

Honolulu, Hawaii

MAR 14 2014

RE: GOV. MSG. NO. 580

Honorable Donna Mercado Kim
President of the Senate
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawaii

Madam:

Your Committee on Judiciary and Labor, to which was referred Governor's Message No. 580, submitting for study and consideration the appointment of:

SUPREME COURT, STATE OF HAWAII

G.M. No. 580 MICHAEL D. WILSON,
for a term to expire in ten years,

begs leave to report as follows:

Your Committee has reviewed the resume and statements submitted by the appointee and finds Michael D. Wilson to possess the requisite qualifications to be appointed to the Supreme Court, State of Hawaii.

Your Committee received testimony in support of the appointment of Judge Michael D. Wilson to the position of Associate Justice of the Supreme Court of the State of Hawaii from the Honorable Neil Abercrombie, Governor of the State of Hawaii; Retired Associate Justice James Duffy, Supreme Court of the State of Hawaii; Retired Judge Reynaldo D. Gaulty, Circuit Court of the First Circuit; Retired Judge Michael Town, Circuit Court of the First Circuit; Retired Judge Shackley F. Raffetto, Circuit Court of the Second Circuit; Sovereign Councils of the Hawaiian Homelands Assembly; Hawaii Disability Rights Center; Hawaii Friends of Civil Rights; Collection Law Section of the Hawaii State Bar Association; Hawaii Laborers-Employers Cooperation and Education Trust; and eighty-seven individuals. Your Committee received testimony in opposition to the appointment from one



individual. Comments regarding the appointee were submitted by the Hawaii State Bar Association and one individual.

BACKGROUND AND EXPERIENCE

Judge Wilson obtained his Bachelor of Science degree from the University of Wisconsin at Madison where he received and maintained a tennis scholarship throughout his undergraduate studies and served as a team captain during his senior year when the tennis team placed second in the Big Ten Athletic Conference. He also served as a housefellow during his junior and senior years and provided academic counseling to approximately sixty undergraduate students. A housefellow is a resident student dormitory advisor who is selected through a competitive process based on high academic achievement and demonstrated management skills. Lastly, he was a four-year recipient of the Marion Maccarell Scott Scholarship that is awarded to students who graduated from public high schools in Hawaii and attend colleges on the mainland. He later received his Doctorate of Jurisprudence from the Antioch School of Law (now known as the University of the District of Columbia David A. Clarke School of Law). During his last semester of law school, he served as an extern for Judge Samuel P. King, Chief Judge of the United States District Court for the District of Hawaii.

Since May 2000, Judge Wilson has served as a presiding Circuit Court Judge of the Sixth Division of the First Circuit. He currently serves as the presiding judge for the Felony Drug and Mental Health Courts, which is a position he has held since 2008. The purpose of the Drug Court program is to apply current treatment methods to break the addiction cycle and contain crime because drug addiction and family abuse are commonly found to be the underlying problems for most criminal behavior. Graduates of the Drug Court program achieve a healthy self-esteem, become drug-free individuals prepared to seek employment, and learn relapse prevention skills. The Mental Health Court is a post-arraignment court that accepts judge-ordered referrals from Circuit, District, and Family Courts for the purposes of improving the court system's response to the criminalization of persons with serious mental illnesses, thereby reducing the long-term burden on the correctional, probation, parole, and court systems. The success of the court is attributed to the teamwork of the court, Adult Mental Health Division of the Department of Health, treatment facilities, Department of the Prosecuting Attorney of the City and County of Honolulu, and Office of the Public Defender. Judge



Wilson's experience with the Drug Court and Mental Health Court programs have provided him with a working knowledge of the most effective judicial rehabilitative and sentencing strategies.

Furthermore, Judge Wilson is assigned the felony criminal calendar and has presided over one hundred fifty jury trials. The class of cases on his calendar include violent crimes, sex crimes, property crimes, and drug crimes. He also currently serves as a Substitute Intermediate Court of Appeals judge to preside over a broad range of cases and all phases of appeals and has written several published concurring and dissenting opinions. Judge Wilson previously served as the lead domestic violence judge from 2000 to 2002, when he presided over a high volume calendar involving approximately twenty new cases per week.

