The Judiciary, State of Hawai‘i

Testimony to the Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Tuesday, March 22, 2016, 9:00 a.m.
State Capitol, Conference Room 016

by

Rodney A. Maile
Administrative Director of the Courts

Bill No. and Title: House Bill No. 2006, H.D. 1, Relating to the Employees' Retirement System

Purpose: Reduces the benefit multiplier for judges who become judges, are reappointed, or promoted, after June 30, 2016.

Judiciary's Position:

The Judiciary strongly opposes the proposed amendments to Hawai‘i Revised Statutes, Chapter 88, pertaining to retirement of judges.

This bill singles out one group of employees—judges—from among several categories of employees (legislators, police, fire, and several others) who currently participate in the contributory retirement plan of the Employees Retirement System (ERS). The bill would create a disparity between judges and other employee group/retirement classes by, for the first time, reducing retirement benefits for *current* employees. We know of no other previous situation in which current employees have had their respective retirement benefits reduced by the Legislature in this manner. The bill creates a disincentive for current and new ERS members to serve as judges. It would also require ERS to make expensive modifications that ERS notes are out of proportion to the small number of members affected by this bill. Finally, it undermines the constitutionally mandated work of the Salary Commission and, thereby, undermines judicial independence.

1. The Bill Singles out Judges for Disparate Treatment.

As noted above, this bill affects only judges. Retirement benefits have never previously been reduced for existing employees. In the past, changes in plans for existing members, (e.g., contributory to non-contributory or hybrid), have been initiated by presenting ERS members with a ***choice*** as to whether to stay with their existing plan or opt for the new plan on a prospective basis. Giving employees that choice is fundamentally fair because it protects the reasonable expectations of individuals who enter into government service.

The approach taken by this bill is in stark contrast to Act 163, Session Laws of Hawai'i 2011, wherein changes were made to *all* categories of employees enrolled in the different retirement plans. Act 163 subjected all new employees entering into the ERS after June 30, 2012 to more restrictive requirements and reduced benefits. In contrast, this bill targets only judges.

2. The Bill Undermines Judicial Independence.

The Hawai'i State Constitution, article XVI, section 3.5, states that "[a]ny salary established pursuant to this [Salary Commission] section shall not be decreased during a term of office unless by general law applying to all salaried officers of the State." The Proceedings of the Constitutional Convention of Hawai'i 1950, from which the 1959 Constitution is derived, reflect that this protection was patterned on Article III, Section 1 of the U.S. Constitution, which provides: "The Judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." While Hawaii's constitutional provision is more specific as to "salary" diminishment, it is clear that the intention was identical to that of the federal constitutional framers: to ensure an independent judiciary.

The prohibition of diminishment of judicial salaries is not intended for the benefit of the judges, but serves to enhance the quality of justice for everyone. A legislative amendment that singles out judges undermines judicial independence and would erode the public's confidence in the Judiciary.

3. The Bill Will Not Result in Cost-Savings.

The ERS's March 1, 2016 testimony in the House Finance Committee makes clear that this bill would not achieve cost savings for the State. ERS testified that changing the benefit package for a relatively small segment of the total ERS membership will require computer programming modification and counseling resource costs which, from a business perspective, the ERS believes will be out of proportion to the members affected by this legislation. Thus, this bill will not save the State money.

4. The Bill Undermines the Role of the Salary Commission.

Article XVI, section 3.5 of the Hawai'i Constitution established a commission on salaries, which is charged with reviewing and making recommendations for the salaries of justices and judges of all State courts, members of the Legislature, and numerous executive officials. The Salary Commission has so far submitted recommendations to the Legislature in 2007 and 2013.

Enacting a law that singles out a particular class of employees is contrary to the very reason that the Salary Commission was created and undermines judicial independence. The Salary Commissions of 2007 and 2013 specifically reviewed salaries for judges and took into consideration retirement benefits in determining what was fair relative to salaries. The 2007 Salary Commission report included the statement "Commission also considered Judicial retirement benefits and the Judicial mandatory retirement age of 70." (2007 Salary Commission Report, page 17; attached as page 45 of 2013 Salary Commission Report). The 2013 Salary Commission report cites the 2007 report as material reviewed by the 2013 Salary Commission.

5. This Bill may Deter Qualified and Experienced Attorneys from Considering Judgeships.

The passage of this bill may deter qualified and experienced persons from becoming judges. As noted by the 2013 Salary Commission, "Judges are constitutionally prohibited from practicing law, running for, or holding any other office or position of profit, including paid service on for-profit boards." Retirement benefits are tremendously important to attract judges because of the limits on earning additional income. Retirement benefits are also important because of the mandatory retirement age (70 years) applicable solely to judges.

Reducing retirement benefits adversely affects the total compensation and benefits package for judges, impairing the ability to attract the most qualified and experienced persons to serve. It also creates a disincentive for judges to seek promotion and may lead to judges not seeking retention when their terms expire.

6. This Bill Creates Uncertainty and May Result in the Premature Retirement of Experienced Judges.

This bill reduces the retirement benefit multiplier to 2.0% for vested ERS members currently serving as judges. This change would create tremendous uncertainty, as it suggests (to judges and all other public employees alike) that critical retirement benefits may be cut at any time.

If judges leave the bench early based upon concern about future impacts to benefits, the Judiciary's ability to fulfill its constitutional mandate to provide due process and justice to all will be negatively impacted. The public will be deprived of the efficiency and wisdom that result from those judges' years of experience, including the strong mentoring provided to newer judges. Approximately ***two-thirds*** of Hawaii's judges are vested and eligible to retire. If some of those judges retire early because of this bill, it will adversely impact the community and the public we serve.

For these reasons, we must oppose this bill. Thank you for the opportunity to present this testimony.

