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## Written Comments

### HCR5

## ESTABLISHING A JOINT COMMITTEE ON JUDICIAL SELECTION

Charlotte A. Carter-Yamauchi, Director  
Legislative Reference Bureau

Presented to the House Committee on Judiciary & Hawaiian Affairs

Monday, March 22, 2021, 2:15 p.m.  
Conference Room 325

Chair Nakashima and Members of the Committee:

I am Charlotte Carter-Yamauchi, Director of the Legislative Reference Bureau (LRB). Thank you for this opportunity to provide written **comments** on H.C.R. No. 5, Establishing a Joint Committee on Judicial Selection.

The purpose of this measure is to establish a Joint Committee on Judicial Selection to work with the Judicial Selection Commission and Judiciary to:

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

The measure also requests that the Bureau assist the Joint Committee on Judicial Selection. Specifically, the Bureau is requested to assist the Committee in submitting a report of the Committee's findings and recommendations, including any proposed legislation, to the Legislature no later than twenty days prior to the convening of the Regular Session of 2022.

The Bureau takes no position on this measure but submits the following comments for your consideration.

The Bureau believes that, if the scope of the Bureau's requested assistance is not altered, the services requested under the measure would be manageable, provided that the Bureau's interim workload is not adversely impacted by too many additional responsibilities, such as conducting studies, writing or finalizing other reports, drafting legislation, or any combination of these for the Legislature or for other state agencies, task forces, or working groups that may be requested or required under other legislative measures.

Thank you again for the opportunity to submit written comments.



*The Judiciary, State of Hawai'i*

**Testimony to the Thirty-First Legislature, 2021 Regular Session**

**House Committee on Judiciary and Hawaiian Affairs**

Rep. Mark M. Nakashima, Chair  
Rep. Scot Z. Matayoshi, Vice Chair

Monday, March 22, 2021, 2:15PM  
VIA VIDEOCONFERENCE  
State Capitol, Conference Room 325

**WRITTEN TESTIMONY ONLY**

by

Rodney A. Maile  
Administrative Director of the Courts

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**Measure No. and Title:** House Concurrent Resolution No. 5, Establishing a Joint Committee on Judicial Selection.

**Judiciary's Position:**

The Judiciary offers the following comments to provide background on Hawai'i's current merit-based system for the selection and retention of judges, and to make several suggestions for consideration.

This resolution seeks to create a Joint Committee on Judicial Selection (Joint Committee) to develop standards for evaluating candidates who apply to fill judicial vacancies, develop protocols for training members of the Judicial Selection Commission (JSC), streamline JSC voting rules, define constitutional terms that govern the work of the JSC, and create greater transparency to the rules and procedures of the JSC. Furthermore, this resolution calls on the Joint Committee to submit a report of its findings and recommendations, including any proposed legislation, to the Legislature.



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The current system for selecting and retaining judges stems from the 1978 Constitutional Convention.<sup>1</sup> The convention’s judiciary committee was primarily concerned with insulating the selection system from political influence. It was the committee’s firm belief that a judicial selection commission system, commonly referred to as a “merit-based system,” would provide for a more qualified and independent judiciary.<sup>2</sup> Under article VI, section 3 of the Hawai‘i Constitution, the JSC plays two important roles in the merit-based process. First, it screens and then identifies qualified candidates for vacant judicial offices, after which the Governor (for supreme, intermediate, and circuit court positions) or Chief Justice (for district and district family court positions) selects a nominee from the list, who is subject to advice and consent by the Senate. Second, when a sitting judge applies to be retained in office, the JSC evaluates and determines whether the judge will be allowed to serve another term. The structure of the JSC reflects a careful balancing of the various branches of government and other interests.

To implement that vision, article VI, section 4 requires that the JSC adopt rules to govern its process for selecting and retaining judges, which have the force and effect of law, and provides that deliberation of the commission shall be confidential. As a result of this constitutional authority, the JSC promulgated the Judicial Selection Commission Rules to govern the work of the commission. These rules are publicly available on the JSC website, along with information about past and current JSC members, notices of judicial vacancies, notices of petitions for retentions, relevant JSC forms, and all JSC press releases with statistics about those who apply to fill each judicial vacancy.<sup>3</sup>

This resolution tasks the Joint Committee with providing a report of its findings and recommendations, including any proposed legislation, to the Legislature. However, section 4 of article VI of the Hawai‘i State Constitution states in pertinent part, “The commission shall adopt rules which shall have the force and effect of law,” and the Department of the Attorney General, in Opinion No. 07-03, notes that “[t]his last direction is given without qualification or limitation.” AG Op. No. 07-03 at page 6. The Department of the Attorney General relied upon the constitutional history to opine that the JSC rules are not to be limited or altered by legislation. The Attorney General Opinion notes:

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<sup>1</sup> The 1978 Constitutional Convention’s judiciary committee concluded that the JSC was “the fairest and best method, one that will provide input from all segments of the public, include a system of checks and balances and be nonpartisan.” Stand. Comm. Rep. No. 52, in *1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 620 (1980). In 2017, the American Judicature Society, an independent, non-partisan organization committed to promoting “an independent and qualified judiciary and a fair system of justice,” reviewed the merit-based system nearly forty years after its creation and echoed the committee’s conclusion: “the current system of judicial selection and retention [in Hawai‘i] has promoted the fair and impartial administration of justice through an independent judiciary.” “Mission,” *American Judicature Society*, <http://americanjudicaturesociety.org/>; *Report of the AJS Special Committee on Judicial Independence and Accountability II 2* (February 21, 2017).

