



The Judiciary, State of Hawai ʻi

Testimony to the Senate Committee on Judiciary and Labor

Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

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State Capitol, Conference Room 016

by
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Bill No. and Title: Senate Bill No. 2238, Relating to Judicial Elections.

Purpose: Makes conforming amendments to implement a constitutional amendment that establishes judicial elections. Requires the judiciary, office of elections, and campaign spending commission to study appropriate methods of implementing a judicial election system in the State and submit a written report, including any proposed legislation, to the legislature.

Judiciary's Position:

This bill would result in far-reaching ramifications not only to the judicial branch of this state, but to Hawaii's government as a whole. From the time of Hawaii's Constitution of 1852 through the present day, our judges have never been selected through an electoral process. The current merit-based system, which has been in place since 1978, has served this state well by providing for the selection and retention of qualified judges, while ensuring that judges can exercise independent judgment in deciding cases.

While we should always look for ways to improve the current system, this bill proposes a radical departure from it. Jurisdictions with judicial elections have seen dramatic increases in spending, including an influx of special interest money. Judges in these states must raise money to run for office and often face negative attack ads by their opponents or special interest groups. Research studies have shown that judicial elections affect judges' decision making, and result in less diverse judiciaries.



Accordingly, the judiciary respectfully opposes this bill. We offer this testimony to provide the historical basis for Hawaii's current merit-based system, to explain briefly how that system operates, and to highlight concerns raised by the experience of jurisdictions with judicial elections.

Hawaii's 150-Year History of an Appointive Judiciary System, and Adoption of a Merit Based Process

Hawai'i has had a long tradition of an appointive judiciary system, dating back to the Constitution of 1852.¹ Upon statehood, our first state constitution provided for gubernatorial appointments with the advice and consent of the Senate.²

The 1978 Constitutional Convention again considered how to select and retain judges. The convention's judiciary committee was primarily concerned with the potential for political influence and abuse in the selection system. It was the committee's firm belief that a judicial selection commission system, commonly referred to as a "merit based system," would provide for a more qualified and independent judiciary.³

At the convention, amendments providing for the election of judges were proposed and defeated. Delegates indicated that judicial elections suffer from many problems, including being disruptive to judicial proceedings and making judges beholden to campaign contributors.⁴ Delegate Adelaide "Frenchy" DeSoto noted that public hearings made clear that the people of Hawai'i did not want an elective judge system.⁵ Also defeated was an amendment to provide for a retention election after appointment. Delegates expressed concern regarding the lack of voter knowledge about candidates and the potential for judges to decide cases on the basis of popular appeal, rather than on what is right.⁶

Ultimately, the convention adopted the merit-based process which—with some subsequent amendments—remains in place to this day. This system reflects the sentiment that a judicial selection commission provides the essential foundation for a qualified and independent judiciary.

¹ Craig Kugisaki, *Hawaii Constitutional Convention Studies 1978, Article V: The Judiciary* 29 (Legislative Reference Bureau, May 1978).

² *Id.*

³ Stand. Comm. Rep. No. 52, in *1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 621 (1980).

⁴ *2 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 368-69 (1980).

⁵ *Id.* at 371.

⁶ *Id.* at 371-72.



Hawaii's Current Framework of Judicial Appointment

The Judicial Selection Commission (JSC) plays two important roles in the merit-based process. First, it screens and then identifies the most qualified candidates for vacant judicial offices, after which the Governor (for supreme, intermediate, and circuit court positions) or Chief Justice (for district and family court positions) selects a nominee from the list, who is subject to advice and consent by the Senate. Second, when a sitting judge applies to be retained in office, the JSC evaluates and determines whether the judge will be allowed to serve another term.

The structure of the JSC reflects a careful balancing of the various branches of government and other interests. Pursuant to article VI, section 4 of the Hawai'i Constitution, the JSC 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 are selected by the President of the Senate, one is selected by the Chief Justice of the Supreme Court, and two members are elected by the attorneys of the State.⁷ At least one member of the JSC must be a resident of a county other than the City and County of Honolulu.

The JSC's process for identifying candidates for judicial vacancies provides for an extremely thorough review of the applicants. The rules of the JSC allow for public notice to be provided when there is a vacancy. Applicants must submit a detailed application that includes information relating to their background, professional experience, disciplinary record, criminal history, health, and compliance with tax laws. Additionally, the JSC meets with key resource people in the community to obtain their confidential input, and conducts in-person interviews with the applicants.

Concerns with the Election of Judges

This bill would eliminate the JSC and institute an election process to select judges for six-year terms.⁸ At the end of their terms, judges would apply to the Senate to be considered for retention for additional six-year terms.

There are a number of concerns with the judicial election process.⁹

⁷ In 1994, the Hawai'i Constitution was amended to change the composition of appointees to the JSC. 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).

