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Judicial Retention in Hawaii: A Case Study

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Over the past several decades, judicial selection in the states has become increasingly politicized. Heightened special interest spending in judicial elections, threats of political retaliation for unpopular judicial decisions, and increasing political pressure and partisanship threaten the fairness and integrity of state courts.² These pressures are particularly acute when sitting judges' job security is at stake. Only three states provide life tenure for judges (with or without age limits). In every other state, judges wishing to remain on the bench after their first term has expired must be reselected, typically through: (1) a contested election; (2) an uncontested retention election where judges face a yes-or-no vote; or (3) reappointment by the governor or legislature. Meanwhile, a growing body of empirical evidence shows that concerns over job security impact how judges decide cases,³ suggesting that reselection pressures can threaten the promise of fair and evenhanded justice.

But is reselecting judges inherently problematic or is it the existing methods of reselection that threaten our courts? The unique system of reselection in Hawaii presents a lens for studying this question. Hawaii is the only state in which a commission — and not a political body or the electorate — is empowered to decide whether judges can keep their seats. Drawing from interviews with former judicial employees and members of the wider legal community, legislative testimony, media coverage, and professional scholarship, this paper aims to identify lessons that can be garnered from Hawaii's singular judicial selection system.

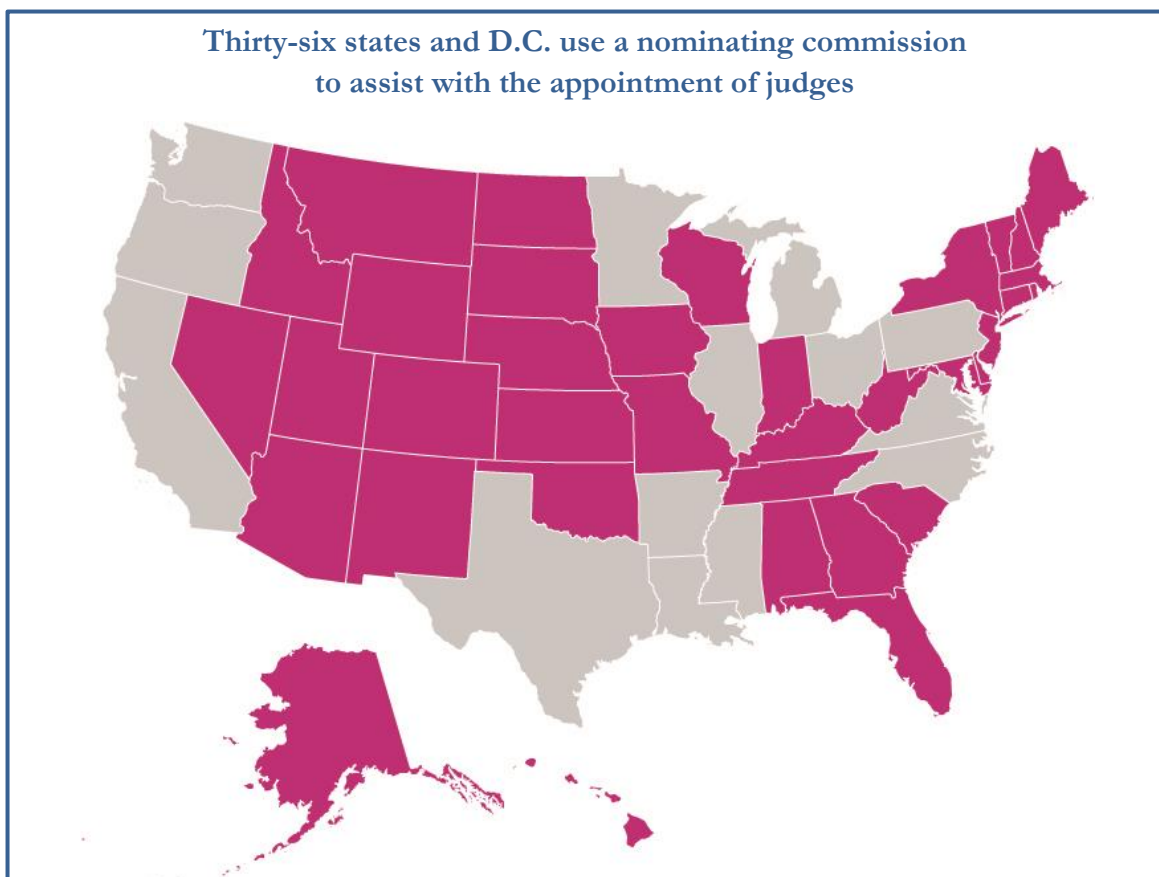
An investigation into Hawaii's system of commission-based retention suggests that it is structured to protect judges from the outside pressures that can threaten their capacity to decide cases impartially, without fear of retribution for unpopular decisions. Available evidence indicates the system is relatively successful in insulating judges, but a lack of transparency and scant openings for public input unnecessarily hinder opportunities to assess or inform the commission's work. 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.

I. Hawaii Uses a Unique Judicial Selection System

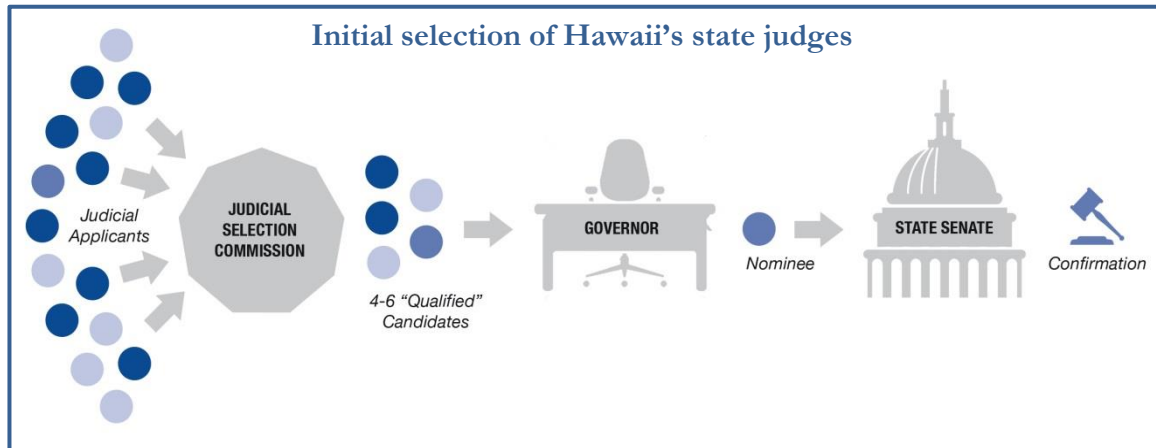
Established at the state's 1978 Constitutional Convention, Hawaii's Judicial Selection Commission occupies a critical role in both the initial selection and reselection of judges. When a vacancy opens on any of Hawaii's courts, the commission screens all applicants for the position and sends a list of qualified candidates to the appointing authority, who is either the governor or chief justice, depending on the court level. When a judge has completed a term on the bench, the commission is the sole decision-maker as to whether that judge will be granted an additional term — a practice unique to Hawaii.

A. Judges Are Initially Selected by Commission-Assisted Appointment

As in many states, in Hawaii the governor fills all judicial vacancies on courts of general jurisdiction — the supreme court, intermediate appellate court, and trial courts — with the help of a nominating commission. Commission-assisted appointment is a common method for filling judicial vacancies: nominating commissions assist the governor or legislature with the appointment of at least some judges in 36 states and the District of Columbia.⁴



The Judicial Selection Commission plays a number of roles in selecting judges for their initial term on the bench. It encourages potential candidates for judicial positions to apply, reviews applications, interviews candidates, and selects a “slate” of four to six candidates to recommend to the governor.⁵ The governor may interview candidates on the list before selecting one as her nominee.