Prior to his appointment to the Circuit Court bench, Judge Wilson served as the State Consumer Advocate and, most notably, the Chairperson of the Board of Land and Natural Resources. As head of the Department of Land and Natural Resources and Chairperson of the Water Commission, he was directly responsible for the State's aquatic resources, forests and wildlife, historic preservation, public land management, state parks, and the Department's enforcement division. He traveled weekly to the neighbor islands for community meetings and department activities that allowed him to gain personal exposure to the State's unique ocean and terrestrial settings on all islands and meet the residents of each island in the State. Judge Wilson noted in his judicial application that his philosophy as Chairperson was that the Department had a profound responsibility to manage the Earth's best resources. His tenure with the Department of managing approximately six hundred employees with a budget of over \$70,000,000 allowed him to gain substantial insight and experience on issues relating to the legislative and executive branches of state government.

Of particular note, as Chairperson, Judge Wilson sat in a quasi-judicial capacity for contested case hearings and in a quasi-legislative role for regular meetings. He noted in his judicial application that the most significant proceeding during his tenure was the Waiahole contested case before the Water Commission. The primary issue of this case was the allocation of approximately twenty-seven million gallons of water per day that runs through the Waiahole Ditch on the leeward side of Oahu. The hearing involved twenty-five parties and one hundred sixty witnesses and lasted approximately six months. Judge Wilson noted



that this case was an extremely rewarding experience that prepared him for complex administrative law issues.

Lastly, Judge Wilson gained a wide range of experience in the law during his fourteen years of private practice that consisted of litigation in state and federal courts. He has experience in criminal and civil jury trials and appellate practice in state and federal jurisdictions.

Judge Wilson is licensed to practice law in Hawaii and is an active participant in the legal community by serving as a board member of the Hawaii Supreme Court Attorneys and Judges Assistance Program. His public service activities include serving as a mentor for a fifteen-year-old boy who is part of the Angel Tree Community Group that provides services for children with parents who are incarcerated. For the past three years, he has also actively participated in Na Kama Kai, which is a nonprofit community group that introduces children to the ocean. Surfers, lifeguards, and other volunteers teach children between the ages of four to thirteen how to surf, paddleboard, and canoe to develop these skills while gaining a deeper appreciation and respect for the ocean and Hawaiian culture.

TESTIMONY IN SUPPORT

Testimony in support of Judge Wilson commends him for his integrity, moral courage, legal ability, and commitment to the community. As a lawyer, public servant, and Circuit Court judge, he has demonstrated his commitment to equal justice under the law regardless of position or social status. He has a deep and abiding respect for the law and solid understanding of the delicate separation of powers between the three branches of government. He deeply respects the division of creating policy, which is under the purview of the Legislature and applying the policy, which is the responsibility of the court. He testified that if a law is unclear as to what the Legislature intended, then it would be prudent for the court to allow the Legislature to provide further clarity. Furthermore, when asked by your Committee to interpret his role when making a decision that is based on an article of the State Constitution that lacks additional statutory guidance, Judge Wilson explained that he would first determine whether a similar or related provision of the law existed and if not, then he would consult sources that may assist in the interpretation, such as the documents of the Constitutional Convention. He further explained that there are



instances, such as the decision under *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, more commonly known as the PASH decision, when the court needs to recognize an important longstanding issue and interpret the Constitution to come to a resolution.

Testifiers in support also praise Judge Wilson for his work with the Native Hawaiian community, especially during his tenure as Chairperson of the Board of Land and Natural Resources. During his tenure, he assisted the Department in making land transfers to the Department of Hawaiian Home Lands, assisted residents on Molokai in establishing community based rules for fishing based on Hawaiian cultural practices at Hoolehua Homestead for Moomomi Bay, and assisted in protecting Kawainui Marsh as a cultural site for the Hawaiian community. Furthermore, regarding his community service, testimony praised his commitment to the Angel Tree Community Group, where his dedication and impact to his mentee has been unsurpassed.

HAWAII STATE BAR ASSOCIATION'S RATING

Despite the overwhelming testimony in support of the appointment, your Committee notes that the Hawaii State Bar Association (HSBA) Board of Directors found the appointee to be unqualified for the position of Associate Justice of the Hawaii Supreme Court, based on established criteria for determining the qualifications of judicial and executive appointments generally using the American Bar Association Guidelines for Reviewing Qualifications of Candidates for State Judicial Office. Specifically, the Board uses the following criteria in its deliberations: integrity and diligence, legal knowledge and ability, professional experience, judicial temperament, financial responsibility, public service, health, and responsibilities and duties required of the position for which the applicant has been nominated. The Board's rating system includes the categories of "qualified" and "not qualified".

