



AMERICAN
JUDICATURE
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AJS MISSION

The American Judicature Society (“AJS”) is an independent, non-partisan membership organization working nationally to protect the integrity of the American justice system. Its mission is to secure and promote an independent and qualified judiciary and a fair system of justice.

SAVE THE DATE: AJS National Conference

The AJS National Conference, “Judicial Independence in the Age of Political Polarization” is scheduled for November 21 to 24, 2021, at the Sheraton Waikiki, Honolulu, Hawaii.

The conference general session topics include (1) “Assault on the Courts--the 2020 Election and Beyond;” (2) “Politics, Judicial Selection, and the Administration of Justice;” (3) “Confidence in the Courts, Judicial Ethics and Accountability;” (4) “Understanding the Courts, Civics, and Judicial Independence;” and (5) “Judicial Diversity in the Courts.” Other exciting sessions are being planned. Dean Erwin Chemerinsky, University of California Berkeley School of Law, will be a presenter at the first general session.

Please calendar the event and plan to attend for stimulating and engaging presentations and discussion. Because of the pandemic, the conference was rescheduled from November 2020 to this year, but due to COVID-related limitations on gatherings, the conference will be conducted in a hybrid format featuring participation in-person or via Zoom.



We must move beyond 'the rank of a mere citizen'

by Aviam Soifer

Legal complicity with racism in the United States has been an astoundingly potent and yet often hidden force. It must be called out, and redress must be sought.

Many of us in the legal profession are highly critical of the current U.S. Supreme Court, yet we tend to forget the vital role judges have played in producing and protecting racism in our country over time. Judges did devastating work in undermining the promise of the post-Civil War constitutional amendments and the early civil rights statutes. On a daily basis, and in ways we can never know, they practiced, imposed, and legitimated racism. Even the published judicial opinions that we do know helped build the curse of institutional racism.



In 1883, for example, the U.S. Supreme Court declared that it was time for former slaves, who had been aided by “beneficent legislation,” to “cease to be the special favorites of the laws.” and to “take[] the rank of a mere citizen.” Thus, less than 18 years after the Thirteenth Amendment abolished slavery, the majority in the Civil Rights Cases totally ignored the vicious and violent deprivations aimed at Black people as Reconstruction crumbled and a return to normalcy became the era’s dominant motif.

The Court declared that “it would be running the slavery argument into the ground” to recognize, as Congress had in the Civil Rights Act of 1875, that racial discrimination in public accommodations across the nation ought to be prohibited.

This decision, along with a host of others by the Supreme Court and by other judges, did much to bury Reconstruction altogether and to launch decades of Jim Crow laws and customs. It illustrates the ongoing complicity of the judiciary in accepting, and yes, in promoting institutional racism.

As my colleague and teacher Chuck Lawrence stated in his recent essay in the *Harvard Law Review*: “[T]he impediment to the achievement of racial equality is our collective national and societal denial of our racism. The law plays a principal role in this collective denial.”

The horrific death of George Floyd — as well as the many other unspeakable recent deaths at the hands of police officers across the United States — has triggered the growing momentum behind Black Lives Matter. Prompted by the rightful passion of this time, however, is the question of what lawyers and judges might do in response. It ought to be abundantly clear that we must do something.

I say this for many reasons, not least because, two months ago, I became a grandparent for the first

time, and I am mightily worried about the world we are handing over to the next generations.

In Hawai‘i, where I live and teach, we have many reasons to feel somewhat distant from the dramatic events of the past weeks, though we have had large demonstrations and shown considerable passion ourselves. We are justifiably proud of our diversity, and we treasure the aloha spirit that really does exist here. And we are rather old-fashioned in our multigenerational families and our close-knit neighborhoods. We thrive on mutuality. And yet...

We, too, have deep fissures and immense gaps in health, education, and economic resources. And we long have had and still know of racism, often relying on “we/they” and accepting the shorthand of stereotyping to make our complicated lives simpler. Police misconduct is also hardly unknown here.

So what should the role of law be as we strive for “a juster justice?”

So what should the role of law be as we strive for “a juster justice?”

One part of our duty — particularly those of us in the legal profession — is to help those who get in trouble with

the law. In fact, there can be a symbiotic relationship between those who demonstrate and protest on the outside, and those who represent them on the inside. The participants in the civil rights movement of the 1960s, as well as the antislavery activists over a century before, often made use of the fact that a court room itself may be a “bully pulpit” in efforts to focus righteous change. We should continue to assist those who make “good trouble, necessary trouble,” as civil rights icon Representative John Lewis recently put it.

Abraham Joshua Heschel, who narrowly escaped the Holocaust, said that “in regard to cruelties committed in the name of a free society, some are guilty, while all are responsible.” Heschel was the white-haired, soulful looking Rabbi often pictured in the front row marching with Rev. Dr. Martin Luther King, Jr., and Heschel explained that he had



an obligation to bear witness actively because “indifference to evil is worse than evil itself.”