The commission operates in a zone of strict confidentiality, with rules prohibiting members from disclosing candidate names, candidate application materials, or commission deliberations. Only once the commission sends the candidate shortlist to the governor does that shortlist become public.⁶

The Hawaii Senate must confirm all judicial nominees by majority vote. Prior to a vote, the state senate's judiciary committee holds a public hearing to discuss each nominee's qualifications and to receive testimony from both the public and the Hawaii State Bar Association.⁷ If the senate does not confirm a judge, the governor nominates a new candidate from the commission's original list.⁸ Once appointed, judges serve ten-year terms, at the end of which they may apply for retention to additional terms of the same length.⁹

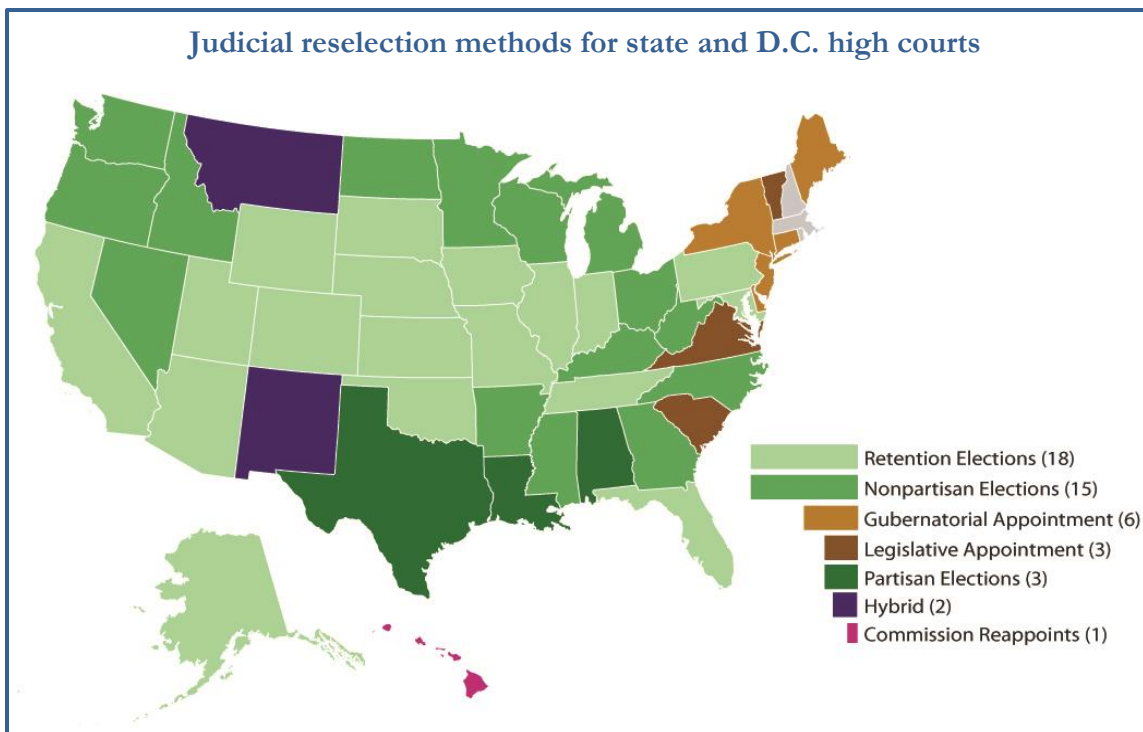
COURTS OF LIMITED JURISDICTION

In Hawaii, judicial selection for courts of limited jurisdiction, such as district or family court, is an identical process to that for courts of general jurisdiction, with two exceptions. First, the chief justice of the Hawaii Supreme Court — rather than the governor — is the nominating authority and, second, the Judicial Selection Commission is required to send a minimum of six potential nominees, rather than the four required for courts of general jurisdiction.¹⁰ There is also a difference in the length of judicial terms; courts of limited jurisdiction have six-year terms¹¹ and courts of general jurisdiction have ten-year terms.¹²

B. The Commission Decides Whether to Reappoint Judges for Subsequent Terms

Most states, including Hawaii, allow judges to serve multiple terms. (Only three states select judges to single terms and in each of these states judges may sit for life, though two curtail the term with age limits.) Hawaii is the only state, however, in which neither the voting public nor the political branches decide whether judges seeking another term may remain on the bench. Instead, the Judicial Selection Commission decides whether to retain sitting judges.¹³

In contrast, across the country, elections are by far the most common method of reselection. Looking at state high courts, 38 states use elections to determine whether sitting judges should stay on the bench. Of these, 18 use contested elections — where multiple candidates vie for a single seat — and 18 use retention elections — where a sitting judge stands for an uncontested up-or-down vote (the other two states use both types of elections). The remaining states, apart from Hawaii, rely upon the governor or the legislature to decide whether a judge continues to serve.¹⁴



Under Hawaii’s unique system, the Judicial Selection Commission is the sole decision-maker as to whether a sitting judge may serve another term. As a judge approaches the end of her term, she must either notify the commission of her intent to retire or petition it for retention, setting the commission’s review process in motion.¹⁵ The commission evaluates the sitting judge’s fitness for retention using materials including the judge’s decision-making record, performance evaluations administered by the judiciary and the Bar, an in-person interview, and written comments submitted confidentially by the public in response to postings online and in newspapers, all discussed in more detail below.¹⁶

After meeting to consider the petition, the commission votes by secret ballot.¹⁷ A judge must receive five votes from the nine-member commission in order to be retained for an additional term. If a judge's petition is denied, it cannot be appealed or reheard,¹⁸ and the judge must step down at her term's end. The resulting vacancy is filled through the initial selection process described above.

II. The Structure of Hawaii's Reselection System Helps Insulate Judges from Outside Pressures but Would Benefit from Greater Transparency and Clearer Standards for Retention

Hawaii's Judicial Selection Commission possesses several structural advantages that help insulate judges from political pressures.¹⁹ The power to select commissioners is apportioned broadly, encouraging diversity of viewpoint within the commission and resistance to political or interest group capture. Additionally, the commission's process for evaluating judges — namely, soliciting a wide range of confidential input — promotes nuanced consideration of judicial performance. However, despite these protections, some anecdotal evidence suggests that Hawaii's judges are not adequately insulated from outside pressure, and that its system could be strengthened by creating more transparent procedures and clearer standards for how judges are assessed for retention.

A. The Rules for Appointing Judicial Selection Commissioners Encourage Nonpartisan Deliberations and Unbiased Evaluation

The Hawaii Constitution directs that the members of the commission “shall be selected and shall operate in a wholly nonpartisan manner.”²⁰ The commission rules additionally instruct commissioners to “consider each applicant and petitioner for a judicial office in an impartial, objective manner.”²¹ The extent to which partisan political considerations are inevitable, or even desirable, in the selection of judges is the subject of much debate,²² but Hawaii has identified partisan interests as having no place in the commission's deliberations.

The appointment and tenure of members of the Judicial Selection Commission is structured in a way that supports these stated goals. By distributing the power to appoint commissioners across a wide range of leaders in government and the legal community, Hawaii's system of judicial reselection helps insulate the commission against partisan capture and supports richer decision-making. Commissioners' terms, which are staggered and shorter than judges', contribute to this insulation while protecting against bias in the selection process.

WHY DOES HAWAII RESELECT JUDGES BY COMMISSION?

The historical record indicates that concerns about judicial selection politics motivated the designation of the Judicial Selection Commission as the decider of judicial retention.

