

Judicial Independence In Hawaii



League of Women Voters of Hawaii
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JUDICIAL INDEPENDENCE IN HAWAII

JUDICIAL INDEPENDENCE PROJECT

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PREFACE

Most of us will never see the inside of a courtroom except as spectators, potential jurors, or through the prisms of television and movie cameras, but decisions made by judges and justices on the interpretation and applications of constitutional, statutory, and common laws have far-reaching consequences on our lives. We depend on our courts to fairly and impartially apply our laws in settling civil disputes, adjudicating and sentencing criminals, and protecting the rights of all people guaranteed by our state and federal constitutions.

Fair and impartial are the root and operative words, and they can only be nurtured if our courts and the judiciary as an institution remain independent from political, economic and social pressures.

The Brennan Center For Justice at NYU School of Law defines judicial independence as: “the freedom we give judges to act as principled decision-makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent, judges are not influenced by personal interest or relationships, the identity of status of the parties to a case, or external economic or political pressures.”

Of course, judicial independence applies not only to individual judges in their adjudication of cases, but to the whole judicial system. Does Hawaii’s judiciary enjoy the independence to act as an important co-equal partner in our tripartite government? Can it operate free from political, economic, and social pressures to serve as the check and balance to the other two branches— the executive and the legislative?

In discussing the threats to judicial independence, one of the Brennan Center’s articles comments that “.... judicial independence can flourish only as long as society has confidence in the impartiality of judges. Without faith that judges for the most part act neutrally and fairly, the public has no reason to defend the judiciary as a separate and powerful third branch of government.”

It was this same reasoning on our part that sent the League of Women Voters’ Judicial Independence Project Committee on a tour of discovery of our state judiciary.

Maile Bay, President
League of Women Voters of Hawaii

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League of Women Voters of Hawaii
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League of Women Voters of Hawaii

The League of Women Voters of Hawaii (LWVHI) is a council of local leagues, with a 15 member board for 2001-2004. The presidents of the local leagues—Honolulu (Island of Oahu), Kauai (Island of Kauai), and Maui (Island of Maui, and one of the co-presidents of Hawaii County (Island of Hawaii)—are automatically members of the State board. Most of the other board members are also active members of their local leagues.

INTRODUCTION

In the absence of any glaring systemic problems that are obvious threats to judicial independence such as the election of judges, we decided to explore the whole judicial system on the premise that the degree of independence our citizens would recognize as necessary for the proper functioning of the judicial branch is dependent on their perceptions of the soundness of that system. In order for citizens to accept the importance of and need for judicial independence, we need to be convinced that we have a system dedicated to equal access to justice and the fair adjudication of cases in accordance with the laws of our state and our nation. Therefore, we have devoted our time to exploring our judicial system, its structure, the checks and balances put in place to identify and resolve problems, problems encountered in the past, and weaknesses and strengths perceived and real today.

This was quite an experience, for most of us really knew very little about the structure of the judiciary. Piece by piece, we explored it—gathered brochures and committee reports, the judiciary's own studies and plans for improving services, interviewed the members of the various commissions and committees and individual members of the legal community and some of its critics, gathered newspaper and magazine articles about events that had occurred decades back, read current criticisms and the counter arguments of knowledgeable people inside and outside of the judiciary.

While this report is meant to be an overview of Hawaii's judicial system, it is based on those interviews we were able to conduct and those articles that we were able to gather and read in the limited time available. As such, it conveys our views and opinions about the system. During the process, we identified areas we would like to explore further, but we have set those aside for further study after this project is completed.

It is our conclusion, as well as the conclusion of most of the more vocal critics, that we have a sound judicial system. We have a system of selecting judges that avoids the abuses, real or perceived, of electing judges. In addition, our system includes a program to regularly evaluate judges and a commission on judicial conduct. While we have experienced problems in the past and will likely encounter others in the future, most of them have been identified and resolved over time.

