



**Supreme Court — THE JUDICIARY • STATE OF HAWAII**

417 SOUTH KING STREET • ALI'ĪOLANI HALE • HONOLULU, HAWAII 96813-2902 • TELEPHONE (808) 539-4700 • FAX (808) 539-4703

**Ronald T.Y. Moon**  
CHIEF JUSTICE

Remarks by the

**HONORABLE RONALD T. Y. MOON**  
Chief Justice

to the

**AMERICAN JUDICATURE SOCIETY'S  
ANNUAL MEMBERSHIP MEETING**

on

Thursday, December 3, 2009  
4:30 p.m. -- Plaza Club, Pioneer Plaza

GOOD AFTERNOON, LADIES AND GENTLEMEN:

On behalf of the Hawai'i State Judiciary, I extend holiday greetings to you all. It's always a privilege to be here, and I thank you -- and, specifically, Larry Okinaga -- for the opportunity to speak to you today. I am actually elated -- not because this is my last opportunity to address you as chief justice, but because, in 272 days, I will be drinking "senior coffee" at my neighborhood McDonald's with other retired judges! Although I may have the privilege of addressing you at other events over the rest of my term, I take this opportunity to thank all of the members of the AJS for your support, assistance, collaboration, and cooperation extended throughout my tenure as chief justice in contributing to the administration of justice, and I am confident that you will continue to assist the Judiciary for many more years to come.

Today, I address you on the subject of the Judiciary's Budget Woes and Its Consequences, as well as comment -- as a follow-up on last year's subject -- of the threat of judicial elections in Hawai'i. As some of you may know, due to last year's projection of a billion dollar budget deficit over the next biennium, the Hawai'i Judiciary's budget base of 150 million dollars was reduced by 7.6% during the 2009 legislative session, as opposed to a smaller 6.0% reduction for the executive branch. -- It is important to keep in mind that the judiciary's budget comprises only 2.6% of the state's total budget and that 70.7% of our appropriation is dedicated to payroll and personnel expenses. -- The reduction to our budget included the elimination of 79 vacant -- but essential -- staff positions, a lump sum decrease for other operating expenses, as well as a first-time-ever salary cut for Hawaii's justices and judges -- for a total reduction of 11.5 million dollars. As a result, we were compelled to impose significant reductions in such areas as purchase of service or POS contracts, fees for guardians ad litem and court-appointed counsel in family court matters, building repairs, maintenance, and more.

---

In addition to scaling back 1.5 million dollars for guardian ad litem and legal counsel services in family court matters, we had to make the hard decision to cut back over 3 million dollars or 26% of our POS contracts. For those who may not be familiar with POS contracts, these involve the purchase of services -- such as treatment programs for substance abuse, child sex abuse, and mental health; assessment and treatment of adult sex offenders, anger management and victim impact classes, emergency shelter services, juvenile client and family services, and the list goes on. The significant reduction of POS contracts and other needed-services brings me to the subject of the Judiciary's mission.

Traditionally, the core mission of judiciaries across the nation has been to adjudicate disputes brought before its courts. However, the role of state courts throughout the nation is no longer limited to simply adjudicating cases. Over the last several decades, the role of state judiciaries has changed significantly by the implementation of, for example, drug, domestic violence, and mental health courts where adjudication and diversion programs, including rehabilitation and treatment go hand-in-hand. In other words, in today's modern judiciary, the exercise of judicial power and the breadth of its application has extended far beyond adjudication; but, with the threat of more budget cuts, the Judiciary may be forced to abandon the modern, service-oriented structure and return to the more traditional judicial function of adjudication. Doing so, however, would have serious consequences to our citizenry.

The impact from the reductions to our POS contracts that I just mentioned will likely result in increased domestic violence and other crimes, higher recidivism rates, prison and/or juvenile facility overcrowding, increased risk to children and families, as well as increased concerns regarding public safety -- not to mention increased workloads for our judges and staff. Consider, for example, further cutbacks that leave the Judiciary with no alternative but to significantly reduce -- and, possibly, eliminate -- all programs that provide valuable rehabilitation and intervention services, such as drug courts.

Because of the recent budget cuts, the treatment capacity of Oahu's Adult Drug Court dropped from 160 to 130 clients. Currently, there are 30 people on a wait list. Assuming these 30 people are unable to be admitted into our drug court program, they will -- in all likelihood -- be incarcerated at a cost of \$139 a day each or \$50,735 per defendant per year. Incarcerating these 30 individuals will result in an annual cost to the State of 1.5 million dollars. Keep in mind that this additional cost stems from our inability to service just 30 clients on O'ahu due to the recent budget cuts.