Hawaii adopted its unique system in 1978, as part of its new constitution. Before 1978, the governor — or, for courts of limited jurisdiction, the chief justice — appointed judges with advice and consent from the senate and made reappointment decisions unilaterally.²³ Concerns over political horse-trading led participants in the state’s 1978 Constitutional Convention to advance Hawaii’s current selection system. Former commission chair Lawrence Okinaga, who helped organize and served on the first Judicial Selection Commission, said convention participants were motivated by “allegations of a lot of legislative and political insiders or officeholders becoming judges . . . [They] believed we should minimize the role of politics, while acknowledging it is a part of the process.”²⁴ In *Judicial Independence: The Hawaii Experience*, the late Chief Justice William Richardson of the Supreme Court of the State of Hawaii writes: “The convention history indicates that the primary purpose of the new retention process is to exclude or, at least, reduce partisan political action.”²⁵

Diverse Commissioner Perspectives Incentivize Consensus Building Around Candidate Qualifications

A diverse group of stakeholders wields the power to appoint Hawaii’s judicial nominating commissioners. Hawaii’s constitution provides for nine commission members: the governor appoints two, the president of the state senate appoints two, the speaker of the state house of representatives appoints two, the chief justice of the state supreme court appoints one, and the Hawaii State Bar Association elects two.²⁶ No more than four of the nine commission members may be licensed attorneys, thus reserving a majority of seats for laypersons. The constitution guarantees some geographic diversity as well — the commission must always include one resident of an island other than Oahu, home to the state capital of Honolulu.²⁷

Distributing commissioner appointment power across all three branches of government, as well as to the state bar association, may help preserve the commission’s goal of “nonpartisan” evaluations by protecting against capture by a single partisan motive or special interest. Spreading out appointment power lessens the likelihood that commissioners will share political goals or allegiances, therefore making it harder for any particular interest to control the commission’s decisions. It also, according to one law professor and former judge, “makes cooperation, consideration, and compromise among commissioners more likely, thus strengthening the system.”²⁸ A committee of judges, lawyers, and laypeople, assembled in 2008 by the Hawaii chapter of the American Judicature Society to examine judicial independence and accountability, found that that the commission’s composition is “one of its greatest strengths, with appointees from each branch of government and the bar, acting as checks and balances to any real or perceived bias that might result from less diversity.”²⁹ The fact that this diversity of membership is constitutionally established also helps protect against politically opportunistic manipulation of the commission’s composition.

Building diversity into the commission’s structure also enriches its decision-making. The commission’s composition facilitates inclusion of different perspectives, including diversity of political affiliation, professional background, and geography. A substantial body of research shows that judicial decision-making is enhanced by the inclusion of diverse backgrounds, perspectives, and life experiences.³⁰ Similarly, the Judicial Selection Commission is strengthened when infused with multiple points of view.

AVOIDING COMMISSION “CAPTURE”

The Judicial Selection Commission was created to insulate judicial selection from political capture, and the current composition of Hawaii’s commission reflects those concerns.

In 1993, the Hawaii State Judiciary, the state bar association, the American Judicature Society, and other court stakeholders convened a citizen’s conference to recommend reforms to the judicial selection process. One catalyst for reform was that, earlier that year, the wife of the governor’s former attorney general was advanced by the Judicial Selection Commission and nominated for a seat on the state supreme court, only to be rejected by the senate for a perceived lack of experience. In an article for the Hawaii Bar Journal, attorney Edmund Leong writes that reformers attributed the candidate’s rejection to “improper manipulation of the screening process by the nomination authorities” — the governor and chief justice — who between them appointed a majority of commissioners.³¹

A number of changes to the Judicial Selection Commission emerged from the citizen’s conference and were passed by legislatively-referred amendment in 1995.³² The amendment:

- Reduced the number of the governor’s appointments from three to two and the chief justice’s appointments from two to one, and increased the number of appointees from the speaker of the house of representatives and the president of the senate from one to two each.
- Added the requirement that at least one commissioner be a resident of an island other than Oahu.
- Reduced the number of candidates the commission must put forward to the governor for vacancies on courts of general jurisdiction from “not less than six” to “not less than four and not more than six.”³³

Staggered Six-Year Commissioner Terms Promote Consistent and Unbiased Evaluation of Judicial Performance

Another advantage of Hawaii’s system is its use of single, staggered terms for commissioners. Because commissioners may only serve for six years and judges serve either ten or six-year terms (depending on the court level), a commissioner never considers the retention of a judge she previously evaluated. This structure promotes objective decision-making by eliminating the risk — borne out in research on unconscious cognitive biases —

that a commissioner who previously assessed a candidate favorably will be predisposed to give that candidate a second positive evaluation.³⁴ Preventing commissioners from evaluating the same judge twice thus improves their ability to objectively assess judicial performance.

Commissioners also serve staggered, or offset, terms, which encourage consistent standards for assessing judges. Staggered terms have historically been used for their stabilizing effect, perhaps most prominently in the U.S. Senate.³⁵ The staggering of commissioner terms allows commissioners to pass on knowledge gained on the job and encourages the consistent application of standards for judicial evaluation as membership changes over time.

B. Retention Procedures Support Candid Evaluations but Excessive Secrecy May Endanger Public Confidence

Another strength of Hawaii's reselection system is the breadth of information Judicial Selection Commissioners consider in evaluating judges, and the protection of this information as confidential. This system encourages comprehensive evaluations that can identify misconduct or poor performance. However, it may be possible to preserve necessary confidentiality while making more information about judges available to the public. In particular, Hawaii's system would benefit from more transparent procedures and clearer standards for assessing judges.

Reviewing Input from Diverse Stakeholders Creates a More Complete Picture of Judicial Performance

Judges must possess a number of skills and serve diverse communities. Effective evaluation of judicial performance therefore requires the input of a variety of stakeholders.³⁶ One strength of Hawaii's system is that the Judicial Selection Commission has a practice of considering a wide range of information and perspectives when reviewing the petition of a judge seeking retention.

In interviews, several former commissioners asserted that this commitment to soliciting diverse feedback allows the commission to more accurately spot and assess potential misconduct.³⁷ In one case, the commission decided not to retain a judge whose judicial record revealed a recurring failure to identify prosecutorial misconduct, despite receiving a high rating from the Bar.³⁸ In other cases, a judge may have a spotless judicial record, but members of the public may report incidences of inappropriate conduct that indicate a lack of judicial fitness. If feedback were solicited from only a narrow audience, such as judges or the bar, commissioners could miss these critical problems.

The commission's rules are not, however, explicit about what information must be considered in making reselection decisions. Pursuant to the Hawaii Constitution, the Judicial Selection Commission creates and maintains its own rules, "which shall have the force and effect of law."³⁹ The rules acknowledge that the judge's petition for retention and in-person interview must be seen by the commission before making a retention assessment. Beyond that, the rules do not identify what additional materials commissioners should consider, saying that they may use the retention petition "as a starting point" to "obtain as much information on the applicant or petitioner as possible from available sources."⁴⁰ Former

commission members report that as a matter of ordinary practice they review the following information to inform their evaluation:

- **Retention questionnaire.** The commission asks the petitioning judge to complete and return a 28-page questionnaire collecting: (1) information on personal, educational, and professional background and experience; (2) memoranda, opinions, and court transcripts; (3) the judge’s personal reflections on her experiences on the bench; (4) financial and medical records; and (5) character references.⁴¹
- **Public comment.** The commission begins a judge’s retention evaluation by issuing a public notice “in newspapers, the Hawai‘i State Bar Association newsletter, and on the Judiciary website”⁴² to solicit confidential written comments from interested members of the public on whether or not the judge should be retained.⁴³
- **Interviews with “resource people.”** Members of the commission meet with individuals who have had frequent dealings with the judge — including lawyers, court personnel, parole officers, police officers, and members of community groups — to solicit confidential feedback.⁴⁴ If necessary, the commission may subpoena witnesses to compel them to give testimony or produce documents.⁴⁵
- **The Hawaii court system’s Judicial Performance Program.** The Judicial Performance Program, sometimes referred to as the Rule 19 Committee, evaluates general jurisdiction judges three times per 10-year term and full-time limited jurisdiction judges twice per six-year term.⁴⁶ Under the program, a third party surveys attorneys who have appeared before the judge, asking them to confidentially rate the judge’s legal ability, judicial management skill, comportment, and settlement and/or plea agreement ability.⁴⁷ The commission may receive access to the redacted comments and evaluation results concerning the performance of a judge upon request.⁴⁸
- **Records of judicial conduct, complaints, or discipline.** The commission obtains any relevant information on a petitioning judge from the Commission on Judicial Conduct.
- **Information submitted by agencies such as the prosecutor’s office, public defender’s office, or Legal Aid Society of Hawaii.**⁴⁹
- **Bar evaluation.** The Hawaii State Bar Association conducts its own, independent evaluation of judges who are midway through their term or up for retention, rating them on their integrity and intelligence, legal knowledge and ability, professional experience, judicial temperament, financial responsibility, public service, health, and responsibilities and duties of the position.⁵⁰ These evaluations are made available to the commission with individual attorney comments redacted.
- **Interview of petitioner.** After reviewing all other information, the commission conducts an in-person interview with the petitioning judge.

