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Merit Judicial Selection in Hawaii

**William S. Richardson,
A Leader, Mentor,
And Friend**



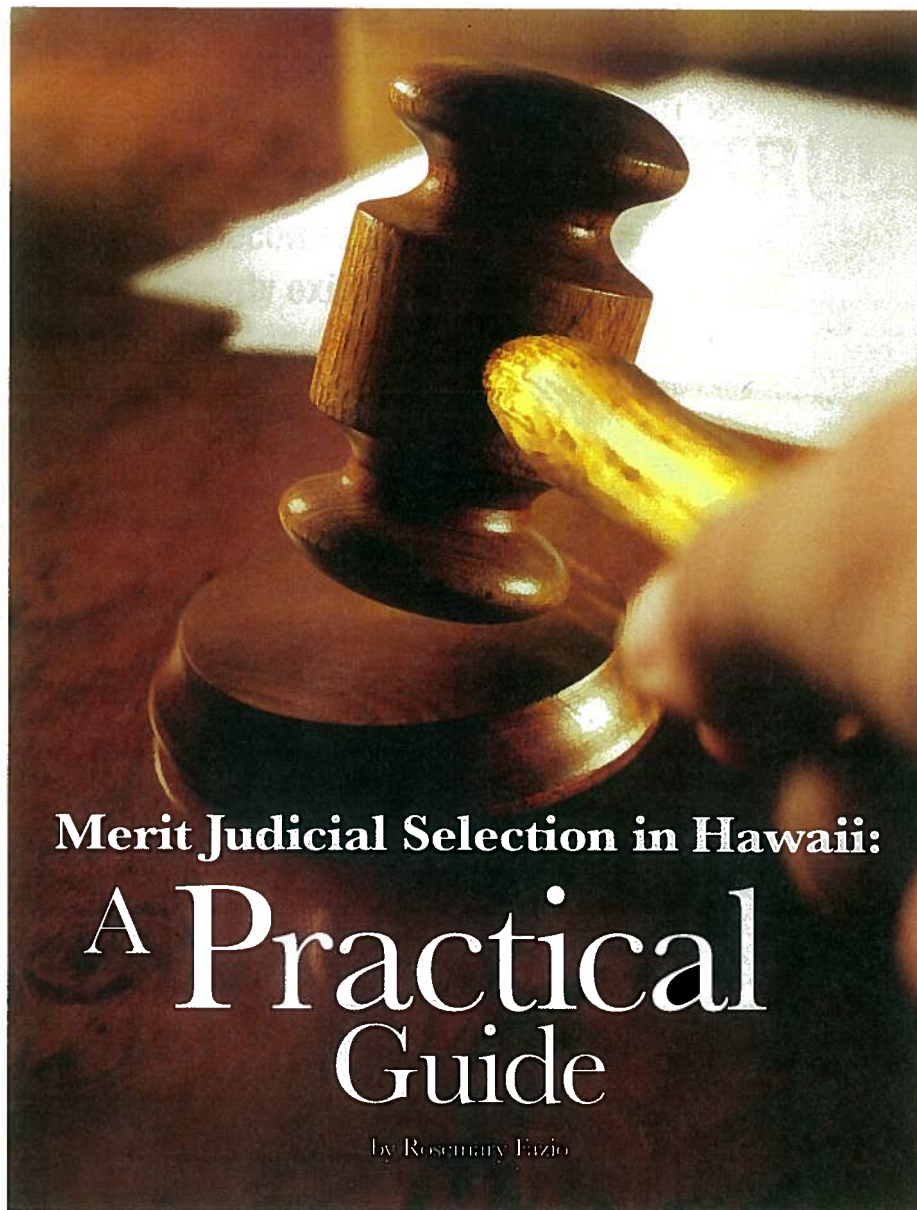
The recent increase in the number of judicial vacancies has created heightened interest in the judicial selection process in Hawaii. As a result, Hawaii State Bar Association ("HSBA") members may be confronted with questions about the process from clients, family, or friends. Whether or not one aspires to become a judge, one should, as a member of the bar, understand how merit judicial selection and retention works in Hawaii and be able to explain it to the public.

