



*THE JUDICIARY, STATE OF HAWAII*

**Testimony to the House Committee on Finance**

The Honorable Marcus R. Oshiro, Chair  
The Honorable Marilyn B. Lee, Vice Chair

Thursday, March 25, 2010, 12:30 p.m. (Agenda #3)  
State Capitol, Conference Room 308

by  
James Branham  
Supreme Court Staff Attorney

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**Bill No. and Title:** Senate Bill No. 2150, H.D. 1, Relating to Appellate Jurisdiction.

**Purpose:** Extends the sunset date added to Act 202, 2004 Session Laws of Hawaii, by Section 1 of Act 94 of the 2006 Hawaii Session Laws.

**Judiciary's Position:**

Senate Bill No. 2150 started as a Judiciary package bill to repeal the sunset date that was added to Act 202 of the 2004 Hawaii Session Laws by Act 94 of the 2006 Hawaii Session Laws. The House Committee on Judiciary amended Senate Bill No. 2150 to extend the sunset date to June 30, 2014. The Judiciary respectfully asks that the bill be amended to repeal the sunset date.

As reported to the legislature in accordance with Section 2 of Act 94 of the 2006 Hawaii Session Laws (copy attached), Act 202 has been successful. The Supreme Court has held oral argument in more of the cases it takes, appeals at the Intermediate Court of Appeals (ICA) have been decided timely, and the age of pending and decided appeals have been reduced.

Extending the sunset date will result in a subsequent Judiciary administration and a subsequent Legislature having to use human and monetary resources to again address issues with regard to the jurisdiction of the appellate courts. If issues arise that need to be addressed in the future, they can be addressed, but in these times of employee furloughs and limited appropriations we should not build into the law an unnecessary waste of resources that could be otherwise directed until a need arises. Please note that if the House and Senate cannot agree on a bill there will be no statutory right to appeal to either the Supreme Court or the ICA because Acts 202 (2004) and 94 (2006) did not include provisions reenacting prior law.



Senate Bill No. 2150, H.D. 1, Relating to Appellate Jurisdiction  
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The Judiciary respectfully asks that Senate Bill No. 2150, H.D. 1 be amended to simply delete the sunset date, as originally proposed and passed by the Senate.

Thank you for the opportunity to testify on Senate Bill No. 2150.

ANNUAL REPORT TO THE TWENTY-FIFTH LEGISLATURE

ON

ACT 94

SESSION LAWS OF HAWAII 2006

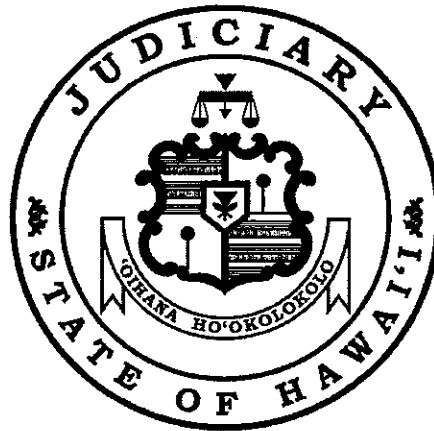
A Report on the Effects and Consequences of the Changes  
to the Appellate Court System

AND

ACT 148

SESSION LAWS OF HAWAII 2008

A Report on the Number of Times the Intermediate Appellate Court  
Has Exercised the Subpoena Power Granted Regarding Compelling the  
Attendance of Witnesses From Any Part of the State and the  
Production of Books, Papers, Documents, or Tangible Things



Submitted by:

Office of the Administrative Director of the Courts  
The Judiciary, State of Hawaii

December 2009

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This report is submitted in accordance with Section 2 of Act 94 of the 2006 Hawai'i Session Laws and Section 2 of Act 148 of the 2008 Hawai'i Session Laws.