Former commissioners confirm that they considered these sources of information as a matter of practice, with no single source of information determining the commission’s retention decision.⁵¹

Commission Confidentiality Requirements Incentivize Candid Assessments of Judicial Fitness but May Be Unnecessarily Strict

Judges wield significant power and getting frank feedback from those who appear before them can be challenging. Attorneys, court employees, and members of the public are unlikely to be forthcoming if they believe their feedback and identity will eventually be made public or otherwise reach the judge in question.⁵² One way Hawaii's commission invites candid evaluations of sitting judges is by guaranteeing that this feedback will be kept confidential.

Hawaii's confidentiality requirements cover not just public comment and commission deliberations, but also nearly all sources of information used within deliberations, detailed above.⁵³ Confidential materials include the entirety of the judge's retention questionnaire, the results of "resource person" interviews, and the judge's interview with the commission. Both judicial evaluations available to the commission, those conducted by the Rule 19 Committee and the Bar, are also confidential, although the chief justice of the Hawaii courts does release a summary report of the Rule 19 judicial evaluations for each court.⁵⁴ Relevant parts of the public judicial record, including the petitioning judge's opinions and appellate cases reviewing the judge's work, are the only pieces of information used by the commission that are also available to the public. When the commission denies a judge's retention petition, it provides no justification to the judge or to the public for the decision.⁵⁵

The opacity of Hawaii's system is unusual. While Hawaii is the only state in which a commission is the sole arbiter of retention, a number of other states rely on commissions to evaluate judges and inform the retention or reappointment decision. In these states, it is also standard practice to create confidential channels for public comment, but unlike Hawaii, almost all of these commissions share a version of each judge's evaluation results with the public.⁵⁶ In Utah, for example, the commission publishes a report on each judge up for retention, including composite survey results, an explanation of the survey methodology, courtroom observations, and the commission's overall recommendation and underlying vote.⁵⁷ The reports are available online and included within the state's voter information pamphlet.⁵⁸

Former commissioners hold differing opinions on the need for transparency. According to one, all materials seen by the commission must be kept confidential or the commission would be rendered ineffective. "There can be no compromise," said attorney Rosemary Fazio, a former commission chair. "If confidentiality is not absolute, the system couldn't function."⁵⁹ Another former commissioner disagrees with Fazio, asserting that evaluative materials could be shared with the public without endangering the judge or those evaluating or commenting on the judge. The former commissioner acknowledged that releasing some content could require edits or redaction, but he pointed out that some materials, including judicial performance evaluations, are already stripped of identifying information in order to be shared with judges in their interviews. "I'm not sure why it all couldn't be public," said the former commissioner.⁶⁰

DEFENDING HAWAII'S RETENTION SYSTEM

The response to three recent legislative proposals to do away with Hawaii's commission-based retention system suggests that the existing system is popular with a diverse set of court stakeholders. The proposed changes ranged from electing judges to empowering the legislature to veto the commission's retention decisions, and they triggered an outpouring of support for the current system as successfully protecting judges from political pressure.⁶¹ A Judiciary Committee Report on one of the bills, proposing a switch to judicial elections, noted the committee "did not receive any testimony in support of this measure."⁶² In opposition, however, testimony was offered by a long list of interested parties, including state and local bar associations, the state's Office of the Public Defender, the American College of Trial Lawyers, unions, nonprofit organizations — including the Hawaii chapters of the American Civil Liberties Union, Common Cause, and the League of Women Voters — the Hawaii Judiciary itself, and 50 interested members of the public.⁶³ Nearly all presented testimony in support of the Judicial Selection Commission as a rigorous and nonpartisan evaluative body and cited concerns that an alternative approach to reselecting judges would politicize the courts.⁶⁴ Attorney and former commission chair David Fairbanks testified that no study or data had been presented to support the idea that "that the present system is inadequate, is fundamentally unsound, has failed, or needs changing." All three bills died in committee.⁶⁵

Procedural Transparency is Underemphasized in Hawaii's Judicial Selection Process, Posing Problems for Public Confidence

Where so much of the underlying materials used to assess judges remains confidential, transparency in other aspects of the commission's process becomes particularly important. Yet in Hawaii, the Judicial Selection Commission's procedure for evaluating retention candidates is informal and closed off from the public. As a 2003 report from the American Judicature Society found: "There is, in effect, no way to either validate or criticize the way the [commission] handled matters because there is no way to know how those matters were, in fact, handled."⁶⁶ The commission rules instruct commissioners to "consider each applicant's and petitioner's background, professional skills, and character" to reach a decision, but offer no specific procedures for how they should do so.⁶⁷ The commission also does not publish any statistics about its retention decisions, such as the percentage of judges retained or demographic data about retention.⁶⁸ Furthermore, the rules do not identify any clear or measurable judicial performance standards, making it difficult for the public to evaluate the commission's work.

Clear standards for reviewing judges and accessible data about the commission's work would promote confidence that quality judges are being selected in accordance with commission rules and discourage commission bias.⁶⁹ As law professor Leo Romero observes, transparency "permit[s] monitoring of the process by the public and interested groups like women's and minority bar associations that may bring pressure or lawsuits to compel compliance with the rules."⁷⁰ Romero argues that extending transparency to the collection

and release of data on the commission’s selected and non-selected candidates will further increase public confidence. Showing how minorities fare under the system, he argues, will go a long way towards informing the public about how well the system is promoting representativeness, and will increase the public perception that the system is “open” rather than “closed.”⁷¹

There is also some evidence that Hawaii’s lack of transparency has had a negative impact on public confidence in the judiciary. Randall Roth, law professor and former president of the Hawaii State Bar Association, noted in 1999 that the Judicial Selection Commission’s secrecy “left many members of the public skeptical, even cynical, about the work of the Commission, not to mention the judiciary.”⁷² A set of focus groups commissioned by Hawaii’s judiciary in 2003 confirmed Roth’s concern, finding that the general public was unfamiliar with how state judges are selected and reselected. In the information vacuum, the report found, the public “tends to think that the system is ‘closed,’ and that judges are selected through ‘the old-boy system’ or some other process that has little to do with the qualifications of the candidate.”⁷³ Public criticism of the system, such as allegations of gender bias in the commission’s retention decisions, tends to focus on this prevailing sense of exclusion.⁷⁴ A more transparent process would ultimately promote public trust by allowing the commission to dispel such allegations or, possibly, expose a serious problem in need of reform.

