



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 4, 2008
4:30 p.m. -- Plaza Club, Pioneer Plaza

GOOD AFTERNOON, LADIES AND GENTLEMEN:

It is, indeed, my pleasure to be here today. On behalf of the justices and judges of our state judiciary, I thank AJS and its members for their continued support in answering the call for assistance from judiciaries and judges across the country and especially here locally. I also thank you -- and, specifically, Larry Okinaga -- for the privilege of addressing you today.

I take this opportunity to extend a special mahalo to AJS -- more specifically, to co-chairs Alan Oshima and Judge Michael Seabright, as well as the members of the AJS Special Committee on Public Knowledge, Understanding, and Confidence in the Courts, for their recent report, recommending how we can enhance the public's understanding of the workings of our government -- and, more pointedly, the need to revitalize civic education in our schools. The report demonstrates the hard work of the committee and provides much food for thought. It is my hope that the AJS will follow-up and ensure that some, if not all, of the recommendations are pursued.

As I have stated to you in the past and as recognized by the special committee's report, our citizens' basic knowledge about our government -- and, specifically, about our courts -- and how they work is essential to our democracy. Part of that knowledge includes knowing how judges are selected and retained. Historically, as you know, the Founders of our nation, in declaring their independence from Great Britain, designed -- among other things -- a separate and independent judicial branch of government in response to the intolerable abuses of the king. Although judges were initially appointed by either the legislature or the governor, the states gradually began to adopt popular election as a means for selecting judges, and, by 1850, 24 of the 34 states in the Union had established an elected judiciary. However, the electoral system eventually came under attack.

One of the most outspoken critics of an electoral system for judges was Roscoe Pound, who -- in 1906 -- addressed the American Bar Association on “The Causes of Popular Dissatisfaction with the Administration of Justice.” In his remarks, he stated that “putting courts into politics and compelling judges to become politicians in many jurisdictions . . . almost destroyed the traditional respect for the bench.” Reformers in the early 1900s claimed that the worst aspects of partisan politics could be eliminated through what was called a “merit plan” for selecting judges. Origins of the merit plan have commonly been traced back to Albert M. Kales, one of the founders of the American Judicature Society. In the 1930s, versions of his proposal were introduced in state legislatures and earned the endorsement of the American Bar Association in 1937. Missouri became the first state to implement a merit-based system of selecting judges in 1940.

Under Missouri’s plan, which combines an appointment and election process, the Missouri Appellate Judicial Commission forwards a list of three names to the governor, who has sixty days to select one of the nominees. At the general election after completion of one year of service, the judge must stand in a retention election. If a majority votes against retention, the judge is removed from office, and the process begins anew. The Missouri Plan -- in some form, that is, a commissioned-based plan where judges stand for retention elections after completion of a short initial term -- exists in some states today. Other states utilize one of the following methods -- either alone or in combination, depending on the level of court: (1) governor or legislative appointment without a nominating commission; (2) merit selection through a nominating commission for a full term; (3) partisan elections; and/or (4) nonpartisan elections. In fact, of the 50 states, a great majority -- 43, to be exact, -- conduct judicial elections, either for new judges or the retention of incumbent judges on at least one court level within each of those states.

Indeed, as borne out by the nearly endless literature on the subject, the rationale for judicial elections -- in rather simplistic terms -- is this: judges elected by the people would inspire greater public trust, and their decisions, in turn, would command greater respect. If bad judges were elected, recourse would be available at the polls. However, problems regarding judicial elections -- mainly, the low level of knowledge and interest among the electorate -- have become increasingly evident. With a great majority of states holding some form of judicial elections, other serious problems have come to the forefront -- namely: (1) the role of political parties and other special interest groups; (2) the need for and sources of campaign funds; and (3) the substantive -- sometimes negative -- content of the campaigns themselves. Indeed, in recent years, media reports regarding the cost of running a judicial campaign are mind-boggling. For example: Since 2004, more and more states are reporting record-breaking numbers in terms of judicial fund-raising efforts. For example, in 2004, two candidates running for a vacancy on the Illinois Supreme Court amassed approximately 4.5 million dollars each in campaign funds. Last year’s Wisconsin Supreme Court race was the most expensive in the state’s history, where both candidates raised a combined total of 5 to 6 million dollars.

