the Commission _____	18
Recommendations _____	21
Constitutional Amendment on Merit Principles _____	21
Concurrent Resolution Establishing the Joint Committee on Judicial Selection _____	21
Steering Committee Members _____	23
Appendices _____	24

INTRODUCTION

Introduction

Hawaii's Judicial Selection Commission was created over forty years ago and has been widely praised for its work in selecting and retaining judges. Over the years, Hawaii's Judicial Selection Commission has been subject to review by various community groups, including the Citizens' Conferences on Judicial Selection in 1989 and 1993, Hawaii League of Women Voters in 2003, and American Judicature Society, Hawaii Chapter. Despite the success of the Commission, concerns have been raised on occasion regarding transparency, confidentiality, political influence, bias, and the standards for selecting and retaining judges.

Recognizing the importance of public confidence in the judicial selection process, a group of interested individuals formed the ad hoc Judicial Selection Commission Steering Committee in October 2020 to engage in meaningful discussion about the status and potential improvement of Hawaii's judicial selection process. The Steering Committee determined early on that it did not support the election of judges and justices. The Steering Committee's primary goal was to determine whether any constitutional amendments, legislation, or rule amendments should be proposed to the Legislature to improve Hawaii's Judicial Selection Commission.

Once the Steering Committee formed, it began compiling and reviewing various sources of information, including the Hawaii State Constitution; the rules of the Judicial Selection Commission; the journals of the 1978 Constitutional Convention; relevant case law; reports created by community groups and organizations, such as the American Judicature Society and Brennan Center for Justice; and the laws and regulations of other states. The Steering Committee reached out to several key stakeholders in the State to solicit input on potential changes to the Commission. These stakeholders included current and former members of the Commission, retired justices of the Hawaii State Supreme Court, and representatives from the Judiciary, the Hawaii State Bar Association, Hawaii Women Lawyers, and the Committee on Judicial Selection, Retention, and Accountability of the American Judicature Society, Hawaii Chapter.

The Steering Committee's discussions primarily focused on improvements in the following three areas:

- Transparency and confidentiality;

INTRODUCTION

- The selection of nominees; and
- The composition and operations of the Commission.

Taking into consideration the feedback it received from stakeholders, the Steering Committee voted to recommend the following actions:

- (1) Propose an amendment to the Hawaii State Constitution to require the Judicial Selection Commission to be guided by principles of merit in the selection of judicial nominations and the retention of judges and justices; and
- (2) Establish, by Concurrent Resolution, a Joint Committee on Judicial Selection to work with the Judicial Selection Commission and Judiciary to:
 - (A) Develop clear, written standards for evaluating applicants and petitioners for judicial office;
 - (B) Develop protocols for training new and existing members of the Judicial Selection Commission;
 - (C) Streamline the Judicial Selection Commission's voting rules;
 - (D) Define the term "deliberations" under article VI, section 4, of the Hawaii State Constitution; and
 - (E) Create greater transparency as to the rules and procedures applicable to the Judicial Selection Commission.

To implement these recommendations, the Steering Committee has included proposed legislation for consideration by the Legislature under Appendices C and D of this report.

The Steering Committee's goal for this report is to not only provide a written record of its recommendations and discussions over the past several months, but to also provide the Legislature and the public with information regarding the history of the Judicial Selection Commission, the current Commission's rules and operations, and suggestions to improve the Hawaii's existing judicial selection process.

Background

ORIGIN OF THE JUDICIAL SELECTION COMMISSION IN HAWAII

1978 Constitutional Convention

Hawaii's current judicial selection process was largely proposed by the 1978 Constitutional Convention and ratified by the electorate on November 5, 1978, in response to concerns raised about the previous system of appointment. During the 1978 Constitutional Convention, many citizens and attorneys felt that the previous system, whereby judges were appointed by the Governor with the advice and consent of the Senate, reflected partisan politics and did not ensure that the highest caliber of attorneys in the community were being considered for judicial vacancies. For many, the possibility of political influence and potential for abuse were risks too great to leave unaddressed. Furthermore, the Committee on the Judiciary of the 1978 Constitutional Convention felt that the public should not be deprived of having the most qualified candidate for a judicial appointment.