On July 1, 2006, in accordance with Act 202 of the 2004 Hawai'i Session Laws and Acts 93 and 94 of the 2006 Hawai'i Session Laws, the Hawai'i Supreme Court implemented new appellate processes. Consequently, all appeals filed on or after July 1, 2006 were assigned to the Hawai'i Intermediate Court of Appeals (ICA), subject to transfer to, or review by, the Supreme Court in accordance with the terms of Act 202 and the Hawai'i Rules of Appellate Procedure.

#### **I. Overview**

On July 3, 2006, pursuant to Section 82 of Act 202, the Chief Justice ordered that (1) all appeals previously assigned to the Supreme Court and the ICA would be retained by each of those courts and (2) all appeals that had not been previously assigned were transferred to the ICA. Consequently, as of July 1, 2006, the ICA had a total of 631 pending appeals (284 unbriefed; 347 briefed); the supreme court had 171 pending appeals (all briefed). The median age of pending appeals in both courts immediately before implementation of Act 202 was 347 days.

During Fiscal Years 2007, 2008, and 2009, 1,621 new appeals were filed. During the same time period, the Intermediate Court of Appeals terminated 1,613 appeals, and the Supreme Court terminated all 171 of the appeals it had retained. At the end of FY 2009, 630 appeals were pending at the Intermediate Court of Appeals. At the Supreme Court, 11 appeals taken on transfer or applications for writs of certiorari were pending at the end of FY 2009. The median age of all pending appeals as of June 30, 2009 was 246 days, a decrease of 101 days from the median age of pending appeals at the end of FY 2006. The median age of terminated appeals in FY 2009 was 332 days, a 146 day decrease from the median age of 478 days in FY 2006.

By the end of 2009, approximately 20% fewer appeals were pending in the appellate courts and the median age at disposition in FY 2009 was almost five months less than in FY 2006. In sum, the backlog of cases in the appellate courts has decreased and appeals are being decided more promptly under the Act 202 appellate process.

**II. Information relating to case load per intermediate appellate court judge<sup>1</sup>**

The three fiscal years covered by this report included the retirement of ICA Chief Judge James S. Burns, the death of ICA Associate Judge John S.W. Lim, the appointment of ICA Chief Judge Mark E. Recktenwald, the appointment of ICA Associate Judge Katherine G. Leonard, the appointment of ICA Chief Judge Mark E. Recktenwald to the Supreme Court, and the appointment of ICA Associate Judge Craig Nakamura to Chief Judge of the ICA. Consequently, the "per judge" figures below are adjusted to account for periods of vacancy.

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<sup>1</sup>Information required by Section 2(1) of Act 94, 2006 Hawai'i Session Laws.

**A. Appeals terminated per appellate judge**

Appeals are decided by three judge panels. Each appeal is assigned to one of 20 possible randomly selected panels. A lead judge on each panel takes primary responsibility for researching and writing the panel's disposition of the appeal. On average, during the three year measuring period, each judge was responsible for 94 terminations.

FY	No. Terminated <sup>2</sup> (from Table 1B annual report)	No. Appellate Judges (adjusted to account for vacancies)	No. Terminated/No. Appellate Judges = No. Terminated per appellate judge
2007	559	5.8	96
2008	469	5.4	87
2009	585	5.8	101
Average	538	5.7	94

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<sup>2</sup>See Table 1B, Judiciary's Annual Report Statistical Supplements for FY 2007, FY 2008, FY 2009. The number terminated is the total number of terminations *minus* terminations due to transfers to the supreme court.

**B. Filings per appellate judge**

The number of new filings divided by the number of judges shows that an average of 95 appeals per year were filed for each judge on the Hawai'i ICA during this three-year period.

FY	No. Filed <sup>3</sup>	No. Appellate Judges (adjusted to account for vacancies)	No. Filed/No. Appellate Judges = No. Filed per appellate judge
2007	524	5.8	90
2008	527	5.4	98
2009	570	5.8	98
Average	540	5.7	95

**C. Pending appeals per appellate judge**

An average of 110 appeals for each intermediate appellate court judge were pending at the end of each fiscal year, during this three-year period.