DAVID Y. IGE
GOVERNOR

THOMAS WILLIAMS
EXECUTIVE DIRECTOR

KANOE MARGOL
DEPUTY EXECUTIVE DIRECTOR

STATE OF HAWAII
EMPLOYEES' RETIREMENT SYSTEM

TESTIMONY BY THOMAS WILLIAMS
EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM
STATE OF HAWAII

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

HOUSE BILL NO. 2006, H.D. 1

MARCH 22, 2016, 9:00 A.M.

RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee,

H.B. 2006, H.D. 1 proposes to reduce the Employees' Retirement System (ERS) benefit multiplier of judges who become judges after June 30, 2016 and for judges who are reappointed or promoted on or after July 1, 2016, by amending section 88-74, Hawaii Revised Statutes.

The ERS Board of Trustees has not taken a formal position on this proposal; however the ERS staff has the following comments and concerns regarding H.B. 2006, H.D. 1:

This proposal creates a new "tier" of benefits for a relatively small segment of the total ERS membership. Class A judges with reduced benefit multipliers, annuities and 75 percent benefit limitations, will be a unique membership group for whom the ERS will be required to identify, monitor and implement program changes. This unique segment (of a current membership group of approximately 80 judges) will require computer modification and counseling resource costs which, from a business perspective, the ERS believes will be out of proportion to the members affected by this legislation.

On behalf of the Board of Trustees and staff of ERS we wish to thank you for the opportunity to testify.

Employees' Retirement System
of the State of Hawaii

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HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Twenty-Eighth Legislature, State of Hawaii
The Senate
Committee on Judiciary and Labor

Testimony by
Hawaii Government Employees Association
March 22, 2016

H.B. 2006, H.D. 1 – RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly opposes H.B. 2006, H.D. 1 which amends Ch. 88, Hawaii Revised Statutes by reducing the benefit multiplier to 2% for judges who either become judges, are reappointed, or are promoted after June 30, 2016, including those judges who are currently vested within the Employees' Retirement System.

As written, H.B. 2006, H.D. 1 is unprecedented legislation that severely reduces *current* employees' retirement benefits. Prior enacted legislation that changed the retirement benefits for employees were done either prospectively, whereby only future employees would be affected, or, by option, whereby current employees who would be affected had the opportunity to participate in a one-time election to remain in their existing plan or prospectively opt into the new plan. Unlike prior statutory changes, H.B. 2006, H.D. 1 strips current benefits without granting the affected employee group a choice. While this bill currently targets judges, consideration and passage of this measure establishes a harmful legislative precedent allowing the modification of any employees' retirement benefits, at any time.

We respectfully argue that maintaining a fair compensation and benefits package can incentivize experienced attorneys to public service to serve as judges. Adopting this legislation may dissuade those most adept and impartial from serving and will hinder the Judiciary's ability to recruit the most qualified. Additionally, sitting judges may vacate their positions in order to preserve their benefits, leaving a shortage and creating a backlog of cases.

We strongly oppose attempts to adversely impact *any* employee's retirement benefits mid-term and mid-employment; therefore we respectfully request the Committee defer this measure. Thank you for the opportunity to testify in opposition to H.B. 2006, H.D. 1.

Respectfully submitted,

for Randy Perreira
Executive Director

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COMMITTEE ON JUDICIARY AND LABOR
Sen. Gil Keith-Agaran, Chair
Sen. Maile Shimabukuro, Vice Chair
Tuesday, March 22, 2016
9:00 a.m.
Room 016

COMMENTS ON HB 2006 HD1

Aloha Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai`i for almost two decades. This testimony is respectfully offered on behalf of the 6,000 Hawai`i individuals living behind bars or under the "care and custody" of the Department of Public Safety. We are always mindful that approximately 1,400 of Hawai`i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far, far from their ancestral lands.

Community Alliance on Prisons does not generally weigh in on measures like this, however, two things have caught our attention: 1) fairness – is one branch of government being singled out? And 2) the chatter in the community has compelled us to at least let policymakers know what the regular folks in the community are thinking.

With the various bills this session to elect judges, limit terms, and now to change the retirement, the community is getting the perception that the Legislative Branch of government is trying to control the Judicial Branch. We certainly hope that would never happen; however, people keep asking, *"What is going on at the capitol?"*

The importance of an independent Judiciary in a democracy cannot be understated. As described by Wikipedia - https://en.wikipedia.org/wiki/Judicial_independence:

> ***Judicial independence*** *is the concept that the judiciary needs to be kept away from the other branches of government. That is, courts should not be subject to improper influence from the other branches of government, or from private or partisan interests. Judicial Independence is vital and important to the idea of separation of powers*

The following excerpts are from an Initiative of The Constitution Project [1]

As explained by U.S. Supreme Court Justice Stephen Breyer:

> *"The good that proper adjudication can do for the justice and stability of a country is only attainable if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors. Judicial independence provides the organizing concept within which we think about and develop those institutional assurances that allow judges to fulfill this important social role."*

What is Judicial Independence?

"Judicial independence" is the principle that judges should reach legal decisions free from any outside pressures, political, financial, media-related or popular. Judicial independence means judges must be free to act solely according to the law and their good faith interpretation of it, no matter how unpopular their decisions might be. It means judges need not fear reprisals for interpreting and applying the law to the best of their abilities. An independent judiciary is a cornerstone not only of our justice system but of our entire constitutional system of government.

Why Does Judicial Independence Matter?

…Criticism and debate of judicial decisions are a healthy – indeed a vital – part of America's political and governmental discourse and are protected by the First Amendment. However, if America's judiciary is to remain healthy, vigorously autonomous, and able to perform its constitutional functions without improper influences, it must be immune to attacks that seek to influence judicial decision-making.