C. Hawaii’s Judicial Selection System Appears to Largely Insulate Judges, but Could Be Strengthened to Better Promote Judicial Independence While More Effectively Identifying Poorly-Performing Judges

There is evidence that many of the attorneys and other stakeholders who regularly interact with Hawaii’s court system see its judiciary as highly independent from political pressure. In 2008, the American Judicature Society assembled a Committee on Judicial Independence and Accountability, which included Hawaiian judges, lawyers, “concerned members of the public,” and present and former members of the Judicial Selection Commission. The Committee found that “judges in Hawai‘i are able to execute their duties without interference, retribution or retaliation from external forces.”⁷⁵ Ian Lind, a long-time judicial reporter in Hawaii, has made similar observations, affirming that “[t]he Hawaii judiciary jealously guards its independence.”⁷⁶ Still, more research is required to gain a deeper understanding of the extent to which Hawaii’s courts are insulated from outside pressure and how such independence relates to Hawaii’s mode of judicial selection, as opposed to its political culture, tradition, or other forces.

COURTESY OF WITHDRAWAL

An informal practice of alerting judges when their petition is going to be denied allows them to withdraw their petition and retire without a public announcement of non-retention.⁷⁷ According to commission rules: “The petitioner, by giving notice to the commission, may withdraw the petition for retention before the issuance of an order by the commission.”⁷⁸ The practice of withdrawal makes it difficult to quantify how many retention petitions are actually denied.

Yet, while many stakeholders believe Hawaii’s system is insulated from outside pressures, there is also evidence that this insulation is accompanied by, and potentially even the partial result of, lenient retention standards that may make it difficult to remove poorly-performing judges. Judges in Hawaii are rarely denied retention; one former commissioner could recall only two or three instances of a judge not being retained in his six-year commission term.⁷⁹ As a point of comparison, in the last five years, the commission has helped to fill 25 vacant court seats and considered 27 petitions for retention.⁸⁰

To be sure, the high retention rate could simply reflect the effectiveness of the initial vetting process for judicial candidates, leading to high-quality judges that are consistently retained. But the structure of Hawaii’s retention system also creates an incumbent advantage because, as litigator Norman Greene notes, “the decision over [a judge’s] retention is without reference to other applicants.”⁸¹ In fact, retention elections — which are used in 20 states and are uncontested⁸² — may exhibit even higher retention rates. One study found that, of the 6,306 state court judges that faced retention elections from 1964-2006, just 56 — or less than 1 percent — were not retained.⁸³ Interviews with individuals familiar with Hawaii’s system suggest that the commission adopts a “rebuttable presumption” in favor of retaining sitting judges as a matter of practice. “The consensus of the commission is that you have to really mess up to not be retained,” a former commissioner said.⁸⁴ Once a candidate is appointed to the bench, the commission tends to extend them the benefit of the doubt, assuming they are doing their job unless they are shown not to be.⁸⁵ “The retention system weeds out the really bad ones but does nothing about mediocrity once it’s in the door,” added the former commissioner.⁸⁶

A presumption of retention is not necessarily undesirable. As Rachel Paine Caufield, professor of political science at Drake University, puts it, “there is nothing inherently wise or virtuous about removing sitting judges from office.”⁸⁷ It is central to our system of justice that judges make decisions based on their understanding of the law, not bending to external pressures. Providing judges with job security is one tool for promoting such decisional independence; indeed, federal judges enjoy life tenure for just this reason. Yet Hawaii’s retention system reflects a judgment that there should be a formal system for periodically reviewing and removing low-performing judges from the bench, separate from processes like impeachment, which typically require evidence of illegal or unethical behavior.⁸⁸ Given this policy choice, Hawaii’s high rate of retention raises a question about whether Hawaii’s retention process actually functions to weed out low-performing judges.

This question takes on added urgency because reselection pressures can impact judges’ decision-making,⁸⁹ even in relatively insulated systems like Hawaii’s. For example, one retired federal judge in Hawaii said that his state court peers were, in an attempt to improve their retention prospects, hesitant to make any decision that could be deemed controversial, resulting in their tempering or delaying judicial decisions.⁹⁰ Such accounts suggest that judges may feel influenced by outside forces, even when their job security does not depend on the preferences of voters or the political branches. More research is required to fully assess these questions, but if commission-based retention weakens judicial independence while not weeding out low-quality judges, it may be that alternative systems, such as life tenure or a single term for judges, would be preferable. Alternatively, as discussed in the next section, structural reforms to Hawaii’s existing system may help mitigate these concerns.

III. Two Modest Reforms Could Further Strengthen Hawaii’s Judicial Selection Process

Every system of choosing judges reflects tradeoffs among different values, and there are challenging and important debates about what values to elevate. Hawaii’s system is designed to minimize the reselection pressures on judges and political influence on their selection. Yet while there is evidence that Hawaii’s system is generally popular and works well in achieving these goals, small changes could better promote both public confidence in Hawaii’s system and judges’ decisional independence.

A. Make the Commission’s Procedures and Evaluative Criteria Public

The Judicial Selection Commission could further promote public confidence in the judiciary by clearly and publicly identifying its procedure for investigating judges and judicial candidates and the criteria it uses in its deliberations. For example, the commission could develop public rules identifying its procedures for investigating and evaluating judicial misconduct complaints. It could also make it clear that unpopular or controversial decisions by a judge do not hurt a judge’s chances of being retained, so long as they have clear footing in the law. Commissioners can also work within their existing rules to improve public confidence through community engagement. This may in fact already be occurring. Patricia Mau-Shimizu, Executive Director of the Hawaii State Bar Association, notes that “[t]his commission seems more willing to go out into the community and discuss things.”⁹¹

Academics commonly portray transparency and accountability as values in tension with judicial independence.⁹² Yet releasing the commission’s criteria and procedures to the public would encourage the commission to adhere to a consistent process for considering judges, while simultaneously increasing judges’ decisional independence by making it clear that they should be evaluated on their entire record, and not targeted for politically charged decisions.

Practically, the commission rules declare that the chairperson “shall call at least one meeting each year for the principal purpose of reviewing and/or amending commission rules and operating procedures,” offering a mechanism to make this important adjustment.⁹³

B. Share More Retention Materials with the Public

The Judicial Selection Commission could also bolster the public’s confidence in its retention decisions by making more materials publicly available. For example, the Commission could release redacted versions of key evaluative materials such as judicial performance evaluations, notable parts of the judge’s decision-making record, and the judge’s interview with the commission. Doing so would make it easier to understand and assess the commission’s decision-making process without sacrificing the confidentiality necessary to foster candid critiques of judges.

These changes would make Hawaii’s process consistent with the practices of other states. While Hawaii’s commission has no exact analog, similar issues of confidentiality arise in the other nine states that use judicial performance evaluation commissions to inform retention

or reappointment decisions. In eight of the other nine states, the evaluation commissions publicly disseminate the results of each individual judge’s performance evaluation surveys.⁹⁴ Releasing judge-specific evaluations would help foster the public’s understanding of the sources considered by Hawaii’s commission. Since the commission relies on multiple information sources — not just the Judicial Performance Program evaluation — to inform its decisions, it should also consider releasing a summary explanation of how it evaluated a judge’s performance and reached the decision it did. Doing so would follow the example set by the District of Columbia, where an appointed judicial tenure commission evaluates each judge up for reappointment and publishes a reappointment report outlining the materials they considered in making their determination and what those materials told them about the judge’s fitness.⁹⁵

These reforms would enable the public to see whether there are recurring failures in judges’ performance or serious episodes of misconduct, and encourage commissioners to hold low-performing judges accountable. It would also offer judges confidence that they will be held to predictable and transparent standards. As a result, the public’s understanding of and confidence in an otherwise strong system of judicial selection would grow while continuing to protect judges’ day-to-day decision-making.

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² See ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, RETHINKING JUDICIAL SELECTION IN STATE COURTS 6-16 (2016), available at <https://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts>.

³ See KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 7-11 (2015), available at <https://www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases>; Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1617-21 (2009).

⁴ Brennan Ctr. For Justice, *Judicial Selection: An Interactive Map*, <http://judicialselectionmap.brennancenter.org/> (last visited July 19, 2016) [hereinafter *Judicial Selection: An Interactive Map*].