The article starts with a brief history of merit judicial selection in order to set the

context. The major focus of the article, though, will be practically oriented, concentrating on the local merit judicial selection procedures.

Judges in Hawaii state courts are chosen and retained through a process originally created as a result of the 1978 state constitutional convention. Because no system of judicial selection is perfect, one can point to potential weaknesses in the present system. This article takes as a given, however, that merit selection is superior to elective or political appointive systems in its ability to protect the Judiciary from the demands and pressures of special interest groups and partisan politics.¹

Merit selection applies in Hawaii on both the state and federal judicial levels. Both systems operate in a similar fashion. Major differences, however, do exist. This article covers both systems.



Merit Judicial Selection in Hawaii: A Practical Guide

by Rosemary Fazio

I. The Development of Merit Selection in the United States

The American Judicature Society ("AJS") was founded in 1913 with the goal of promoting the effective administration of justice in the United States. As one means to achieve that end, the AJS sought to sever the link between judicial selection and partisan politics.

From its inception, the AJS promoted merit judicial selection. The AJS achieved its first success in 1940, when Missouri became the first state to enact a system of merit judicial selection. Since then, two-thirds of the states have adopted some form of merit selection.

The AJS's website contains a complete listing of the states which have adopted merit selection, and a description of each state's system. A key component of any merit plan is a nominating commission composed of both lawyers and non-

lawyers. Hawaii's unique system of merit judicial selection and retention was created as a result of the 1978 state constitutional convention.

II. Merit Selection and Retention for Hawaii State Court Judges: Overview of the Process

When Hawaii became a state in 1959, the Governor appointed and retained judges, with the advice and consent of the Senate.² The term for Supreme Court justices was seven years; the term for Circuit Court judges was six years; and there was mandatory retirement at

the age of seventy years. The Hawaii Constitution at that time provided for the removal of judges from office "upon the concurrence of two-thirds of the membership of each house of the legislature, sitting in joint session, for such causes and in such manner as may be provided by law."³

Judicial terms of office for Supreme Court justices and Circuit Court judges were extended to ten years as a result of the 1968 Constitution. The legislature at that time lost its ability to remove justices and judges. Instead, provision was made for the Governor to appoint a three-person board to recommend whether a justice or judge should remain in office.⁴

The system of gubernatorial appointment of judges changed in 1979. As a result of the 1978 constitutional convention, Hawaii adopted a merit judicial selection system. That system was memorialized in Haw. Const. art. VI, §§ 3 and 4.

Since the creation of the State's merit selection process in 1978, the process has been modified somewhat. For example, initially the Judicial Selection Commission was comprised of nine members, three of which were appointed by the Governor, one each of which was appointed by the President of the Senate and the Speaker of the House, two of which were appointed by the Chief Justice of the Hawaii Supreme Court, and two of which were appointed by the Hawaii State Bar Association.⁵ That selection process was amended by 1995 Haw. Const. art. VI, § 4. While the number of Commissioners remained at nine, the number of the Governor's appointees was reduced to two, the number of the Chief Justice's appointees was reduced to one, while the number of appointees for the President of the Senate and the Speaker of the House was increased to two each. The Hawaii State Bar Association continued to have two appointees.

From the Commission's inception, the number of licensed attorneys on the Commission was limited to four. An additional limitation on the composition of the Commission was added in 1995, when a constitutional amendment required at least one Commissioner to be a resident of a county other than Honolulu.⁶

Also, initially the Judicial Selection Commission had to present the Governor with a list of six candidates. The numerical requirement was later changed, such that, presently, lists to fill vacancies for appellate and circuit courts are to contain no less than four and no more than six names. The lists presented by the Judicial Selection Commission to the Chief Justice to fill vacancies in the District Court must still be comprised of six candidates.⁷