As observed by Retired Supreme Court Justice Sandra Day O’Connor in an article that appeared in the November 15, 2007 issue of *The Wall Street Journal*, entitled “Justice for Sale,” she wrote:

most of this money comes from special interest groups who believe that their contributions can help elect judges likely to rule in a manner favorable to their causes. As interest-group spending rises, public confidence in the judiciary declines. . . . Special interest appeals to emotion and policy preferences tempt voters to join efforts to control the decisions of judges.

Consequently, calls for judicial selection reforms are on the rise.

The National Center for State Courts tracks legislation throughout all 50 states and reports on significant reforms either affecting, or with the potential for affecting, the courts. In a special June 2008 issue, dedicated to judicial selection legislation, the National Center's publication, entitled *Gavel to Gavel*, reported a number of changes and attempts to change the judicial selection process in several states that underscores the ongoing debate on the subject. To highlight just a few, I note that the legislatures in Minnesota (a non-partisan election state), as well as Pennsylvania and West Virginia (both partisan election states), actively debated moving towards merit selection. Minnesota's legislation advanced out of committee and is set for additional discussion and debate in 2009. Likewise, West Virginia's legislature -- although rejecting a proposal to switch from partisan to nonpartisan election of judges -- convened a joint committee on government and finance to study judicial selection and to report by the start of the 2009 legislative session.

On the other hand, Tennessee's legislature declined to continue the existing merit selection process that had sunset in June of this year. Therefore, Tennessee-appellate judges will return to a partisan election process in November 2009. By contrast, Arizona's efforts to end the merit selection process were unsuccessful this year.

Clearly, the debate regarding merit versus election-based systems continues notwithstanding the serious problems with judicial elections and the horror stories regarding campaign fund raising that I just mentioned. Moreover, the movement to commission-based systems has been, and continues to be, slow. Consider that it took 32 years from Roscoe Pound's historic address on court and politics for one state -- Missouri -- to adopt a merit selection system; 68 years thereafter, we have only 26 states (plus the District of Columbia) currently utilizing a commission-based system, either solely or in combination with other selection methods. As you may know, Hawaii's judicial selection system is said to be based on the Missouri Plan; however, unlike the Missouri Plan, we do not hold retention elections. In fact, Hawai'i is the only state where retention decisions are vested with the same commission that made the initial nomination.

However, we, in Hawai'i, have not been immune from attempts to modify our merit-selection process. Over the past twenty years, 17 bills have been introduced, seeking a variety of changes, such as: (1) requiring all judges to stand for nonpartisan judicial retention election after completing two years of service; (2) providing for "recall" or removal of state judges from office by the electorate; (3) requiring the chief justice to be elected in a nonpartisan election; (4) calling for the nonpartisan election of appellate judges by voters statewide and the nonpartisan election of circuit and district judges by voters of the circuit in which the judge sits; and (5) calling for all justices of the supreme court to be elected. Although all 17 measures passed first reading and were referred to various committees, no hearings were held, and the measures died. However, the fact that such

measures have been introduced by legislators over the past twenty years with some regularity evinces -- at the very least -- some disenchantment with our existing merit-based system.

The AJS -- well-known for its dedication to maintaining the independence and integrity of the courts -- has been at the forefront in promoting and defending commission-based judicial selection processes across the nation. An AJS editorial, posted on February 25, 2008, entitled *Saving the Missouri Plan*, observes:

States with some type of appointive system generally have seen themselves as immune from the hyper-politicization of judicial selection that has infected nearly all states with contestable judicial elections. That feeling of safety is eroding, as systems of commission-based appointment, or merit selection, are now under concerted, coordinated attack across the country.

Isolated legislative hostility towards merit selection plans has flared up in many states for years The most aggressive campaign against merit selection is being waged in Missouri[.]

As a strong proponent of commission-based judicial appointments, the AJS editorial acknowledges that merit selection systems are attacked because they are perceived as being “overly secretive” and that most commission-based systems could benefit from greater transparency. Like the AJS, I -- without reservation -- strongly support our commission-based system for the selection and retention of judges.