⁸ Currently, district and family court judges serve six-year terms, while judges and justices on the circuit, intermediate, and supreme courts serve ten-year terms.



First, judicial elections require candidates for judicial office to raise money for their campaigns, which may undermine the public's perception of the judiciary's fairness, impartiality, and independence and erode its reputation for making decisions that reflect these fundamental qualities. These concerns are particularly relevant in the aftermath of the U.S. Supreme Court's decision in Citizens United v. Federal Election Commission, which allows corporations and unions to make unlimited independent expenditures and electioneering communications in federal and state elections, including judicial elections.¹⁰ Further, many highly qualified lawyers who would be inclined to apply for a judicial position under the current system would likely not be willing to run for office if they were required to raise large amounts of funds to successfully campaign.

The threat to state courts from the influx of campaign money is serious. "Between 2000 and 2009, candidate fundraising more than doubled from the previous decade across more than 20 states with competitive elections for state supreme courts—rising to \$206.4 million from \$83.3 million between 1990 and 1999."¹¹ In 2014, 19 states held elections for their highest courts.¹² Spending in these elections exceeded a combined \$34.5 million, with much of the money coming from special interests, according to a report by Justice at Stake, the Brennan Center for Justice, and the National Institute on Money in State Politics.¹³ This runaway spending in judicial elections poses a substantial threat to fair and independent courts.

Second, escalating spending in judicial elections may have a negative effect on judicial behavior and fosters appearances of partiality by judges. In 2013, the American Constitution Society for Law and Policy found that the more campaign contributions that state supreme court justices receive from business interests, the more likely the courts are to vote for business

⁹ This bill finds that there has been a trend to eliminate or alter the merit selection of judges. However, in the last decade, the percentage of states with merit-based systems versus states with judicial elections has remained substantially the same. Most efforts to eliminate merit-based systems—such as in Arizona, Florida, and Missouri—have failed due to a lack of popular support. *Judicial Selection in the States*, Ballotpedia, https://ballotpedia.org/Judicial_selection_in_the_states (last visited Feb. 8, 2016).

¹⁰ 558 U.S. 310 (2010).

¹¹ Adam Skaggs, *Buying Justice: The Impact of Citizens United on Judicial Elections* 3 (Brennan Center for Justice, 2010), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/BCReportBuyingJustice.pdf>. The Center also reported that in one week, special interest groups spent nearly \$1 million to air television ads in judicial races in Illinois, Michigan, Montana, North Carolina, and Ohio. *Surge of Last Minute Outside Spending Hits State Supreme Court Races*, Brennan Center for Justice (Oct. 30, 2014), <http://www.brennancenter.org/press-release/surge-last-minute-outside-spending-hits-state-supreme-court-races>.

¹² Christina A. Cassidy, *Campaign Cash in State Judicial Elections Grows*, Associated Press (Dec. 28, 2015), <http://bigstory.ap.org/article/a8b9c2e0085f459d9f743d8bb375f2de/campaign-cash-state-judicial-elections-grows>.

¹³ Scott Greytak, et al., *Bankrolling the Bench: The New Politics of Judicial Elections 2013-2014* 2 (Brennan Center for Justice, Oct. 2015), available at <https://www.brennancenter.org/publication/bankrolling-bench-new-politics-judicial-elections>.



litigants appearing before them in court.¹⁴ Thus, by seeking votes through campaigning and fundraising, the study concluded, judges invariably lose what is most important for them to retain: their perceived credibility as neutral and unbiased arbiters of cases and controversies.¹⁵

In West Virginia, a newly elected supreme court justice refused to disqualify himself from hearing the case of a campaign supporter who had spent over \$3 million dollars to elect the justice. That justice was the deciding vote in favor of the campaign supporter, reversing a \$50 million jury verdict. On appeal, the U.S. Supreme Court reversed the West Virginia court ruling, concluding that the justice's failure to recuse himself constituted a violation of due process.¹⁶ This example, while dramatic, is by no means isolated. Similar situations have occurred in Illinois, Alabama, and Ohio, among other states.¹⁷ These incidents increase the public perception that justice is for sale to the highest bidder.

Moreover, studies have shown that the pressures of both selection and retention elections make judges more punitive in criminal cases. In 2015, the Brennan Center for Justice found that, near election time, judges are less likely to rule in favor of criminal defendants, and more likely to sentence defendants convicted of certain felonies to longer terms.¹⁸ The same study reviewed death sentences over a 15-year period and concluded that appointed supreme court judges reversed death sentences 26 percent of the time, judges facing retention elections reversed 15 percent of the time, and judges facing competitive elections reversed 11 percent of the time.¹⁹

Third, merit-based systems encourage judicial diversity. A 2009 study by the American Judicature Society concluded that merit-based systems led to a more diverse judiciary than an election-based system.²⁰ In a diverse and multicultural state like Hawai'i, it is critical that our judicial selection process does not create artificial obstacles to achieving this goal.