<sup>2</sup> Stand. Comm. Rep. No. 52, in *1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 621 (1980).

<sup>3</sup> Hawai‘i State Judiciary, *Judicial Selection Commission*, [https://www.courts.state.hi.us/courts/judicial\\_selection\\_commission](https://www.courts.state.hi.us/courts/judicial_selection_commission).



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A law passed by the Legislature must accede to a “law” passed by an agency pursuant to a constitutionally conferred rule-making power. The Legislature “cannot abridge the rule-making power [conferred by a constitution].” Louk v. Cormier, 622 S.E.2d 788, 798 (W.Va. 2005). Legislative enactments may not unduly infringe rule-making authority conferred by a constitution. County of Cook, Cermak Health Serv. v. Illinois State Local Labor Relations Bd., 579 N.E.2d 866, 870 (Ill. 1991).

“Whatever the extent of the Legislature’s “plenary power [of law making], it is subordinate to the “organic” law of this State – the . . . Constitution.” Schisler v. State, 907 A.2d 175, 218 (Md. 2006). “[A]s a general rule . . . whatever power is conferred upon [an agency to adopt rules] by the Constitution cannot be enlarged or abridged by the Legislature.” (Citations omitted.) Allowing the Legislature to ignore the rule-making power conferred by a Constitution “would have the effect of eroding, or possibly even destroying the constitutional and exclusive authority of the Commission . . . .” (Citation omitted.)

AG Op. No. 07-03, at pg. 7. The Attorney General further opined that “[t]he delegates [to the constitutional convention] could have specified or limited the scope of the Commission’s rule-making powers . . . or reserved [specific powers] . . . for the Legislature, but they did neither.” Id. at 11-12.

Accordingly, to avoid any potential conflicts with Article VI, section 4, we respectfully suggest that the Joint Committee focus on potential amendments to the JSC’s rules, or other changes to the JSC’s procedures that could be implemented administratively (such as development of training for commissioners). Consistent with that focus, we further suggest that the resolution be amended so that any recommendations of the Joint Committee are sent to the JSC directly, with copies to the President of the Senate, the Speaker of the House, the Chief Justice and the Hawaii State Bar Association for their information:

~~[BE IT FURTHER RESOLVED that the Legislative Reference Bureau is requested to assist the Joint Committee on Judicial Selection; and]~~

BE IT FURTHER RESOLVED that the Joint Committee on Judicial Selection[, ~~with the assistance of the Legislative Reference Bureau,~~] is requested to prepare a report of its findings, and any recommendations regarding proposed amendments to the rules of the Judicial Selection Commission or other changes to the procedures of the Commission [, ~~including any proposed legislation,~~] and to submit that report to the Judicial Selection Commission [Legislature] no later than twenty days prior to the convening of the Regular Session of 2022, with copies to the



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**President of the Senate, the Speaker of the House, the Chief Justice of the Hawaii Supreme Court, and the President of the Hawaii State Bar Association;**

We further suggest that the composition of the Joint Committee be expanded to provide a broader range of perspectives to the Committee's deliberations, through the following amendments:

BE IT FURTHER RESOLVED that the Joint Committee on Judicial Selection shall consist of the following members:

- (1) Two members appointed by the Speaker of the House of Representatives;
- (2) Two members appointed by the Senate President;
- (3) ~~One~~ **Two** members appointed by the Governor;
- (4) ~~One~~ **Two** members appointed by the Chief Justice of the Hawaii Supreme Court; and
- (5) ~~One~~ **Two** members appointed by the Hawaii State Bar Association[.]

In conclusion, the Judiciary welcomes opportunities to improve Hawaii's merit-based selection process and to build public trust and confidence in that process.

Thank you for the opportunity to testify on this measure.



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March 19, 2021

TESTIMONY SUBMITTED ELECTRONICALLY

Rep. Mark M. Nakashima, Chair  
Rep. Scot Z. Matayoshi, Vice Chair  
Committee on Judiciary & Hawaiian Affairs

Re: Testimony IN SUPPORT of House Bill HCR 5  
Establishing A Joint Committee on Judicial Selection  
Date: March 22, 2021

Dear Chair Nakashima, Vice Chair Matayoshi, and members of the Committee on Judiciary & Hawaiian Affairs:

I am the former Attorney General of the State of Hawaii and an attorney in private practice. I am currently serving as Chair of an ad hoc Judicial Selection Commission Steering Committee (“Steering Committee”). The Steering Committee has looked into this issue and recommends the establishment of a joint committee on judicial selection as noted in this current house resolution. A comprehensive Report regarding this issue has been prepared by the Steering Committee and is being submitted herewith, along with clarifying attachments. The Steering Committee recommends this matter be passed for the reasons that are set forth in the attached Report.