Consider the consequences of further cuts to our budget that could result in the closure of Adult Drug Court altogether. Using the same formula and applying it to the 387 defendants currently enrolled in Adult Drug Court statewide, the cost to the State to incarcerate these defendants would be approximately 19.6 million dollars a year, as compared to the entire drug court appropriation for fiscal year 2010 of \$877,345. More importantly, these potential costs to the State will multiply if further cuts mean closing our other drug courts, that is, our juvenile and family drug courts.

---

Clearly, diverting defendants to drug treatment through our various drug court programs, has the potential of saving the State millions of dollars, especially when you consider that our statistics indicate that the average recidivism, or re-offense, rate for adult drug court, statewide, is a low 9.6%. Allow me to explain. The Bureau of Justice Statistics reports that over 50 percent of those released from prison will re-offend within 3 years. Thus, for a majority of the defendants who were incarcerated without the benefit of the drug court program, the doors of the courthouse and the prisons become revolving doors, and each re-incarceration costs the state more money. Given the low recidivism rate for drug court graduates, those recurring costs of incarceration are significantly reduced.

Additionally, to graduate from drug court, clients must meet certain requirements, such as obtaining their G.E.D., be in school or gainfully employed, have a place to live and some form of transportation, that is, either a car or ability to buy a monthly bus pass. Graduates must also pay all court-ordered fines, fees, and restitution, or, in the case of larger restitution amounts, must have established a history of regular payments while in the program. Thus, drug court graduates become productive and meaningful contributors -- financially and otherwise -- to our society. On the other hand, without drug court intervention, the state loses revenues from the fines, fees, and taxes that cannot be collected because the incarcerated-defendant is not gainfully employed. Moreover, as illustrated by my previous discussion, incarceration shifts the cost of housing and subsistence from the defendants to the state, and, for the duration of their imprisonment, drains the limited resources we have.

After balancing last session's budget by cutting 11.5 million dollars, we remained optimistic. However, after the session ended, Council of Revenues' projections indicated that the budget deficit was back up to one billion dollars. Therefore, in order to assist with the State's continuing revenue shortfall, I announced to our employees in mid-October that the Judiciary would be implementing a two-day-a-month furlough for all HGEA-employees. As a result, statewide court closures began on November 6, and the twice-a-month closures will continue for at least the next 7 months, which will contribute 4.8 million dollars to the general fund and another 7.6 million dollars if the furlough plan is continued for fiscal year 2011.

Obviously, court closures will have a direct impact on court operations and, in turn, on the members of the public. I anticipate that trials will take longer and will be set further down the road due to the shortened work week. Similarly, attorneys and parties will probably be waiting longer to schedule a hearing or conference. Those involved in our criminal justice system may find that the kinds of services and treatment programs previously available to their clients have been eliminated due to severe budget cuts. Court-appointed guardians ad litem and legal counsel in family court matters may notice a drop in the number of cases being assigned in light of the cut backs in those areas.

Unfortunately, the situation is probably going to get worse before it gets better. The cuts in programs and services that have been made thus far are the result of the budget reductions imposed at the last legislative session. Since then, the projections from the Council of Revenues, as I've mentioned, paints an even darker picture. Thus, we are holding our breath until the end of the next legislative session and are hoping that the measures that we have taken to date -- including

---

implementation of a furlough plan -- will negate, or, at least, minimize any further reductions to our budget base at the end of the next session.

In that regard, I ask for your assistance in helping us “educate” -- and, candidly speaking, to actively lobby -- your legislators about the consequences of any further cuts to the Judiciary’s budget. In these clearly unprecedented times, legislators must understand how any further cuts to the judiciary’s budget can and will increase the costs at the back end and adversely impact the lives of the people in our communities -- that is, their constituents.

In the past, I have spoken to you and to our legislators about the importance of judicial independence and have focused on “decisional independence” -- that is, the freedom of judges to render impartial decisions based solely on the facts of the specific case and the rule of law, without influence, threats, or fear of reprisals. Today, I focus on another aspect of judicial independence -- that is, institutional independence and how an underfunded judiciary can actually increase cost and expenses to the State, as well as jeopardize public safety, and impact the administration of justice.

As you know, the independence of the judiciary as an institution is grounded in our constitution, which the Founding Fathers recognized as they crafted a government comprised of three, separate and equal, branches of government. However, you and I also know that the institutional independence of the judiciary cannot be absolute when the judiciary must rely upon the other two branches for its funding needs. Some argue -- and I would agree -- that the budgetary powers held by the executive and legislative branches place the judiciary at their mercy.