⁵ In addition to the recommended candidate’s names, the commission also sends along a “summary” of the most important aspects of each candidate’s application. See Rosemary Fazio, *Merit Judicial Selection in Hawaii: A Practical Guide*, 14 HAW. B. J. 4, 5 (2010), available at <http://www.ashfordwriston.com/articles/rtf-MeritJudicialSelection.pdf>.

⁶ See JUDICIAL SELECTION COMM’N RULES, R. 5 §2, available at http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf. This is a recent change. In 2011, after a Hawaii circuit court ruled that state public records law required the governor to release the list once he makes his appointment, the Judicial Selection Commission amended its rules to require publication of the names on each list at the same time they are submitted to the governor or chief justice. Previously, the nominating authority decided whether or not to make the list public. In 2014, the change was written into the Hawaii Constitution by an amendment passed unanimously through the legislature and ratified with 82 percent of the vote.

⁷ Telephone Interview with Patricia Mau-Shimizu, Executive Director, Hawaii State Bar Ass’n (Nov. 2, 2015) [hereinafter Mau-Shimizu Interview]. The president of the HSBA appoints a three-person subcommittee to investigate the candidate, using a Bar questionnaire, an interview, and comments solicited from members of the Bar to evaluate the candidate across a number of factors. The criteria are: integrity, diligence, legal knowledge, professional experience, temperament, financial responsibility, public service, health, and ability to fulfill the duties and responsibilities of the position. The subcommittee’s report is delivered to the Board, which then votes by secret ballot on whether or not the candidate receives a qualified rating.

⁸ HAW. CONST. art. VI, § 3 (“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.”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ HAW. REV. STAT. § 604-2 (2012).

¹² HAW. CONST. art. VI, § 3.

¹³ D.C. Circuit judicial reselection is similar. There, a judicial tenure commission can reappoint a judge by finding them well-qualified, or deny them reappointment by finding them “unqualified.” But if the commission finds a judge “qualified,” the appointing authority — the United States President — decides whether they are reappointed, subject to Senate confirmation. See D.C. Code § 1-204-33(b)(5) (2016).

¹⁴ *Judicial Selection: An Interactive Map*, *supra* note 4.

¹⁵ According to testimony submitted by the Hawaii State Judiciary, the retention petition “contains detailed information on subjects ranging from timeliness of case dispositions to the status and outcome of cases on appeal.” *Proposing an Amendment to Article VI, Section 3, of the Constitution of the State of Hawaii to Amend the Timeframe to Renew the Term of Office of a Justice or Judge and Require Consent of the Senate for a Justice or Judge to Renew a Term of Office: Hearing on S.B. No. 2420 Before the S. Comm. on Judiciary and Labor*, 2016 Leg., 28th Sess. (Haw. 2016) [hereinafter *Hearing*] (statement of Rodney A. Maile, Admin. Dir. of the Courts), *available at* http://www.courts.state.hi.us/docs/news_and_reports_docs/legislative_update/2016_session/33_SB2420_2-8-16_FINAL_v3.pdf.

¹⁶ The commission’s official rules guide commissioners to consider candidates in light of their “integrity and moral courage, legal ability and experience, intelligence and wisdom, compassion and fairness, diligence and decisiveness, judicial temperament, and such other qualities that the commission deems appropriate.” *See* JUDICIAL SELECTION COMM’N RULES, R. 10(A), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf. However, in interviews, commissioners said the criteria are not always weighed in any consistent way. One could be tremendously qualified but nixed for a perceived lack of judicial temperament.

¹⁷ JUDICIAL SELECTION COMM’N RULES, R. 11, *available at* http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf.

¹⁸ James E. T. Koshiba, *Judicial Selection and Retention in the State of Hawaii: Hawaii’s Judicial Selection Commission – The First Six Years*, 20 HAW. B.J. 1, 8 (1986).

¹⁹ *See* Mark A. Behrens and Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. L. & PUB. POL’Y 273, 302 (2002), *available at* <http://scholarship.law.cornell.edu/cjlp/vol11/iss2/1> (“Assembling a commission that is truly nonpartisan and representative of various interests is both challenging and crucial for obtaining an impartial, moderate judiciary.”).

²⁰ HAW. CONST. art. VI, § 4.

²¹ JUDICIAL SELECTION COMM’N RULES, R.5 §3(D), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf.

²² *See, e.g.*, CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS (Matthew J. Streb, ed., 2009); JAMES L. GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY (2012).

²³ Koshiba, *supra* note 18, at 2.

²⁴ Telephone Interview with Lawrence Okinaga, attorney and former Judicial Selection Comm’n chair (Dec. 11, 2015) [hereinafter Okinaga Interview].

²⁵ William S. Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. HAW. L. REV. 1, 4 (1979).

²⁶ HAW. CONST. art. VI, § 4.

²⁷ *Id.*

²⁸ Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 81 (2006), *available at* <http://ir.lawnet.fordham.edu/ulj/vol34/iss1/2/>.

²⁹ AMERICAN JUDICATURE SOCIETY – HAWAII CHAPTER, SPECIAL COMMITTEE ON JUDICIAL INDEPENDENCE AND ACCOUNTABILITY REPORT (2008), *available at* http://www.ajshawaii.org/assets/judicial_independence__accountability.pdf.

³⁰ *See, e.g.*, CTR. FOR JUSTICE, LAW AND SOC'Y AT GEORGE MASON UNIV., IMPROVING DIVERSITY ON THE STATE COURTS: A REPORT FROM THE BENCH 6 (2009), *available at* http://www.justiceatstake.org/media/cms/DiversityReport2009_4F739E0E55910.pdf (“Perhaps the most important argument for diversity in the judiciary is that it benefits judicial decision-making. Judges from different backgrounds and a diversity of experiences help to guard against the possibility of narrow decisions. Judges can debate with one another, offering divergent perspectives and educating their colleagues about how their decisions will affect various populations.”); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329 (2002) (“And in a judicial environment in which collegial deliberations are fostered, diversity among the judges makes for better-informed discussion. It provides for constant input from judges who have seen different kinds of problems in their pre-judicial careers, and have sometimes seen the same problems from different angles.”); James Andrew Wynn, Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 789 (2004) (“However, it is generally difficult for a homogenous judiciary of affluent white men to understand and explain the socially diverse realities of poverty, race, and gender. For instance, a recent study of one federal circuit reveals that female judges are more likely than male judges to observe, report, and intervene when instances of gender-related incivility are directed at women.”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 456 (2000) (“The inclusion of alternative or ‘non-mainstream approaches’ in judicial decision-making can invigorate the law with new and challenging approaches to decision-making and create opportunities for better, richer judicial decision-making. In this sense, diversity benefits not only minority litigants but the entire justice system. Focusing narrowly on case outcomes obscures this potential benefit of diversity.”); SHERYL J. WILLERT, WASH. STATE MINORITY AND JUSTICE COMM'N, BUILDING A DIVERSE COURT: A GUIDE TO RECRUITMENT AND RETENTION v, 12, 73 (2d ed. 2010), *available at* <http://www.courts.wa.gov/committee/pdf/Buidling%20a%20Diverse%20Court%20RR%20Manual%202nd%20Ed.pdf> (“A diverse court is a smart court — one that is more likely to be innovative, productive and efficient in meeting the challenges facing the justice system in the twenty-first century because a diverse court is rich in human resources including a broad range of experience, background and perspective.”).

³¹ Edmund M. Y. Leong, *Politics, Merit, and the Selection of Judges*, 10 HAW. B.J. 61 (2007).

³² Fazio, *supra* note 5, at 5.

³³ LEAGUE OF WOMEN VOTERS OF HAW., JUDICIAL INDEPENDENCE IN HAW. (2003), *available at* <http://www.lwv-hawaii.com/judicial.htm>.

