



The Judiciary, State of Hawai'i

Testimony to the Twenty-Ninth State Legislature, 2017 Session

Senate Committee on Judiciary and Labor

Senator Gilbert Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

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by

Rodney A. Maile

Administrative Director of the Courts

Bill No. and Title: Senate Bill 673, Proposing Amendments to the Constitution of the State of Hawai'i to Amend the Manner in Which Justices and Judges are Appointed, Consented to, and Retained.

Purpose: Proposes amendments to the Constitution of the State of Hawaii relating to the appointment and retention of justices and judges. Authorizes the senate to approve or reject subsequent terms of office for justices and judges.

Judiciary's Position:

The Judiciary respectfully, but strongly, opposes this bill.

1. This bill would undermine the independence of Hawaii's judicial system by transforming the process for retention of judges from one based on merit to one that would be politically-based.
2. The current system was adopted at the 1978 Constitutional Convention. It reflects a careful balancing of various interests, which ensures judicial accountability while preserving judicial independence. Judicial independence means that judges have the ability to decide cases by applying the law to the facts of each case, without outside pressure or influence.
3. After nearly 40 years of the current system, the nine members of the Judicial Selection Commission, a majority of whom must be non-lawyers, decide whether

- to retain a judge at the end of their term. The political branches of government already have a significant voice, since the Senate and House leadership appoint a total of four of the members of the Commission, and the Governor appoints two.
4. A political process for judicial retention would not elicit the quality of information available to the Commission, which reviews confidential attorney and juror evaluations of the judges, and conducts confidential interviews with respected resource persons in the community.
 5. The Commission also obtains public input, by publishing newspaper ads seeking comment, as well as posting requests for comment on the Judiciary website.
 6. After nearly 40 years of the current merit-based system, Hawai'i has the most diverse judiciary in the nation. This bill may deter qualified, experienced, and diverse lawyers from seeking judgeships.
 7. The basic structure of the current system—with some amendments over the years—has served Hawai'i well. While we always look for possible improvements to how the system operates, this bill would fundamentally restructure the process. Such radical change would have substantial negative consequences, and would undermine the independence of the Judiciary.

This Bill Would Undermine the Independence of the Courts by Politicizing the Process

The current retention system supports the Judiciary's commitment to the rule of law and the public's trust in that commitment by providing the Judiciary with the independence to make decisions based on the law, free of outside pressure or influence. "Those who undertake to resolve disputes between citizens, corporations, or government . . . cannot allow control, real or imagined, to influence their decisions; cannot allow the public to believe or even perceive that the decision maker owes allegiance to one side or the other."¹ In other words, justice must not only be done according to the law—the parties before the court and the general public must understand that justice is being done.²

Vermont's experience highlights how a reconfirmation process similar to that proposed by this bill can impact the justice system. In Vermont, judges are evaluated by a judicial selection committee and retained by a majority vote of the general assembly. In 1997, the Vermont Supreme Court declared the state's funding procedure for public schools unconstitutional. In response, some political candidates indicated that they would use Vermont's judicial retention system as a means of ousting the "three most liberal" justices.³

¹ Penny J. White, *Judicial Courage and Judicial Independence*, 16 J. Nat'l Ass'n Admin. L. Judges 165. (1996) available at <http://digitalcommons.pepperdine.edu/naalj/vol16/iss2/1>.

² *Id.* at 166 (quoting Judge John Parker, *The Judicial Officer in the United States*, 20 TENN. L. REV. 703, 705–06 (1949)).

³ David McLean, *Judicial Tenure in Vermont: Does Good Behavior Merit Retention?*, 27 Vt. B.J. 39, 39 (2001).

There were weekly “highly rancorous protests” during the retention process.⁴ Although the justices were ultimately retained, this illustrates how this type of process threatens the independence of the courts and the public’s trust and confidence in them.

In Hawai'i, a robust, balanced system enables fair, impartial, transparent, and accountable courts to resolve disputes among citizens, entities, and government.

The Framers’ Vision: A Merit-Based, Non-Political Process

The current system of judicial selection and retention was crafted by delegates to the 1978 Constitutional Convention and ratified by the people of the State of Hawai'i at an ensuing election.⁵ The convention’s judiciary committee stated that a judicial selection commission system, which the Committee referred to as a “merit based system,” would provide for a more qualified and independent judiciary.⁶ The Committee described the Judicial Selection Commission (Commission) as “the fairest and best method, one that will provide input from all segments of the public, include a system of checks and balances and be nonpartisan.”⁷ With respect to the retention of judges, it elaborated:

[Y]our Committee recommends that any justice or judge petition the judicial selection commission for retention in office, or inform them of his or her intent to retire. Your Committee is of the opinion that retention through review by a nonpartisan commission is more desirable than simple reappointment by either the governor or the chief justice. It is intended that the commission in its review and retention function again perform the same function of excluding or at least lessening partisan political actions and also ensure that capable judges are kept on the bench. This review and retention process, in tandem with the judicial selection commission, is intended to provide an unbiased and effective method of maintaining the quality of our jurists.⁸

(Emphasis added).