As we indicate in our report, where doubts remain, most of the issues can be alleviated or avoided through greater transparency built into the system.

BACKGROUND

Hawaii's Courts.

The Hawaii State Judiciary encompasses a statewide system consisting of courts of appeal and trial courts. Appellate level courts include the supreme court and intermediate court of appeals. In addition, there are special courts such as the land court, and tax appeals court. The Hawaii Supreme Court consists of a chief justice and 4 associates; the Intermediate Court of Appeals consists of a chief judge and 3 associates. The 2003 Hawaii Legislature added funding for two more judges at the Intermediate Court of Appeals. As of this writing, those positions are in the process of being filled. At present there is one woman on the Intermediate Court of Appeals and one on the Supreme Court.

District and circuit level courts operate in four counties: first judicial circuit, Oahu; second judicial circuit, Maui; third judicial circuit, Hawaii; and the fifth judicial circuit, Kauai (there is no fourth circuit court). As of May 14, 2003, on Oahu, there were 23 circuit (12 women), 9 family (2 women), and 14 district court judges (6 women). On Maui, there were 3 circuit (0 women), 1 family (0 women), and 4 district (2 women) court judges. On Hawaii (Big Island) there were 2 circuit (0 women), 4 district (1 woman), and 2 family (0 women) court judges. Kauai had 2 circuit (0 women) and 2 district court (1 woman) judges. Among the four counties, there were 50 per diem district and family court judges (16 women) who are appointed by the Chief Justice. Unlike most other states, all of Hawaii's courts are contained within an integrated system funded by one source—the State Legislature. A central administrative office, headed by a director appointed by the Chief Justice with the approval of the Supreme Court, assists in supervising operations. Court rules, procedures, and forms are consistent throughout all judicial circuits.

All judges/justices, except per diem, in Hawaii are appointed by either the Governor or Chief Justice from a list compiled by a commission established by the State Constitution, then confirmed by the Senate, as is more fully described below. The Hawaii Constitution requires that judges/justices be citizens of the state and the United States and licensed to practice law by the Hawaii Supreme Court for 10 years to be appointed to the supreme court, the intermediate court of appeals, or the circuit court and for 5 years to be appointed to the district court.

Chief Justice Ronald Moon has initiated many programs to aid the public when accessing the courts. For example, the Ho'okele program (Ho'okele means "to guide" in Hawaiian) places concierge desks inside the front entrances of both the District Court and the Circuit Court buildings. Among other things, the concierge staff directs those unfamiliar with the legal system to the appropriate offices and programs within the courthouse and helps them find where their cases are being heard and/or refers them to appropriate outside agencies. Other programs have improved the quality of justice for Hawaii's large immigrant population through such things as free, recorded telephone messages in seven languages and a directory of bilingual attorneys and legal assistants. Adult Drug Courts were initiated for the purpose of emphasizing treatment and rehabilitation. Achieving Court Excellence is an ambitious program setting out 29 goals to improve service to the public by increasing efficiency, eliminating duplication, and adding flexibility in resources, through the statewide, unified court management information system.¹

SELECTION OF JUDGES

Judicial Selection Commission

The Judicial Selection Commission, established by the 1978 Hawaii Constitutional Convention, is composed of nine members, no more than four of whom may be lawyers, selected or elected as follows:

- 2 members selected by the Governor
- 2 members selected by the Speaker of the Hawaii House of Representatives
- 2 members selected by the President of the Hawaii Senate
- 1 member selected by the Hawaii Chief Justice
- 2 members elected by the members of the Hawaii State Bar Association