When the Commission was created, it was empowered to promulgate rules "which shall have the force and effect of law."⁸ The Commission's current rules can be found on the Judiciary website (www.courts.state.hi.us). Since their adoption in 1979, the Rules have been amended four times. The Commission's Rules require the Commission's Chairperson to call "at least one meeting every two years to review and consider amending or revising commission rules and operating procedures..."⁹

Perhaps the most controversial aspect of the Commission's Rules relates to confidentiality. The Commission is constitutionally mandated to maintain the confidentiality of its proceedings.¹⁰ To comply with that requirement, the Rules adopted by the Commissioners provide as follows: "All commission records, proceedings, and business, including the names of all proposed nominees and the names of nominees forwarded to the appointing authority, shall be confidential and may not be discussed outside commission meetings, except among commission members..."¹¹

The Commission's Rules also contain detailed conflict of interest provisions.¹² In addition, Commissioners are prohibited from taking "an active part in political management or in political campaigns."¹³

The current composition of the Commission, along with the name of the person or entity who appointed each Commissioner, can be found on the Judiciary website.¹⁴

In spite of these changes, the overall structure of the State's merit selection system has remained substantially the same as when it was first enacted in 1978. The system has withstood the test of time.

III. How The Process Works

A. Advertising for vacancies

The first step in the process involves disseminating news of vacancies. Until recently, the Commission relied upon newspaper advertisements to alert potential applicants that a vacancy existed. This system of notifying potential applicants was largely successful. From time to time, however, the Commission received complaints from potential applicants who missed the application deadline because he or she was unaware of the vacancy.

This potential problem has hopefully been eliminated with cooperation from the HSBA. The HSBA now publicizes vacancies through email messages sent to all bar members. Because all Hawaii attorneys must belong to the HSBA, this system of electronic publication of vacancies casts a large net. As a result it has become increasingly unlikely that someone would miss the application deadline on account of not knowing that a vacancy exists.

As another source of dissemination of

information, the Judiciary website lists all judicial vacancies and the deadlines for submission of applications to the Commission.

If one is interested in becoming a judge, one should read carefully the notices posted in the Hawaii Bar Journal and the notices posted on the HSBA's and Judiciary's respective websites. The Judicial Selection Commission still advertises notices of vacancies in the local newspapers, for additional dissemination of open judicial positions.

B. Receiving applications

In order to apply to fill a judicial vacancy, one must submit a written application on the form created by the Judicial Selection Commission. Until recently, one had to request a blank form from the Commission, and fill it out manually. Starting in 2009, however, the Commission was finally able to go on-line at the Judiciary's website. Potential applicants can now download application forms from that website and complete the forms electronically. This greatly simplifies the application process. Potential applicants, also, can prepare their applications in advance of a vacancy, and modify the application depending upon the vacancy that exists. This allows applicants to fill out the applications at their leisure and not have to struggle to meet filing deadlines during times when they might be busy with work or other obligations.

C. Soliciting and compiling references

Once an application is received, the Commission then proceeds to collect references for the applicants. On the application form, an applicant is requested to supply five references. The Commission sends each of those references the reference form found at the Judiciary's website referred to as "RF-1." Each of the references selected by the applicant is then asked to identify two other references. Those people receive the reference form found on the Judiciary's website referred to as "RF-2."

Applicants often ask Commissioners who should be selected as a reference. The question is whether a politically-connected or otherwise well-known reference confers

a benefit to the applicant. The answer is that the person who knows the applicant best and who will provide the Commissioners with the best insight into the applicant's personal and professional qualifications, should be selected as a reference.

D. Investigation of applicants

Once completed applications are received, the vetting process begins. The Commission investigates a candidate's background to uncover any financial or criminal problems. The Office of Disciplinary Counsel (for all applicants) and the Commission on Judicial Conduct (for petitioners for judicial retention) are consulted. Police Departments from all counties are contacted. Prior places of employment may be contacted. Follow-up with references are conducted, on an as-needed basis.

