

HB420

HD1

LATE

TESTIMONY



Judicial Selection Commission –The Judiciary – State of Hawai‘i

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Testimony to the Senate the Twenty-Seventh Legislature Regular Session of 2014

Committee on Judiciary and Labor

Senator Clayton Hee, Chair

Senator Maile S.L. Shimabukuro, Vice Chair

Tuesday, March 11, 2014 10:00 am

State Capitol, Conference Room 016

by

Dr. Doris M. Ching

Chair, Judicial Selection Commission

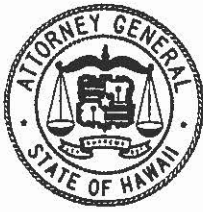
Bill No. and Title: House Bill No. 420, HD1: PROPOSING AN AMENDMENT TO THE HAWAII STATE CONSTITUTION TO REQUIRE DISCLOSURE OF THE NAMES OF JUDICIAL NOMINEES

Chair Hee, Vice Chair Shimabukuro, and Members of the Senate Committee on Judiciary and Labor:

The Judicial Selection Commission does not take a position of support or opposition to House Bill 420 proposing an amendment to the Hawai‘i State Constitution to require disclosure of the names of judicial nominees. Rather, the Commission wishes to submit this written testimony to provide information on the Commission’s current practice of disclosure of names of judicial nominees in accordance with the November 2011 revised Judicial Selection Commission Rules.

After a series of meetings between June 2011 and November 2011 to discuss, review, and update its rules and procedures, as required on a regular basis by the Judicial Selection Commission Rules, the Commission on November 15, 2011, amended its Rules to disclose the list of nominees to the public at the same time the names are presented to the Governor or Chief Justice. It has, therefore, since November 2011, been the practice of the Commission, under its revised Rules, to release to the public the list of nominees at the time the names are transmitted to the Governor or Chief Justice as the applicable appointing authority for the judge or justice vacancy.

The Judicial Selection Commission appreciates the opportunity to present this informational testimony.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014**

ON THE FOLLOWING MEASURE:

H.B. NO. 420, H.D. 1, PROPOSING AN AMENDMENT TO THE HAWAII STATE CONSTITUTION TO REQUIRE DISCLOSURE OF THE NAMES OF JUDICIAL NOMINEES.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 11, 2014 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Charleen M. Aina, Deputy Attorney General

Chair Hee and Members of the Committee:

The Attorney General opposes passage of this bill and urges the Committee to defer acting on it. The Attorney General believes that confidentiality is critical to getting attorneys who would make good judges to apply to fill judicial vacancies, and believes that passage of this bill could undermine the quality of our Judiciary.

The Attorney General urges that rather than move this bill forward, the Committee should seek to obtain statistical information from the Judicial Selection Commission with which to evaluate whether disclosure of the Commission's list of nominees by governors, chief justices and the Commission since the Hawaii Supreme Court decided Pray v. Judicial Selection Commission, 75 Haw. 333, 861 P.2d 723 (1993), and the Commission's amendment of its Confidentiality rule have reduced the size, or altered the composition or quality of the pool of candidates the Commission has had to prepare its nominating lists.

This bill proposes to amend provisions in article VI of the State Constitution for appointing justices and judges of the State's courts, to expressly require the Judicial Selection Commission to publicly disclose its list of nominees for each judicial vacancy it prepares, concurrently with its presentation of that list to the Governor or Chief Justice.

In 1978, the Committee on the Judiciary of the 1978 Constitutional Convention that amended article VI of the State Constitution to transfer the power to qualify and nominate individuals for appointment to serve as justices and judges of the State's courts from the Governor and the Chief Justice, to a Judicial Selection Commission, noted: "Confidentiality is

necessary to encourage and protect those prospective candidates who otherwise would not be willing to be considered if the deliberation process of the commission were to be made public.” Standing Committee Report No. 52, I Proceedings of the Constitutional Convention of Hawaii of 1978 at 626 (1980).

In the course of representing Governor Abercrombie in the suit the Star-Advertiser brought to compel the Governor to disclose the names of the nominees on the list from which he appointed Justice McKenna to serve on the Supreme Court, several individuals shared anecdotes about how in the recent past, attorneys had been treated unfairly after their firms discovered that they had applied for judicial appointments. Two commentaries published in the Star-Advertiser when the case was pending cited similar situations, and are attached to this testimony for the Committee’s consideration.

If only to assure the voters that this proposed amendment to the State Constitution should not undermine the quality of our Judiciary, this Committee should direct the Commission to furnish information only it has about the pools of candidates it used to prepare the nomination lists it presented to the Governor and Chief Justice to fill judicial vacancies after Pray was decided in 1993. At minimum, the Commission should be asked to provide the number of applications it received to fill each vacancy, broken down by the numbers of candidates in the pool who practiced as government attorneys, solo practitioners, or in small, medium, or large private firms, and the areas of practice and number of years each candidates practiced in those areas. The Committee should also ask if multiple (and how many) notices of vacancy needed to be published to secure an adequate candidate pool for each of the vacancies it filled.

Until it receives and reviews this information to satisfy itself that amending the State Constitution as proposed will not frustrate the judicial appointment process or diminish the quality of the Judiciary, the Committee should hold this bill.

Thank you for the opportunity to testify on this measure.

Star Advertiser

principles.

It should be noted that very few attorneys in private practice submit their names for judgeships, whereas the heavy majority of our judges come from previous public service in state or city government.

Such persons should be part of the applicant pool for prospective judges, but I and many other attorneys believe that a balance of attorneys from both public and private practice would provide a better judiciary, particularly in the appellate courts like the Hawaii Supreme Court.