At the convention, a proposed amendment establishing a retention election after appointment was defeated. Delegates expressed concern that the lack of voter knowledge about candidates and the potential for judges to decide cases on the basis of popular appeal, rather than on the law, would be detrimental to the judicial process.⁹ Ultimately, the convention adopted the merit-based process for selection and retention. This system reflects the sentiment that a judicial selection commission provides the essential foundation for a qualified and independent judiciary.

⁴ Bridget Asay, et al., *Justice Johnson and the Clerks*, 37 Vt. B.J. 24, 25 (2011).

⁵ 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 344–56 (1980).

⁶ Stand. Comm. Rep. No. 52, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 621 (1980).

⁷ 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 620 (1980).

⁸ 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 623 (1980).

⁹ 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 371–72 (1980).

The Current Retention Process Ensures An Independent And Accountable Judiciary

The Constitution requires that the Commission operate in a “wholly nonpartisan manner.”¹⁰ Specifically, the Constitution requires that members of the Commission be appointed in staggered six-year terms, prohibits any member from serving more than one term on the Commission, and prohibits members from running for or holding any political office or taking an active part in political management or political campaigns.¹¹ Members are not eligible for appointment as a judge and for three years thereafter.

The structure of the Commission reflects a balance of the three branches of government and other interests. While the Commission is non-partisan, it nevertheless provides the political branches with a significant voice. Pursuant to article VI, section 4 of the Hawai'i Constitution, the Commission is composed of nine members, no more than four of whom can be licensed attorneys. Two members are selected by the Governor, two members are selected by the Speaker of the House of Representatives, two by the President of the Senate, one by the Chief Justice of the Supreme Court, and two members are elected by the attorneys of the State.¹² At least one member must be a resident of a county other than the City and County of Honolulu.

The Commission has two functions. First, it identifies the most qualified candidates for vacant judgeships. Second, when judges near the end of their judicial terms¹³ and petition to be retained as judges, the Commission conducts thorough evaluations. A judge first submits a petition for retention, which contains detailed information on subjects ranging from the timeliness of case dispositions to the status and outcome of cases on appeal. Notice of the petition for retention is published in newspapers and on the Judiciary website. The Commission invites public comment on whether the judge should be retained, allowing interested parties (including Legislators) to submit confidential written comments. The Commission also meets with resource people in the community who provide direct, confidential feedback.

Also essential to the Commission's process is its review of confidential evaluations of judges that are completed by attorneys and jurors. These evaluations are undertaken pursuant to the Judicial Performance Program (JPP) established by Rule 19 of the Rules of the Supreme Court of the State of Hawai'i. All full-time judges are evaluated at approximately three year intervals by attorneys who have appeared before those judges on

¹⁰ Haw. Const. art. VI, § 4.

¹¹ *Id.*

¹² In 1994, the Hawai'i Constitution was amended to change the composition of appointees to the Commission. The amendment reduced the number of the Governor's appointees from three to two, reduced the Chief Justice's appointees from two to one, and increased the number of appointees by the Speaker of the House of Representatives and the President of the Senate from one each to two each. S.B. 2515, 16th Leg., Reg. Sess. (HI. 1994). It further required one member of the Commission to be a resident of a county other than the City and County of Honolulu. *Id.*

¹³ Currently, district and family court judges serve six-year terms; judges and justices on the circuit, intermediate, and supreme court serve ten-year terms.

substantive matters. Attorneys are asked to respond confidentially to a series of questions covering subjects such as legal ability, judicial management, and comportment, and are invited to provide written comments. Another important component of the JPP is periodic evaluations of judges by jurors. Surveys are sent to those who have served as jurors, asking them to rate judges.

Results of the questionnaires are shared with each judge. The judge then meets with members of the Judicial Evaluation Review Panel to discuss the results. A Judicial Evaluation Review Panel consists of a senior member of the HSBA, a retired judge, and a respected lay person from the community. The evaluation results are confidential, provided only to the individual judge, the Chief Justice, and members of the review panel. However, upon request by the Commission, copies of the individual judge's evaluation results are provided to the Commission for its use in reviewing a judge's application for retention or for a new judicial position. Although the individual results are confidential, the Judiciary provides a yearly summary of the program's activities and results.

The Commission also reviews pertinent information from the Commission on Judicial Conduct, which investigates and conducts hearings concerning allegations of judicial misconduct or disability and makes disciplinary recommendations to the Hawai'i Supreme Court.

The HSBA also conducts confidential attorney evaluations of judges, midway through their terms and when they are in the retention process. Results are shared with each judge, the Chief Justice, the Judicial Evaluation Review Panel, and the Commission upon request.