Your Committee is deeply concerned and disappointed that the process the HSBA Board of Directors uses to make a finding of "qualified" or "unqualified" lacks the legal principles of due process and is fundamentally flawed and unfair. Following a comment period where HSBA members are solicited to confidentially share their input and past experiences regarding the appointee with the HSBA Board, the HSBA Board members review these comments and then interview the appointee. During the interview, the



appointee is apprised of the nature of any negative comments so that the appointee may fairly address those concerns during the appointee's interview. After the interview, the Board members each take a separate vote to rate the appointee. The basis upon how each Board member voted is confidential and not subject to disclosure to your Committee or to the public.

Your Committee further notes that the extremely confidential nature and procedures of the process that HSBA uses to rate judicial nominees have been longstanding concerns. Because your Committee was unable to obtain from HSBA the details of the negative comments, if any, solicited by its membership; issues or concerns that the Board members had regarding the appointee, if any; or how the Board voted, your Committee asked Judge Wilson to describe the interview process he experienced with the HSBA Board. Judge Wilson explained that he was asked questions by the HSBA Board members present about his personal life, including whether he had been arrested or publically intoxicated, which he answered in the negative. Furthermore, he was asked about allegations that occurred almost fifteen years ago that were previously raised and determined by your Committee to be unfounded when Judge Wilson was appointed to the Circuit Court bench in 2000, at which time the HSBA Board found him to be "highly qualified" for the position. Your Committee and the Governor duly note these allegations but find that these allegations are unsubstantiated. As a result, Judge Wilson testified he felt he was not afforded due process because the nature of any negative comments lacked specificity, including but not limited to the date, time, place, or other specific circumstances pertaining to the allegations. As a result, the appointee could not provide any responses to the unsubstantiated allegations.

Your Committee was disappointed in the responses from the HSBA regarding the reasons for cloaking its evaluation process under a veil of secrecy. The HSBA President-Elect testified that confidentiality protects attorneys and the attorneys' clients from retribution in the event that a judge is able to determine the attorney who submitted a negative comment when HSBA solicited comments from its membership. However, your Committee is not convinced that retribution is a reason to keep certain components of an important process confidential, especially when the procedures of the American Bar Association's (ABA) Standing Committee on the Federal Judiciary, which evaluates the professional qualifications of persons nominated to the federal bench, authorize the Chairperson to appoint a second evaluator in



the event that the prospective nominee is rated "unqualified" as a matter of fairness. When asked to distinguish between the HSBA's evaluation guidelines for state judges, which do not provide for a second evaluation, and evaluation guidelines for federal judges, the HSBA President-Elect reasoned that Hawaii is a small, unique state where state judges interact with attorneys and the public on a daily basis. Thus, confidentiality is necessary to protect attorneys and the public from retribution. Your Committee finds this reasoning to be unsound and disagrees. Furthermore, your Committee notes that the ABA's Standing Committee on the Federal Judiciary prepares and submits a written statement to the United States Senate Judiciary Committee explaining the ABA Committee's reasons for finding the appointee for the federal bench unqualified. This procedure is implemented despite the fact that federal district court judges also reside and interact daily with attorneys and the public within this same small, unique State.

Therefore, your Committee believes that the HSBA's qualification process for a position to serve as a jurist at every level lacks due process. This is unfortunate, especially when the HSBA represents the profession of law, which consists of upholding and defending laws and constitutional rights that guarantee due process. In fact, your Committee is further troubled by the HSBA President-Elect's testimony that although in his opinion the process is unfair, the unfairness is justified. Your Committee respectfully disagrees that such a process is justified. While your Committee recognizes that maintaining a certain level of confidentiality is necessary to encourage the appointee's peers to submit comments without the fear of reprisal or retaliation from the appointee or the appointee's supporters, the policy and procedures of the HSBA Board's process prevents your Committee from determining the weight to give the HSBA Board's finding.