However, understanding the public’s sentiments and concerns regarding accountability, transparency, and participation in the process -- and the record of previous legislation over the past twenty years, -- I predict that, unless certain reforms are adopted to enhance the public’s trust and confidence in the process, Hawai‘i will soon see a strong move towards the election of judges, or -- at the very least -- some form of retention elections. Perhaps it’s time to have another citizen’s conference on judicial selection and retention in order to determine how our current process can be improved to enhance public confidence in the way we select and retain judges.

The last citizen’s conference was held in 1993, at which time a number of recommendations emerged, such as making public the list of nominees for judicial office, senate confirmation of district court judgeships, limiting the number of nominees for a judicial office, changing the selection of commission members, and matters relating to commission ethics. By 1996, all of the aforementioned recommendations were implemented via ratification by voters through constitutional amendments, rule changes by the commission, and decisions by the chief justice and governor to voluntarily disclose the list of nominees for judicial office. However, organizing and holding such a conference will probably take time and money, which, in our current economic situation, may not be appropriate. Thus, I suggest that the AJS-Hawai‘i chapter, following the lead of its national organization, take the lead -- as it has in the past -- to address issues regarding judicial selection and retention in Hawai‘i in order to bolster the public’s trust and confidence in our present system.

You may recall that, in November 2004, the AJS convened a Special Committee on the Judicial Selection System, which was led by co-chairs Warren Luke and Judge Victoria Marks. I also served on the special committee, along with Mark Bennett, Robin Campaniano, Momi Cazimero, Douglas Crosier, Judge Kenneth Enright, Lawrence Foster, Senator and now Senate President Colleen Hanabusa, James Kawashima, Bert Kobayashi, Jr., Russell Okata, Jackie Parnell, Terry Thomason, Robert Toyofuku, and ICA Associate Judge Corinne Watanabe. The committee issued its report in November 2005; however, I note that two of the 18-member committee -- Doug Crosier and Jackie Parnell -- appended a minority report to the majority report of the committee. Although you may be familiar with the committee's majority report, allow me to share with you some of the observations made therein.

Based on the HSBA Board's active involvement in the confirmation process and pointing particularly to the fact that its recommendations have included that certain appointees be declared not qualified, the Committee stated, "Based on published reports, the rejection by the Senate of one nominee was based in part on some Senators' reliance in whole or in part on the HSBA board's recommendation. The recommendations of the HSBA board have obviously had a significant impact on the process. Its impact has caused some to inquire about the goals, objectivity, and thoroughness of the process." The Committee observed that "[s]ome would say that the HSBA's recommendation implies that the judicial selection commission [(or JSC)] did not adequately fulfill its constitutional responsibility in making sure that it only recommends qualified nominees." In other words, by labeling an appointed candidate as "highly qualified," "qualified," or "not qualified," the HSBA board essentially elevates itself above the commission, which -- as pointed out by the special committee -- has a constitutional duty to nominate only qualified candidates. The bar's assessment of a candidate as "not qualified" is a direct affront to the integrity of the JSC.

The overwhelming majority of the Special Committee ultimately recommended that the Hawaii State Bar Association cease its current practice of rating nominees, reasoning that:

In circumstances where there is little or no merit selection process (e.g. appointment of federal judges and in states where judges are elected), it makes sense for the ABA or local bar association to provide the role played by our Judicial Selection Commission -- an objective screening of candidates for state court judgeships based on their competence.

In Hawaii, the rating of candidates by the Hawaii State Bar Association is, at best, duplicative and, at worst, potentially harmful to the public's confidence in the process.

Given the constitutional mandate to nominate only qualified candidates for judgeships, the HSBA Board's rating simply amounts to "second-guessing" the JSC. Doing so, not only serves to undermine the process, but -- as pointed out by the special committee -- is potentially harmful to the public's confidence in that process. As indicated by numerous media accounts in the last several years regarding the confirmation process of various judges, some government officials have questioned the HSBA's rating process. For example, in March 2004, the *Honolulu Advertiser* reported that the two-and-a-half hour judiciary committee hearing on the appointment of Simone Polak to the district family court on Maui "questioned the bar association's process for reviewing judicial nominees as much as it did [Polak's] qualifications to be a family court judge." The article

