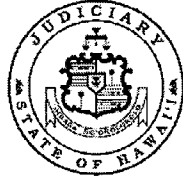


**SB2151**



*THE JUDICIARY, STATE OF HAWAII*

**Testimony to the Senate Committee on Judiciary and Government Operations**

The Honorable Brian T. Taniguchi, Chair  
The Honorable Dwight Y. Takamine, Vice Chair

Wednesday, February 10, 2010, 9:30 a.m.  
State Capitol, Conference Room 016

by  
James Branham  
Supreme Court Staff Attorney

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**Bill No. and Title:** Senate Bill No. 2151, Relating to Appellate Jurisdiction.

**Purpose:** Permanently establishes the jurisdictional responsibilities of the appellate courts.

**Judiciary's Position:**

Senate Bill No. 2151 is a Judiciary package bill. The bill would amend Act 202 of the 2004 Session Laws of Hawaii (as subsequently amended by Section 1 of Act 94 of the 2006 Session Laws of Hawaii) by:

- repealing the sunset date (Section 12) on the amendments made by Acts 202 and 94.

In addition the bill would amend various jurisdictional statutes by:

- eliminating the mandatory transfer provision of HRS 602-58(a) in favor of direct appeals to the supreme court for two of the mandatory transfer case types and returning the other mandatory transfer to the discretionary transfer provision of HRS 602-58(b) (Section 9), and
- allowing direct appeals to the supreme court from
  - county voter registration boards' decisions (Sections 1, 2, 8),
  - circuit court public record access decisions (Sections 3, 8),
  - circuit court eminent domain decisions (Sections 4, 5, 6, 8),
  - circuit court labor injunctions (Section 7, 8),



Senate Bill No. 2151, Relating to the Intermediate Appellate Court  
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- water commission decisions (Section 8<sup>1</sup>), and
- life sentences (Section 8, 11).

Allowing these direct appeals will terminate the litigation of these priority and public impact cases more quickly, will relieve the ICA of some part its current caseload, and will eliminate likely transfer applications.

After submission of the bill, the Judiciary found another statute, HRS 485A-609(f), allowing an appeal to the supreme court that would in conflict with HRS 602-5 unless Section 8 of the bill is modified. Consequently, the Judiciary recommends that Section 8 of House Bill No. 1993 be modified to add section 485A-609(f) to the proposed amendment of Section 602-5(a)(1)(B) as follows:

“(B) Appeal pursuant to sections 11-51, 92F-15(f), 101-32, 101-34, 101-52, 174C-60, 380-10, or 485A-609(f);”

This bill is supported by the Judiciary’s experience with the appellate system established by Act 202 of the 2004 Hawaii Session Laws, as reported in the Judiciary’s December, 2009 Report to the Twenty-Fifth Legislature in accordance with Section 2 of Act 94 of the 2006 Hawaii Session Laws (copy attached). Act 202 amended various statutes so that all appeals were filed in the Hawaii Intermediate Court of Appeals (ICA) and heard by the ICA, unless transferred to the supreme court, subject to review by the supreme court on application for a writ of certiorari. As shown by the Judiciary’s report, the system of appellate review established by Act 202 has been very successful. The system can, however, be fine-tuned. In consequence of the quarter century of experience with the prior appellate system and three years of experience with the Act 202 system, the Judiciary proposes to retain the Act 202 appellate system for most appeals, but to allow select appeals to be heard directly by the supreme court.

Thank you for the opportunity to testify on Senate Bill No. 2151.

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<sup>1</sup> The supreme court is aware the addition of Section 174C-60 in Section 8 of this bill will specifically overrule its holding in *In re Water Use Permit Applications*, 113 Hawaii 52, 147 P.3d 836 (2006) (holding that after July 1, 2006, jurisdiction to hear and determine appeals from the water commission is with the ICA).

ANNUAL REPORT TO THE TWENTY-FIFTH LEGISLATURE

ON

ACT 94

SESSION LAWS OF HAWAI'I 2006

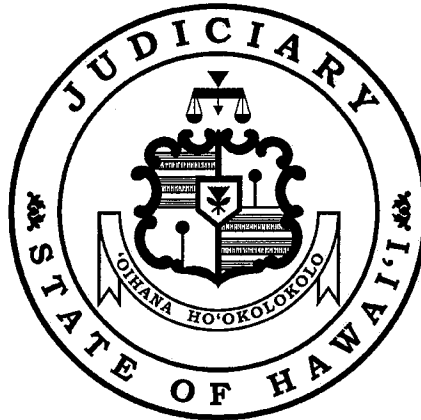
A Report on the Effects and Consequences of the Changes  
to the Appellate Court System

AND

ACT 148

SESSION LAWS OF HAWAI'I 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 Hawai'i

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 = <b>No. Terminated per appellate judge</b>
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 = <b>No. Filed per appellate judge</b>
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 = <b>No. Pending per appellate judge</b>
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