Both critics and judges share responsibility for ensuring this immunity. When public officials and policymakers attack judges based upon their rulings in specific cases, particularly when they threaten removal or other forms of censure, they effectively influence future decisions. This undermines the health and standing of an independent judiciary and thus jeopardizes our constitutional system of government itself. Judges also bear certain responsibilities. First, they must promote accountability by ensuring that their professional conduct is above reproach and free of conflicts of interest. Second, they must avail themselves of the rapidly-expanding number of opportunities to educate the public about the judiciary, its role and functions, and how judges perform their constitutional duties and decide cases. …

Cases That Illustrate the Importance of Judicial Independence

Were it not for an independent judiciary, America would be a very different place. Judges have acted courageously to make unpopular decisions throughout our history knowing that, to an extent, they would be protected by the federal or a state constitution. A wide array of

[1] ***THE NEWSROOM GUIDE TO JUDICIAL INDEPENDENCE***, An Initiative of The Constitution Project.
http://www.constitutionproject.org/pdf/Newsroom%20Guide-Updated-%202005.pdf

constitutional and civil rights have been recognized and upheld only because of an independent judiciary, as the following cases demonstrate:

• *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (overturning the "separate but equal" doctrine and finding racial discrimination in public education to be unconstitutional)

• *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting organized prayer in public schools) • Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the 14th Amendment requires that the constitutional right to counsel apply to state prosecutions)

• *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that, prior to interrogation, police must clearly advise the suspect of the so-called "Miranda warning" - i.e., right to remain silent, right to counsel, etc.)

• *Loving v. Virginia*, 388 U.S. 1 (1967) (nullifying laws prohibiting interracial marriage)

• *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (affirming that symbolic speech is protected by the First Amendment)

• *New York Times Co. V. United States*, 403 U.S. 713 (1971) (barring governmental "prior restraint" to prevent publication of the "Pentagon Papers")

• *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing three-pronged test for determining whether a governmental activity violates the constitutional separation of church and state)

• *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a right to privacy that includes a woman's qualified right to terminate a pregnancy)

Across communities, we have found a clear consensus supporting judicial independence and fairness.

To Community Alliance on Prisons, this bill appears to be singling out one branch of government from the others and that presents an issue of fairness to us. Working on justice issues for a long time, fairness is something of which we are acutely aware.

We are also concerned about the unintended consequences and the impacts it could cause if this bill were to pass and experienced judges decided to retire. The loss of institutional knowledge is painful to any institution and, we believe, even more so when it come to the quality of justice.

Mahalo for considering our comments.

Testimony
Senate Committee on Judiciary and Labor
Hearing: Tuesday, March 22, 2016 at 9:00 am

To: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair

From: Jeffrey Ng
President, Hawai'i County Bar Association

Re: HB 2006, Relating to the Employees' Retirement System

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Senate Committee on Judiciary and Labor, thank you for the opportunity to submit testimony on House Bill 2006. The Hawai'i County Bar Association (HCBA) submits this testimony in opposition to HB 2006.

The HCBA opposes HB 2006 to the extent it applies to new judges because this bill may discourage qualified attorneys from seeking appointment to the bench because of financial considerations. Our communities are best served when many qualified candidates apply for judgeships because it encourages the appointment of only the most highly qualified candidates. As such, the HCBA believes that any legislation that discourages an otherwise qualified applicant from applying for a judgeship based upon an adverse financial impact is a disservice to both our communities and system of justice.

The HCBA further opposes HB 2006 to the extent it applies to current sitting judges because it may be unconstitutional and cause a majority of current judges who are eligible for retirement to retire. The potential mass exodus of judges would cause a severe adverse effect throughout the legal system. The loss of their knowledge and experience would create tremendous instability and may cause irreparable harm.

The HCBA Board voted to oppose HB 2006, and informed its members of its intent to oppose unless "an overwhelming majority of HCBA members voice their disagreement with the position to oppose." A message to the HCBA membership was sent on March 18, 2016, with a reply date of March 22, 2016. The HCBA Board later learned that a public hearing is scheduled on March 22, 2016, at 9:00 am with testimony due 24 hours before. As a result, the HCBA Board informed membership on March 21, 2016, of its intent to oppose and if our members disagree, they can submit testimony directly the Senate Committee on Judiciary and Finance.

Additionally, the HCBA supports the testimony previously submitted by Rodney A. Maile, Administrative Director of the Courts, Hawaii State Judiciary, and Randy Perreira, Executive Director, Hawaii Government Employees Association on March 1, 2016.

Very truly yours,

Jeffrey Ng

HAWAII FIRE FIGHTERS ASSOCIATION
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THE SENATE
THE TWENTY-EIGHTH LEGISLATURE
REGULAR SESSION OF 2016
March 22, 2016

Committee on Judiciary and Labor

Testimony by
Hawaii Fire Fighters Association

H.B. No. 2006, H.D. 1 Relating to the Employees' Retirement System

My name is Robert H. Lee and I am the President of the Hawaii Fire Fighters Association (HFFA), Local 1463, IAFF, AFL-CIO. The HFFA represents approximately 2,100 active-duty professional fire fighters. HFFA strongly opposes H.B. No. 2006, H.D. 1, Relating to the Employees' Retirement System.

H.B. No. 2006, H.D. 1 proposes drastic reductions to pension benefits for both incumbent and prospective appointees to the bench. It is very vexing that this bill proposes to bifurcate a current judge's benefit after July 1, 2016 by decreasing the benefit multiplier based on reappointment or appointment to another court. We believe that this change violates Article XVI, Section 2 of the Constitution of the State of Hawaii which provides that accrued benefits "shall not be diminished or impaired" and as a matter of public policy, this proposal is not fair and certainly not in the best interest of our community. It begs to one to wonder, if this proposal is enacted, which is the next group of public employees that may be faced with this type of takeaways.

HFFA urges your Committee to hold this bill and thank you for the opportunity to testify.

The Senate Committee on Judiciary and Labor
Tuesday, March 22, 2016
9:00 a.m., Room 016

RE: HB 2006, HD1, Relating to the Employees' Retirement System

Attention: Chair Gilbert Keith-Agaran, Vice Chair Maile Shimabukuro and Members of the Committee

The University of Hawaii Professional Assembly (UHPA) **strongly opposes HB 2006, HD1,** which seeks to reduce the benefit multiplier for judges who become judges, are reappointed, or promoted after June 30, 2016.