Very truly yours,

DAVID M. LOUIE

for  
KOBAYASHI SUGITA & GODA, LLP

# 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



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# 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;

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- 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;

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- (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

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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

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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



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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;

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- (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.

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## **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

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interview and investigate petitioners for retention.<sup>1</sup> 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.

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<sup>1</sup> 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.

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## **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

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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

# APPENDIX A

## THE CONSTITUTION OF THE STATE OF HAWAII

### ARTICLE VI

#### THE JUDICIARY

#### JUDICIAL POWER

**Section 1.** The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules. [Ren and am Const Con 1978 and election Nov 7, 1978]

#### SUPREME COURT; INTERMEDIATE APPELLATE COURT;

#### CIRCUIT COURTS

**Section 2.** The supreme court shall consist of a chief justice and four associate justices. The chief justice may assign a judge or judges of the intermediate appellate court or a circuit court to serve temporarily on the supreme court, a judge of the circuit court to serve temporarily on the intermediate appellate court and a judge of the district court to serve temporarily on the circuit court. As provided by law, at the request of the chief justice, retired justices of the

## **APPENDIX A**

supreme court also may serve temporarily on the supreme court, and retired judges of the intermediate appellate court, the circuit courts, the district courts and the district family courts may serve temporarily on the intermediate appellate court, on any circuit court, on any district court and on any district family court, respectively. In case of a vacancy in the office of chief justice, or if the chief justice is ill, absent or otherwise unable to serve, an associate justice designated in accordance with the rules of the supreme court shall serve temporarily in place of the chief justice. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978; am HB 355 (1985) and election Nov 4, 1986]

### **APPOINTMENT OF JUSTICES AND JUDGES**

**Section 3.** The governor, with the consent of the senate, shall fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts, by appointing a person from a list of not less than four, and not more than six, nominees for the vacancy, presented to the governor by the judicial selection commission.

If the governor fails to make any appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the

## APPENDIX A

consent of the senate. If the senate fails to reject any appointment within thirty days thereof, it shall be deemed to have given its consent to such appointment. If the senate shall reject any appointment, the governor shall make another appointment from the list within ten days thereof. The same appointment and consent procedure shall be followed until a valid appointment has been made, or failing this, the commission shall make the appointment from the list, without senate consent.

The chief justice, with the consent of the senate, shall fill a vacancy in the district courts by appointing a person from a list of not less than six nominees for the vacancy presented by the judicial selection commission. If the chief justice fails to make the appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the consent of the senate. The senate shall hold a public hearing and vote on each appointment within thirty days of any appointment. If the senate fails to do so, the nomination shall be returned to the commission and the commission shall make the appointment from the list without senate consent. The chief justice shall appoint per diem district court judges as provided by law.

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The judicial selection commission shall disclose to the public the list of nominees for each vacancy concurrently with the presentation of each list to the governor or the chief justice, as applicable.

### **QUALIFICATIONS FOR APPOINTMENT**

Justices and judges shall be residents and citizens of the State and of the United States, and licensed to practice law by the supreme court. A justice of the supreme court, a judge of the intermediate appellate court and a judge of the circuit court shall have been so licensed for a period of not less than ten years preceding nomination. A judge of the district court shall have been so licensed for a period of not less than five years preceding nomination.

No justice or judge shall, during the term of office, engage in the practice of law, or run for or hold any other office or position of profit under the United States, the State or its political subdivisions.

### **TENURE; RETIREMENT**

The term of office of justices and judges of the supreme court, intermediate appellate court and circuit courts shall be ten years. Judges of district courts shall hold office for the periods as provided by law. At least six months prior to the

## **APPENDIX A**

expiration of a justice's or judge's term of office, every justice and judge shall petition the judicial selection commission to be retained in office or shall inform the commission of an intention to retire. If the judicial selection commission determines that the justice or judge should be retained in office, the commission shall renew the term of office of the justice or judge for the period provided by this section or by law.

Justices and judges shall be retired upon attaining the age of seventy years. They shall be included in any retirement law of the State. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978; am SB 2182 (1994) and SB 2294 (1994) and election Nov 8, 1994; am HB 1917 (2006) and election Nov 7, 2006; am HB 420 (2014) and election Nov 4, 2014]

### **JUDICIAL SELECTION COMMISSION**

**Section 4.** There shall be a judicial selection commission that shall consist of nine members. The governor shall appoint two members to the commission. No more than one of the two members shall be a licensed attorney. The president of the senate and the speaker of the house of representatives shall each respectively appoint two members to the commission. The chief justice of the supreme court shall appoint one member to

## APPENDIX A

the commission. Members in good standing of the bar of the State shall elect two of their number to the commission in an election conducted by the supreme court or its delegate. No more than four members of the commission shall be licensed attorneys. At all times, at least one member of the commission shall be a resident of a county other than the City and County of Honolulu.