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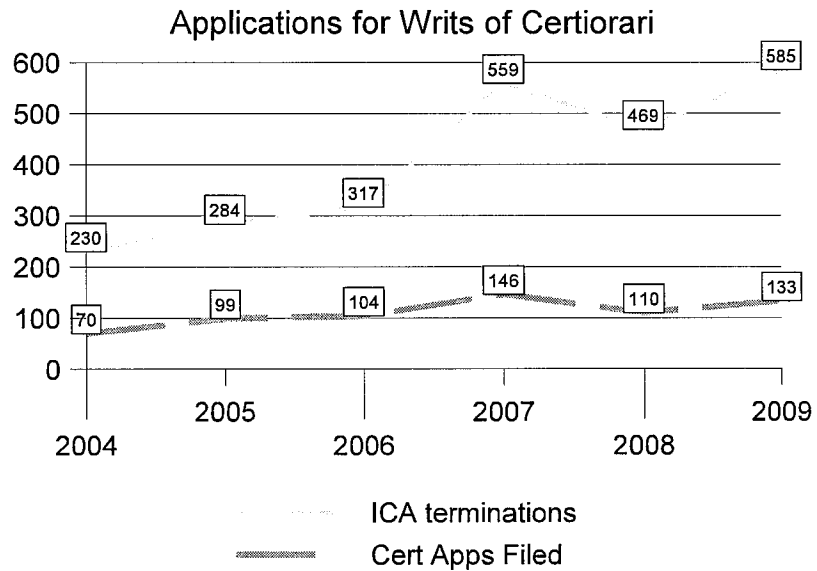
<sup>5</sup>Information required by Section 2(2) of Act 94, 2006 Hawai'i Session Laws.

<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.

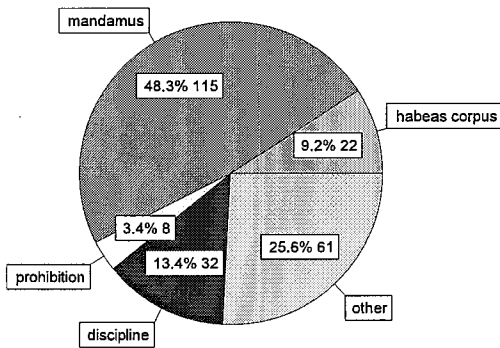
	FY 04	FY 05	FY 06	FY 07	FY 08	FY 09
Applications for Writs of Certiorari	70	99	104	146	110	133
ICA Appeals Terminated	230	284	317	559	469	585
Cert Apps as % of ICA Terminations	30%	35%	33%	26%	23%	23%

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

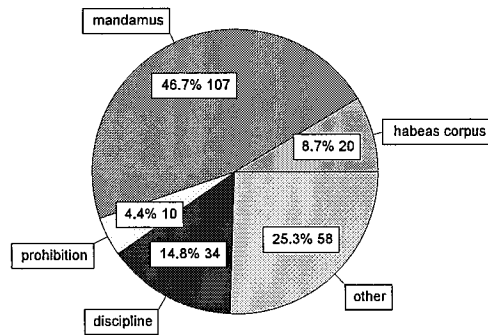
During the reporting period, 238 original proceedings were filed in the supreme court and 229 were terminated.

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**

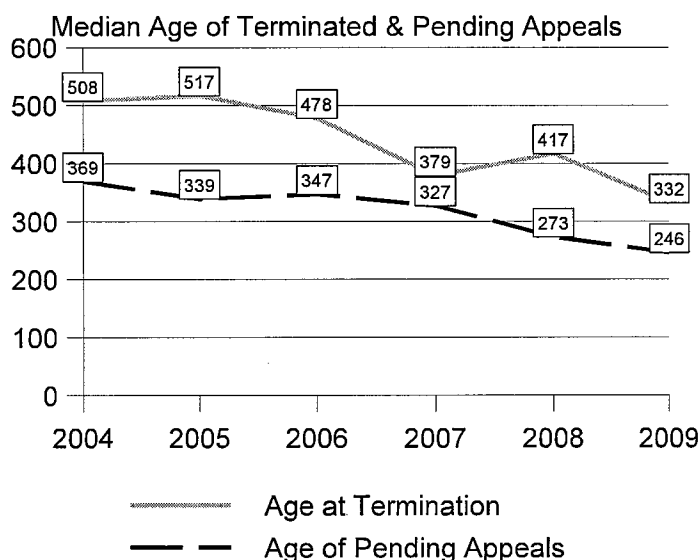
The median age of **terminated** appeals in FYs 2007 through 2009 ranged from 332 days to 417 days. In comparison, the median age of terminated appeals in fiscal years 2004 through 2006 ranged from 478 to 517 days. The difference

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.



Testimony of the Office of the Public Defender  
To the Senate Judiciary and Governmental Operations

February 10, 2010

Re: SB No. 2151: Relating to Appellate Jurisdiction

Chair Taniguchi and Members of the Committee:

Senate Bill 2151, expands the category of cases directly appealable to the Hawaii Supreme Court, and transforms §602-58, HRS, from a statute defining those cases which must be transferred from the Intermediate Court of Appeals, into a discretionary statute.

The Office of the Public Defender has the following concerns that the proposed bill restricts criminal defendants' ability to have their cases thoroughly litigated through the appellate process.

Currently, §602-58, HRS, provides for mandatory transfer to the supreme court upon application, where the case involves a sentence of life imprisonment without the possibility of parole. Senate Bill 2151 deletes this portion of the law, but mandates Supreme Court jurisdiction in 602-5 (a) (1) (C), "if the judgment includes a sentence of life imprisonment."

The proposed amendments enlarge the scope of the Supreme Court's jurisdiction to include criminal cases where any life sentence is imposed. However, it also restricts life sentence cases only to the Supreme Court, thus denying the litigants a chance to have their case heard before both the Intermediate Court of Appeals and the Supreme Court.

Cases where a defendant receives the most severe punishment available in our state should also be allowed the most stringent and thorough of legal reviews available. Thus, a litigant should be afforded the right to appeal to the Intermediate Court of Appeals and the Hawaii Supreme Court, which is the current state of the law.

Absent any compelling reasons to amend the current law, we have strong reservations to SB 2151.

Thank you for the opportunity to comment on this bill.