We view this measure as an attempt to not only reclassify judges' future retirement benefits, but also adversely impacting their current retirement benefits. We strongly oppose attempts that negatively impact the retirement benefits of any employee mid-employment.

Changes to retirement benefits are generally made prospectively, for any new employees beginning their service at a future date. Passage of this legislation would be setting a precedent by diminishing retirement benefits for current employees.

UHPA appreciates the opportunity to provide testimony in **opposition to HB 2006, HD1**, and urges the committee to **defer this measure.**

Respectfully submitted,

Kristeen Hanselman
Executive Director

University of Hawaii
Professional Assembly

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From:	amy agbayani
To:	JDLTestimony
Subject:	JDL 9am March 22, 2016 TESTIMONY IN OPPOSITION TO HB2006 HD1 HAWAI"I FRIENDS OF CIVIL RIGHTS AGBAYANI
Date:	Sunday, March 20, 2016 11:31:37 PM

TESTIMONY IN OPPOSITION TO HB2006 HD1 Reducing the benefit multiplier for judges
Tuesday 9am, March 22, 2016
COMMITTEE ON JUDICIARY AND LABOR

TESTIMONY SUBMITTED BY: AMY AGBAYANI, CO-CHAIR
HAWAI'I FRIENDS OF CIVIL RIGHTS
3432 B-1 Kalihi St, Honolulu, Hi 96819

Chair Keith-Agaran, Vice Chair Shimabukuro:

The Hawai'i Friends of Civil Rights opposes HB 2006 HD1 which reduces the benefit multiplier for judges. HFCR supports programs and policies that promote equal rights, non-discrimination and social justice. There does not seem to be any cost savings or good policy reasons to approve this bill. This bill targets only judges and is not consistent with past practice of not reducing retirement benefits for existing employees. Passing a bill that targets one category of employees is unfair and against the reason for having a Salary Commission.

We respectfully urge you not to pass this bill.

TESTIMONY

Chair of Senate: Senator Gilbert Keith-Agaran

Bill: HB 2006, HB 1, reduction of judicial retirement benefits.

Date of Hearing: March 22, 2016, Senate Judiciary and Labor Committee

Time and Place of Hearing: 9:00 AM, CR016

Name of Person Testifying: Shackley F. Raffetto, Chief Judge (Ret.), Second Circuit Court, State of Hawaii

Testifying about: HB2006, HB1 – Reduces the retirement benefits of judges of the State of Hawaii.

Position: I oppose HB 2006, HB 1, in its entirety

Testimony:

This Bill in it's present iteration, HB 2006, HB 1, now provides for a substantial reduction in retirement benefits for our Hawaii judges either first entering service, extending their service or moving to a higher court after July 1, 2016. This will deter our best, most experienced lawyers from applying to serve as Hawaii judges and this is not in the best interests of justice for the people of Hawaii.

ERS testimony on this Bill makes it clear that the Bill does ***not*** result in any cost savings for our taxpayer-citizens. What, then is the purpose of this HB 2006? The sponsor of the Bill states, unrevealingly, that it's purpose is to "…bring the retirement benefits of [judges] in line with the retirement benefits of other public employees…" Mr. Nakashima, the Chair, does not, however, tell us why this is important or even if it is important. The position of judge in Hawaii requires extensive, additional educational and experience requirements that are not present for other State positions. There are good reasons for the present compensation package of our Hawaii judges. Despite this lack of information, 9 of the 11 Committee members voted "Aye" in favor of this Bill. Are we to be left, then, with the understanding that the purpose of this HB 2006, drastically reducing the retirement benefits for our judges, and thus harming our justice system, is being proposed for a purely "clerical" purpose? This cannot be true, yet no information is provided.

In fact, the ERS goes on to point out that by changing the benefit package for a unique segment (of a current membership group of approximately 80 judges) it will require computer modification and counseling resource costs which, *from a business perspective*, will "be out of proportion to the members affected by this legislation."

In other words, it will not save any money and, in fact, may cost the taxpayer additional expenses. Unfortunately, none of this is clear; and, for what?

Among the most important institutions and characteristics of our American democracy are 1) the "separation of powers" between our three branches of government (executive, judicial and legislative), 2) the "checks and balances" that these three branches of government provide upon each other protect our citizens from abuses of government power, and 3) an ***independent*** judicial branch of government that will decide cases in accordance with the Rule of Law; and, independent of and without regard to any outside influence. That is, decisions will be based upon the law alone. Having independent judges who are compensated well is the best guarantee that Rule of Law will be protected. Without the Rule of Law, we are lost.

"Judicial independence" means that our judiciary is designed and operates in such a way that judges will decide cases without interference from any outside influences, including financial influences. It is the most important feature of the judiciary in a democracy. One of the most persuasive and pernicious "outside influences", of course, is *financial* influence. This was considered to be such a great threat to our well being of that the founding fathers of our American democracy provided for protection of the financial status of judges in our US Constitution itself. Our US Constitution provides in Article III, Section 1, that "The Judges…shall …receive for their services, a ***compensation, which shall not be diminished*** during their continuance in office." In fact, every State constitution of the United States, likewise, protects State judicial decision making from financial influence by protecting against the reduction of the financial compensation of judges. In our Hawaii Constitution, Article XVI, Section 3.5 it provides that "[a]ny salary established pursuant to this [Salary Commission] *shall not be decreased during a term of office* unless by general law applying to all salaried officers of the State." Yet, in the present HB 2006, judges are in fact singled out to have their compensation reduced.

The Hawaii Constitutional provision refers to "salary" diminishment, however, given the fact that Hawaii judges are prohibited by law from any outside employment and the fact that te Judicial Salary Commission considered judicial compensation as a whole in recommending the financial package that was approved by the Legislature, it is likely that HB 2006 would be found to be an unconstitutional reduction. At the very least, HB 2006 will likely be challenged by lawsuit if it should become law. And, a prospective judicial applicant will no doubt not wish to take that risk when considering a possible change to a judicial career. Therefore, the uncertainty created by HB2006 will be a deterrent and it will harm t he public interest.

