

STAND. COM. REP. NO. **1**

Honolulu, Hawaii

JAN 28 2010

RE: GOV. MSG. NO. 109

Honorable Colleen Hanabusa
President of the Senate
Twenty-Fifth State Legislature
Regular Session of 2010
State of Hawaii

Madam:

Your Committee on Judiciary and Government Operations, to which was referred Governor's Message No. 109, submitting for study and consideration the appointment of:

CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII

G.M. No. 109 EDWARD H. KUBO, JR.,
for a term to expire in ten years,

begs leave to report as follows:

Testimony in support of the appointee was submitted by the State Attorney General; Major General Robert G.F. Lee, State Department of Defense; Brigadier General Gary Ishikawa, State Department of Defense; House Speaker Calvin Say, House Vice Speaker Michael Magaoay, Representative Barbara Marumoto, Representative Karen Awana, Representative Henry Aquino, Representative Maile Shimabukuro, and Representative Kymberly Pine, State House of Representatives; the Mayor of the City and County of Honolulu; the Mayor of Hawaii County; the Honolulu Prosecuting Attorney; State of Hawaii Organization of Police Officers; Hawaii Carpenters Union; International Union of Painters and Allied Trades; H.E.L.P. Organization of Hawaii; and eighty-eight individuals. Testimony in opposition to the appointment of Mr. Kubo was submitted by three individuals. Comments were submitted by Senior Judge Alan Kay, United States District Court; Judge J. Michael Seabright, United States District Court; the Drug Policy Action Group; and the Board of Directors of the Hawaii State Bar Association.



Written testimony presented to the Committee may be reviewed on the Legislature's website.

The Hawaii State Bar Association found the appointee to be qualified for the position of Judge, Circuit Court of the First Circuit, based upon the criteria of integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, financial responsibility, and public service, collegiality, and writing ability.

Edward H. Kubo, Jr., received a Bachelor of Arts degree in Political Science from the University of Hawaii at Manoa and a Juris Doctor degree from the University of San Diego School of Law. He has been the United States Attorney for the District of Hawaii from 2001 to 2009, and prior thereto, served as an Assistant United States Attorney with the District of Hawaii from 1990 to 2001. From 1985 to 1990 and from 1980 to 1983, Mr. Kubo was a Deputy Prosecuting Attorney for the City and County of Honolulu. From 1983 to 1985, Mr. Kubo worked in private practice with the law firm of Carlsmith and Dwyer as an Associate Trial Attorney.

Mr. Kubo has also been extensively involved in community activities, including the Drug Free Coalition of Hawai'i, the Hawai'i Weed and Seed Program, and the Palama Settlement, as a member of the Board of Trustees. He has also been involved in professional organizations, such as the Hawaii High Intensity Drug Trafficking Area Organization Executive Board.

Your Committee considered the number of testifiers who submitted testimony in support of the appointee, and the breadth of his support, from attorneys, community leaders, community organizations, and individual residents. Your Committee also considered testimony and supporting documentation in opposition submitted by two individuals. Most importantly, your Committee notes that during the course of the confirmation hearings, serious questions arose regarding the thoroughness and consistency of the judicial candidate evaluation process and materials and information submitted by the appointee in support of the appointment. The appointee failed to disclose to your Committee or the Judicial Selection Commission:

- (1) A federal criminal case which was dismissed due to his failure to appear in court when required during the jury selection process;



- (2) A case in which the United States Court of Appeals for the Ninth Circuit found that the appointee had engaged in several instances of improper conduct during trial; and
- (3) A case in which the United States Court of Appeals for the Ninth Circuit found that the United States Attorney's office, under the supervision of the appointee, failed to properly train and supervise Special Assistant United States attorneys which ultimately resulted in prosecutorial misconduct.

This lack of disclosure greatly troubles your Committee.

Your Committee is mindful of the very high ethical standards set for the Judiciary. A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Hawai'i Revised Code of Judicial Conduct. Unlike an attorney, for example, a judge's conduct must never be measured against the bright line of a rule of conduct, but must be evaluated against the goal of preserving the public's confidence in the Judiciary. The integrity of the judge is, in the final analysis, the keystone of the judicial system. It is integrity that enables a judge to disregard personalities, special interests, and partisan political influences and enables him or her to base decisions solely on the facts and the law applicable to those facts. It is therefore, imperative that a judge's integrity and character with regard to honesty and truthfulness be above reproach.

It is within this framework that your Committee has considered the inconsistencies in application materials and disclosures made during the appointee's appointment and confirmation process. Such inconsistencies call into question the appointee's judgment and ability to assume the mantle of the judicial role with all of the expectations attached.

Due to the high ethical bar that must be maintained by the Judiciary, your Committee cannot ignore these inconsistencies. However, your Committee is also unable to ignore the great number and high caliber of individuals testifying on Mr. Kubo's behalf. Your Committee finds itself at an impasse.

As affirmed by the record of votes of the members of your Committee on Judiciary and Government Operations that is attached



to this report, your Committee, after full consideration of the background, experience, and qualifications of the appointee, lacks a majority of votes to either recommend or not recommend that the Senate consent to the appointment. As such, your Committee returns the appointment to the full Senate for consideration.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Government Operations,



BRIAN T. TANIGUCHI, Chair



