Judicial Selection Commission –The Judiciary – State of Hawai'i
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Testimony to the House the Twenty-Seventh Legislature Regular Session of 2014

Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Sharon E. Har, Vice Chair
Friday, January 17, 2014, 2:00 PM
State Capitol, Conference Room 325

by
Dr. Doris M. Ching
Chair, Judicial Selection Commission

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

Chair Rhoads, Vice Chair Har, and Members of the House Committee on Judiciary:

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.

HB420
Submitted on: 1/16/2014
Testimony for JUD on Jan 17, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara Polk		Support	No

Comments: Americans for Democratic Action/Hawaii strongly supports transparency in government. For this reason, we urge the legislature to pass HB420 to require that the names of nominees for judicial positions be made public.

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HB420
Submitted on: 1/13/2014
Testimony for JUD on Jan 17, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Todd Hairgrove	Individual	Support	Yes

Comments:

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

ON THE FOLLOWING MEASURE:
H.B. NO. 420, PROPOSING AN AMENDMENT TO THE HAWAII STATE CONSTITUTION TO REQUIRE DISCLOSURE OF THE NAMES OF JUDICIAL NOMINEES.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, January 17, 2014 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

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

Chair Rhoads 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.

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Gov. Abercrombie right not to publicize names of judicial nominees

By Daniel H. Case
POSTED: 01:30 a.m. HST, Feb 05, 2011

I write in support of Gov. Neil Abercrombie's decision not to make public the list of prospects for the Hawaii Supreme Court.

Both the editorial board of the Honolulu Star-Advertiser and its excellent political writer, Richard Borreca, have assailed the governor for not publicizing the list of prospects he received from the state Judicial Selection Commission on the grounds that it goes against the idea of open government.

Personally, I support the general principle of open government, but the primary purpose of preserving confidentiality in the work of the Judicial Selection Commission and its duty to submit lists of the most qualified candidates to the appending authority is to attract the most qualified attorneys in the state and get them to submit their names to the commission as prospective judges.

I was president-elect of the Hawaii State Bar Association in 1978 and co-chaired (with Russell Cades) the committee to study the merit selection process, as it is called, and to draft such a program for submission to the 1978 Constitutional Convention.

Our final product was first submitted to all members of the Hawaii State Bar Association and then, upon heavy approval of the state attorneys, to the 1978 convention as a proposed amendment to our state Constitution.

After hearings and discussions, and some fairly minor changes in the program, the Judicial Selection Commission was established as Article VI, Section 4 of our state Constitution.

Section 3 of the same Article VI states that the governor, with the advice of the Senate, shall fill the judicial vacancy by appointing a person from the commission's list of prospects numbering no less than four and no more than six nominees.

The list of nominees is sent to the governor in confidence, and the governor may or may not publish the list of nominees.

Gov. Abercrombie chose Circuit Judge Sabrina McKenna from the list of nominees for the Hawaii Supreme Court and stated that he thinks that "publishing the list would be detrimental to attracting prospective judicial applicants."

I agree.

The most and only important purpose of having a Judicial Selection Commission is to seek out the most capable attorneys in the state for service as judges.

Many of the discussions among the committee members on the Merit Selection Committee dealt with the question of how best to attract the top legal talent to the Judiciary.

We felt that many, if not most, of the attorneys believed to be the best attorneys in the state would not apply for a judgeship if their applications would be made public because it might well affect the goodwill of their clients, as well as their partners and associates, whether put on the ultimate list or not.

We also hoped that the commission itself might seek out an outstanding attorney and gain his or her consent to apply for judgeship, if provided this initial confidentiality.

The submitting of an appointable list of candidates to the governor in confidence adheres to the same

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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 Case 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 Eden 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 p redecessor's decision to release the entire list.

Eden Elizabeth Hifo 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.