E. Preparing summaries of applications and back-up material

Once all relevant information has been assembled, the Commission prepares summaries of each applicant's files. The summaries are used not as a substitute for thorough file review, but rather as a reminder of the most important aspects of an applicant's file. The summaries help focus areas for possible questioning during the applicant's interview. The summaries of the applicants on the list transmitted to the appointing authorities are also provided to the appointing authorities. This is the only portion of an applicant's file that is shared with parties outside of the Commission.

F. Interviewing source people

In addition to material compiled from investigating the backgrounds of applicants, the Commission also solicits comments from court personnel, representatives of certain community groups, and various members of the bar. The source people change from time-to-time, depending upon the then pending judicial vacancy or retention petition. The identity of these source people is confidential, in order to encourage to the greatest extent candid evaluations from the source people.

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G. Interviewing applicants

Once the source people have been interviewed, the Commission interviews the candidates or the petitioner for retention. While the practice may change in the future, presently all applicants receive a personal interview. The Commissioners at that point have the chance to clarify any questions that may have arisen from a review of the application, the background investigations, or the interviews with source people.

H. Deliberating and voting on applicants

Once the above steps have been completed, the Commissioners then vote on the composition of the lists to be submitted to the appointing authority, be it the Chief Justice (for District Court vacancies) or the Governor (for all other judicial vacancies).

In connection with their evaluation of candidates or petitioners for retention, the Commissions "shall" consider the applicant's background, professional skills, and character. In addition, the Commissioners "may" consider the following qualities: integrity and moral courage, legal ability and experience, intelligence and wisdom, compassion and fairness, diligence and decisiveness, and judicial temperament.¹⁵

The Commissioners vote by way of secret ballot. In order to make the list, an applicant must receive the vote of at least five of the Commissioners.¹⁶ While some lists are created upon the first ballot, some lists require multiple votes in order to reach agreement regarding the names of the nominees. Similarly, a judge who petitions for retention must receive five favorable votes in order to be retained.

I. Providing appointing authority with list of nominees

Shortly after the Commissioners decide upon the composition of the list, the list is then transmitted to the appointing authority. The names of the nominees are provided in alphabetical order, without ranking in terms of Commissioners' preference. Along with the list of names, the Commission also provides the appointing authority with a brief summary of respective nominees' applications. If the appointing authority so requests, the Commission may consult with the appointing authority about the list.¹⁷

J. Select from list of nominees if appointing authority defaults in the appointment

If for some reason the appointing authority fails to select a nominee from the list provided by the Commission within thirty days of receipt of the list, the Commission selects the nominee from the list that the Commission created.

In the past decade, the Commission was called upon to make such a selection in only two instances: in 2002 in connection with the appointment of a Circuit Court judge for the Second Circuit (Maui) and again in 2007 in connection with the appointment of a District Court judge for the Third Circuit (Big Island).

K. Senate confirmation

Whether the nominee is selected by the appointing authority or by the Commission, the Senate must confirm the nominee. The Senate has thirty days from when the appointing authority makes its selection in which to confirm or reject a nominee. If the Senate fails to reject a nominee within that time period, it is deemed to have consented to the appointment. Because of this time limitation, when a name of a nominee is presented to the Senate while the Legislature is not in session, the Senate must return in special session if it wants to exercise its consent function.¹⁸

If the Senate confirms the nominee, the nominee does not automatically become a judge. The nominee does not ascend to the bench until he or she is sworn into office. The swearing-in ceremony typically occurs shortly after the nominee is confirmed by the Senate.

In the event that the Senate does not confirm the nominee, the appointing authority has ten days to make another appointment from the same list that was initially transmitted to the appointing authority by the Commission.

The same appointment and consent procedure is followed, until a valid appointment is finally made from the original list. Failing this, the Commission is empowered to make the appointment, without Senate consent.



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IV. Merit Selection for Federal Court Judges

In 1974, Florida's United States senators were the first to establish a form of merit selection for federal court judgeships. Since then, senators in several states have followed Florida's lead.