The commission shall be selected and shall operate in a wholly nonpartisan manner. After the initial formation of the commission, elections and appointments to the commission shall be for staggered terms of six years each. Notwithstanding the foregoing, no member of the commission shall serve for more than six years on the commission.

Each member of the judicial selection commission shall be a resident of the State and a citizen of the United States. No member shall run for or hold any other elected office under the United States, the State or its political subdivisions. No member shall take an active part in political management or in political campaigns. No member shall be eligible for appointment to the judicial office of the State so long as the person is a member of the judicial commission and for a period of three years thereafter.

No act of the judicial selection commission shall be valid except by concurrence of the majority of its voting members.



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The judicial selection commission shall select one of its members to serve as chairperson. The commission shall adopt rules which shall have the force and effect of law. The deliberations of the commission shall be confidential.

The legislature shall provide for the staff and operating expenses of the judicial selection commission in a separate budget. No member of the judicial selection commission shall receive any compensation for commission services, but shall be allowed necessary expenses for travel, board and lodging incurred in the performance of commission duties.

The judicial selection commission shall be attached to the judiciary branch of the state government for purposes of administration. [Add Const Con 1978 and election Nov 7, 1978; am SB 2513 (1994) and SB 2515 (1994) and election Nov 8, 1994]

### **RETIREMENT; REMOVAL; DISCIPLINE**

**Section 5.** The supreme court shall have the power to reprimand, discipline, suspend with or without salary, retire or remove from office any justice or judge for misconduct or disability, as provided by rules adopted by the supreme court.

The supreme court shall create a commission on judicial discipline which shall have authority to investigate and conduct hearings concerning allegations of misconduct or disability and to make recommendations to the supreme court concerning

## **APPENDIX A**

reprimand, discipline, suspension, retirement or removal of any justice or judge. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]

### **ADMINISTRATION**

**Section 6.** The chief justice of the supreme court shall be the administrative head of the courts. The chief justice may assign judges from one circuit court to another for temporary service. With the approval of the supreme court, the chief justice shall appoint an administrative director to serve at the chief justice's pleasure. [Ren and am Const Con 1978 and election Nov 7, 1978]

### **RULES**

**Section 7.** The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law. [Ren Const Con 1978 and election Nov 7, 1978]

# **JUDICIAL SELECTION COMMISSION RULES**

**Published by the Supreme Court  
of the State of Hawai‘i  
for the Judicial Selection Commission**

**Adopted by the Commission April 23, 1979  
With Amendments as Noted  
pursuant to Article VI, Section 4 of the  
Hawaii State Constitution**

**The Judiciary  
State of Hawai‘i**

## **APPENDIX B**

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**APPENDIX B**  
**JUDICIAL SELECTION COMMISSION RULES**

**Rule 5**

**PREAMBLE**

Judicial selection commissioners hold positions of public trust and shall conduct themselves in a manner which reflects credit upon the judicial selection process.

**Rule 1. COMMISSION CHAIRPERSON**

The chairperson of the commission shall adhere to the Rules for the Judicial Selection Commission and shall preside at any meeting of the commission and shall perform such additional acts and functions as authorized by the commission.

*(Amended and effective 2/13/13)*

**Rule 2. COMMISSION VICE-CHAIRPERSON**

In the event that the chairperson is an attorney, the vice-chairperson shall be a lay member of the commission. If the chairperson is not an attorney, the vice-chairperson shall be an attorney. The vice-chairperson shall serve in the absence of the chairperson.

**Rule 3. COMMISSION SECRETARY**

The commission shall choose one of its members as secretary. It shall be the duty of the secretary to prepare and keep the minutes of all meetings. In the secretary's absence, the commission shall choose a member to be acting secretary. The duties may be delegated to a staff member.

**Rule 4. TERMS OF OFFICE**

The terms of office of the chairperson, vice-chairperson and secretary shall be for two years. Any officer may be removed prior to the expiration of his or her term of office upon a majority vote of the commission.

*(Amended and effective 2/13/13)*

**Rule 5. CODE OF CONDUCT FOR COMMISSION MEMBERS**

**SECTION ONE: ABUSE OF POSITION**

**A.** No commissioner shall use or attempt to use his or her official position to secure privileges or exemptions for the commissioner or others.

**B.** No commissioner shall attempt, solicit, or agree to accept any gift, favor or anything of value

based upon any understanding, either explicit or implicit, that the official actions, decisions or judgment of any commissioner would be influenced thereby. Nothing in this section shall prohibit a commissioner from accepting a public award presented in recognition of public service.

**C.** No commissioner shall request or accept any fee or compensation, on commission related matters.

**D.** Each commissioner shall use the resources, property and funds under the commissioner's official control judiciously and solely in accordance with prescribed statutory and regulatory procedures.

**E.** Each commissioner shall immediately report to the Judicial Selection Commission any attempt to induce him or her to violate any of the standards set out above.