quoted the state's chief legal officer -- attorney general Mark Bennett (who joined in the majority view of the AJS Special Committee's report) -- commenting on the bar's "not qualified" rating and the reasons therefor as saying: "The suggestion that because a person has devoted their career to working as an attorney in criminal law . . . [is] unqualified to be a judge of the district [family] court makes absolutely no sense. . . . I don't see a flaw in the process, just a dreadful flaw in the logic." The article also pointed out that now-Senate President Hanabusa (also amongst those in the AJS special committee majority), Governor Lingle, and others had criticized the HSBA's practice during the Hong debate, referring to the "not qualified" rating of Ted Hong, who had been appointed by Lingle to a judgeship on the Big Island, but was not confirmed. Interestingly, in explaining the bar's "not qualified" rating of Hong, then-HSBA President Dale Lee stated that they had received 56 responses out of over 4,000 attorneys -- just over 1% of the membership -- with 28 in favor and 28 opposed to Hong's appointment. Clearly, not a representative opinion of the bar members.

Ladies and gentlemen -- the answer lies not in finding a different mechanism for selecting judges -- that is, switching from a merit-based system to an elective system -- but in strengthening the process and thereby enhancing the public's confidence in it. And, in that regard, I believe there are a number of areas that should be addressed and could lead to elevating the public's confidence in our merit selection process. The first is to convince the HSBA Board to abandon its rating of judicial appointees and encourage it, instead, -- as did the special committee's majority -- to submit the information it gathers from its members (without judgment) to the Appointing Authorities (in the case of judicial vacancies) and to the JSC (in the case of judicial retentions). I encourage the attorney-AJS members to take the lead and actively pursue a change in the HSBA board's current practice -- after all, you, too, are members of the Bar.

Second, I note that the Hawai'i Constitution provides that "the commission shall adopt rules which shall have the force and effect of law." As such, the commission's rules are much more than simple procedural rules. Having the "effect of law," the commission's rules -- like any other law -- cannot violate the constitution: namely, due process. Allow me to explain.

The commission rules provide that "every commissioner shall avoid conflicts of interest, in the performance of the commission duties," that is, "any personal, business, or legal relationship as a party or attorney which the commissioner had with the applicant or petitioner." But, no where in the rules is a commissioner required to recuse for bias or prejudice. Another part of the rules provides that "no commissioner shall participate in any retention proceeding . . . if that commissioner has a substantive matter pending before [the judge or justice seeking retention.]" Admittedly, the rules do not provide that a commissioner is disqualified if he or she **had** a case in which the judge or justice seeking retention ruled against his or her client. And, don't get me wrong, I'm not saying that there should be such a rule. However, based on my own experience and the experiences of other judges who have confided in me, there is a concern that -- in some instances -- a commissioner should have been disqualified or voluntarily recused himself or herself from participating in the retention proceeding. These concerns become especially acute where anecdotal experiences indicate that the commissioner -- either prior to or during the commissioner's term -- has made particular statements or has acted in a certain manner to seriously call into question the commissioner's ability to be fair and impartial in objectively assessing the candidate's ability to be

a good judge. The point I wish to make here is two-fold: one -- the rules do not provide for a process that would allow a judge to file a request or motion, calling for a particular commissioner to be disqualified from considering his or her petition for retention. Such a procedure is provided for in our court rules, where a party or attorney may move to disqualify a judge from hearing his or her case, and the judge -- in considering his obligation to decide a case fairly and impartially, including avoiding even an appearance of impropriety, -- would be called upon to make a personal assessment of his or her personal bias or prejudice, if any. And, two -- the commissioners are essentially “judging the judges.” As such, shouldn’t they be held to the same high standards of ethical conduct which are imposed on judges and subject to review by an entity like the judicial conduct commission? I think the answer is obvious.

Additionally, I do not believe that the above concerns are unique to judges seeking retention. I suspect that practicing attorneys, seeking judicial office, would have similar concerns if they found themselves in a commission interview, sitting across the table from a commissioner with whom they had some negative past history. Like judges seeking retention, attorney-applicants also have no recourse as the rules provide no process by which to challenge a commissioner’s suspected bias or prejudice.

The third area that should be addressed is the criticism, as noted in the AJS editorial, that commission-based systems are overly secretive. Although Rule 12D of the JSC rules provides that retention hearings may, at the discretion of the commission, be either opened or closed to the public, I’m not aware of any commission hearings that have ever been opened to the public. Whether such proceedings should or should not be open is worthy of further exploration.