It is important to remember that Hawaii has utilized and had the benefit of a Judicial Salary Commission to review and recommend adjustments of judicial compensation. This is a great, modern improvement over the manner in which judicial compensation has been addressed in the past. This procedure has worked well, it

has been highly regarded by the public and it has provided a well-balanced, thoughtful and orderly method and process for evaluating and recommending judicial compensation packages. Everyone involved has believed that this was an improvement and a fair and transparent way to address judicial compensation. The most recent Judicial Salary Commission was in 2013. That Commission recommended increases in judge's compensation (the first increase in many years) and while the Legislature had the right and opportunity to *not* approve the recommendations of the Commission, it did not and the recommendations became law. There was no controversy and our judges got their raises. Now, for reasons yet unexplained, some of our Legislators seek to reduce the compensation package of our judges. This, of course, undermines the work of the Commission, done only a little over one year ago. It should also be noted that the Commission in it's evaluation took into consideration *total judicial compensation*, including such factors as judicial retirement benefits, judicial compensation in other States, the cost of living and mandatory retirement at age 70. The Commission provided an orderly, thorough and thoughtful re-evaluation of the compensation package of our Hawaii judges and recommended changes, which were accepted by the Legislature. What would be the benefit of going back to the former, ad hoc, method? If the Legislature as a whole believes that judicial compensation should be re-evaluated, why not convene another Judicial Salary Commission, as provided for in our State Constitution? Would that not be the best and correct, legal procedure to follow?

Legal experience is a very important quality that we should desire in our applicants for judicial office. Our top men and woman lawyers who have this level of experience in our communities will make outstanding judicial officers who's service will ensure the greatest possibility for justice for the people of Hawaii. Experience as a lawyer is very important qualification to be a Judge or Justice. This is the reason that our current law requires that a lawyer applying to serve as a judge must have first been licensed to practice law for a minimum of five years for District Court and ten years for all other Courts

Currently, in Hawaii, two factors deter many of the most highly qualified of our lawyers from seeking judicial office: the six year limit on judicial terms in the District/Family Courts and mandatory retirement at age seventy years.
In addition, under current law, a Judge or Justice vests under the Hawaii State retirement system after ten years of service. An applicant to a position other than our District/Family Courts (who serve for six years) knows that if they give up their law practice or prior career employment, to which they have likely devoted many years, in order to commit their lives to public service, he or she will have at least the opportunity to earn a pension should they only serve one term of office. Once one becomes a judge, one's prior career is in most cases over and one's future is entirely dependant upon creating a successful, new career serving as a Judge or Justice. Most judges re-apply for additional terms of service, but there is no guarantee and some judges are not continued in office. In order to earn something close to a full pension a judge must serve about 18 or so years under the current system, and, of course, more years if current proposals to reduce judicial retirement benefits are

enacted. This presents a lawyer-applicant, when considering the opportunity to serve as a judge, with a necessary cost-benefit analysis. Financial considerations such as these are very practical and very important considerations. And, it is important to remember that full-time Hawaii judges are prohibited from engaging in outside gainful professional or business activities. These factors must be carefully considered in order to realistically understanding how to build and maintain the best judiciary we can for the people of Hawaii. Our selection/continuation process and judicial compensation package should encourage our best and most experienced legal professionals to leave their current careers and devote their futures to public service in our Judiciary. There is no question that if HB 2006 were to become law, it would deter our best, most experienced lawyers from applying to serve a Hawaii judge. This Bill is simply not in the best interests of the people of Hawaii.

For the reasons stated above, I oppose HB 2006 and recommend that it be rejected.

Thank you for this opportunity to present testimony.

Shackley F. Raffetto
Chief Judge (Ret.), Second Circuit,
State of Hawaii
[redacted]

Testimony Presented Before the
Senate Committee on Judiciary and Labor
March 22, 2016 at 9:00 a.m.
by
Doris M. Ching, Ed.D

HB 2006, HD1 – RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM.
Reduces the benefit multiplier for judges who become judges, are reappointed, or promoted after June 30, 2016.

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee:

As a citizen of the State of Hawai`i, I present this testimony in opposition to HB 2006 HD1 which reduces the benefit multiplier for judges. HB 2006 HD1 is diametrically opposite to all that the State of Hawai`i is known to advocate in the promotion of equal rights, non-discrimination, and social justice. There does not appear to be any cost savings or reasonable policy justification to approve this bill, which targets only judges and is inconsistent with past practice of not reducing retirement benefits for current employees of the State of Hawai`i. Approving a bill that targets one category of employees is unfair and against the reason for having a State Salary Commission.

I respectfully urge you not to pass HB 2006 HD1. Thank you for the opportunity to testify in opposition to HB 2006 HD1.

Eden Elizabeth Hifo

[redacted]

[redacted]

The Honorable Gilbert Keith-Agaran

Senate Judiciary & Labor Committee Chair

RE: Testimony in Opposition to H.B. 2006, H.D. 1 (judges retirement benefits)

Hearing: Tuesday, March 22, at 9:00 a.m.

Dear Chairman and Committee Members:

I write to strongly oppose H.B. 2006, H.D. 1, which proposes to reduce retirement benefits for new judges effective July 2016 and all sitting judges upon their retention or confirmation to a higher level judgeship. This bill breaks with all past legislation which treated judges, legislators, and elected officials retirement benefits the same in terms of annual percentage accrual. When the economy and other factors dictated reductions in such retirement benefits, the legislation imposed the same reduction to all. Second, the concept of "rewarding" current judges found worthy of retention or promotion with a reduction in retirement benefits defies logic and promotes the loss of our most experienced judges who are an important strength in any institution including the judiciary.