**SECTION TWO: CONFIDENTIALITY**

**A.** Under the Constitution of the State of Hawai'i, the commission's deliberations must be confidential. To keep deliberations confidential, information that shall be kept confidential and shall not be disclosed outside of any commission meeting shall include, but not be limited to: information relating to the identity of any applicant; information received from or about current or former applicants and petitioners; the identity of informational sources; and any communications among or votes by commissioners that have transpired in the course of their deliberations on any subject.

*(Amended and effective 11/15/11; further amended and effective 2/13/13; further amended and effective 1/24/14)*

**B.** This mandate of confidentiality survives commissioners' terms of office and must be observed in perpetuity.

*(Amended and effective 11/15/11)*

**C.** The commission shall release lists of its nominees for judicial office concurrent with its submission of each list to the appointing authority.

*(Amended and effective 11/15/11)*

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### Rule 12

### JUDICIAL SELECTION COMMISSION RULES

#### SECTION THREE: CONFLICT OF INTEREST

A. Every commissioner shall avoid conflicts of interest in the performance of commission duties. Every commissioner is required to exercise diligence in becoming aware of conflicts of interest, and in disclosing any conflicts to the commission. If a commissioner knows of any personal, business, or legal relationship that a commissioner may have with an applicant or petitioner, including any legal proceeding in which a commissioner is appearing as a party or counsel before an applicant or petitioner, the commissioner must report this fact to the commission. The commission shall then decide the extent to which the involved commissioner shall participate in the proceedings concerning said applicant or petitioner. In the event that a commissioner does not vote, the fact that a commissioner did not vote may be announced publicly. The commission may disclose its decision on this issue.

*(Amended and effective 2/13/13)*

B. No commissioner shall participate in any retention proceeding regarding a judge or justice who has a petition for retention pending before the commission pursuant to Rule 12 if that commissioner has a substantive matter pending before that judge or justice.

C. No commissioner shall take an active part in political management or in political campaigns.

D. A commissioner shall consider each applicant and petitioner for a judicial office in an impartial, objective manner. No commissioner shall discriminate on the basis of nor manifest, by words or conduct, bias or prejudice based on race, religion, sex, national origin, gender, marital status, sexual orientation or political affiliation in the conduct of the business of the commission.

#### Rule 6. COMMISSION MEETINGS

A. Meetings of the commission may be called by the chairperson or a majority of the members by written notice to the other members specifying the time and place of meeting. Such notice shall be transmitted in writing at least seven days before the time specified, except that a meeting may be held on shorter notice if the notice specifies that the meeting will be an emergency meeting. Notice of meeting may be waived by any commissioner either before or

after the meeting takes place; and attendance at a meeting by any member shall constitute a waiver of notice by such member unless he or she shall, at or promptly after the beginning of such meeting, object to the holding of the meeting on the ground of lack of, or insufficiency of, notice.

*(Amended and effective 2/13/13)*

B. Meetings of the commission may be held without notice at any time or place whenever the meeting is one as to which notice is waived by all members or whenever the commission at a previous meeting shall have designated the time and place for such a meeting.

C. The chairperson shall call at least one meeting each year for the principal purpose of reviewing and/or amending commission rules and operating procedures and briefing new commissioners of the rules and operating procedures.

D. A quorum for the commission shall be five commissioners. The commission shall act by majority vote of all commissioners in all actions.

#### Rule 7. RECRUITMENT OF APPLICANTS, NOTICE

A. Commissioners may actively seek out and encourage qualified individuals to apply for judicial office. Commissioners should always keep in mind that often persons with the highest qualifications will not actively seek judicial appointment.

B. Upon notification or knowledge that a vacancy has occurred or will occur, the chairperson shall inform the other members of the commission of the vacancy. The commission may publicize a vacancy.

#### Rule 8. APPLICATIONS AND PRELIMINARY SCREENING OF APPLICANTS

A. Applicants who meet the constitutional qualifications for appointment shall receive and respond to forms of applications as prescribed by the commission.

B. After it receives the applications, the commission may by a majority vote eliminate from further consideration those applicants whom it evaluates to be unqualified for judicial office. A list of the remaining applicants may be prepared and the commission may gather additional information on each applicant as it deems appropriate.

*(Amended and effective 2/13/13)*



**APPENDIX B**  
**JUDICIAL SELECTION COMMISSION RULES**

**Rule 12**

C. The chairperson may designate one or more commissioners to review the qualifications of the applicants whose names appear on the list of remaining applicants prepared pursuant to Rule 8B. The designated commissioner or commissioners shall prepare a list recommending the names of applicants whom the commission should interview, the names of applicants who should not be further considered by the commission, and the names of applicants the commission should further consider for judicial office. In the event of such designations, the commission shall determine by a majority vote whether or not to accept or reject the recommendations.