³⁴ Confirmation bias is the tendency to search for, interpret, focus on and remember information in a way that confirms one's preconceptions and conservatism in belief revision is the tendency to revise one's belief insufficiently when presented with new evidence. *See e.g.*, Margit E. Oswald & Stefan Grosjean, *Confirmation Bias*, in COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGEMENT AND MEMORY 79 (Rüdiger F. Pohl ed., 2004); Martin Hilbert, *Toward a Synthesis of Cognitive Biases: How Noisy Information Processing Can Bias Human Decision Making*, 138(2) PSYCHOLOGICAL BULLETIN 211 (2012), *available at* <http://www.martinhilbert.net/HilbertPsychBull.pdf>; Wesley M. DuCharme, *Response Bias Explanation of Conservative Human Inference*, 85(1) J. EXPERIMENTAL PSYCHOLOGY 66 (1970), *available at* <http://psycnet.apa.org/journals/xge/85/1/66.pdf>.

³⁵ Supreme Court justice and constitutional commentator Joseph Story (1779-1845) explained that the gradual turnover of one-third of the Senate every two years was “[s]o that the whole body is gradually changed in the course of six years, always retaining a large portion of experience, and yet incapable of combining together for any sinister purposes.” *See* JOSEPH STORY, THE CONSTITUTIONAL CLASS BOOK: BEING A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 57 (1834), *available at* <http://www.archive.org/stream/constitutionalcl00stor#page/56/mode/2up>.

³⁶ See, e.g., INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FOCUS GROUP REPORT: IAALS QUALITY JUDGES INITIATIVE APPELLATE JUDICIAL PERFORMANCE EVALUATION 7 (2013), available at http://iaals.du.edu/sites/default/files/documents/publications/iaals_appellate_jpe_focus_group_summary.pdf. (“Generally, there seemed to be support for an array of parties to bring different perspectives to the evaluation.”); Norman L. Green, *Reflections On The Appointment And Election Of State Court Judges: A Response To Adumbrations On Judicial Campaign Speech And A Model For A Response To Similar Advocacy Articles*, 43 IDAHO L. REV. 601, 612 (2007) (“As consumers of judicial services, non-lawyers contribute a valuable perspective; therefore, they should and do play an important role on judicial nominating commissions.”).

³⁷ Okinaga Interview, *supra* note 24; Telephone interview with former commissioner who wished to remain anonymous (Nov. 13, 2015) [hereinafter Anonymous Interview].

³⁸ Rick Daysog, *Attorneys Urge Commission to Reconsider Judge Lee’s Petition*, HAW. NEWS NOW (Mar. 21, 2015), <http://www.hawaii.newsnow.com/story/28578333/exclusive-attorneys-urge-commission-to-reconsider-judge-lees-rejection>.

³⁹ HAW. CONST. art. VI, § 4.

⁴⁰ JUDICIAL SELECTION COMM’N RULES, R. 9, available at http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf.

⁴¹ See SB No. 2239: *Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges: Testimony of the Judicial Selection Commission to the S. Comm. on the Judiciary*, 2016 Leg., 28th Sess. (Haw. 2016) (testimony by Jackie Young, Comm’n Vice-Chair), available at http://www.capitol.hawaii.gov/Session2016/Testimony/SB2239_TESTIMONY_JDL_02-10-16.PDF; Koshiba, *supra* note 18, at 4; JUDICIAL SELECTION COMM’N, APPLICATION FOR JUDICIAL OFFICE (2014), available at <http://www.courts.state.hi.us/docs/form/jsc/JSP084.pdf>.

⁴² *Hearing*, *supra* note 15, at 3.

⁴³ The commission is empowered to hold a public hearing on the matter of a judge’s retention petition, to receive sworn testimony, and subpoena witnesses, but we could find no record of them ever having done so. See JUDICIAL SELECTION COMM’N RULES, R. 12(C) and 12(D), available at http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf.

⁴⁴ See Rob Perez, *Comprehensive Review Awaits Judges Seeking to Stay on Hawaii Bench*, HONOLULU STAR-BULLETIN (May 30, 2004), <http://archives.starbulletin.com/2004/05/30/news/story1.html>; Fazio, *supra* note 5, at 7.

⁴⁵ See JUDICIAL SELECTION COMM’N RULES, R. 12(D), available at http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf.

⁴⁶ RULES OF THE SUPREME COURT OF THE STATE OF HAWAII’I, RULE 19, available at http://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm - Rule_19.

⁴⁷ See THE STATE OF HAWAII’I JUDICIARY, JUDICIAL PERFORMANCE PROGRAM REPORT (2015), available at http://www.courts.state.hi.us/docs/news_and_reports_docs/JP15REPT.pdf.

⁴⁸ RULES OF THE SUPREME COURT OF THE STATE OF HAWAII’I, R. 19. 5(C), available at http://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm - Rule_19. The chief justice does publish a summary evaluation report for each court, but individual judicial evaluation results are confidential. See *id.*

⁴⁹ See LEAGUE OF WOMEN VOTERS OF HAW., *supra* note 33.

⁵⁰ See Mau-Shimizu Interview, *supra* note 7 (indicating that each judge is ranked on a scale from 1-6 based on the attorney comments received by the Bar and that when the Judicial Selection Commission asks for the evaluations, the Bar sends them the raw number as well as redacted copies of the attorney comments).

⁵¹ Okinaga Interview, *supra* note 24; Anonymous Interview, *supra* note 37.

⁵² See Seth S. Andersen, *Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375, 1377 (2001) (“The anonymity of survey responses also provides judges with systematic and honest feedback on their performance that is seldom forthcoming under normal circumstances.”).

⁵³ The Hawaii Constitution makes commission deliberations confidential. HAWAII CONST. art. VI, § 4. Commission rules interpret that goal to require the confidentiality of “the identity of informational sources,” as well as “information received from or about current or former applicants and petitioners.” JUDICIAL SELECTION COMM’N RULES, R. 5 § 2(A), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/jsqr.pdf.

⁵⁴ See JUDICIAL PERFORMANCE PROGRAM REPORT, *supra* note 47.

⁵⁵ See Rob Perez, *Rejected Judges Remain in Dark*, HONOLULU STAR-BULLETIN (May 30, 2004), <http://archives.starbulletin.com/2004/05/30/news/story1.html>.

⁵⁶ See Andersen, *supra* note 52, at 1385-86 (“Commissions in Alaska, Colorado, and Utah are able to mail evaluation results directly to voters, generally as part of a larger voter information pamphlet mailed to all registered voters. Other states rely on a host of methods for disseminating evaluation results, including: Web pages; voter pamphlets made available at polling places, libraries, banks, shopping centers, courts, bar offices, etc.; newspaper coverage; public service announcements on television and radio; and meetings with community groups.”).

⁵⁷ See Utah Judiciary, 2016 Judicial Ballot & Retention Report Summary, *available at* <https://judges.utah.gov/2016-judicial-ballot-summary.html>.

⁵⁸ See Utah Judiciary, *Frequently Asked Questions*, <https://judges.utah.gov/faq.html> (last visited June 19, 2016).

⁵⁹ See Perez, *supra* note 55.

⁶⁰ Anonymous Interview, *supra* note 37.

⁶¹ See e.g., S.B. 2239, 28th Leg. (Hi. 2016), *available at* http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2239&year=2016; S.B. 2420 SD 1, 28th Leg. (Hi. 2016), *available at* http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2420&year=2016; S.B. 2238 SD 1, 28th Leg. (Hi. 2016), *available at* http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2238&year=2016.

⁶² See HI. S. REP. NO. 2481, (2016) (Com. Rep.), *available at* http://www.capitol.hawaii.gov/session2016/CommReports/SB2238_SD1_SSCR2481_.htm.