It is important to understand that, although the judiciary collects funds related to day-to-day judicial activities, such as fines, fees, and special assessments, these funds are deposited in the state’s general fund or are ear-marked for a specific purpose. For example, of the \$7.00 collected for traffic abstracts, \$5.00 is deposited in the general fund and the additional \$2.00 assessment goes to the Computer System Special Fund, which was statutorily created for the judiciary to implement a statewide computer case management system. Therefore, the judiciary has no discretion as to how monies deposited into the general fund are expended and, when funds are deposited into a special fund like the Computer System Special Fund, the judiciary’s spending discretion is limited to the purpose for which the fund was created. In other words, the Judiciary cannot decide, on its own, how collected-revenues are spent and, thus, is wholly reliant on the other two branches.

Additionally, scholars opine that, when elected officials perceive the need to raise revenues without raising taxes, pressure may be exerted upon the courts to do more to increase revenues derived from fines, fees, and forfeitures. Such occurrences, they believe, creates the potential for biasing court decisions, thereby implicating both the decisional and institutional independence of the judiciary. More importantly, they express concerns that higher fees would make it difficult for our citizens to gain access to the courts. I, therefore, reiterate and emphasize that we need your help to convince legislators that programs such as our drug courts, including their attendant rehabilitation and intervention services, are critical not only to reducing costs and expenses to the State in the future and to public safety, but vital to the administration of justice. As more aptly stated in a recent editorial in the *New York Times*, “slashing state court financing jeopardizes something beyond basic fairness, public safety, and even the rule of law. It weakens democracy itself.”

---

I wish to now take a few moments to update you on an issue that I talked about last year -- that is, judicial elections. Based upon what was happening across the nation and specifically here in Hawai'i, I discussed the ongoing debate regarding merit versus election-based systems. I emphasized the serious problems with judicial elections and the resulting horror stories regarding campaign fund raising. I also predicted that, if we did not heed the warning signs, judicial elections would one day become a reality, especially given the fact that 64% of Americans favor the election process for judges. Because the AJS continues to be at the forefront in promoting and defending commission-based judicial selection processes across the nation, I strongly urged the Hawai'i chapter to proactively work towards securing needed enhancements to strengthen our merit-selection system. The enhancements I proposed would, in my view, elevate the public's confidence in our judicial selection and retention process, thereby ensuring the preservation of that process. If anyone is interested in reviewing the needed enhancements that I discussed last year, a copy of my speech is available on the Judiciary's website or you can call my office for a copy.

Surely, the publicity surrounding the recent lawsuit filed by James Bickerton, a member of the Judicial Selection Commission, against Sheri Sakamoto, the Commission's Chair, does not bode well for enhancing public trust and confidence in our selection process. In his first amended complaint, filed on September 21, 2009, Bickerton alleged that Sakamoto unilaterally, and without a prior vote of the commission members, issued an announcement on September 8, 2009, calling for applications for the anticipated vacancy for the chief justice's position, as well as two other judicial vacancies, and setting a submission deadline of October 5th, a window of 27 days. The complaint alleged, among other things, that there was insufficient time for many applicants to gather the required information for the application and do the necessary consultation with friends, family, colleagues, and business associates for these vital public service positions, especially with regard to the head of the third branch, that is, the chief justice's position.

In response, the Attorney General, on behalf of Commission Chair Sakamoto, filed a motion to dismiss; however, the motion was never heard because a settlement was reached in early October, the terms of which were confidential, and a stipulation for dismissal was subsequently filed. On October 5th -- the date on which applications were due, -- Commission Chair Sakamoto issued a second announcement, extending the application deadline for the chief justice position for an additional 30-days -- to November 4th.

Although Bickerton's law suit was ultimately settled and dismissed, my concern centers around the negative impact that it may have upon the public's perception of our selection process. First, the fact that a commission member felt compelled to file suit against another member of the commission cannot be viewed as an action that instills confidence in the process. Second, I have serious concerns regarding the seemingly small window that was provided to potential applicants to submit an application for the impending vacancies. In fact, while at a dinner function in early November, a senior lawyer, whom I highly respect, approached me and asked whether I had decided to retire early because the recruitment announcement for the chief justice position had already come out.

I said, "no" and asked him if he had submitted an application. He explained that he had thought about it when the announcement first came out, but felt there just wasn't enough time to consult with his wife, his children, and other members of his family. Thus, he decided not to apply.