FY	No. Pending at end of year <sup>4</sup>	No. Appellate Judges (adjusted to account for vacancies)	Pending/No. Appellate Judges = No. Pending per appellate judge
2007	594	5.8	102
2008	650	5.4	120
2009	630	5.8	109
Average	625	5.7	110

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<sup>3</sup>See Table 1B, Judiciary's Annual Report Statistical Supplements for FY 2007, FY 2008, FY 2009.

<sup>4</sup>See Table 1A, Judiciary's Annual Report Statistical Supplements for FY 2007, FY 2008, FY 2009.



**III. Number and Nature of Appeals and Applications for Transfer to Supreme Court<sup>5</sup>**

As noted above, the supreme court retained 171 appeals on July 1, 2006. All appeals in the Supreme Court thereafter were taken on transfer from the Intermediate Court of Appeals or on applications for writs of certiorari.

**A. Appeals Terminated at Supreme Court**

The supreme court terminated appeals as set out below.

Termination of Appeals at Supreme Court <sup>6</sup>			
	FY 07	FY 08	FY 09
Civil	87	41	24
Criminal	36	36	9
Family	6	8	5
Other	5	5	0
Total terminated	134	90	38

**B. Applications for Transfer**

From July 1, 2007 through June 30, 2009, 20 applications to transfer appeals from the ICA to the supreme court were filed. Two applications were filed in criminal appeals; 18 applications were filed in civil appeals.

Applications for Transfer	FY 07	FY 08	FY 09
Filed	5	6	9

<sup>5</sup>Information required by Section 2(2) of Act 94, 2006 Hawai'i Session Laws.

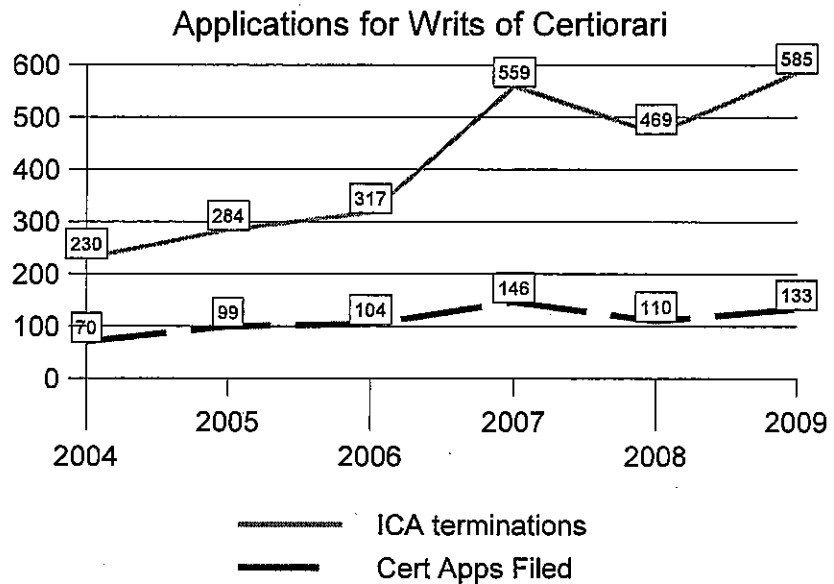
<sup>6</sup>See Table 1A, Judiciary's Annual Report Statistical Supplements for FY 2007, FY 2008, FY 2009.

An application to transfer is terminated when the supreme court accepts or rejects the application.<sup>7</sup> One of the criminal applications was rejected because the case met none of the criteria for transfer; the other was filed by the defendant and dismissed without prejudice to being filed by counsel of record. Of the 18 civil applications for transfer, 10 were accepted or granted and eight were rejected or denied.