The retention process culminates with the Commission's in-person interview of the judge. To be retained, at least five members of the Commission must then vote in favor of retention.

The current retention process is thorough. It minimizes the influence of outside pressures on the process. Methods for obtaining input are tailored to maximize the quality and quantity of input, and the current process allows the Commission to place all input into context.

The Proposed Senate Reconfirmation Process Would Have Significant Limitations

Under this bill, the Commission's decision—either affirmative or negative—as to whether a judge should be retained is not dispositive, instead it is considered as a “recommendation” subject to the Senate's review, public hearings, and a final decision as to whether the judge will be retained.

Under the proposed reconfirmation process, the Senate will not have access to the same comprehensive information that is available to the Commission, most notably the confidential attorney and juror evaluations of the judges, and the confidential interviews with respected resource persons in the community.

This is particularly problematic because it is that information that allows the Commission to place any concerns raised about a judge's performance in a particular case into a broader context, i.e., the body of the judge's work.

Moreover, judges may not be able to respond to criticisms that are raised in the Senate's hearing process regarding their rulings in specific cases. The Revised Code of Judicial Conduct prohibits judges from discussing or making any statements on pending or impending matters, or making any statement that might substantially interfere with a fair trial or hearing.¹⁴

Thus, judges who make rulings in controversial cases of high public interest shortly before retention would be unable to respond to the specifics of a pending case; they could effectively have their hands tied. And as noted above, the Senate would not have access to the confidential attorney or juror evaluations or resource person interviews to contextualize those concerns. The Senate would have only part of the picture, and neither the judge nor anyone else would be able to complete the picture.

The confidential evaluations submitted by attorneys are one of the most valued sources of information available to the Commission. The assurance of confidentiality is key to gathering input that is helpful and candid. The numerous resource persons who speak with the Commission on the assurance of confidentiality may not be willing to share the same information publicly.

There are other negative consequences to the proposed re-confirmation process. For example, it will substantially lengthen the time that each judge is subject to the retention process, from six months to between nine to twelve months. The judges would undertake that process while still performing their regular judicial duties. District and family court judges, who serve six-year terms, could spend as much as the last year—or one-sixth—of their term in the retention process.

The Bill May Deter Qualified, Experienced, And Diverse Lawyers From Seeking Judgeships

Merit-based systems encourage judicial diversity. A 2009 study by the American Judicature Society concluded that “minorities and women fared very well in states that used merit selection.”¹⁵ After nearly 40 years of a merit-based system, Hawai'i has the most diverse

¹⁴ Rule 2.10(a) states that “A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing.” The “Terminology” section of the Code provides that “[a] matter continues to be pending through any appellate process until final disposition.”

¹⁵ Malia Reddick, et al., *Racial and Gender Diversity on State Courts, an AJS Study*, 48 No. 3 Judges' J. 28, 30 (2009).

state judiciary in the nation.¹⁶ This bill, by proposing to significantly alter the nature of a judicial career, may make many highly-qualified attorneys less inclined to seek to become judges.¹⁷ It is critical that our retention process does not create artificial obstacles to maintaining and expanding the diversity of the Judiciary.

Conclusion

In 1979, Chief Justice William S. Richardson succinctly declared: “Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision.”¹⁸ Our current merit-based system serves the public well by ensuring that qualified judges are appointed, and then carefully reviewed during the retention process. The bill’s proposed fundamental shift is unwarranted when the current system is working well, particularly given the concerns discussed above.

For these reasons, the Judiciary respectfully opposes this bill. Hawaii’s current judicial selection and retention procedures were developed to ensure that highly qualified and skilled judges are selected by merit and retained without regard to political considerations. Judges are held accountable when they fall short of expectations for competence, integrity and fairness. Indeed, the present system ensures accountability while safeguarding the public’s interest in an independent judiciary.

While we appreciate, and share, in the Legislature’s desire to seek ways to improve the present retention system for judges, this bill’s approach is not consistent with the goal of improving the quality of judges. Instead, it will lead to the perception of a politicized judiciary. Therefore, retention by Senate reconfirmation will erode the confidence the public has in the non-partisanship of the judicial selection process and will ultimately diminish trust in the judicial system.

Respectfully, the Judiciary strongly opposes this bill. Thank you for the opportunity to testify.

¹⁶ Tracey E. George & Albert E. Yoon, *The Gavel Gap: Who Sits in Judgement on State Courts?*, American Constitution Society (2016), available at <http://gavelgap.org/pdf/gavel-gap-report.pdf>.

¹⁷ See 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 619 (1980) (“The public should not be deprived of having the most qualified candidate for judicial appointment.”).

¹⁸ William S. Richardson, *Judicial Independence in Hawaii*, 1 U. HAW. L. REV. 1, at 4 (1979).