*(Amended and effective 2/13/13)*

**Rule 9. INTERVIEWS AND INVESTIGATIONS**

The commission may interview applicants and petitioners and conduct investigations into their backgrounds and qualifications. The chairperson may designate one or more commissioners to interview and investigate applicants and petitioners. Using the commission's form of application or petition or as the case may be, as a starting point, the designees may obtain as much information on the applicant or petitioner as possible from available sources. The commission may retain such services as it deems necessary and appropriate to conduct investigations.

**Rule 10. EVALUATION OF APPLICANTS AND PETITIONERS**

A. The commission shall consider each applicants and petitioners background, professional skills and character, and may give consideration to the following qualities.

- (1) integrity and moral courage
- (2) legal ability and experience
- (3) intelligence and wisdom
- (4) compassion and fairness
- (5) diligence and decisiveness
- (6) judicial temperament
- (7) such other qualities that the commission deems appropriate

**Rule 11. SELECTION OF NOMINEES**

A. Oral or written reports on the investigations and interviews conducted pursuant to Rule 9 shall be made to the commission. Thereafter, the chairperson

shall open the meeting to a discussion of each applicant's qualifications for judicial office.

B. When the commission has completed its evaluation of applications for judicial office, it shall meet for the purpose of selecting not less than four and not more than six nominees for a vacancy in the office of chief justice, supreme court, intermediate appellate court and circuit courts. The commission shall select not less than six nominees for a vacancy in the district courts.

*(Amended and effective 6/25/09)*

C. The commission members shall vote by secret ballot. Each member shall vote to select the number of qualified nominees for any given judicial office vacancy required under Rule 11B. In the event that the initial ballot produces less than the stipulated number of nominees, voting shall continue for the remaining nominee positions; provided, however, that each nominee must have been selected by a majority vote of nine commissioners. An applicant's name may be included on more than one list of nominees for different judicial office vacancies. The names of the nominees selected by the commission shall be transmitted pursuant to Rule 13.

*(Amended and effective 6/25/09)*

**Rule 12. RETENTION OF PETITIONERS**

A. When a judge or justice petitions the commission pursuant to Section 3 of Article VI of the Constitution of the State of Hawai'i to be retained in office, the commission shall promptly upon receipt of such petition commence an investigation into qualifications of the petitioner for continued judicial office. Every petitioner shall complete forms prescribed by the commission. The petitioner, by giving notice to the commission, may withdraw the petition for retention before the issuance of an order by the commission under Rule 12F.

B. The commission shall publicize the fact that the judge or justice has petitioned for retention in such a manner as it deems appropriate to the need that all persons who might have an interest in the subject matter be given an opportunity to submit their views.

C. At any meeting of the commission held for the purpose of considering a petition filed pursuant to this rule, the chairperson or acting chairperson may administer oaths and affirmations to any person testifying at such meetings.

## APPENDIX B

### Rule 12

### JUDICIAL SELECTION COMMISSION RULES

**D.** The commission may compel by subpoena the attendance of witnesses by hearings under this rule and the production of pertinent books, papers and documents. Writs of subpoena shall be signed by the chair or acting chair and attested to by the secretary or acting secretary. The circuit court of any circuit in which a subpoena is served or in which the attendance is required may, upon proper application, enforce the attendance and testimony of any witness and the production of any documents so subpoenaed. Subpoena and witness fees and mileage shall be the same as in civil cases in the circuit courts.

**E.** The commission shall interview the petitioner and may hold hearings which, at the discretion of the commission, may be either opened or closed to the public and which interested parties may testify before the commission.

The commission shall make a determination that the petitioner should or should not be retained in office, and the commission shall attempt to make its decision within thirty days prior to the expiration of the petitioner's then current term of office. Voting by the commissioners on the question of the granting or denial of the petition shall be by secret ballot. The term of a petitioner may not be extended except by a majority vote of the commissioners as provided by Rule 6D.

**F.** The commission shall issue an order upon making a determination that the petitioner should or should not be retained in office. The order shall renew the term of office of the petitioner for the period provided by law if the determination is that the petitioner should be retained in office. The order shall state that the petition has been denied if the determination is that the petitioner should not be retained in office.

#### **Rule 13. TRANSMITTAL TO THE APPOINTING AUTHORITY**

**A.** The names of the nominees, listed in alphabetical order, shall be hand-delivered to the appointing authority.

**B.** No other information shall be forwarded to the appointing authority, except that the commission may submit to the appointing authority a factual summary of the nominee's background based on material provided by the nominees, and the commission may consult with the appointing authority on request.

## APPENDIX THE CONSTITUTION OF THE STATE OF HAWAII as amended and in force July 1, 2004

### [ARTICLE VI]

#### APPOINTMENT OF JUSTICES AND JUDGES

SECTION 3. The governor, with the consent of the senate shall fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts, by appointing a person from a list of not less than four, and not more than six, nominees for the vacancy, presented to the governor by the judicial selection commission. If the governor fails to make any appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the consent of the senate. If the senate fails to reject any appointment within thirty days thereof, it shall be deemed to have given its consent to such appointment. If the senate shall reject any appointment, the governor shall make another appointment from the list within ten days thereof. The same appointment and consent procedure shall be followed until a valid appointment has been made, or failing this, the commission shall make the appointment from the list, without senate consent. The chief justice, with the consent of the senate, shall fill a vacancy in the district courts by appointing a person from a list of not less than six nominees for the vacancy presented by the judicial commission. If the chief justice fails to make the appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the consent of the senate. The senate must hold a public hearing and vote on each appointment within thirty days of any appointment. If the senate fails to do so, the nomination shall be returned to the commission and the commission shall make the appointment from the list without senate consent. The chief justice shall appoint per diem district court judges as provided by law.