⁶³ See *Senate Bill No. 2238, Relating to Judicial Elections*, 28th Leg. (Haw. 2016) (testimony of interested parties to the Senate Committee on Judiciary and Labor), *available at* http://www.capitol.hawaii.gov/Session2016/Testimony/SB2238_TESTIMONY_JDL_02-10-16.PDF.

⁶⁴ See *Senate Bill No. 2239, Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges*, 28th Leg. (Haw. 2016) (testimony of interested parties to the Senate Committee on Judiciary and Labor), *available at* http://www.capitol.hawaii.gov/Session2016/Testimony/SB2239_TESTIMONY_JDL_02-10-16.PDF; *Senate*

Bill No. 2420, *Proposing an Amendment to Article VI, Section 3 of the Constitution of the State of Hawai'i to Amend the Timeframe to Renew the Term of Office of a Justice or Judge and Require Consent of the Senate for a Justice or Judge to Renew a Term of Office*, 28th Leg. (Haw. 2016) (testimony of interested parties to Senate committee on Judiciary and Labor), available at http://www.capitol.hawaii.gov/Session2016/Testimony/SB2420_TESTIMONY_JDL_02-10-16.PDF.

⁶⁵ See Courtney Teague, *Senate Kills Last Bill That Would've Reformed Judiciary Renewal Process*, HONOLULU CIVIL BEAT (Mar. 10, 2016), <http://www.civilbeat.com/2016/03/senate-kills-last-bill-that-wouldve-reformed-judiciary-renewal-process/>.

⁶⁶ AMERICAN JUDICATURE SOCIETY – HAWAII CHAPTER, REPORT OF THE AJS COMMITTEE ON JUDICIAL SELECTION AND RETENTION (2003), available at http://www.ajshawaii.org/assets/judicial_select__retention.pdf.

⁶⁷ Commission rules say it “shall consider each applicant’s and petitioner’s 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; and (7) such other qualities that the commission deems appropriate.” JUDICIAL SELECTION COMM’N RULES, R. 10(A), available at http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf.

⁶⁸ The commission’s process for vetting candidates for open seats is more transparent. The commission recently began releasing each slate of final candidates and releasing aggregate data on the applicant pool for the position, including breakdowns for gender, age, and years of legal experience (though not including race or ethnicity). See Press Release, Judicial Selection Commission (Nov. 16, 2011), available at http://www.courts.state.hi.us/docs/courts_docs/JSC_Press_Release_Rule_5.pdf (announcing the commission’s rule change); Press Release, Judicial Selection Commission, District Court of the first Circuit Nominees, (Sept. 23, 2015), available at http://www.courts.state.hi.us/docs/legal_references/2015_September_23_Press_Rel_Nominee_D1.pdf (showing the applicant pool information provided by the commission).

⁶⁹ See Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and their Application to a Commission-Based Selection System*, 34 FORDHAM URBAN L. J. 125, 156 (2006), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1939&context=ulj>.

⁷⁰ See Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 FORDHAM URB. L.J. 485, 497 (2006) available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1951&context=ulj>.

⁷¹ *Id.* at 496.

⁷² Randall Roth, *Perspectives: Inspiring Trust and Confidence In Our System of Justice*, HAWAII B.J. (1999), available at <https://www.law.hawaii.edu/sites/www.law.hawaii.edu/files/downloads/HSBJNov1999Roth.pdf>.

⁷³ See Ronald T. Y. Moon, *Together, Courts and Media Can Improve Public Knowledge of the Justice System*, 87 JUDICATURE 205, 261 (2004).

⁷⁴ See Perez, *supra* note 55.

⁷⁵ AMERICAN JUDICATURE SOCIETY – HAWAII CHAPTER., *supra* note 29.

⁷⁶ Telephone Interview with Ian Lind, reporter (Feb. 8, 2016).

⁷⁷ According to our interview with a former commissioner, a petitioning judge who has failed to get the five votes necessary for retention is first informed privately, in a custom the former commissioner refers to as “like

leaving you alone in the room with the gun.” When a judge does not withdraw their petition and retire, the commission issues an announcement of nonretention. The announcement provides no reason for why the judge was denied retention. *See* Anonymous Interview, *supra* note 37. This account is supported by media reports as well. *See, e.g.,* Perez, *supra* note 55 (“Instead of forcing those judges off the bench, though, the commission let them withdraw their retention applications before the formal rejection orders were filed. Once the applications were withdrawn, the judges retired.”).

⁷⁸ JUDICIAL SELECTION COMM’N RULES, R. 12(A), *available at* http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf.

⁷⁹ *See* Anonymous Interview, *supra* note 37.

⁸⁰ *See Senate Bill No. 2420, Proposing an Amendment to Article VI, Section 3 of the Constitution of the State of Hawai‘i to Amend the Timeframe to Renew the Term of Office of a Justice or Judge and Require Consent of the Senate for a Justice or Judge to Renew a Term of Office*, 28th Leg. (Haw. 2016) (statement of Rodney A. Maile, Administrative Director of the Hawaii courts) at 5 footnote 9, *available at* http://www.courts.state.hi.us/docs/news_and_reports_docs/legislative_update/2016_session/33_SB2420_2-8-16_FINAL_v3.pdf.

⁸¹ Norman L. Greene, *What Makes a Good Appointive System for the Selection of State Court Judges: The Vision of the Symposium*, 34 *FORDHAM URB. L. J.* 35, 65 (2006), *available at* <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1937&context=ulj>.

⁸² *Judicial Selection: An Interactive Map*, *supra* note 4.

⁸³ *See* Larry Aspin, *Judicial Retention Election Trends 1964-2006*, 90 *JUDICATURE* 208, 210 (2007), *available at* <http://heinonline.org/HOL/LandingPage?handle=hein:journals/judica90&div=55&id=&page=>.

⁸⁴ Anonymous Interview, *supra* note 37.

⁸⁵ Perhaps because non-retention is rare, it can surprise judges when it occurs. Judges who were not retained have complained that they never saw it coming. *See* Perez, *supra* note 55.

⁸⁶ Anonymous Interview, *supra* note 37.

⁸⁷ Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 *MO. L. REV.* 573, 577 (2009), *available at* <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3836&context=mlr>.

⁸⁸ *See* HAWAII CONST. art. VI, § 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 reprimand, discipline, suspension, retirement or removal of any justice or judge.”);

RULES OF THE SUPREME COURT OF THE STATE OF HAWAII, R. 8.5, *available at* http://www.courts.state.hi.us/docs/court_rules/rules/rsch.htm (“8.5. Grounds for discipline. (a) In general. Grounds for discipline shall include: (1) Conviction of a felony; (2) Willful misconduct in office; (3) Willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute; (4) Conduct prejudicial to the administration of justice or conduct that brings the judicial office into disrepute; (5) Any conduct that constitutes a violation of the Code of Judicial Conduct; or (6) Any conduct before assuming full-time duties that constitutes a violation of the Hawai‘i Rules of Professional Conduct.”).

⁸⁹ *See* BERRY, *supra* note 3 at 7-11; Shepherd, *supra* note 3, at 1617-21.

⁹⁰ See Perez, *supra* note 55.

⁹¹ Mau-Shimizu Interview, *supra* note 7.

⁹² See, e.g., Jackson, *supra* note 69, at 127 (“In advocating the advancement of these principles, I realize that two of them, independence and accountability, are diametrically opposed.”).

⁹³ JUDICIAL SELECTION COMM’N RULES, R. 6(C), http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf.

⁹⁴ See Malia Reddick, *Growing Chorus Calling for Greater Transparency in Selecting and Evaluating Hawaii’s Judges*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Apr. 16, 2014), <http://iaals.du.edu/blog/growing-chorus-calling-greater-transparency-selecting-and-evaluating-hawaiis-judges>.

⁹⁵ See DISTRICT OF COLUMBIA COMM’N ON JUDICIAL DISABILITIES AND TENURE, REAPPOINTMENT EVALUATIONS, *available at* <http://cjdtdc.gov/node/574282>.