The majority of people who testified at the 1978 Constitutional Convention before the Committee on the Judiciary, including the Hawaii State Bar Association, supported the concept of a nonpartisan judicial selection commission, which could screen qualified candidates for judicial appointments. At that time, 29 states had adopted some form of a judicial selection commission, which was more than twice the number of states that adopted this type of system during the 1968 Constitutional Convention. To the Committee on the Judiciary, this nationwide trend demonstrated that judicial selection commissions were the best means of obtaining qualified judges and justices. Accordingly, the Committee on the Judiciary summarized the major reasons for establishing a Judicial Selection Commission as follows:

- (1) It removes the selection of judges from the political consideration of one person and places it in the hands of a nonpartisan board of citizens;
- (2) The choice of nominees is made without consideration or influence of partisan politics;
- (3) It forms an independent panel of commissioners whose sole and exclusive function is to seek out, encourage, and screen all candidates for judicial appointments;

BACKGROUND

- (4) It includes both lawyers and laypersons' views in the selection of judges; and
- (5) It permits consideration of many more qualified candidates who might otherwise be overlooked by the one person.

The Committee on the Judiciary believed that a Judicial Selection Commission would provide a Judiciary that would be better qualified in the long run to deal with increasing and increasingly complex litigation.

Delegates believed that having a Judicial Selection Commission carefully screen candidates for judicial vacancies would assure the public that all names on the list submitted to the appointing authority would be very highly qualified. The expectation was that the qualifications of any nominee would be such that there would be no basis upon which the Senate could reject the nominee.

Additionally, the Committee on the Judiciary felt that the retention of judges and justices through review by a nonpartisan Judicial Selection Commission is more desirable than simple reappointment by either the Governor or Chief Justice. Delegates believed that requiring judges and justices to resubmit to review by the unbiased Commission at the end of their term would ensure that the qualifications of judicial candidates would be the paramount consideration in any retention process.

CONSTITUTIONAL FRAMEWORK FOR JUDICIAL SELECTION IN HAWAII

Judicial Appointment

In Hawaii, judges and justices are chosen through a variation of the merit selection process. Under this process, the Governor appoints judges and justices for vacancies in the Hawaii Supreme Court, Intermediate Court of Appeals, and Circuit Courts from a list of four to six nominees submitted by the Judicial Selection Commission. For District Court vacancies, the Chief Justice of the Hawaii Supreme Court appoints judges from a list of no less than six nominees submitted by the Commission. However, prior to appointment, all appointees are subject to confirmation by the Hawaii State Senate.

Although the Hawaii State Constitution does not provide a time limit before which the Judicial Selection Commission must present the list of nominees to the appointing authority, the Committee on the Judiciary of the 1978 Constitutional Convention intended

BACKGROUND

that the Commission act deliberately and carefully in preparing the list while also remembering the needs of the public in having the position filled. Upon presentation of the list of nominees to the appointing authority, the Judicial Selection Commission must concurrently disclose the list to the public.

If the Governor or Chief Justice fails to make any appointment within 30 days of presentation, or within ten days of the Senate's rejection of any previous appointment, the Judicial Selection Commission must appoint an individual from the list with the consent of the Senate.

If the Senate fails to reject an appointment to the Supreme Court, Intermediate Court of Appeals, or Circuit Courts within 30 days of receiving the appointment notice, the appointee is automatically considered appointed to the judicial position. However, if the Senate rejects the appointment, the Governor must make another appointment from the list within ten days. The appointment and consent procedure will be followed until a valid appointment is made, or failing this, then the Judicial Selection Commission must make the appointment from the list without Senate consent.

On the other hand, the Senate is constitutionally mandated to conduct a public hearing and vote on each nominee for a District Court vacancy within 30 days of appointment. If the Senate fails to do so, the nomination is returned to the Judicial Selection Commission and the Commission must make the appointment from the list without Senate consent.

Unlike full-time District Court judges, per diem District Court judges are appointed by the Chief Justice as provided by law and are not subject to the Judicial Selection Commission process.