Your Committee further notes that Ken Kobayashi, the Honolulu Star-Advertiser reporter assigned to the courts in 2011, wrote an article, "State bar to share evaluations", dated January 18, 2011. This article stated that HSBA had amended its rules to allow for the disclosure of the reasons for its "qualified" or "unqualified" findings for judicial nominees in the wake of the controversy over the HSBA's negative rating of Chief Justice nominee Katherine Leonard. The article further stated that the new policy would allow the HSBA President, with HSBA Board approval, to disclose the reasons for the Board's findings. After the recent confirmation hearing for Judge Wilson, your Committee inquired with the HSBA regarding this policy that was reported in January



2011. The HSBA Executive Director responded in an email that the Board minutes do not reflect Board action specifically modifying its policy that would allow the disclosure of reasons for the Board's finding that Judge Wilson is unqualified. Furthermore, after consulting with a couple of HSBA Board members who were sitting members at the time that this policy would have been adopted, the Executive Director stated that a Board member recollected that there was discussion about allowing the HSBA President to issue a statement if an appointee was deemed "unqualified". However, from her review of the Board minutes, "that proposition was never put to a vote and incorporated in the Board Policy". Your Committee finds this action unfortunate and disingenuous.

CONCLUSION

All of the actors in the appointment process, including the Judicial Selection Commission, HSBA, Governor, and Senate, are essential in assuring that the individual who ultimately assumes the weighty mantle of judicial responsibility has been thoroughly vetted, is qualified for the position, and possesses the requisite qualities to fairly, intelligently, and impartially interpret and apply the law that governs our society. As described in the Hawaii Revised Code of Judicial Conduct, "the judiciary plays a central role in preserving the principles of justice and the rule of law. . . . [J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system." Accordingly, your Committee takes its role in the judicial appointment process seriously.

Notwithstanding the HSBA Board's finding of Judge Wilson as "unqualified", your Committee is not aware of the basis for the HSBA Board's finding. Therefore, the unanimous vote of your Committee to recommend Judge Wilson for the Senate to consent to the appointment reflects your Committee's disappointment in the HSBA Board's judicial nominee evaluation process and concern over the reliability and credibility of the HSBA's resultant finding. Testimony from the legal community, and community advocates from Molokai, and notable individuals from the Hawaiian community reflect the nominee as being multi-faceted, which is an important quality of a jurist.

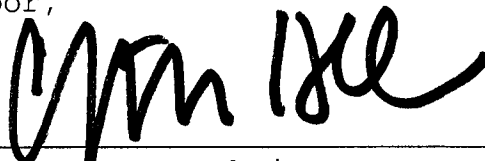
Accordingly, your Committee finds that, based on the testimony submitted on his behalf, Judge Michael D. Wilson has the



experience, temperament, judiciousness, and other competencies to be an Associate Justice of the Hawaii Supreme Court, and has a good sense of where the equities, rights, and responsibilities lie in a case, which is essential for an Associate Justice of the Hawaii Supreme Court.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee, after full consideration of the background, experience, and qualifications of the appointee, has found the appointee to be qualified for the position to which appointed and recommends that the Senate consent to the appointment.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Labor,

A handwritten signature in black ink, appearing to read 'Clayton Hee', written over a horizontal line.

CLAYTON HEE, Chair



The Senate
Twenty-Seventh Legislature
State of Hawai'i

Record of Votes
Committee on Judiciary and Labor
JDL
Consent

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|--|-----------------------------------|------------------------|------------|----------------|
| Gov. Msg./Jud. Comm. No.:* GM 580 | Committee Referral: JDL | Date: 3/6/14 | | |
| <input type="checkbox"/> The Committee is reconsidering its decision | | | | |
| The Recommendation is: <div style="display: flex; justify-content: space-around; align-items: flex-start;"> <div style="text-align: center;"> <input checked="" type="checkbox"/> Consent 2347 </div> <div style="text-align: center;"> <input type="checkbox"/> Not Consent 2349 </div> </div> | | | | |
| Members | Aye | Aye (WR) | Nay | Excused |
| HEE, Clayton (C) | ✓ | | | |
| SHIMABUKURO, Maile S.L. (VC) | ✓ | | | |
| GABBARD, Mike | ✓ | | | |
| GALUTERIA, Brickwood | ✓ | | | |
| IHARA, Jr., Les | ✓ | | | |
| SOLOMON, Malama | ✓ | | | |
| SLOM, Sam | ✓ | | | |
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| TOTAL | 7 | | | |
| Recommendation: <div style="display: flex; justify-content: space-around; align-items: center;"> <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted </div> | | | | |
| Chair's or Designee's Signature: | | | | |
| Distribution: <div style="display: flex; justify-content: space-between; font-size: small;"> <div>Original File with Committee Report</div> <div>Yellow Clerk's Office</div> <div>Pink Drafting Agency</div> <div>Goldenrod Committee File Copy</div> </div> | | | | |

*Only one Message/Communication per Record of Votes