Of the 10 civil applications accepted or granted, two were granted as mandatory transfers under HRS § 602-58(a)(1) (matter of imperative or fundamental public importance); three were accepted as discretionary transfers under

HRS § 602-58(b)(1) (matter of first impression or novel legal question); and five were accepted and granted under both HRS § 602-5(a)(1) and HRS § 602-5(b)(1).<sup>8</sup>

Eight of the 10 transferred appeals were decided during the reporting period. The average time to disposition from the date of transfer was 125 days.



<sup>7</sup>The appeal in which the application for transfer is filed is terminated when an opinion or order on the merits or an order of dismissal is entered. Supreme court denials of applications for writs of certiorari (to review ICA final decisions) are not counted in this category, but are included in Section III.C. of this report.

<sup>8</sup>Of the 20 applications filed, 19 were terminated before the end of FY 2009. The nature of all 20 terminations are noted in the text, although one of the terminations was after the end of FY 2009.

**C. Applications for Writs of Certiorari**

During the three fiscal years covered by this report, 389 applications for writs of certiorari were filed. That is, applications were filed from approximately 24% of ICA's 1,613 terminations, compared to a 33% average for the three fiscal years before Act 202 was implemented.

Eighty-eight of the 389 certiorari applications were accepted for review on the merits. Eighty-three of the merit reviews were completed within the three year measuring period, with an average time of 87 days from acceptance to disposition on the merits.

	FY 04	FY 05	FY 06	FY 07	FY 08	FY 09
Applications for Writs of Certiorari	70	99	104	146	110	133
ICA Appeals Terminated	230	284	317	559	469	585
Cert Apps as % of ICA Terminations	30%	35%	33%	26%	23%	23%

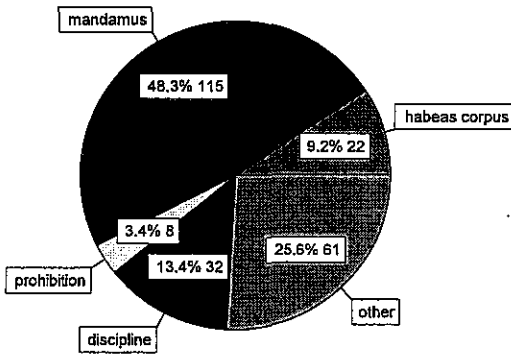
**D. Original Proceedings (excluding Bar Applications)<sup>9</sup>**

During the reporting period, 238 original proceedings were filed in the supreme court and 229 were terminated.

Original Proceedings					
FY 2007		FY 2008		FY 2009	
Filed	Terminated	Filed	Terminated	Filed	Terminated
69	68	72	72	97	89

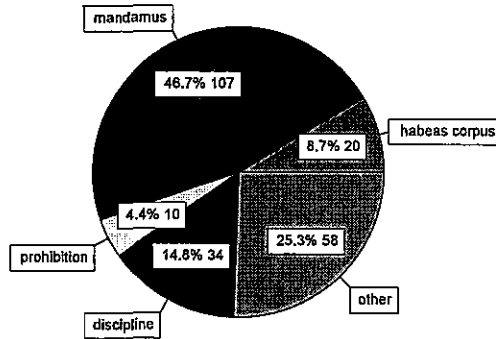
**Original Proceedings Filed**

FY 2007 - FY 2009



**Original Proceedings Terminated**

FY 2007 - FY 2009



<sup>9</sup>In the three fiscal years covered by this report, 1,015 applications for admission to the bar were filed and 617 individuals were admitted to the bar.

**IV. Length of time required for disposition of cases and motions for both the intermediate appellate court and the supreme court<sup>10</sup>**

**A. Appeals**

The median age of **terminated** appeals in FYs 2007 through 2009 ranged from 332 days to 417 days. In comparison, the median age of terminated appeals in fiscal years 2004 through 2006 ranged from 478 to 517 days. The difference