Judicial Retention

Justices of the Supreme Court and judges of the Intermediate Court of Appeals and Circuit Courts serve ten-year terms of office, while District Court judges hold office for a statutorily prescribed term of six years. To be retained in office, judges and justices must petition the Judicial Selection Commission for retention at least six months before completing their terms of office. If the Commission determines that the judge or justice

BACKGROUND

should be retained, it may renew the judge's or justice's term in office by a majority vote of the Commission's voting members.

Qualifications

All judges and justices must be residents of the State, citizens of the United States, and licensed to practice law by the Hawaii State Supreme Court for no less than ten years preceding nomination to the Supreme Court, Intermediate Court of Appeals, or Circuit Courts or no less than five years preceding nomination to the District Courts.

To eliminate the possibility of conflicts of interest that might arise through either the private or public sector, all judges and justices are prohibited from engaging in the practice of law or running or holding any other office or position during their term of office.

Judicial Selection Commission

Hawaii's constitutionally established Judicial Selection Commission is comprised of nine members serving staggered six-year terms. Members of the Commission are appointed or elected as follows:

- The Governor appoints two members, only one of whom may be a licensed attorney;
- The President of the Senate and Speaker of the House of Representatives each appoint two members;
- The Chief Justice appoints one member; and
- Members in good standing of the Hawaii State Bar Association elect two members.

No more than four members of the Judicial Selection Commission may be licensed attorneys, and at least one member must be a resident of a neighbor island. All members must be a resident of the State and citizen of the United States.

The Hawaii State Constitution requires the Judicial Selection Commission to be selected and operate in a wholly nonpartisan manner. To this end, members are prohibited from running for or holding any other elected office or taking an active part in

BACKGROUND

political management or campaigns. Members may only serve for six years on the Commission and are not eligible for judicial office in the State until three years after completion of their term.

Acts by the Judicial Selection Commission are only valid upon the concurrence of the majority of its voting members and deliberations of the Commission are confidential. The Commission must adopt rules which shall have the force and effect of law.

RULES OF THE JUDICIAL SELECTION COMMISSION

General

Pursuant to the Hawaii State Constitution, the Judicial Selection Commission has two principal functions: selecting nominees for vacancies in the Judiciary and determining whether incumbent judges and justices should be retained in office. Commissioners hold positions of public trust and are required to conduct themselves in a manner that reflects credit upon the judicial selection process.

The Chairperson of the Judicial Selection Commission must call at least one meeting each year for the principal purpose of reviewing or amending Commission rules and operating procedures and briefing new commissioners.

A quorum of the Judicial Selection Commission is five commissioners. Actions by the Commission require a majority vote of *all* commissioners, even though the Hawaii State Constitution only requires concurrence of the majority of the Commission's *voting* members.

Abuse of Position

The Judicial Selection Commission's code of conduct prohibit commissioners from:

- (1) Using or attempting to use their official position to secure privileges or exemptions for the commissioner or others;

BACKGROUND

- (2) Attempting, soliciting, or agreeing to accept any gift, favor, or anything of value based upon any understanding, explicit or implicit, that the commissioner's official actions, decisions, or judgments would be influenced; and
- (3) Requesting or accepting any fee or compensation on Commission-related matters.

Commissioners must use the Commission's resources, property, and funds judiciously and solely in accordance with laws and regulations. Each commissioner must immediately report any attempt to induce the commissioner to violate these standards to the Commission.

Confidentiality

To keep the Judicial Selection Commission's deliberations confidential, the Commission specifically requires information relating to the identity of any applicant, information received from or about current or former applicants and petitioners, and any communications among or votes by commissioners that have transpired in the course of their deliberations on any subject to be kept confidential in perpetuity and not disclosed outside of any Commission meeting.

Conflicts of Interest

Commissioners must avoid conflicts of interest and exercise diligence in becoming aware of conflicts. If a commissioner has any personal, business, or legal relationship with an applicant or a petitioner, the commissioner must report this relationship to the Judicial Selection Commission. The Commission must decide on the commissioner's involvement in the proceedings concerning the applicant or petitioner. The Commission may publicly announce when a commissioner does not vote and may disclose its decision on this issue. If a commissioner has a substantive matter before a judge or justice who is petitioning the Commission for retention, then the commissioner may not participate in the retention proceeding.