Prior to 1978, the Governor appointed the supreme court justices and circuit court judges, and the Chief Justice of the Supreme Court appointed all district court judges. The 1978 Hawaii Constitutional Convention established the Judicial Selection Commission in an attempt to remove political influence and favoritism in the selection of judges. Under the constitutional provisions, the Governor would appoint 3 commissioners, the Chief Justice 2, and the House Speaker and the Senate President 1 each with the Hawaii State Bar Association electing 2 of its members to serve on the commission. U.S. District Court judge Samuel P. King said at that time that it was misleading to voters to characterize the commission as a way of selecting judges by merit that also eliminated all politics. Hawaii State Bar Association President Daniel Case said that the bar association was going to endorse the commission process, but felt that by giving the Governor 3 appointments, it stacked the deck in favor of the politicians.²

In 1993, responding to the public's perception that the commission lacked independence among other issues, a citizens' conference was sponsored by the HSBA, the American Judicature Society, the Hawaii State Judiciary and a few others. Over 125 citizens, many of them representatives of civic organizations, were invited to attend. Among the many recommendations for reform of the judicial selection process, four required constitutional amendments. One of the proposed amendments reduced the Governor's and the Chief Justice's appointment of commissioners and increased that of the House Speaker and the Senate President. Another proposed amendment reduced the number of Circuit court nominees submitted by the Judicial Selection Commission from a list of "not less than six" to "not less than four and not more than six". This proposed amendment alleviated the problem of the commission sometimes having to relax the standards to identify six qualified nominees. One other proposed amendment provided for Senate approval of district court judges. In addition, the proposed amendments required that at all times at least one commissioner be a resident of a neighbor island county.

The Hawaii Legislature placed these proposed amendments on the ballot in the 1994³ election, and voters approved all four. However, the State's Attorney General challenged the validity of the amendments based on alleged procedural errors. It was not until January of 1997⁴ that the Hawaii Supreme Court upheld the validity of the amendments.

Issue. Political influence.

There has been a continuing debate over the political nature of the appointment of the commissioners. In 1993, for example, the local newspaper ran several articles that suggested the public didn't trust commission members to act independently in selecting nominees for open judgeships.⁵ While acknowledging that the commission process was superior to the prior process of direct selection of judges by the governor and chief justice, the public still perceived the selection of commission members as influenced by politics. At that time, Lieutenant Governor (then, Governor)

Ben Cayetano suggested that the judicial selection process would be improved if the governor and chief justice were removed as appointers of commission members.

In 1997, another appointment to the commission created more accusations that politics was inappropriately involved in the process. The then-Senate President appointed to the commission a person considered the most powerful lobbyist in the state at the time, the director of the United Public Workers Union, Gary Rodrigues. One editorial said “this appointment contradicts the idea of keeping politics out of the judiciary.”⁶ In part, the media reaction was to a requirement in the State Constitution that no judicial selection commission member “take an active part in political management or in political campaigns.” (Article VI, Section 4) Many felt that this commissioner’s activities and position contravened the Constitution’s intent.

Media coverage over this appointment increased later in 1999 when he was investigated by the Department of Labor and then criminally indicted.⁷ Pending trial, the commissioner at first continued to serve on the judicial selection commission despite calls for him to resign.⁸ He finally did recuse himself. However, this commissioner was the only member of the commission from the outer islands (resident of Kauai); therefore, the outer islands was not technically represented on the commission. Commissioner Rodrigues ended his term in April 2002. When the current Senate President appointed a commissioner from Oahu, he was notified that the appointment must be someone from one of the neighbor islands. He resisted. It was not until the Statue Judicial Selection Commission petitioned the State Supreme Court for a writ of mandamus directing the President to fulfill his constitutional obligations that the Senate President relented.

A seat on the Judicial Selection Commission is highly coveted, and the authority to make appointments is not taken lightly. Because the commissioners sit for 6-year terms, the opportunity for any one appointing authority to make a selection does not occur often, or may not arise more than once for any appointing authority. Unfortunately, the State Constitution does not stipulate which appointing authority should make the neighbor island selection. Barring some disruption to the appointment cycle, it seems that the Senate President will always be the one to select someone from the outer islands. If the Senate President is someone from the outer islands, this may be a welcome opportunity, but the fact remains that unless some other appointing authority, by choice or by design, selects a neighbor islander, the responsibility may always rest with the Senate President.