With respect to the latter concept, I acknowledge and echo the March 1, 2016 testimony of HGEA which opposed HB 2006 before the House Finance Committee in part as follows: "We strongly oppose attempts to adversely impact any employee's benefits mid-term and mid-employment. If our interpretation is correct, then H.B. 2006 is in direct violation of Article XVI, Section 2 of the Constitution of the State of Hawaii . . . ." If the Legislature adopts this bill, it puts all government employees in jeopardy of the same unfair treatment that could be imposed if they obtain a different or higher level paying job, which surely does not comport with common sense.

Finally, even the ERS staff in commenting on the bill makes clear that it will not have a significant impact on state finances to treat the 80 some judges differently from others (legislators/elected officials) and indeed it appears the ERS would expend more than the bill would save by requiring the multi-aspect of calculating final retirement benefits for such a small group. Be that as it may, there is no articulated bases for enacting such a discrepancy in retirement benefits both as compared with other previously identical groups (legislators/elected officials) and within the target group of sitting judges. (E.g. a judge

retained or promoted before July 1, 2016 would still have the same, higher annual accrual rate than a colleague whose retention petition is granted the next day or any time thereafter.)

Therefore, I respectfully urge the Committee to defeat this measure, in the interest of fairness and with knowledge that a nearly identical version was earlier adopted by the Senate and moved to the House. This Committee has the opportunity to revisit the issues this legislation creates, and hopefully will determine not to move it forward.

Thank you for your consideration of this opposition to H.B. 2006, H.D. 1.

Aloha,

Eden Elizabeth Hifo, retired first circuit court judge

From: Jim Burns
To: JDLTestimony
Subject: HB2006, HD1
Date: Sunday, March 20, 2016 11:00:30 PM

Senator Gilbert S. C. Keith-Agaran, Chair
Commitee on Judiciary and Labor

I write in opposition to HB 2006, HD 1.

HR 2006, HD 1 reduces the retirement benefit multiplier from 3% to 2% (a) for judges/justices who became judges/justices after June 30, 2016, and (b) for judges/justices who were retained or promoted after June 30, 2016, commencing upon their retention or promotion.

First Reason for My Opposition:

Those who are now Judges/Justices decided on becoming judges with the reasonable expectation that the benefit multiplier would not be reduced prior to their retirement. Reducing the benefit multiplier upon retention is, in effect, a mid-service reduction in compensation without justification. (The reduction from 3.5% to 3% was offset by a significant increase in monetary compensation.)

Second Reason for My Opposition:

What is the purpose of reducing the 3% to 2%? To save money? How much?

A reduction of the benefit multiplier from 3% to 2% will seriously discourage:

many good and experienced Judges/Justices from applying for retention;

many highly qualified lawyers from applying to become Judges/Justices; and

all lawyers except the following from applying to become Judges/Justices:

a lawyer who now is and has for some time been members of the State Retirement System;

a lawyer who has no interest in a monetary retirement benefit;.

a lawyer who seeks to obtain retirement health benefits;

a lawyer who seeks to enjoy the prestige and power of being a Judge/Justice; and

a lawyer who seeks to be a Judge for ten years and then to move on to become a professional mediator/arbitrator.

Is the small savings worth the negative impacts the reduction will have on the number, diversity and quality of the applicants for appointment or retention as a Judge/Justice? Clearly, the answer is no.

James S. Burns, Chief Judge (Retired)

JAMES KAWASHIMA ALC

[redacted]

Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Members, Senate Committee on Judiciary and Labor

Re: **Bill No.: HB 2006, HD 1**

Hearing Date: Tuesday, March 22, 2016
Time: 9:00 a.m.
Place: Conference Room 016
State Capitol
415 South Beretania Street

Dear Senator Keith–Agaran, Senator Shimabukuro and Members of the Senate Committee on Judiciary and Labor:

This testimony is being submitted by a group of attorneys, all of whom are former members of the Judicial Selection Commission. They constitute the most experienced and well-respected members of the Hawaii State Bar and represent hundreds of years of experience in the practice of law in Hawaii. They bring to the table a wealth of knowledge and experience, unequaled among groups of this nature.

We submit this testimony purely from the standpoint of those who interviewed literally hundreds of applicants for judgeship positions since 1978, the inception of the Judicial Selection Commission process in the State of Hawaii.

In addition, it appears at first glance that this bill singles out judges for disparate treatment and appears to undermine judicial independence. Nonetheless, this testimony will be limited to observations of those applying for judgeships over the years.

Applicants for judgeships, whether it be the lowest District Court or the highest Supreme Court, with the exception of attorneys coming from government service, are applying from positions in which their income has grown over the years to be a substantial amount and, in a good number of cases, a very substantial amount. This means that these individuals, in applying to be judges, in choosing to provide public service to the members of their community, are making sacrifices, substantial ones in some cases, to have conferred on them the honor of being a judge.

HB 2006, HD 1 is contrary to the intent of the legislature and the Salary Commission in attempting to make the salary and benefits package for these judges as generous as possible under the circumstances and understanding that they are providing a public service.

Therefore, to deny them a portion of their benefits, especially after they have already been in office in most cases, and would not have the choice of deciding whether or not they would want to become a judge with the lessened benefits being provided.

Therefore, we would strongly urge you to reconsider any position that would result in the passage of this bill and the signing of it into law.

More testimony will be provided at the hearing on March 22, 2016.

