



## *The Judiciary, State of Hawai‘i*

### **Testimony to the Senate Committee on Judiciary and Labor**

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

Wednesday, February 10, 2016, 9:00 am  
State Capitol, Conference Room 016

by  
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**Bill No. and Title:** 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.

**Purpose:** Proposes a constitutional amendment to amend article VI, section 3 of the Hawai‘i Constitution to amend the timeframe to renew the term of office of a justice or judge, and require consent of the Senate for reappointment of a justice or judge.

### **Judiciary’s Position:**

Presently, justices and judges (collectively “judges”) petition the Judicial Selection Commission (JSC) for reappointment. The JSC conducts an in-depth evaluation, including a review of confidential performance evaluations completed by attorneys and jurors, written comments from interested persons, and interviews with key resource people. The JSC then decides whether to retain the judge in judicial office.

This system was first developed at the 1978 Constitutional Convention. It reflects a careful balancing of various interests, with the goal of ensuring judicial accountability while preserving judicial independence.

This basic structure—with some amendments over the years—has served Hawai‘i well. While we should always look for possible improvements to how the JSC operates, this bill would fundamentally restructure the process and have negative consequences. Accordingly, the



Judiciary respectfully opposes this bill. In this testimony, we set forth the background and operation of the current system and identify some issues that would arise under the proposed amendment.

### **History of the Judicial Selection Commission and the Current Retention Process**

The current process of judicial selection and retention was established pursuant to the electorate's approval of amendments proposed by the 1978 Constitutional Convention. The convention's judiciary committee and delegate debates reflected a strong belief in an independent judiciary free from political influence and abuse.<sup>1</sup>

The 1978 amendments to article VI included the establishment of the JSC. The judiciary committee indicated that the "clear majority" of those testifying strongly supported the concept of a nonpartisan JSC that could screen qualified candidates for judicial appointment.<sup>2</sup> The committee noted that this process would reduce unnecessary political influence while ensuring that the public had the most qualified candidates for judicial appointment.<sup>3</sup> The committee described the proposal for a JSC 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."<sup>4</sup>

Under the 1978 amendments, when a judicial vacancy occurs, the JSC presents to either the Governor or the Chief Justice a list of candidates for the position. The nominee is subject to the consent of the Senate. However, the convention decided to leave the decision of retention exclusively to the JSC. The judiciary committee noted that this process would lessen partisan politics and maintain the high quality of the judiciary:<sup>5</sup>

[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

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<sup>1</sup> 2 *Proceedings of the Constitutional Convention of Hawaii of 1978*, at 368-69 (1980).

<sup>2</sup> Stand. Comm. Rep. No. 52, in 1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, at 619 (1980).

<sup>3</sup> *Id.* at 619-20.

<sup>4</sup> *Id.* at 620.

<sup>5</sup> *Id.* at 623.



commission, is intended to provide an unbiased and effective method of maintaining the quality of our jurists.

The JSC is composed of nine members, no more than four of whom can be licensed attorneys. 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. It further required one member of the JSC to be a resident of a county other than the City and County of Honolulu.<sup>6</sup> In short, the amendment diminished the authority of the Governor and Chief Justice in favor of the legislature, and maintained the parity between the House and Senate by providing an equal number of appointees for each.

### **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.

Currently, the JSC determines whether judges will be retained in office. To summarize the process briefly, the JSC's retention process involves a careful review of information from a number of different sources, including public comments, meetings with key resource people, confidential evaluations of the judge's performance, appellate cases reviewing the judge's decisions, and the judge's retention petition and in-person interview with the JSC.

Initially, 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, the Hawai'i State Bar Association (HSBA) newsletter, 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 (JPP) established by Rule 19 of the Rules of the Supreme Court of the State of Hawai'i.

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<sup>6</sup> S.B. no. 2515, 16th Leg., Reg. Sess. (Hi. 1994).



The Hawai'i Information Consortium administers the JPP evaluation process. All full-time judges and a limited number of per diem judges are evaluated by attorneys who have appeared before those judges on substantive matters. Attorneys are asked to respond confidentially to a series of questions covering subjects such as legal ability, judicial management, and comportment, as well as provide any helpful written comments.