In sum, the available studies and the experience of other states suggest that judicial elections threaten the independence and impartiality of the judiciary. It is precisely these concerns that led Hawai'i to adopt a merit-based process that has served us well for over 40 years, and which caution against the adoption of the elective system proposed by this bill.

¹⁴ Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* (American Constitution Society for Law and Policy, June 2013), available at http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf.

¹⁵ *Id.*

¹⁶ *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

¹⁷ David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265, 303-04 (2008).

¹⁸ Kate Berry, *How Judicial Elections Impact Criminal Cases 2* (Brennan Center for Justice 2015), available at https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf.

¹⁹ *Id.*

²⁰ Malia Reddick, et al., *Racial and Gender Diversity on State Courts, an AJS Study*, 48 No. 3 *Judges' J.* 28, 30 (2009).



Hawaii's Current Framework of Judicial Retention

This bill also proposes that judges seeking to remain in office apply to the Senate, which in turn must hold a public hearing and then decide whether to consent to the retention. The bill does not state what happens if the Senate fails to act.

Currently, the JSC determines whether judges will be retained in office. To summarize the process briefly, a judge submits a petition for retention, which contains detailed information on subjects ranging from timeliness of case dispositions to the status and outcome of cases on appeal. After the petition is received, notice of the petition for retention is published in newspapers and on the Judiciary website. The JSC invites public comment on whether the judge should be retained, allowing interested parties to submit confidential written comments or fill out an evaluation form.

In addition, the JSC meets personally with key resource people who provide direct, confidential feedback to the commissioners. The JSC also obtains from the Judiciary confidential evaluations of judges that are completed by attorneys and jurors. These evaluations are undertaken pursuant to the Judicial Performance Program established by Rule 19 of the Rules of the Supreme Court of the State of Hawai'i.²¹

The Hawai'i State Bar Association (HSBA) also conducts confidential attorney evaluations of judges who are either midway through their term or up for retention. Results of those evaluations are shared with each judge and the Chief Justice, and provided to the JSC upon request for use in the retention process.

The JSC also obtains input from the Commission on Judicial Conduct, which investigates and conducts hearings concerning allegations of judicial misconduct or disability, and has the authority to make disciplinary recommendations to the Hawai'i Supreme Court.

The retention process culminates with an in-person interview of the judge by the JSC, followed by a vote on whether or not the judge will be retained. At least five members of the commission must vote in favor of retention.

Currently, district and family court judges serve six-year terms, while judges and justices on the circuit, intermediate, and supreme court serve ten-year terms. This bill would provide for six-year terms for all positions. The 1978 Constitutional Convention determined that ten-year terms for circuit, intermediate, and supreme court judges would "give a judge job security and

²¹ Further details of this process are provided in our testimony on S.B. no. 2420.



independence from the appointing authority,” and that it would allow a new judge enough time to “learn and mature in his role as an arbiter of the law.”²²

Concerns with the Proposed Senate Retention Process

The proposed Senate consent process for sitting judges raises several concerns. Because the Rule 19 and HSBA attorney evaluations, as well as the juror evaluations, are confidential, the Senate would lack the information that these sources provide to the JSC. Moreover, the numerous resource persons who speak with the JSC on the assurance of confidentiality may not be willing to share the same information publicly. Thus, the proposed process will not have the benefit of these significant sources of information, which are available to the JSC.

Further, a judge seeking retention would be ethically precluded from responding to questions before the Senate about certain cases. Hawai‘i Revised Code of Judicial Conduct, Rule 2.10, does not allow a judge to make any public statements on pending or impending matters.²³

Thus, judges who make rulings in controversial cases shortly before retention could effectively have their hands tied—unable to respond to the specifics of a pending case, and unable to have the decision makers refer to the judicial evaluations or resource persons to serve as a counterweight to concerns expressed by disappointed litigants.

Conclusion

In a 1979 University of Hawai‘i Law Review article, then-Chief Justice William S. Richardson succinctly explained the significance of judicial independence: “Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision.”²⁴

Hawai‘i has never had judicial elections. Our current merit-based system, which has been in place since 1978, is serving the public well. The present system ensures that qualified judges are appointed and are carefully reviewed when they seek retention of their position.

The shift to an election-based system would be an unwarranted change and would raise significant concerns regarding judicial independence and public confidence in the Judiciary. The

²² *Supra* note 3, at 623.

²³ 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.”

²⁴ William S. Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. Haw. L. Rev. 1, 4 (1979).



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delegates at the 1978 Hawai'i Constitutional Convention recognized as much when they rejected judicial elections and endorsed a judicial selection commission and our appointive process.

For these reasons, the Judiciary respectfully opposes this bill.

Thank you for the opportunity to present testimony on this important issue.