Yet it is also useful to remember how extensively legal ideas are intertwined with what Langston Hughes called “the dream deferred.” A striking example may be found within a lesser known part of Dr. King’s “I Have A Dream” speech.

Here is what King said in 1963:

In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the 'unalienable Rights' of 'Life, Liberty and the pursuit of Happiness.' It is obvious today that America has defaulted on this promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked 'insufficient funds.'

And he continued:

But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. And so, we've come to cash this check, a check that will give us upon demand the

riches of freedom and the security of justice.

This use of an extended metaphor lifted from the dry world of Bills and Notes is brilliant, and it underscores a basic paradox within law. On the one hand, we often need law to “cool the fierce glow of moral passion by making it pass through reflection,” as Shalom Spiegel declared at a Convocation on Law as a Moral Force in the 1950s.

On the other hand, Spiegel also noted that we must resist becoming inert through “the mischievous subtlety of the law.” He explained: “The sheer inertia of outlived tradition, the dead weight of knowledge of the past, may stifle the living flame of justice.” And it is misleading to think of law as a unified thing; law is no single thing nor a hierarchical essence that simply can be looked up or frozen in time. Law should not be reified.

Nonetheless, the role of law is of crucial importance right now.

We are at a moment when the crying need for substantial change must be actually heard and acted upon. The central challenge for those of us in the legal profession right now is to use our legal skills to help shape that change, without stifling “the living flame of justice.” Law and legal skills remain a necessary link to move from what is to what ought to be.

Aviam Soifer was the Dean of the William S. Richardson School of Law at the University of Hawai'i for 17 years. He has been writing and teaching about constitutional law and legal history for over 40 years, often focusing on the post-Civil War period. [Ed. Note: This article was first published in The Hill on July 3, 2020.]



A Report on Judicial Selection in Hawaii

A number of concerned individuals organized to form an ad hoc Judicial Selection Commission Steering Committee (“Steering Committee”) and submitted its report to the 2021 Hawai‘i State Legislature recommending an amendment to the Hawai‘i Constitution to require the Judicial Selection Commission be guided by principles of merit in the selection of judicial nominations and the retention of judges and justice. (The Report was filed in support of House Bill 340.)

The Steering Committee also recommended a concurrent legislative resolution establishing a Joint Committee on Judicial Selection consisting of members appointed by all three branches of government and the private sector to work with the Judicial Selection Commission and Hawai‘i State 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 Hawai‘i State Constitution; and (e) create greater transparency as to the rules and procedures applicable to the Judicial Selection Commission.

The members of the ad hoc Steering Committee are: David Louie, Chair Daniel Foley, Vice Chair,

Margery Bronster, Douglas Chin, Clare Connors, Susan Ichinose, John Komeiji, and Scott Saiki.

Selected contents of the 2021 Judicial Selection Commission Steering Committee Report are set forth below.

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;
- 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..

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;
- (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

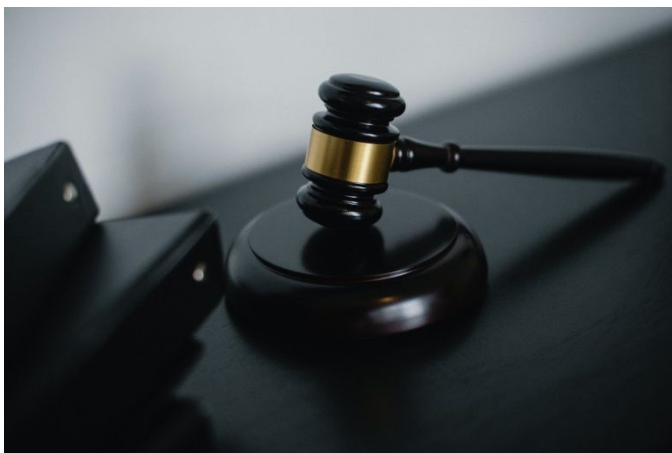
In Hawaii, judges and justices are chosen through a variation of the merit selection process. Under this process, the Governor appoints judges and justices for vacancies in the Hawaii Supreme Court, Intermediate Court of Appeals, and Circuit Courts from a list of four to six nominees submitted by the 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 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 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 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.

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 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 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 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 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 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 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.

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The full report is available at https://www.capitol.hawaii.gov/Session2021/Testimony/HB340_TESTIMONY_JHA_02-04-21_PDF.

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- Enjoy networking opportunities with AJS members and other organization

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If you see or hear of any news that may be of interest to the American Judicature Society or if you wish to submit an article for consideration in the bulletin, please email Susan Asato at susan.ajs2020@gmail.com

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