**APPENDIX B**  
**JUDICIAL SELECTION COMMISSION RULES**

**Appendix**

**QUALIFICATIONS FOR APPOINTMENT**

Justices and judges shall be residents and citizens of the State and of the United States, and licensed to practice law by the supreme court. A justice of the supreme court, a judge of the intermediate appellate court and a judge of the circuit court shall have been so licensed for a period of not less than ten years preceding nomination. A judge of the district court shall have been so licensed for a period of not less than five years preceding nomination. No justice or judge shall, during the term of office, engage in the practice of law, or run for or hold any other office or position of profit under the United States, the State or its political subdivisions.

**TENURE; COMPENSATION; RETIREMENT**

The term of office of justices and judges of the supreme court, intermediate appellate court and circuit courts shall be ten years. Judges of district courts shall hold office for the periods as provided by law. At least six months prior to the expiration of a justice's or judge's term of office, every justice and judge shall petition the judicial selection commission to be retained in office or shall inform the commission of an intention to retire. If the judicial selection commission determines that the justice of judge should be retained in office, the commission shall renew the term of office of such justice or judge for the period provided by this section or by law. There shall be a salary commission to review and recommend salaries for justices and judges of all state courts. Justices and judges shall have salaries as provided by law. Their compensation shall not be decreased during their respective terms of office, unless by general law applying to all salaried officers of the State. They shall be retired upon attaining the age of seventy years. They shall be included in any retirement law of the State.

*(Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978; am SB 2182 (1994) and SB 2294 (1994) and election Nov 8, 1994.)*

**JUDICIAL SELECTION COMMISSION**

SECTION 4. There shall be a judicial selection commission that shall consist of nine members. The governor shall appoint two members to the commission. No more than one of the two members shall be a licensed attorney. The president of the senate and the speaker of the house of representatives shall each respectively appoint two members to the commission. The chief justice of the supreme court shall appoint one member to the commission. Members in good standing of the bar of the State shall elect two of their number to the commission in an election conducted by the supreme court or its delegate. No more than four members of the commission shall be licensed attorneys. At all times, at least one member of the commission shall be a resident of a county other than the City and County of Honolulu. The commission shall be selected and shall operate in a wholly nonpartisan manner. After the initial formation of the commission, elections and appointments to the commission shall be for staggered terms of six years each. Notwithstanding the foregoing, no member of the commission shall serve for more than six years on the commission. Each member of the judicial selection commission shall be a resident of the State and a citizen of the United States. No member shall run for or hold any other elected office under the United States, the State its political subdivisions. No member shall take an active part in political management or in political campaigns. No member shall be eligible for appointment to judicial office of the State so long as the person is a member of the judicial commission and for a period of three years thereafter. No act of the judicial selection commission shall be valid except by concurrence of the majority of its voting members. The judicial selection commission shall select one of its members to serve as chairperson. The commission shall adopt rules which shall have the force and effect of law. The deliberations of the commission shall be confidential. The legislature shall provide for the staff and operating expenses of the judicial selection commission in a separate budget. No member of the judicial selection commission shall receive any compensation for commission services, but shall be allowed necessary expenses for travel, board and lodging incurred in the performance of commission duties.

## **APPENDIX B**

### **Appendix**

### **JUDICIAL SELECTION COMMISSION RULES**

The judicial selection commission shall be attached to the judiciary branch of the state government for purposes of administration.

*(Add Const Con 1978 and election Nov 7, 1978; am SB 2513 (1994) and SB 2515 (1994) and election Nov 8, 1994.)*

APPENDIX C

HOUSE OF REPRESENTATIVES  
THIRTY-FIRST LEGISLATURE, 2021  
STATE OF HAWAII

H.B. NO.

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A BILL FOR AN ACT

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF HAWAII 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.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1 SECTION 1. Article VI of the Constitution of the State of  
2 Hawaii is amended by adding a new section to read as follows:

3 **MERIT PRINCIPLES**

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

7 SECTION 2. The question to be printed on the ballot shall  
8 be as follows:

9 "Shall the Constitution of the State of Hawaii be amended  
10 to require the judicial selection commission to be guided by  
11 principles of merit in the selection of judicial nominations and  
12 the retention of judges and justices?"

13 SECTION 3. New constitutional material is underscored.

14 SECTION 4. This amendment shall take effect upon

## APPENDIX C

1 compliance with article XVII, section 3, of the Constitution of  
2 the State of Hawaii.