Another controversy involved the Bishop Estate, established through the Will of Princess Bernice Pauahi Bishop in 1884. The Will provided that the five estate trustees “are appointed by the members of the state Supreme Court, acting as private individuals.”⁹ These were lucrative positions. For example, “from 1986 to 1988, the trustees were paid \$1.57 million each in commissions.” Some felt that the selection process added “to the potential for conflicts of interest, real or perceived, between an estate that is Hawaii’s largest private landholder and a Supreme Court that sets the rules regarding many land, tax development and other matters.”¹⁰ In 1994, the Bishop Estate controversy reached to the Judicial Selection Commission when Gerard Jervis was chosen by the justices as a trustee. “As a member of the state Judicial Selection Commission, Jervis had helped interview the five [Supreme Court Justices] when they applied to the high court.”¹¹ In 1997, after extensive adverse publicity and public discussion, the justices announced that they would give up selecting future trustees. This decision dispelled most of the perceptions of political horse trading and conflicts of interest among the three branches of government and the Judicial Selection Commission.¹²

Hawaii’s commission system has evolved over time into one that minimizes the grave problems surrounding the election of judges used in other states. It is based on selection of nominees through an independent commission followed by appointment by either the Governor or Chief Justice and then confirmation by the Senate. While the historical development has at times

seemed political or been tumultuous, as reflected in the examples chosen for this report, the commission process overall appears sound.

Suggestions compiled from various sources (not necessarily endorsed by LWV)

1. Eliminate the Judicial Selection Commission and return to direct appointments.
2. Elect judges.
3. Require confirmation of nominees to the Judicial Selection Commission by the Senate.
4. Revise Judicial Selection Commission rules to clarify and specify politically active. Preamble, Section 3C reads, "No commissioner shall take an active part in political management or in political campaigns."
5. Publicize complete biographies of Judicial Selection members at the time of appointment.
6. Appoint more women to the Judicial Selection Commission (see discussion under "Initial Appointment," below).
7. Require that at least one of the governor's two appointments to the Judicial Selection Commission be from an outer island; or have the State Bar Association elect one of its members from an outer island; or rotate the responsibility of appointing/electing the outer island member.

Selection of Judges – Initial Appointment

All judicial vacancies are advertised in the local newspaper to solicit applications. The Judicial Selection Commission Rules require the Commission to review an applicant or nominee's background, professional skills, and character with attention to:

- integrity & moral courage
- legal ability & experience
- intelligence & wisdom
- compassion & fairness
- diligence & decisiveness
- judicial temperament
- such other qualities as the Commission deems appropriate.

District and district family court judges are appointed to six-year terms by the Chief Justice of the Supreme Court who selects a nominee from a list of not less than six names submitted for each opening by the Judicial Selection Commission. A judicial selection commission rule allows an applicant's name to be included on more than one list of nominees for different judicial office vacancies. (Rule 11)

All appointments are subject to Senate confirmation according to strict thirty day timelines. Procedures for failures to either appoint or confirm within the timelines are also set out in the Hawaii State Constitution, Article VI, Section 3.

Issue: Secrecy.

The State Constitution, Article VI, Section 4, provides that the "deliberations of the commission shall be confidential." One argument against releasing the names of those who are being considered by the Judicial Selection Commission is that it leads to inappropriate lobbying and possible release of sensitive personal information. It may also keep good candidates from pursuing a judicial position. After the Judicial Selection Commission was established, its practice was to keep both its deliberations and the final list of candidates secret. In 1993, a lawsuit was filed asking the court to order the commission to make public the names on the list of finalists sent to the appointing authorities. In, *Pray v. The Judicial Selection Commission* (1993)¹³, the court stated that the