



Testimony to the Twenty -Fourth State Legislature, 2008 Session

House Committee on Judiciary
The Honorable Tommy Waters, Chair
The Honorable Blake K. Oshiro, Vice Chair

Friday, February 1, 2008, 4:00 p.m.
State Capitol, Conference Room 325

by
Thomas R. Keller
Administrative Director of the Courts

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 3056, Proposing Amendments to Article VI of the Constitution of the State of Hawaii

Judiciary's Position:

The Judiciary strongly opposes House Bill No. 3056. The bill falsely purports to establish an "independent" Judicial Conduct Commission, when it actually usurps judicial authority, eliminates judicial review, and is clearly designed to politicize the Judiciary by making judges subject to removal from office for political reasons. Were this bill to become part of the state constitution the people of the State of Hawaii could no longer be confident their disputes would be decided on the evidence and the law, they would have to worry about whether the judge was aligned with the political desires of the commission members.

The current system of judicial review, regulation, and discipline properly places (1) review of legal decisions with the courts, through the appellate system, and (2) review of ethical issues with the Judicial Conduct Commission and the supreme court. Thus, judicial decisions in specific cases cannot be influenced by improper influence or threat of it. Under the system proposed by the administration, each judge would be subject to the ire of an unreviewable and all powerful commission.

Currently, the Hawaii Revised Code of Judicial Conduct provides necessary guidelines for judicial behavior. The adjudicative process under Rule 8 of the Rules of the Supreme Court provides a forum in which complaints about ethical misbehavior are heard and assessed without

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impinging upon the proper role of the courts. Since the inception of the current system with its code of conduct and review process there have been very few instances of serious judicial misconduct.

The Judiciary respectfully asks that the legislature stop the administration's attempt to usurp judicial authority and politicize the Judiciary.

Thank you for the opportunity to testify about this matter.

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

ON THE FOLLOWING MEASURE:

H.B. NO. 3056, PROPOSING AMENDMENTS TO ARTICLE VI OF THE
CONSTITUTION OF THE STATE OF HAWAII.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 1, 2008 **TIME:** 4:00 PM

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

TESTIFIER(S): Mark J. Bennett, Attorney General
or Charleen M. Aina, Deputy Attorney General

Chair Waters and Members of the Committee:

The Attorney General strongly supports this bill.

This bill proposes amendments to article VI of the State Constitution (1) to repeal provisions that presently make the Supreme Court responsible for disciplining and removing justices and judges from the bench, and (2) to establish a Judicial Conduct Commission that is independent in its place.

Article VI, section 5 of the State Constitution presently vests the power to discipline and remove justices and judges for misconduct or disability in the Supreme Court. Under Rule 8 of the Rules of the Supreme Court, a seven-person commission, of which every member is appointed by the Court, is responsible for conducting investigations and hearings and making recommendations to the court as to whether a particular judge or justice should be reprimanded, disciplined, suspended, retired, or removed. The decision to reprimand, discipline, suspend, or remove a judge is exclusively the Supreme Court's to make.

It is far more appropriate that such decisions be made by an independent body. This bill establishes a nine-member commission modeled after the Judicial Selection Commission, the constitutional body that nominates individuals for appointment to the bench. Like the Judicial Selection Commission, none of the Judicial Conduct

Commission's members may hold elected office or take an active part in political management or in political campaigns. However, one seat on the new commission is designated for a judge or justice elected by his or her colleagues in an election supervised by the Supreme Court.

Supervision and review by a body that includes only one judge ought to minimize institutional bias, facilitate scrutiny that focuses only on how individual judges and justices perform their duties and responsibilities, foster independence within the Judiciary, and raise the public's confidence in our court system.

In reviewing governing provisions in other states, however, it does appear that one amendment to this bill is justified. The bill, as drafted, provides no appeal by a judge from the decision of the new commission, and such an appeal is appropriate. For example, article VI of the California Constitution (pertinent parts of which are attached) - which establishes an independent "Commission on Judicial Performance" - provides in section 18(d): "Upon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify pursuant to subdivision (b) a judge or former judge." Article VI of the California Constitution also provides in section 18(f): "A determination by the Commission on Judicial Performance to admonish or censure a judge or former judge of the Supreme Court or remove or retire a judge of the Supreme Court shall be reviewed by a tribunal of 7 court of appeal judges selected by lot."