Commissioners must consider each applicant and petitioner for a judicial office in an impartial, objective manner, and may not discriminate in the conduct of Judicial Selection Commission business.

BACKGROUND

Application and Petition

In pursuit of individuals with the highest qualifications, commissioners may actively seek out and encourage qualified individuals to apply for judicial office. The Judicial Selection Commission may also publicize judicial vacancies.

Applicants for judicial vacancies and petitioners for judicial retention must submit forms to the Judicial Selection Commission providing various information on their education history, professional qualifications and skills, professional and community activities, criminal record, litigation history, health status, and references. Judges and justices are also required to submit a copy of all Hawaii State Bar Association judicial evaluation reports.

The Judicial Selection Commission must publicize the fact that a judge or justice has petitioned the Commission for retention so that all persons who might be interested are given the opportunity to submit their views.

Judicial vacancies and petitions for retention are usually publicized on the Judiciary's website and by the Hawaii State Bar Association.

Investigation and Interview

After the Judicial Selection Commission receives an application, it may vote to eliminate applicants it evaluates to be unqualified for judicial office. One or more commissioners may be designated by the Commission to review the qualifications of applicants and make recommendations regarding the applicants to the Commission. These recommendations may be accepted or rejected upon majority vote of the Commission.

The Judicial Selection Commission, or one or more commissioners, may interview applicants and conduct investigations into their backgrounds and qualifications. It is unclear under the rules of the Commission whether the Commission may or must

BACKGROUND

interview and investigate petitioners for retention.¹ When evaluating applicants and petitioners, the Commission must consider the individual's background, professional skills, and character. The Commission may also consider other qualities, including integrity and moral courage, legal ability and experience, intelligence and wisdom, compassion and fairness, diligence and decisiveness, judicial temperament, and any other qualities that the Commission deems appropriate.

At meetings held for the purpose of considering a petition for retention, the Chairperson or acting Chairperson may administer oaths and affirmations to any person testifying. The Judicial Selection Commission may issue subpoenas to compel the attendance of witnesses and production of pertinent books, papers, and documents. The Commission may also hold open or closed hearings for interested parties to testify.

Voting: Applicants

After a report is made to the Judicial Selection Commission on the investigations and interviews conducted, the Chairperson must open the meeting to a discussion of each applicant's qualifications for judicial office. Upon completion of its evaluation of applications, the Commission must meet for the purpose of selecting four to six nominees for a vacancy in the Supreme Court, Intermediate Court of Appeals, and Circuit Courts, and no less than six nominees for a vacancy in the District Courts.

Commissioners must vote by secret ballot with each commissioner voting to select the number of qualified nominees for any given judicial office vacancy. If the initial ballot produces less than the stipulated number of nominees, voting must continue for the remaining nominee positions. The rules require that each nominee be selected by a majority vote of the nine commissioners. Applicants may be nominated for more than one judicial office vacancy.

¹ Rule 9 states that the Judicial Selection Commission may interview petitioners and conduct investigations into their backgrounds and qualifications. However, Rule 12 requires the Commission to promptly commence an investigation into the petitioner's qualifications upon receipt of a petition and interview the petitioner.

BACKGROUND

Voting: Petitioners

Commissioners must vote by secret ballot on whether a petitioner should be retained in office and attempt to make this decision within 30 days before the expiration of the petitioner's current term in office. A petitioner's term in office may not be extended except by a majority vote of all commissioners.

If the petitioner is retained, the Judicial Selection Commission must issue an order renewing the petitioner's term of office as provided by law. If the petitioner is denied retention, the Commission must issue an order that states the petition was denied. A petitioner may withdraw their petition for retention before the issuance of an order by the Commission.

Transmittal to the Appointing Authority

The alphabetized list of nominees for a judicial vacancy must be hand-delivered to the appointing authority. No other information may be forwarded to the appointing authority, except that the Judicial Selection Commission may also submit a factual summary of the nominees' backgrounds based on material provided by the nominees and consult with the appointing authority on request.