Another area of concern that I have heard about from judges and attorneys alike centers around Rule 6D of the JSC rules. The rule states: “A quorum for the commission shall be five commissioners. The commission shall act by majority vote of all commissioners in all actions.” It appears undisputed that, in order for a judge to be retained, for example, he or she must receive a “thumbs-up” from at least five commissioners. Because the rules provide that the commission may act as long as there is a quorum, I have heard some people describe the judge’s retention-vote as a “luck of the draw.” Consider a judge facing a panel of nine commissioners: that judge must convince 5 of the 9 (or 55% of the panel) that he or she deserves to be retained. Now, consider a judge facing a panel of five: that judge must convince all five (or 100% of the panel) in order to be retained. Clearly, a judge’s chances for retention diminish with each commissioner who does not attend a meeting where a retention vote will be taken. In other words, the more commissioners that are present to vote, the better the odds for retention. Those who shared this observation believe that the quorum and voting rules do not create a level playing field for all applicants for judicial office in the “nomination arena” or all judges seeking a new term in the “retention arena,” suggesting that the only way to level the playing field is to require that all nine commissioners participate in the voting process, at least with regard to the list of nominees and retention decisions. I make no judgments one way or the other regarding the observations and opinions that were shared with me, except to say that this is another area of concern that warrants further review.

Finally, I believe that the public's confidence in the process begins with those who are responsible for carrying out that process -- that is, the commissioners themselves. I suspect that most would agree that the work of the commission is extremely important. In fact, judicial selection commissioners have an enormous responsibility of putting forth individuals who -- no matter which one is selected -- would make a good judge. As such, they, as a body, have the power of shaping the third branch of government. Yet, none of these commissioners are required to undergo the scrutiny of confirmation by the senate -- which, ironically, is a process to which all appointed judges are subjected.

Interestingly, there are at least 21 constitutional or statutory provisions where the appointing authority's selection is subject to the "advice and consent of the senate." For example: members of the Board of Regents of the University of Hawai'i; the board of land and natural resources; the commission on water resource management; the civil rights commission; the board of directors of the Hurricane Relief Fund; the board of private detectives and guards; the early learning council attached to the Department of Education, and others. In my view, judicial selection commissioners are at least as important -- and their responsibilities as significant -- as all of those that I just mentioned; yet, JSC commissioners are not required to undergo the scrutiny of senate confirmation. I submit that the public's confidence in the process and in those who carry out that process would be significantly enhanced if the citizens' elected representatives, that is, the senate, were vested with the responsibility of confirming the appointments of JSC commission members.

Ladies and gentlemen -- when asked in a 2007 Annenberg Public Policy Center judicial survey about how best to select judges, 64% of Americans favored direct elections. I'm not certain if any of those polled were from Hawai'i, but I suspect that, if we asked our citizens the same question, we would get a similar result. As such, we cannot sit and wait to act only when a concerted and coordinated attack is waged, which, judging by what is happening across the nation, may just be a matter of time. If we are to preserve and maintain our commission-based judicial selection and retention system, we must strengthen it so as to withstand any attempts to replace it with an elective system of any kind. If we do not, what is happening in the great majority of other states will surely spill over into Hawai'i.

The time to act is NOW. And, although another citizen's conference on judicial selection and retention would be an excellent forum for discussion, we cannot wait for one to be convened and for the recommended reforms to be implemented. I, therefore, encourage you -- the members of the AJS-Hawai'i chapter -- to take the lead again in addressing concerns regarding judicial selection and retention in Hawai'i that could include:

- ☞ sponsoring legislation with regard to -- for example -- senate confirmation of JSC commissioners and any other enhancements that would require statutory or constitutional changes;
- ☞ lobbying the HSBA Board and members of the Bar, regarding its rating system; and

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- ☞ encouraging the JSC regarding (1) amending its rules to provide for a procedure for recusals or disqualifications based on bias or prejudice, (2) revising the rule on the number of commissioners participating in final voting decisions, and (3) any other appropriate procedural matters.

With your help in proactively working for the needed enhancements to our merit-selection system, we can elevate the public's confidence in our judicial selection and retention process and ensure the preservation of that process. In so doing, it is my hope that Hawai'i will become a model for other states to emulate.

Ladies and gentlemen -- Happy Holidays, and thank you for your attention.