/s/ Sidney K. Ayabe	*/s/ James J. Bickerton*	*/s/ John S. Edmunds*
Sidney K. Ayabe	James J. Bickerton	John S. Edmunds
/s/ David L. Fairbanks	*/s/ Rosemary T. Fazio*	*/s/ William A. Harrison*
David L. Fairbanks	Rosemary T. Fazio	William A. Harrison
/s/ Susan Ichinose	*/s/ Shelton G.W. Jim On*	*/s/ James Kawashima*
Susan Ichinose	Shelton G.W. Jim On	James Kawashima
/s/ Walter S. Kirimitsu	*/s/ Bert T. Kobayashi, Jr.*	*/s/ James E.T. Koshiba*
Walter S. Kirimitsu	Bert T. Kobayashi, Jr.	James E.T. Koshiba
/s/ Lawrence S. Okinaga	*/s/ Arthur Y. Park*	*/s/ Warren Price, III*
Lawrence S. Okinaga	Arthur Y. Park	Warren Price, III
/s/ Jeffrey S. Portnoy	*/s/ Raymond J. Tam*	*/s/ Thomas R. Waters*
Jeffrey S. Portnoy	Raymond J. Tam	Thomas R. Waters

/s/ Raymond J. Tam
RAYMOND J. TAM
Chair
Dated: March 21, 2016

Testimony to the House Judiciary Committee

Representative Karl Rhoads, Chair
Representative Joy A. San Buenaventura, Vice Chair

Re: House Bill 2006

March 22, 2016

My name is Momi Cazimero. I am a businesswoman and community advocate. I have served on a number of boards including the UH Board of Regents, Queens Medical Center, the Judicial Selection Commission and the state and national boards of the American Judicature Society (AJS) since 1983. I currently serve on the Judicial Evaluation Review Panel and the AJS board.

I am opposed to HB 2006 for the following reasons. HB2006 is not fair; is not reasonable; is not democratic, but it IS biased against Hawai‘i’s judges, with no explanation why.

The most important quality for a judge to have is fairness, but our judges are being singled out unfairly. The inequity this bill pursues will not achieve what the people of Hawai‘i want for ourselves, our judiciary, or for our state. We are not seeking the least among us to be judges.

As an employer I never reduced the benefits of my employees retroactively. I was required to follow state rules that regulated my responsibilities to my employees. HB2006 departs from the kind of personnel practice that I was required to follow.

I am concerned by the negative impact this bill will have on the judiciary. When I served on the Judicial Selection Commission, my hope was always to forward a list of highly qualified applicants to the Governor or Chief Justice. We sought applicants who were good students and practitioners of the law; who were exemplary; ethical, and successful; and who desired to serve on the bench until their retirement. Once such an individual made it on the bench, I wanted them to STAY on the bench, because good judges get even better over time.

This bill can hurt the Judicial Selection Commission‘s ability to attract and retain good judges. The conflict that judges will face is a deficit their family will suffer when they extend their service on the bench. I want judges who are retained for their good services to remain on the bench, and not be forced to seek better options elsewhere because of financial pressure.

Society looks to the courts as the final arbiters of justice. We surround our judges with the symbols of stature: a black robe; a bench positioned above us; and a gavel to maintain order. This bill negates the very tradition we value and treats judges as expendable employees. The respect we endow in the role of judgeships will preserve the aspirations we want most in our judiciary. Our citizens deserve nothing less.

Please do not pass HB 2006. Accepting a judgeship should not discourage the most qualified candidates who are willing to serve on the bench.

Mahalo.

SHERRY P. BRODER
Law Offices of Sherry P. Broder

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March 22, 2016

The Honorable Gilbert S.C. Keith-Agaran, Chairman
Senate Committee on Judiciary and Labor

Re: HB 2006, HD 1, Relating to the Employees' Retirement System

Dear Honorable Chairman Keith-Agaran and Committee Members,

I am submitting this testimony to OPPOSE this bill.

This bill proposes, for current judges, upon retention or appointment to a different court on or after July 1, 2016, the retirement benefit multiplier is reduced from the existing 3.5/3.0% to 2.0%. For new judicial appointments on or after July 1, 2016, the retirement benefit multiplier will be 2.0%. This bill would affect only judges. This bill unfairly targets and singles out the Hawaii State Judiciary for reductions in retirement benefits.

The Hawai'i State Constitution guarantees the judges that their salary will not be reduced. Article XVI, section 3.5, applies specifically to the judges and states that "[a]ny salary established pursuant to this [Salary Commission] section shall not be decreased during a term of office unless by general law applying to all salaried officers of the State."

This constitutional provision also establishes a Salary Commission, which did review the salaries for judges in 2007 and 2013, considered judicial retirement benefits and did not recommend any changes to the judges' retirement provisions. The next salary commission will be in 2019 and that would be the appropriate time to review the compensation package for the judges, along with the other ERS employees as designated by the constitutional provisions. Making these changes now undermines this constitutional amendment adopted by the people.

To the extent that the bill seeks to reduce benefits for judges upon retention or promoted to a higher court after July 2, 2016, *see* §(c) (5) (B), it would be contrary to the Hawaii State Constitution, Article XVI, section 2, which provides that "[m]embership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired."

The ERS has testified that this bill would affect a very small number of people and that it did not make sense from a business perspective. The ERS stated in its March 1, 2016 testimony: "This unique segment (of a current membership group of approximately 80 judges) will require

computer modification and counseling resource costs which, from a business perspective, the ERS believes will be out of proportion to the members affected by this legislation."

The bill would create a disincentive for current, experienced judges to continue to serve and may discourage the best qualified candidates from applying in the future.

I was the first woman President of the Hawaii State Bar Association and am the current President of the Federal Bar Association, Hawaii Chapter; however, I am speaking in my personal capacity and not on behalf of any organization.

Mahalo for the opportunity to submit this testimony.

SENATE COMMITTEE ON JUDICIARY AND LABOR
9:00 a.m., March 22, 2016, Conference Room 16

Testimony of Steven H. Levinson in Opposition to HB 2006 HD1 Relating to the Employees' Retirement System

March 19, 2016

Chair Keith-Agaran, Vice Chair Shimabukuro, and distinguished committee members, my name is Steven H. Levinson, Associate Justice, Retired, Hawaii Supreme Court. I testify in strong opposition to HB 2006 HD1, which, by title, relates to the State of Hawaii Employees' Retirement System in general, but which in fact targets newly appointed, reappointed, and "promoted" judges for unique and apparently unprecedented and onerous reductions in ERS benefits. Having retired at the end of 2008 after twenty (20) years on the bench, the bill directly affects me personally not at all. But I care passionately about the quality of the Hawaii Judiciary, in particular, and the excellence of Hawaii's government and the best interests of its people, in general. I therefore feel compelled to weigh in regarding this ill-conceived and pernicious piece of legislation, emphasizing that my testimony reflects only my views as an individual citizen.