Discussion

TRANSPARENCY AND CONFIDENTIALITY

General Information

According to the Special Committee on Judicial Selection and Retention of the American Judicature Society, Hawaii Chapter:

When the public knows little or nothing about a process, suspicion about what goes on can grow. In the merit selection process, confidentiality is crucial. The primary goal is to protect merit selection. Merit selection can only be preserved through public confidence. Public confidence requires full disclosure of the process and the need for confidentiality as an inherent part of merit selection. Often times, confidentiality is viewed as secrecy. In preserving merit selection, it is therefore, critical that the public have a clear understanding of the thorough process utilized by the [Judicial Selection Commission] in nominating judges.

Several Steering Committee meetings addressed the careful balance between transparency and confidentiality during the judicial selection process. Although most Steering Committee members and stakeholders were unclear about how the Judicial Selection Commission operates, many were apprehensive about opening the process up. Some Steering Committee members and stakeholders suggested that transparency could be improved by releasing general information about the Commission's processes to better inform the public about the Commission's functions and operations.

Deliberations

Under the Hawaii State Constitution, deliberations of the Judicial Selection Commission are confidential. The Commission further expanded the scope of this confidentiality under its rules to include, in perpetuity, information relating to the identity of any applicant, information received from or about current or former applicants and petitioners, and any communications among or votes by commissioners that have transpired in the course of their deliberations on any subject. The only time an

DISCUSSION

applicant's name is publicly released is upon nomination by the Commission for a vacant judicial position as provided by the Hawaii State Constitution.

After reviewing the proceedings and committee reports of the 1978 Constitutional Convention, as well as the Hawaii Supreme Court case *Pray v. Judicial Selection Comm'n of State*, members of the Steering Committee decided that the term "deliberations," as used in the Hawaii State Constitution, should be examined and clearly defined. Most of the Steering Committee believed that defining this term would help refocus the intent of the confidentiality requirement under the Hawaii State Constitution and lead to reconsideration of what should be confidential during the judicial selection process.

Disclosure of Applicant Names

Another suggested proposal to publicly release the names of applicants for judicial positions was met with mixed reactions from members of the Steering Committee and stakeholders. Many stakeholders expressed concerns that the release of applicant names would lead to fewer individuals applying for vacancies or result in people lobbying the Judicial Selection Commission. Stakeholders discussed how many private practice attorneys are already apprehensive about applying for judicial vacancies because it could adversely impact their standing in firms or with clients if they are not selected. Stakeholders were also concerned that the disclosure of applicant names would result in fewer women applying for vacancies, which is an even greater concern now that women appear to be leaving the workforce at a disproportionate rate due to the COVID-19 pandemic.

Conversely, other members of the Steering Committee and stakeholders felt that releasing the names of applicants could have the opposite effect by increasing the number of quality applicants for judicial vacancies, including women. A member of the Steering Committee made the observation that the Judicial Selection Commission's confidentiality rule is not attracting more people since the number of applicants has been lower over the past few years. The Steering Committee also noted that several other jurisdictions disclose the names of applicants and the Hawaii State Constitution does not prevent the disclosure of applicant names. During the 1978 Constitutional Convention, several delegates argued against making the receipt and review of applicants for judicial positions confidential under the Hawaii State Constitution for various reasons, including

DISCUSSION

concerns about transparency and the lack of public input. According to one delegate, there was no reason to keep an applicant's name confidential because it was believed that the pride in having the community know that a person's name is being considered for a judicial position outweighed the potential embarrassment that an applicant would face if it became known that the applicant did not receive a nomination. The delegate also pointed out that people would be able figure out who applied anyway since the Commission conducts investigations of applicants.

According to commentary by the American Judicature Society for its Model Judicial Selection Provisions:

Finding the appropriate balance between preserving the privacy of judicial applicants and providing transparency in the screening process is one of the greatest challenges that nominating commissions face. Applicants should be protected from public scrutiny regarding their private lives and from public embarrassment that could result from failure to receive a nomination. At the same time, the public should have sufficient knowledge of the nominating process to maintain confidence in that process.

SELECTION OF NOMINEES

Merit Principles

Although Hawaii's judicial selection process is depicted as a merit selection, the Steering Committee noted that neither the Hawaii State Constitution nor the rules of the Judicial Selection Commission require the Commission to select and retain the most qualified applicants and petitioners.