H.B. No. 3056 currently provides: "All decisions of the commission shall be final, and no decision, act or procedure of the commission shall be subject to appeal or challenge in any other proceeding or before any court, except that the commission may, by rule, provide for motions for reconsideration."

We suggest the following change: "A final decision of the commission may be appealed by the judge or justice. An appeal by a

judge shall be to the supreme court. An appeal by a justice of the supreme court shall be to a panel of five judges of the intermediate court of appeals, chosen by lot, whose decision may not be appealed to the supreme court."

We respectfully urge the Committee to pass this measure.



State of California

Commission on Judicial Performance



CALIFORNIA CONSTITUTION

Article VI, Sections 8, 18, 18.1, and 18.5

Section 8

Commission on Judicial Performance

(a) The Commission on Judicial Performance consists of one judge of a court of appeal and two judges of superior courts, each appointed by the Supreme Court; two members of the State Bar of California who have practiced law in this State for 10 years, each appointed by the Governor; and six citizens who are not judges, retired judges, or members of the State Bar of California, two of whom shall be appointed by the Governor, two by the Senate Committee on Rules, and two by the Speaker of the Assembly. Except as provided in subdivisions (b) and (c), all terms are for four years. No member shall serve more than two four-year terms, or for more than a total of 10 years if appointed to fill a vacancy.

(b) Commission membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term. A member whose term has expired may continue to serve until the vacancy has been filled by the appointing power. Appointing powers may appoint members who are already serving on the commission prior to March 1, 1995, to a single two-year term, but may not appoint them to an additional term thereafter.

(c) To create staggered terms among the members of the Commission on Judicial Performance, the following members shall be appointed, as follows:

(1) Two members appointed by the Supreme Court to a term commencing March 1, 1995, shall each serve a term of two years and may be reappointed to one full term.

(2) One attorney appointed by the Governor to a term commencing March 1, 1995, shall serve a term of two years and may be reappointed to one full term.

(3) One citizen member appointed by the Governor to a term commencing March 1, 1995, shall serve a term of two years and may be reappointed to one full term.

(4) One member appointed by the Senate Committee on Rules to a term commencing March 1, 1995, shall serve a term of two years and may be reappointed to one full term.

(5) One member appointed by the Speaker of the Assembly to a term commencing March 1, 1995, shall serve a term of two years and may be reappointed to one full term.

(6) All other members shall be appointed to full four-year terms commencing March 1, 1995.

Section 18

Judges; disqualification; suspension; retirement; formal proceedings; rules; Commission on Judicial Performance

(a) A judge is disqualified from acting as a judge, without loss of salary, while there is pending (1) an indictment or an information charging the judge in the United States with a crime punishable as a felony under California or federal law, or (2) a petition to the Supreme Court to review a

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termination by the Commission on Judicial Performance to remove or retire a judge.

b) The Commission on Judicial Performance may disqualify a judge from acting as a judge, without loss of salary, upon notice of formal proceedings by the commission charging the judge with judicial misconduct or disability.

c) The Commission on Judicial Performance shall suspend a judge from office without salary when in the United States the judge pleads guilty or is convicted or is found guilty of a crime punishable as a felony under California or federal law or of any other crime that involves moral turpitude under that law. If the conviction is reversed, suspension terminates, and the judge shall be paid the salary for the judicial office held by the judge for the period of suspension. If the judge is suspended and the conviction becomes final, the Commission on Judicial Performance shall remove the judge from office.

d) Except as provided in subdivision (f), the Commission on Judicial Performance may (1) retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent, or (2) censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or (3) publicly or privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty. The commission may also bar a former judge who has been removed from receiving an assignment, appointment, or reference of work from any California state court. Upon petition by the judge or former judge, the Supreme Court may, in its discretion, grant review of a determination by the commission to retire, remove, censure, admonish, or disqualify pursuant to subdivision (b) a judge or former judge. When the Supreme Court reviews a determination of the commission, it may make an independent review of the record. If the Supreme Court has not acted within 120 days after granting the petition, the decision of the commission shall be final.