The 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.

Another component of the JPP is periodic evaluations of judges by jurors. Surveys are sent to jurors who have served on a case before a trial judge, and are asked to rate the judge's overall performance. In 2013, 1,172 survey forms were distributed for eight judges, with 473 being returned; in 2016, 896 forms were distributed for seven judges.<sup>7</sup>

Results of the questionnaires are shared with each judge. The judge then meets with members of the Judicial Evaluation Review Panel to discuss the report and the ways in which the JPP's goals can be achieved in light of the results. A Judicial Evaluation 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 who meet with the judge. However, upon request by the JSC, copies of the individual judge's evaluation reports 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 reports are confidential, the Judiciary does provide a yearly summary report of the program's activities and results. These reports, as well as more information on the JPP, can be found on the Judiciary's website.<sup>8</sup>

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.

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<sup>7</sup> The Judiciary State of Hawai'i, *Judicial Performance Program 2013 Report* 15 (Nov. 7, 2013), available at [http://www.courts.state.hi.us/docs/news\\_and\\_reports\\_docs/JP13REPT.pdf](http://www.courts.state.hi.us/docs/news_and_reports_docs/JP13REPT.pdf).

<sup>8</sup> *Judicial Performance Review*, Hawai'i State Judiciary, [http://www.courts.state.hi.us/courts/performance\\_review/judicial\\_performance\\_review.html](http://www.courts.state.hi.us/courts/performance_review/judicial_performance_review.html) (last visited Feb. 2, 2016).



### **Concerns with the Proposed Senate Retention Process**

There are some significant consequences of the proposal that should be considered.

First, the proposed process would result in approximately doubling the number of judicial confirmation proceedings that the Senate conducts.<sup>9</sup> While some initial confirmation hearings move quickly, others can stretch out over multiple sessions if there are concerns about the nominee. Moreover, because petitions must be acted on before the end of the judge's term, many of these hearings would need to take place during the eight-month period between sessions of the legislature, and would thereby require the Senate to convene in special sessions.

Second, the proposal will substantially lengthen the time that each judge is subject to the retention process, from six months to between 9-12 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.

Third, a judge seeking retention would be ethically precluded from responding to questions before the Senate about pending cases. Rule 2.10 of the Hawai'i Revised Code of Judicial Conduct does not allow a judge to make any public statements on pending or impending matters.<sup>10</sup>

Fourth, because the Rule 19 and HSBA attorney evaluations, as well as the juror evaluations, are confidential, the Senate would not have the benefit of 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, 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 decision makers refer to the judicial evaluations or resource persons to counter concerns expressed by disappointed litigants.

Finally, Vermont's experience highlights how a similar legislative retention system can impact judicial independence. 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

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<sup>9</sup> Since 2011, there have been 27 retention petitions approved by the JSC, and 25 lists of candidates to fill vacant judgeships.

<sup>10</sup> 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."



Senate Bill No. 2420  
Senate Committee on Judiciary and Labor  
February 10, 2016  
Page 6

response, some political candidates indicated that they would use Vermont's judicial retention system as a means of ousting the "three most liberal" justices from the bench.<sup>11</sup> While the justices were ultimately retained, it illustrates the threat to judicial independence that this type of process can create. Indeed, a clerk to the Vermont Supreme Court recalled weekly "highly rancorous protests" outside of the court during the retention process.<sup>12</sup>

### **Conclusion**

The current review and retention process provides a fair and effective method of maintaining the quality and independence of our jurists. The JSC process has served the public well for more than 35 years. The proposal at issue here represents a substantial change and may have consequences that could impair the ability of judges to administer justice in an impartial, efficient, and accessible manner.

For these reasons, the Judiciary respectfully opposes this bill.

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

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<sup>11</sup> David McLean, *Judicial Tenure in Vermont: Does Good Behavior Merit Retention?*, 27 Vt. B.J. 39, 39 (2001).

<sup>12</sup> Bridget Asay, et al., *Justice Johnson and the Clerks*, 37 Vt. B.J. 24, 25 (2011).