According to the American Judicature Society, merit selection is when a nonpartisan commission of lawyers and nonlawyers locate, recruit, investigate, and evaluate applicants for judgeship and submit the names of the most highly qualified applicants to the appointing authority. The American Judicature Society's Model Judicial Selection Provisions suggests constitutionally or statutorily requiring the judicial nominating commission to nominate the best qualified persons for each vacancy. The

DISCUSSION

reason the process is called "merit selection" is because the commission chooses applicants on the basis of their qualifications rather than political and social connections.

A longstanding concern among the public is whether the Judicial Selection Commission is actually selecting and retaining the most qualified judges and justices based on merit, as was originally intended by the delegates of the 1978 Constitutional Convention. Several nominations over the years have been criticized by the public as being politically motivated due to the applicant's perceived lack of experience or qualifications for judicial office, but strong political and social connections. A 2003 report commissioned by Hawaii's Judiciary found that the public generally views judicial selection, appointment, and retention as part of a "closed" process that "is run by and for the benefit of political insiders; i.e., an 'old boy network.'" Some prior commissioners even indicated to the Brennan Center for Justice that there may be a rebuttable presumption in favor of retaining sitting judges and justices so that only the really bad judges or justices are denied retention, but not the mediocre.

Based on its meetings with stakeholders, the Steering Committee discovered that although the Judicial Selection Commission strives to select the "most qualified" applicants, it will sometimes pick the "best" applicants or may balance the list between male and female applicants. Some stakeholders felt that it is not necessary for the Commission to be required to select and retain the "most qualified" individuals because the Commission's rules already provide standards. However, as of December 3, 2019, the Standing Committee on Judicial Selection, Retention, and Accountability of the American Judicature Society, Hawaii Chapter, reported that there are still perceptions in the community concerning the conduct of the Commission; namely, that the Commission does not uniformly or fairly consider all judicial candidates.

Written Standards

In 1998, former federal District Court Judge Samuel P. King noted that recent criticisms of Hawaii's Judicial Selection Commission "stem from doubts about the standards for selection actually used by the [C]ommission." When the topic of standards was brought up in Steering Committee discussions, some felt that the evaluation criteria listed in the rules of the Commission and application forms sufficiently informed the public about the criteria for selection and retention. However, interviews with

DISCUSSION

commissioners conducted by the Brennan Center for Justice revealed that the permissive evaluation criteria listed in the rules of Commission are not always weighed in any consistent way. This inconsistent application may explain why the Special Committee on Judicial Selection and Retention of the American Judicature Society, Hawaii Chapter, urged the Commission in 2003 to make the permissive evaluation criteria mandatory in all cases.

Other Steering Committee members and stakeholders felt that the judicial selection process would benefit from having clear or measurable evaluation standards, including standards that addresses the specific skills that are required for trial or appellate courts and courts with specialized jurisdiction. According to the American Judicature Society's Model Judicial Selection Provisions, the use of written, uniform rules reassures the public and potential applicants that the process is designed to treat all applicants equally and to nominate the best qualified persons.

To assist commissioners, the American Judicature Society's Handbook for Judicial Nominating Commissioners provides sixteen suggested criteria for evaluating applicants for judicial office and lists over one hundred suggested measures for evaluation. The Handbook also provides guidance on which criteria are important based on the judicial role being filled. For example, decisiveness, speaking ability, and conversance with alternative dispute resolution techniques are of particular importance for trial judges, whereas collegiality and writing ability are of greater importance for appellate judges and justices. According to the American Judicature Society's Model Judicial Selection Provisions, each judicial vacancy should be treated individually to the greatest extent possible, especially if the judicial vacancy requires specialized knowledge and legal experience, such as family law or juvenile matters.

The Steering Committee also reviewed the standards used in other jurisdictions, such as Connecticut. Regulations for Connecticut's Judicial Selection Commission provide several minimum qualifications for judicial office based on the candidate's reputation, judicial temperament, legal ability, and physical or mental health, as well as considerations militating against recommendation, including conviction, censure, and prejudicial personal conduct and characteristics. These regulations also require consideration of two sets of criteria: one for evaluating candidates for judicial office and another for evaluating incumbent judges who seek reappointment or elevation to a

DISCUSSION

different court. For example, one criterion for incumbent judges who seek reappointment considers whether the judge has the ability to clearly and logically explain the facts and issues of a case and relevant legal precedent in written opinions.