In 2006, the Hawaii Federal Judicial Selection Commission was established at the behest of United States Senators Daniel Inouye and Daniel Akaka. A complete copy of the Commission's Charter can be found at the American Judicature Society's website.¹⁹

Hawaii's Federal Judicial Selection Commission is loosely patterned after the State Judicial Selection Commission. Unlike the State Commission, which derives its authority and independence from the Hawaii Constitution, the Federal Commission serves in an advisory capacity only. The purpose of the Federal Commission is to assist the Hawaii United States Senators in making recommendations to the President for filling vacancies on the United States District Court for the District of Hawaii and vacancies on the United States Court of Appeals for the Ninth Circuit "for judgeships which are appropriately considered Hawaii seats."²⁰

The Rules of the Federal Commission carefully note that nothing contained therein "is intended to impair or delegate the constitutional and statutory powers, duties, and prerogatives of the President or the Senators."²¹

The number of Commissioners varies, depending upon the political affiliation of the President and the two United States Senators from Hawaii. The Federal Commission consists of nine members when the President and both Hawaii Senators are affiliated with the same political party. That was the case when the Federal Commission was convened for the first time in 2009, to assist in filling the vacancy created upon the announcement of United States District Court Judge Helen W. Gillmor of her decision to take senior status.

In that circumstance, Senator Inouye, as the senior federal senator from Hawaii, appointed four of the Federal Commissioners. Senator Akaka, as the junior Hawaii senator, appointed three of

the Federal Commissioners. The remaining two Federal Commissioners were appointed by the HSBA.

The number of Commissioners and the composition of the federal Commission change when the President and Hawaii United States Senators do not all share the same political party affiliation. The Federal Commission's Rules²² detail how the Commission would be formed in such a circumstance.

Unless replaced as described below, Commissioners serve for a four-year term. Except for the HSBA-appointed Commissioners, however, all other Commissioners serve at the pleasure of the Senator who appointed them. Those Commissioners are subject to replacement by the successor Senator, if the appointing Senator is no longer in office. In any event, no Commissioner may serve for more than eight years.

Similar to the State Judicial Selection Commission, its federal counterpart prohibits Commissioners from taking "an active part in political management or in political campaigns."²³

The Federal Judicial Selection Commission has largely adopted and utilized the procedures of the State Judicial Selection Commission to create the list of candidates.

One interesting difference between the state and the federal systems exists. As noted above, State Commissioners must maintain strict confidentiality concerning all matters relating to Commission business. Therefore, the Commissioners are not allowed to disclose the composition of the lists submitted to the appointing authorities. In response to public interest regarding the composition of the lists, both the Governor and the Chief Justice eventually decided to release the names of candidates submitted to them by the Commission.

The Federal Commission also requires that its members maintain strict confidentiality with respect to Commission work. Therefore, the Federal Commission does not release to the public the composition of the lists submitted to the Senators. So far, the Senators have not chosen to disclose to the public the names of the candidates on the lists submitted to them.

V. Conclusion

Both in reality and in the public's perception, judges should serve as impartial arbiters of justice. The AJS long ago concluded that merit-based appointment of judges through a non-partisan selection commission best served the goal of ensuring fair and impartial courts. The American Bar Association reached the same conclusion.²⁴

No one system of merit selection has yet been devised that is immune to criticism. Over the years, the Hawaii merit selection process has been the subject of review. Various community groups have evaluated the performance of the State Judicial Selection Commission. For example, in 1989 and again in 1993, Special Citizens' Conferences on Judicial Selection were convened. For both of these conferences, the AJS provided technical assistance. Later, in 2003, the Hawaii League of Women Voters issued a report on Judicial Independence in Hawaii, a portion of which was devoted to the Judicial Selection Commission. In all such instances the reviewing bodies concluded that the Judicial Selection Commission, on balance, well served the state.