---

When I mentioned the extended application deadline, he indicated that, even if he were to consider doing so now, he would basically have the same amount of time as before, which was too short. Plus, he said, “What about my clients? Should I advise them of my intent to apply? I sure don’t want them finding out from the newspapers if I’m fortunate enough to make the list. And, with my caseload and upcoming trials, I can’t do everything in less than 30 days.” He added that he might have seriously considered applying if the initial announcement had provided a 60 to 90 day window.

Frankly speaking, I couldn’t argue with him because, having gone through the process myself in 1981 when considering the position at circuit court, I knew exactly what he meant. -- As a footnote, I add that, in those days, the process included a three-week period when nominations would be accepted by the Commission, and, if a person was nominated, an application form would be sent to him or her. The nominee would then have about 6 to 8 weeks to submit the complete application. -- Our conversation brought back vivid memories of the time and effort involved in talking with family, friends, and colleagues, as well as my clients, while continuing to meet the obligations of my practice and to my partners and, at the same time, trying to gather the necessary information and paperwork required to complete my application. In my case, the 8-9 weeks I had back then, as I described, was adequate. However, I have grave concerns that the amount of time given to potential applicants for the chief justice’s position was not. Consequently, I wouldn’t be surprised if the number of applications submitted -- even by the extended deadline -- was quite small. I submit that having a small applicant pool for such a critical position as the head of the third branch of government -- or, for that matter, any judicial vacancy -- simply because potential applicants are not given enough time to consider such a significant career move surely will not garner the public’s trust and confidence in our selection process.

Last year, I suggested that the AJS lobby the Commission to amend its rules to implement some of the much needed enhancements I discussed. Today, I add to that list the adoption of recruitment procedures that would provide potential applicants sufficient time to make an informed and thoughtful decision. I, therefore, reiterate my plea that the AJS actively seek this and other needed enhancements to ensure the preservation of our current process. Additionally, I realize I’m “preaching to the choir” when I say that the election of judges has no place in Hawai’i. Nevertheless, I cannot emphasize enough how critical it is that one of the nation’s leading defenders of the merit system -- the AJS -- aggressively guard against the erosion of the public’s confidence in our selection process.

As you know, the AJS’s special committee report on judicial selection -- issued in November 2004 -- recommended, among other things, that the Hawai’i State Bar Association cease its practice of rating judicial nominees as “highly qualified,” “qualified,” or “not qualified” as such ratings not only undermined the integrity of the Commission, especially given the constitutional mandate that the Commission nominate only qualified candidates for judicial office, but, more importantly, were potentially harmful to the public’s confidence in the selection process. I understand that, recently, the HSBA has omitted the “highly qualified” rating, but intends to continue its rating practice.

Last year, I told you about the HSBA’s “not qualified” rating of a judicial appointee based on 56 responses out of over 4,000 active attorneys. If deciding to issue a “not qualified” rating based on just over ONE PERCENT of its membership wasn’t bad enough, the question as to how the HSBA reached its “not qualified” conclusion is not only a mystery, but completely absurd given

---

the fact that the 56 responses were split right down the middle -- 28 in favor and 28 opposed to the judicial appointment. As I indicated in my remarks, some government officials have already questioned the HSBA's rating process, and, I submit, it is only a matter of time before the public will do the same. My fear is that, when the public throws up its hands and says "enough is enough," our merit-based system will become a thing of the past. Thus, I reiterate my plea to follow through with the recommendation of your special committee on judicial selection by aggressively and relentlessly lobbying the officers and board members of the HSBA to abandon their rating practice and encourage them, instead, to submit the information it gathers from its members (without judgment) to the members of the senate to consider as they decide on whether to confirm or reject the nominee for judicial office.

Ladies and gentlemen -- The judiciary remains committed to serving the public, and, although our efforts, to date, are a significant step towards addressing the state's urgent budget needs, we cannot continue to carry those actions into the future without the serious consequences I have discussed today. We, therefore, hope we can count on you to convey those consequences to the legislature, especially as they relate to the impact that an underfunded judiciary will likely have in creating additional cost and expenses to the State -- not to mention jeopardizing public safety.

We also need your help in lobbying the selection commission as well as the HSBA to implement those needed changes, especially those recommendations in your special committee report, that will contribute significantly to elevating trust and confidence in our judicial selection and retention process, thereby ensuring the preservation of that process.

Thank you again for the opportunity to speak to you today and Happy Holidays!