Establishing specific criteria for different judicial roles was contemplated during the 1993 Citizens Conference on Judicial Selection, where 67 percent of participants favored an amendment to the rules of the Judicial Selection Commission to require significant litigation experience as a qualification for trial judges. This litigation experience could include experience with pre-trial formal procedures, such as depositions, interrogatories, and other discovery methods; alternative dispute resolution mediation; arbitration and administrative hearings; or civil and criminal trials. Participants felt like having this type of experience would ensure that judges have a working familiarity with the law and technical rules before they become trial judges which may avoid costly appeals and retrials that are the result of judges having to learn on the job.

Resource materials also noted that Hawaii's judicial retention process, which rarely results in denied petitions, has raised several concerns over the years, including the perception of prejudice against women and bias in favor of men, and that potentially lenient and overly subjective retention standards make it difficult to remove poorly performing judges or justices. According to the Brennan Center for Justice, clarifying the Judicial Selection Commission's "evaluation process and publicly releasing some of the materials used to assess judges for retention could bolster confidence in the system and promote greater judicial independence." In Arizona, the Commission on Judicial Performance Review evaluates each judge or justice up for retention to assess the judge's or justice's legal ability, integrity, communication skills, judicial temperament, and administrative performance. The Arizona Commission considers several factors, including survey data and public comments, and rates and scores judges and justices in each category to determine whether they meet or do not meet judicial performance standards.

Number of Nominees

The Steering Committee also discussed the possibility of reverting back to requiring the Judicial Selection Commission to nominate six individuals for vacancies in

DISCUSSION

the Hawaii Supreme Court, Intermediate Court of Appeals, and Circuit Courts. Several members and stakeholders noted that the Commission sometimes does not receive six applicants for these positions and that it can be hard to get a large applicant pool on neighbor islands. Nevertheless, members felt that the Commission should have the aspirational goal of selecting the greatest number of qualified applicants, whenever feasible, to give the appointing authority the widest latitude in selecting appointees pursuant to their constitutional obligations. If six qualified applicants apply for an appellate court vacancy, the Commission should aspire to nominate all six applicants. The Steering Committee recognizes that to achieve this goal, the Commission may have to amend its rules, including its voting rules, to ensure that the Commission is nominating the maximum number of qualified applicants, not the minimum.

COMPOSITION AND OPERATIONS OF THE JUDICIAL SELECTION COMMISSION

Composition of the Commission

There was some discussion among the Steering Committee about the possibility of amending the composition of the Judicial Selection Commission to increase the number of commissioners, add ex officio commissioners, and redistribute the number of attorneys and non-attorneys. A few stakeholders expressed interest in the idea of amending the composition of the Commission; however, others were content with the current composition.

Operations of the Commission

The Steering Committee members and stakeholders identified several potential areas where the operations of the Judicial Selection Commission could be improved upon, including streamlining voting and formalizing training.

Voting

The Steering Committee discussed multiple ways the Judicial Selection Commission could streamline its voting process, such as changing the voting system, voting for multiple lists at the same time, or authorizing remote participation. As previously mentioned, the rules of the Judicial Selection Commission appear to establish

DISCUSSION

a different voting requirement than the Hawaii State Constitution, which requires concurrence of the majority of the Commission's voting members, not a majority of all commissioners. When proposing this language, the Committee on the Judiciary of the 1978 Constitutional Convention anticipated that there may be situations where commissioners are involved in a conflict of interest while serving on the Commission. The Committee on the Judiciary intended for the Legislature, not the Commission, to provide for such situations. One delegate to the 1978 Constitutional Convention worried that the language in the Hawaii State Constitution could result in situations where there are only five voting members and judges and justices are selected by a vote of three members. The delegate believed that this was not the intention of the provision, but that the language did not properly address this particular problem.

In its 2003 report, the Special Committee on Judicial Selection and Retention of the American Judicature Society, Hawaii Chapter, questioned why the Judicial Selection Commission requires five votes instead of a majority of the members able to vote. The Special Committee urged the Commission to establish, by rule, that the majority requirement for voting applies to voting members and define "voting members" "as all [c]ommissioners who can vote on a specific matter taking into account vacancies and recusals." The Special Committee felt that at the very least the Commission could amend the majority requirement for retention votes since that is when the power of a minority is of most concern.

