



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

H.B. NO. 2344, PROPOSING AN AMENDMENT TO ARTICLE VI, SECTION 3, OF THE HAWAII CONSTITUTION TO EXTEND THE MANDATORY RETIREMENT AGE BY TWO YEARS FOR STATE JUSTICES AND JUDGES.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 8, 2008 **TIME:** 2:00 PM

LOCATION: State Capitol, Room 325
Deliver to: Committee Clerk, Room 302, 5 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Robyn B. Chun, Deputy Attorney General

Chair Waters and Members of the Committee:

The Department of the Attorney General strongly opposes this bill.

This bill proposes an amendment to the State Constitution to extend the mandatory retirement age for state court justices and judges from 70 to 72. The bill provides no explanation as to why the age of 72 was chosen. The public can only conclude that the sole reason for this proposal is to preclude the present governor from appointing a new chief justice to the Hawaii Supreme Court when the present chief justice reaches the age of 70 in 2010.

Only two years ago, the Legislature proposed a similar amendment. It was overwhelmingly rejected by the electorate, obtaining only a 34.8 percent Yes vote, with a 57.8 percent No vote. The No votes exceeded the Yes votes by 80,000. The amendment lost on every island, and we believe it might have actually lost in every (or virtually every) single precinct. There is simply no reason to bring this subject back to the voters two years later.

When Hawaii's Constitution was originally adopted in 1959, article V, in addition to establishing a retirement age of 70 for judges, also provided: "The term of office of a justice of the supreme court shall be seven years and that of a judge of a circuit

court six years." The framers, through their debates, were clearly concerned about lengthy judicial terms.

Since then, the terms of justices and judges, but not the retirement age, have been extended so that the current retirement age for judges serves both to limit terms (there is no other absolute limit) and to ensure that there is at least some opportunity for lawyers to be appointed to the bench through vacancies, and for judges of the lower courts to be appointed to higher courts through retirements. This amendment will perpetuate reduced judicial opportunities and delayed entry into the judiciary, especially for women and minority lawyers. A New York blue ribbon "Task Force on Mandatory Retirement of Judges" specifically stated in its report:

[C]ontinuation of judicial service beyond age 70 [should] not [be] at the expense of reduced judicial opportunities or delayed entry into the judiciary for women and minority lawyers. Regular turnover invigorates the judiciary by bringing fresh ideas and greater diversity to the bench. . . . [We note] the relatively high diversity [among judges, in the last] five years, and the relatively low diversity among the group of Justices most recently certificated for service beyond age 70.

Extending the mandatory retirement age will defeat these objectives - to the detriment of the bench.

If this amendment is to be proposed regardless of the bad public policy it embodies, it should be materially amended. First, the change should not apply to judges who have already been appointed. Incumbent judges and justices were appointed to the bench under a particular set of rules, and there should be no perception that the proposed amendment is intended to benefit the incumbents. Thus, we would suggest that the relevant part of section 3 of the bill read as follows:

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Justices and judges shall be retired upon attaining the age of seventy years[-], except that justices and judges first confirmed by the senate or appointed by the chief justice to their positions after November 4, 2008 shall be retired upon attaining the age of seventy-two years. They shall be included in any retirement law of the State.

If the title of the bill were broader, we would suggest the following as an alternative:

Justices and judges shall be retired upon attaining the age of seventy-two years[-], except that justices and judges first appointed to their positions before November 4, 2008 shall be retired upon the later of (1) attaining the age of seventy years or (2) serving fifteen years in their position. They shall be included in any retirement law of the State.

We urge the Committee to hold this bill.

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DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE TOMMY WATERS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Fourth State Legislature
Regular Session of 2008
State of Hawaii

February 8, 2008

**RE: H.B. 2344; PROPOSING AN AMENDMENT TO ARTICLE VI, SECTION 3,
OF THE HAWAII CONSTITUTION TO EXTEND THE
MANDATORY RETIREMENT AGE BY TWO YEARS FOR
STATE JUSTICES AND JUDGES.**

Chair Waters and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to H.B. 2344.

The purpose of this bill is to amend article VI, section 3 of the state constitution to increase the mandatory retirement age for justices and judges from 70 years of age to 72 years of age.

The issue of changing or repealing the mandatory retirement age for justices and judges has been discussed in previous legislative sessions and a constitutional amendment to repeal the mandatory retirement age for judges was rejected by the electorate in November 2006, with 54.8% of voters voting against repeal and 34.8% of voters in favor of repeal. It is clear from the previous discussions that there are several options used by other jurisdictions to promote judicial accountability and to determine judicial fitness; these options include term limits, a senior judge system. It is also clear from previous discussions, that there are other issues such as whether any changes to the mandatory age of retirement should apply only to new judges or whether such changes should apply to judges presently serving who chose to serve knowing the mandatory age is age 70.

Given the number of issues involved, we believe there should be a study to examine the issues and to collect data so that an informed discussion can be facilitated and that no changes be

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made without such study. Specifically, we believe the study should look at: 1) the effects of the alteration or elimination of the mandatory retirement age and if any recommended changes should be applied prospectively only; 2) whether there should be term limits for state court judges and justices; 3) whether there should be a senior judge system; and 4) whether there sufficient judicial accountability and means for determining judicial fitness under the current system. Therefore, we prefer the passage of a resolution which proposes such a study rather than this bill; such resolutions were submitted last year and have again been submitted this year.

For these reasons, we oppose the passage of H.B. 2344 and respectfully request that it be held.

Thank you for this opportunity to testify.

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HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

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The Twenty-Fourth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Judiciary

Testimony by
Hawaii Government Employees Association
February 8, 2008

**H.B. 2344 – PROPOSING AN AMENDMENT
TO ARTICLE VI, SECTION 3, OF THE
HAWAII CONSTITUTION TO EXTEND THE
MANDATORY RETIREMENT AGE BY TWO
YEARS FOR STATE JUSTICES AND JUDGES**

The Hawaii Government Employees Association supports the purpose and intent of H.B. 2344, which proposes a constitutional amendment to extend the mandatory retirement age of 70 for state justices and judges to 72. While we would prefer repealing this requirement altogether or raising the mandatory age even higher than age 72, this is a positive step in the right direction.

Each individual deserves consideration as an individual member rather than a stereotypic member of a certain group. The mandatory retirement age of 70 automatically considers that all judges and justices are unfit to perform their judicial duties beyond that point. The current age restriction precludes the state from utilizing the experience and ability of jurists who reach the age of 70, who are still highly productive. It makes good sense to increase the mandatory retirement age for justices and judges to 72.

Thank you for the opportunity to present testimony in support of H.B. 2344.

Respectfully submitted,

Nora A. Nomura
Deputy Executive Director

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