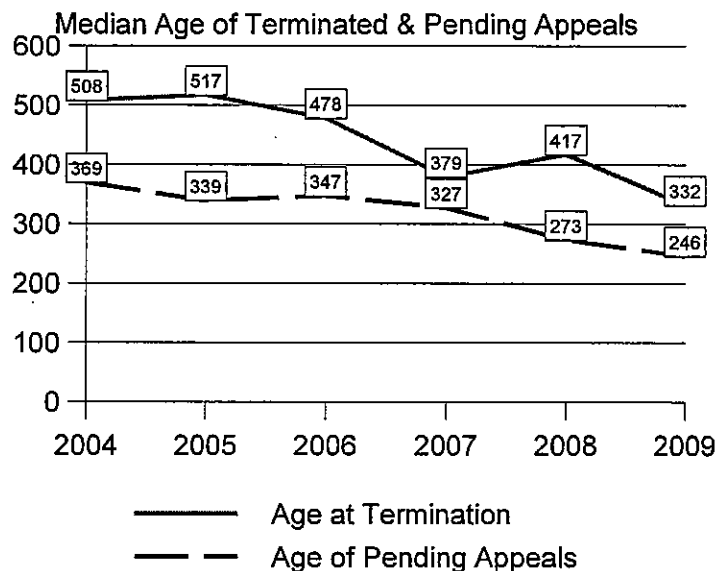
between the average mean termination age for the three years before implementation of Act 202 (501 days) and average mean termination age in the three years following implementation of Act 202 (376 days) is 125 days.

The median age of **pending** appeals at the end of FYs 2007 through 2009 ranged from 246 days to 327 days. In comparison, the median age of

pending appeals at the end of FYs 2004 through 2006 ranged from 339 days to

369 days. The difference between the average mean pending age for the three years before implementation of Act 202 (352 days) and average mean pending age for the three years after implementation of Act 202 (282 days) is 70 days.

In sum, since the implementation of Act 202, the ages of pending appeals and the times to disposition have both significantly decreased.



<sup>10</sup>Information required by Section 2(3) of Act 94, 2006 Hawai'i Session Laws.

**B. Motions**

Exact figures for the length of time it takes to resolve motions are unavailable, but the motions calendar is kept virtually current, as demonstrated by the figures below.

FY	Motions Pending at Start of FY	Motions Filed	Motions Terminated	Motions Pending at End of FY
2007	9	2272	2254	27
2008	27	2179	2169	37
2009	37	2470	2463	44

**V. Any changes in human resource needs or logistical support systems<sup>11</sup>**

No changes in human resources or logistical support systems are requested.

**VI. Such other information as may be requested by the legislature prior to adjournment sine die of the regular session of 2009.<sup>12</sup>**

Section 2 of Act 148 of the 2008 Hawai'i Session Laws required the Judiciary to report "the number of times the intermediate appellate court . . . exercised the subpoena power granted by [Act 148]."

The ICA has not yet used the subpoena power expressly granted by Act 148. It was anticipated, however, that the subpoena power would be infrequently used. Appellate courts typically decide cases based on the evidentiary record that was established in the court or tribunal whose decision is being appealed. The express subpoena power was sought and is important to ensure that the ICA is equipped to fulfill its responsibilities when the need arises.

ICA judges have used the express authority to administer oaths granted by Act 148 on five occasions. On four occasions, ICA judges administered the attorney's oath of office to law clerks who earned admission to the bar. On one occasion, an ICA judge administered the oath of office to the incoming board and officers of a community organization.

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<sup>11</sup>Information required by Section 2(4) of Act 94, 2006 Hawai'i Session Laws.

<sup>12</sup>Information required by Section 2(5) of Act 94, 2006 Hawai'i Session Laws and Section 2 of Act 148, 2008 Hawai'i Session Laws.

## **VII. Summary**

The implementation of Act 202 has resulted in reductions in the total number of cases pending on appeal. Moreover, the time that it takes to resolve cases on appeal has dropped significantly since Act 202 was implemented. Finally, it appears these reductions in case backlog and case processing times did not negatively affect the quality of the work of the ICA, since the proportion of cases the supreme court was asked to review has also dropped since Act 202 was implemented.