e) A judge retired by the commission shall be considered to have retired voluntarily. A judge removed by the commission is ineligible for judicial office, including receiving an assignment, appointment, or reference of work from any California state court, and pending further order of the court is suspended from practicing law in this State. The State Bar may institute appropriate attorney disciplinary proceedings against any judge who retires or resigns from office with judicial disciplinary charges pending.

f) A determination by the Commission on Judicial Performance to admonish or censure a judge or former judge of the Supreme Court or remove or retire a judge of the Supreme Court shall be reviewed by a tribunal of 7 court of appeal judges selected by lot.

g) No court, except the Supreme Court, shall have jurisdiction in a civil action or other legal proceeding of any sort brought against the commission by a judge. Any request for injunctive relief or other provisional remedy shall be granted or denied within 90 days of the filing of the request for relief. A failure to comply with the time requirements of this section does not affect the validity of commission proceedings.

h) Members of the commission, the commission staff, and the examiners and investigators employed by the commission shall be absolutely immune from suit for all conduct at any time in the course of their official duties. No civil action may be maintained against a person, or adverse employment action taken against a person, by any employer, public or private, based on statements presented by the person to the commission.

i) The Commission on Judicial Performance shall make rules implementing this section, including, but not limited to, the following:

(1) The commission shall make rules for the investigation of judges. The commission may provide for the confidentiality of complaints to and investigations by the commission.

(2) The commission shall make rules for formal proceedings against judges when there is cause to believe there is a disability or wrongdoing within the meaning of subdivision (d).

j) When the commission institutes formal proceedings, the notice of charges, the answer, and all subsequent papers and proceedings shall be open to the public for all formal proceedings instituted after February 28, 1995.

k) The commission may make explanatory statements.

l) The budget of the commission shall be separate from the budget of any other state agency or court.

m) The Supreme Court shall make rules for the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns. These rules shall be referred to as the Code of Judicial Ethics.

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Section 18.1
Subordinate judicial officers; oversight and discipline;
Commission on Judicial Performance

The Commission on Judicial Performance shall exercise discretionary jurisdiction with regard to the oversight and discipline of subordinate judicial officers, according to the same standards, and subject to review upon petition to the Supreme Court, as specified in Section 18.

No person who has been found unfit to serve as a subordinate judicial officer after a hearing before the Commission on Judicial Performance shall have the requisite status to serve as a subordinate judicial officer.

This section does not diminish or eliminate the responsibility of a court to exercise initial jurisdiction to discipline or dismiss a subordinate judicial officer as its employee.

Section 18.5
Disciplinary action; disclosure of text; limitations

(a) Upon request, the Commission on Judicial Performance shall provide to the Governor of any State of the Union the text of any private admonishment, advisory letter, or other disciplinary action together with any information that the Commission on Judicial Performance deems necessary to a full understanding of the commission's action, with respect to any applicant whom the Governor of any State of the Union indicates is under consideration for any judicial appointment.

(b) Upon request, the Commission on Judicial Performance shall provide the President of the United States the text of any private admonishment, advisory letter, or other disciplinary action together with any information that the Commission on Judicial Performance deems necessary to a full understanding of the commission's action, with respect to any applicant whom the President indicates is under consideration for any federal judicial appointment.

(c) Upon request, the Commission on Judicial Performance shall provide the Commission on Judicial Appointments the text of any private admonishment, advisory letter, or other disciplinary action together with any information that the Commission on Judicial Performance deems necessary to a full understanding of the commission's action, with respect to any applicant whom the Commission on Judicial Appointments indicates is under consideration for any judicial appointment.

(d) All information released under this section shall remain confidential and privileged.

(e) Notwithstanding subdivision (d), any information released pursuant to this section shall also be provided to the applicant about whom the information was requested.

(f) "Private admonishment" refers to a disciplinary action against a judge by the Commission on Judicial Performance as authorized by subdivision (a) of Section 18 of Article VI, as amended November 8, 1988.

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