Training

It appears that the onboarding of new commissioners is provided by existing commissioners on an informal basis. Commissioners serve staggered terms, which has a stabilizing effect and allows existing members to educate incoming commissioners about their duties and the Judicial Selection Commission's processes. Nevertheless, the Steering Committee discussed the need for a more formalized system of training for the Commission, including orientation for new commissioners and annual continuing education for all commissioners.

In 2003, the Special Committee on Judicial Selection and Retention of the American Judicature Society, Hawaii Chapter, felt strongly about the need to resume and maintain training for commissioners on a regular basis and recommended requiring American Judicature Society training for all commissioners. As part of this

DISCUSSION

recommendation, the Special Committee also recommended that appointing authorities for the Judicial Selection Commission be invited and that there be a public component of the training process for interested individuals and groups to learn more about the merit selection process and how it functions.

To help educate commissioners, the American Judicature Society developed a one-day program called the Institute for Judicial Nominating Commissioners, which brings busy commissioners together to assess the procedures they use to select judicial nominees. To participate in the program jurisdictions can contact the American Judicature Society or seek out additional information and training aides, such as the Facilitator's Guide, from the American Judicature Society.

RECOMMENDATIONS

Recommendations

After much deliberation, the ad hoc Judicial Selection Commission Steering Committee voted to adopt the following two legislative proposals. Both proposals were unanimously approved by all members of the Steering Committee and received wide support from the various legal community stakeholders consulted. The goal of the ad hoc Judicial Selection Commission Steering Committee in making these recommendations to the Legislature is to improve upon Hawaii's existing judicial selection process, particularly with regard to transparency, the selection of nominees, and the operations of the Judicial Selection Commission.

CONSTITUTIONAL AMENDMENT ON MERIT PRINCIPLES

- (1) Propose an amendment to the Hawaii State Constitution to require the Judicial Selection Commission to be guided by principles of merit in the selection of judicial nominations and the retention of judges and justice.**

Article VI of the Hawaii State Constitution should be amended to add a new section to read as follows:

"MERIT PRINCIPLES

Section 1.5. The judicial selection commission shall be guided by principles of merit in the selection of judicial nominations and the retention of judges and justices."

CONCURRENT RESOLUTION ESTABLISHING THE JOINT COMMITTEE ON JUDICIAL SELECTION

- (2) Establish a Joint Committee on Judicial Selection to work with the Judicial Selection Commission and Judiciary.**

A Joint Committee on Judicial Selection consisting of members appointed by all three branches of government and the private sector should be legislatively established to work with the Judicial Selection Commission and Judiciary to:

RECOMMENDATIONS

- (A) Develop clear, written standards for evaluating applicants and petitioners for judicial office;
- (B) Develop protocols for training new and existing members of the Judicial Selection Commission;
- (C) Streamline the Judicial Selection Commission's voting rules;
- (D) Define the term "deliberations" under article VI, section 4, of the Hawaii State Constitution; and
- (E) Create greater transparency as to the rules and procedures applicable to the Judicial Selection Commission.

The Legislative Reference Bureau should be requested to assist the Joint Committee on Judicial Selection, including with the submission of a report to the Legislature on its findings and recommendations, including any proposed legislation.

STEERING COMMITTEE MEMBERS

Steering Committee Members

The ad hoc Judicial Selection Commission Steering Committee was formed by a group of interested individuals with varying perspectives on and experiences with the judicial selection process. Membership includes government officials and private attorneys with a broad spectrum of knowledge and experience. The members of the Steering Committee are:

David Louie, Chair

Daniel Foley, Vice Chair

Margery Bronster

Doug Chin

Clare Connors

Susan Ichinose

John Komeiji

Scott Saiki

Appendices

- Appendix A – Article VI of the Hawaii State Constitution
- Appendix B – Rules of the Judicial Selection Commission
- Appendix C – Proposed Constitutional Amendment on Merit Principles
- Appendix D – Proposed Concurrent Resolution Establishing the Joint Committee on Judicial Selection