I note that only five people with significant experience as private attorneys have served on the Supreme Court during the last 20 years.

I believe the percentage should be higher and I believe that protecting the confidentiality of the process would lead more attorneys to submit their names for possible appointment.

Thus, I compliment Gov. Abercrombie for appointing Judge McKenna to the Hawaii Supreme Court without first publishing the list of nominees received from the Judicial Selection Commission.

Please remember that the appointment of every nominee is still subject to the consent of the state Senate.

—Editor's note: Dan Casa is on the board of Oahu Publications Inc. (the Star-Advertiser's parent company), which is separate from this newspaper's editorial board. Also, the state Office of Information Practices this week said the governor must reveal the list of judge candidates once his nominee is confirmed.

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Judicial nominees not selected deserve privacy

By Edan Elizabeth Hifo
 POSTED: 01:30 a.m. HST, Feb 02, 2011

I Read with interest the editorial urging Gov. Neil Abercrombie to release the names of nominees he receives from the Judicial Selection Commission for Circuit and Appellate Court Judges ("Open process to public view," Star-Advertiser, Jan. 27).

The Hawaii Supreme Court in 1993 decided "it is within the sole discretion of the appointing authorities whether to make public disclosure of the Judicial Selection Commission's lists of judicial nominees."

That decision, Pray v. Judicial Selection Commission, was authored by Justice Steve Levinson and also upheld the commission's own rule of confidentiality finding nondisclosure consistent with the Hawaii Constitution.

Thus, the issue of public disclosure by the appointing authority is entirely within the discretion of our governor for Circuit Court and Appellate Court judgeships, and our chief justice for District Court judgeships.

Many of us welcomed the release of nominees' names, and as a former news reporter, my strong preference has always been in favor of disclosure absent some overriding counterbalance of public interest. Gov. Abercrombie has declined to make the list public to attract more qualified candidates to the judgeships he appoints. I think there's merit to his explanation based on what we can observe from the experience of disclosures during the Lingle administration.

In recent years there has been a paucity of applicants for judgeships subject to gubernatorial appointment. The Judicial Selection Commission apparently keeps the number of applicants confidential, but the fact may be inferred from the many times the commission has re-advertised and extended the time to apply for vacancies in hope of attracting more candidates.

There may be several reasons the number of

applicants has declined, but the concern is whether disclosure of unsuccessful nominees is one of them. We want to encourage competent, experienced attorneys to offer themselves to the bench without risking damage to their careers if they should not be chosen. This risk may seem hypothetical, but unfortunately, it is not.


In recent years I know of four highly qualified attorneys, two women and two men, from three different and well-respected law firms, who were nominated for judgeships but not appointed. None of them works for those firms today.

In each case at least one of their partners retaliated against them for their willingness to leave the firm to join the judiciary. In each case the firm was large enough so the fact of application would not otherwise necessarily become known to all the partners unless the attorney were selected by the governor. In each case, clients learned from the public disclosure that the attorney was willing to leave private practice, and some clients expressed concern about finding a new attorney or law firm.


In all cases, their diversity of background, legal knowledge and experience would enhance the quality of the bench.

Perhaps an analogy may be drawn between nondisclosure of unsuccessful judicial applicants and the applications received by Gov. Abercrombie in the context of his Cabinet appointments. In both cases, only those chosen were made known and are subject to state Senate confirmation. Citizens have the ability to comment at a public hearing where the media can report the source and content of those comments. In

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contrast, there is no way to know what comments are solicited by or given to the governor even when names are floated or otherwise made public.

It does not seem wise or appropriate to make public the names of all those citizens who offered their services but were not chosen for Cabinet positions, and likewise there are legitimate reasons not to disclose unsuccessful judicial nominees.

Gov. Abercrombie's decision to announce only his judicial appointment is as legitimate as his predecessor's decision to release the entire list.

Eden Elizabeth Hilo was an Oahu Circuit Court judge; she retired in 2010. She recently volunteered with the Hawaii Supreme Court appellate mediation program and joined the Dispute Prevention & Resolution Inc. panel.

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House Committee on Finance

Wednesday, February 19, 2014, Conference Room 308
HB 420, HD1 Proposing a Constitutional Amendment to the Hawaii State Constitution to Require
Disclosure of the Names of Judicial Nominees

TESTIMONY

Jean Aoki, Legislative Committee, League of Women Voters of Hawaii

Chair Luke, Vice-Chairs Nishimoto and Johanson and Committee Members:

The League of Women Voters of Hawaii strongly supports HB 420,HD1 which would amend our state constitution to require the judicial selection commission to publicly disclose its lists of nominees for appointments to seats on our district and circuit courts, the intermediate appellate court and the supreme court, concurrently with its presentation of those lists to the governor or the chief justice.

When the League did our study of the Judiciary in 2002 and 2003, we focused a great deal of attention on the Judicial Selection Commission, because the public had really no or little input in the selection of our judges and justices in contrast to states where the judges and justices are elected. While we would oppose any attempts to select the members of our courts by election, we did believe and took the position that the names of the nominees for seats on the courts should be released by the Judicial Selection Commission. This would allow input by members of the public who knew one or more of the nominees to comment as to their qualifications, just as the voluntary release of the names of nominees started by then Governor Lingle and Chief Justice Moon made possible comments to them from the public.

So it was welcome news when the Chair of the Judicial Selection Commission announced that henceforth, the names of all nominees to seats on the courts would be released at the times the names are sent to the governor and the chief justice. Increased sunshine in the process of selecting judges would increase public confidence in the Judiciary.

Thank you for this opportunity to testify on this very important constitutional amendment.