On its face, HB 2006 HD1 contains no legislative findings or underlying statement of legislative intent. It simply, and without explanation, gratuitously does what it does. As the House Committee on Finance stated in Stand. Comm. Rep. No 850-16, dated March 4, 2016, "[t]he purpose of this measure is to classify judges who begin service or who are reappointed or promoted on or after July 1, 2016, as hybrid members of the Employees' Retirement System subject to a two percent benefit multiplier and retirement age of sixty." No reason is given for this reclassification. There certainly is no economic benefit to the State for it. On March 1, 2016, the executive director of the ERS, on behalf of the ERS's board of trustees and staff, stated in his written testimony before the House Finance Committee that the "unique membership group" that HB 2006 would create, consisting of "a relatively small segment of the total ERS membership[,] . . . will require computer modification and counseling

resource costs which, from a business perspective, the ERS believes will be out of proportion to the members affected by the legislation." On the other hand, if enacted, HB 2006 would incentivize early judicial retirements to avoid drastically adverse economic consequences (thereby depriving the Judiciary of critical institutional memory, continuity, and expertise), discourage seasoned and highly qualified attorneys in the private sector from applying for judicial office, and discourage worthy judges from seeking "promotion" to higher courts. What, I ask rhetorically, are the conceivable benefits or advantages to anyone of these inevitable byproducts of HB 2006? I suggest that there are none.

Despite the legislature's silence, and in light of the introduction during this session of SB 2238, SB 2239, SB 2240, and SB 2244, among others, I doubt that there is anyone in this room who is not fully aware of the legislature's motivation underlying HB 2006. Having the power of the purse in our tripartite system of government, the legislature is threatening to punish the Judiciary for perceived transgressions. This course of conduct ought to be beneath the dignity of this august body, which has been so visionary and done such great things in the past. It is time for the legislature to knock it off. In the end, the state as a whole would suffer from this childish act of ritual suicide.

Thank you for the opportunity to testify.

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TESTIMONY OF THOMAS D. FARRELL
Regarding House Bill 2006, HD1
Relating to Public Employees

Committee on Judiciary and Labor
Senator Gilbert S. C. Keith-Agaran, Chair

Tuesday, March 22, 2016, 9:00 a.m.
Conference Room 016, State Capitol

Good morning Senator Keith-Agaran and members of the Committee:

I strongly oppose House Bill 2006, HD1.

It is clear that there are some members of this Legislature who are not happy with a recent decision handed down by a certain circuit court judge, and are looking for ways to punish the judicial branch. Nowhere is that more clear than in this bill.

Now it would be easier, of course, to just give judges a pay cut, but you are barred from doing that by Art. XVI, §3.5 of the Hawaii Constitution which only allows pay cuts "applying to all salaried officers of the State."[1] So instead, it is proposed to change the multiplier in judges' retirement plan. The reason that it is so crystal clear that this bill is payback, is that it only applies to judges. After all, members of this Legislature get a 3% multiplier, just like judges. How is it that only judges have been selected to be reduced to a 2% multiplier, but you folks haven't?

Well, I suppose one could argue that legislators don't make as much as judges, so you'll save more money cutting their retirements. The only problem with that theory is that the ERS says you aren't going to save any money at all.[2] So why exactly are you doing this?

I have said in other contexts, that there is no freedom without the rule of law. And there is no rule of law without an independent judiciary. These shenanigans are shameful.

[1] And there is an argument to be made that this Constitutional provision also bars diminishment of retirement benefits for serving judges.

[2] In testimony before the House Finance Committee, ERS said "This unique segment (of a current membership group of approximately 80 judges) will require computer modification and counseling resource costs which, from a business perspective, the ERS believes will be out of proportion to the members affected by this legislation.

Now, if you are mad at a judge for making a bad decision, it would seem to me that the last thing you would want to do is create even more bad judges.[3] Yet this bill is a sure ticket to judicial mediocrity.

If you're any good as a lawyer, you make a lot more practicing law than you do as a judge. While money isn't everything, it's expensive to live in Hawaii. Judicial compensation is a package deal, based on the principle of deferred gratification. You agree to work for a lower salary, but the retirement plan is pretty good. Now if you're a successful lawyer and around forty years of age, is it a good deal to seek a judgeship? Assuming you've got at least 25 years left in the workplace, with a 3% multiplier you can retire at 65 with 75% of your salary. If HB 2006 passes, the prospective judge is looking at 50% of salary at 65, and 60% if you stay on until age 70 (at which time you have to go). That's not looking so good.

Since this bill will also apply to service after re-appointment,[4] judges who can retire now may choose to cut their losses and get out. About two thirds of our sitting judges are eligible for retirement. Others who are just starting out may decide not to seek reappointment, because it just isn't worth it. Ditto with good judges who might otherwise seek appointment to a higher court---better to stay where you are and not take a hit on your multiplier. So while this Legislature is arguing about whether to give the judiciary the money to create new judgeships, that will be a moot point if you pass HB 2006. You'll wind up with a whole bunch of judicial vacancies that can't be filled.

The bottom line is that the less desirable you make the position, the less desirable will be candidate who seeks it.

I'd like to think that the supporters of this bill never really intended that it should pass, and merely wanted to express their displeasure. If so, it has been duly noted. Can we move on now?

[3] For the record, I do not know the judge in question, nor have I read the decision. I have no opinion on whether this is a good judge, a bad judge, or somewhere in the middle.

[4] The bill refers to a member "who is reappointed or appointed to a different court by and with the advice and consent of the senate…" Legislation that would have required advice and consent for reappointment of a judge was introduced but did not cross over this session.