3

INTRODUCED BY: \_\_\_\_\_

## APPENDIX C

**Report Title:**

Constitutional Amendment; Judicial Selection Commission; Merit Principles

**Description:**

Proposes an amendment to the Constitution of the State of Hawaii 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.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

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HOUSE CONCURRENT  
RESOLUTION

ESTABLISHING A JOINT COMMITTEE ON JUDICIAL SELECTION.

1 WHEREAS, Hawaii's Judicial Selection Commission was  
2 proposed by the 1978 Constitutional Convention as a method of  
3 selecting judges based solely on their qualifications and not on  
4 political patronage; and

5  
6 WHEREAS, this merit-based selection process was intended to  
7 assure the public that only the candidates best qualified for a  
8 vacancy would be considered for judicial appointment; and

9  
10 WHEREAS, however, doubts have been raised over the years  
11 regarding the selection and retention of judges and justices and  
12 the closed and confidential operations of the Judicial Selection  
13 Commission; and

14  
15 WHEREAS, Hawaii's judicial selection process is shrouded in  
16 unlimited secrecy due to strict laws and rules regulating  
17 disclosure; and

18  
19 WHEREAS, deliberations of the Judicial Selection Commission  
20 are further determined to be confidential pursuant to the  
21 Constitution of the State of Hawaii; and

22  
23 WHEREAS, to keep deliberations confidential, the rules of  
24 the Judicial Selection Commission provide, in perpetuity,  
25 blanket confidentiality for information relating to the identity  
26 of any applicant, information received from or about current or  
27 former applicants and petitioners, and any communications among  
28 or votes by commissioners that have transpired in the course of  
29 their deliberations on any subject; and

30  
31 WHEREAS, the only time an applicant's name is publicly  
32 released is upon nomination by the Judicial Selection Commission





# H.C.R. NO.

1 for a vacant judicial position as provided by the Constitution  
2 of the State of Hawaii; and

3  
4 WHEREAS, the continued opacity of Hawaii's judicial  
5 selection process may further erode public confidence in the  
6 judicial selection process and, by extension, the Judiciary; and

7  
8 WHEREAS, Hawaii's merit-based judicial selection process  
9 can only be preserved through public confidence and public  
10 confidence requires full disclosure of the process and the need  
11 for confidentiality as an inherent part of merit-based judicial  
12 selection; and

13  
14 WHEREAS, to preserve Hawaii's merit-based selection  
15 process, it is critical that the public has a clear  
16 understanding of the thorough process utilized by the Judicial  
17 Selection Commission in selecting and retaining judges and  
18 justices; and

19  
20 WHEREAS, the rules of the Judicial Selection Commission do  
21 not identify any clear or measurable evaluation standards for  
22 applicants or petitioners for judicial office, including  
23 standards that address the specific skills that are required for  
24 trial or appellate courts and the knowledge required for courts  
25 with specialized jurisdiction; and

26  
27 WHEREAS, establishing clear, defined standards for  
28 evaluating applicants and petitioners for judicial office will  
29 promote public confidence that the best qualified applicants are  
30 being selected and quality petitioners are retained in a  
31 consistent manner and assure applicants and petitioners that  
32 they will be held to predictable and transparent standards; and

33  
34 WHEREAS, the efficiency and operations of the Judicial  
35 Selection Commission could also be improved with an orientation  
36 program for new members of the Commission and annual training  
37 for all members of the Commission; and

38  
39 WHEREAS, the Judicial Selection Commission's voting process  
40 can be streamlined by amending the voting system, voting for  
41 multiple lists at the same time, or authorizing remote  
42 participation; now, therefore,



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BE IT RESOLVED by the House of Representatives of the Thirty-first Legislature of the State of Hawaii, Regular Session of 2021, the Senate concurring, that the Joint Committee on Judicial Selection shall be established to work with the Judicial Selection Commission and Judiciary to:

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

BE IT FURTHER RESOLVED that the Joint Committee on Judicial Selection shall consist of the following members:

- (1) Two members appointed by the Speaker of the House of Representatives;
- (2) Two members appointed by the Senate President;
- (3) One member appointed by the Governor;
- (4) One member appointed by the Chief Justice of the Hawaii Supreme Court; and
- (5) One member appointed by the Hawaii State Bar Association; and

BE IT FURTHER RESOLVED that the Legislative Reference Bureau is requested to assist the Joint Committee on Judicial Selection; and



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BE IT FURTHER RESOLVED that the Joint Committee on Judicial Selection, with the assistance of the Legislative Reference Bureau, is requested to submit a report of its findings and recommendations, including any proposed legislation, to the Legislature no later than twenty days prior to the convening of the Regular Session of 2022; and

BE IT FURTHER RESOLVED that a certified copy of this Concurrent Resolution be transmitted to the Governor, Speaker of the House of Representatives, President of the Senate, Chief Justice of the Hawaii Supreme Court, Chairperson of the Judicial Selection Commission, Executive Director of the Hawaii State Bar Association, and Director of the Legislative Reference Bureau.

OFFERED BY: \_\_\_\_\_