Most recently, the AJS-Hawaii Chapter formed a special committee on the judicial selection system, co-chaired by Judge Victoria Marks (ret.) and Warren Luke. That committee was tasked with performing a comprehensive review of Hawaii's judicial selection system and to report back to the board of the Hawaii Chapter on whether the state's merit selection system generally worked well, and if not, the types of modifications to the existing system that might be appropriate.

The members of that special committee represented a wide range of community groups and organizations involved in the judicial selection process. After extensive study, the committee concluded by stating its belief in, and its support of, the merit selection process. The report offered several modifications to strengthen the process for consideration by the board. The report concluded, however, that the system fundamentally worked as it should. As a result, the special committee opined that it was unnecessary to convene another Citizens Conference on Judicial Selection. The special committee's report

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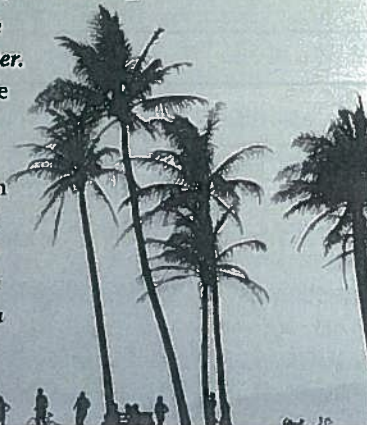
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was adopted by the Hawaii Chapter's
 Board on March 28, 2007.²⁵

¹ Many scholarly articles compare and contrast the various ways to select judges. If one has an interest in studying this subject, a good starting point is the American Judicature Society's website: www.ajs.org. For the local perspective, see also Politics, Merit and the Selection of Judges, Edmund M.Y. Leong, Ph.D., Hawaii Bar Journal, Vol. 10, No. 13; and Judicial Selection in Hawaii, Lawrence S. Okinaga, Hawaii Bar Journal, July 2006.

² Haw. Const. art. of 1950, V, § 3.

³ Id.

⁴ Haw. Const. art. of 1968, V, § 4.

⁵ Haw. Const. art. of 1978, VI, § 4.

⁶ Haw. Const. art. of 1995, VI, § 4.

⁷ Haw. Const. art. of 1994, VI, §§ 3 and 4.

⁸ Haw. Const. art. of 1978, VI, § 4.

⁹ Hawaii State Judicial Selection Commission Rules, Rule 6 (C).

¹⁰ Haw. Const. art. VI, § 4.

¹¹ Hawaii State Judicial Selection Commission Rules, Rule 5, §2 A.

¹² Hawaii State Judicial Selection Commission Rules, Rule 5, §3.

¹³ Hawaii State Judicial Selection Commission Rules, Rule 5, §3 C.

¹⁴ www.courts.state.hi.us/courts/judicial_selection_commission.html.

¹⁵ Hawaii State Judicial Selection Commission Rules, Rule 10.

¹⁶ Hawaii State Judicial Selection Commission Rules, Rules 11 C and 12 E.

¹⁷ Hawaii State Judicial Selection Commission Rules, Rule 13 B.

¹⁸ Haw. Const. of 2009, art. VI, § 3.

¹⁹ http://www.judicialselection.us/judicial_selection/index.cfm?state=FD

²⁰ Hawaii Federal Judicial Selection Commission Rules § I.

²¹ Hawaii Federal Judicial Selection Commission Rules § XI.

²² Hawaii Federal Judicial Selection Commission Rules § II.

²³ Hawaii Federal Judicial Selection Commission Rules § III.

²⁴ See, e.g., Justice in Jeopardy, American Bar Association Report of the Commission on the 21st Century Judiciary, July 2003, pages 70 - 73.

²⁵ The full report can be found at the American Judicature Society's website, under news of the Hawaii Chapter (www.ajs.org/statechapter/hi).

Rosemary Fazio is a partner with the law firm of Ashford & Wriston. She served as Chairperson of the State Judicial Selection Commission from 2007 to 2009, Vice Chairperson from 2005 to 2007 and Secretary from 2003 to 2005. She currently serves as Secretary of Hawaii's Federal Judicial Selection Commission.