



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary

Representative Scott Y. Nishimoto, Chair

Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 13, 2018 2:00 PM

State Capitol, Conference Room 325

by

Rodney A. Maile

Administrative Director of the Courts

Bill No. and Title: House Bill No. 2191, Relating to Appellate Jurisdiction.

Purpose: Amends appellate jurisdiction of the supreme court and the intermediate appellate court to conditions as they existed prior to July 1, 2006. Reestablishes criteria for assigning appeals. Reestablishes requirement that most appeals be filed with the supreme court instead of the intermediate appellate court. Eff. 7/1/2019.

Judiciary's Position:

The Judiciary respectfully opposes this bill.

In 2004, the Judiciary submitted a proposal to the Hawai‘i State Legislature to restructure the appellate courts so that all appeals would go directly to the ICA. Under the system in place at the time, there was a recurring and persistent backlog of appeals, near elimination of oral argument in both appeals and original proceedings at the Supreme Court, and delay in resolution of appeals and other matters. Prior to the final enactment of the changes, the Legislature directed the formation of the Appellate Review Task Force to recommend to the Hawai‘i Legislature proposed statutory changes to ensure the smooth transition to the present appellate process. Based upon the recommendations of the Appellate Review Task Force, the 2006 legislature adopted and approved the present system of appellate review. All appeals are filed directly with the ICA and litigants may seek transfer to the supreme court by filing an Application for Transfer or may seek review of final decisions of the ICA by filing an application for a writ of certiorari. In 2016, the Legislature implemented a change through Act 48 to provide that appeals from certain agency contested case proceedings must be filed directly with the supreme court. Apart from that change and some other minor changes, the appellate process has remained the same.



The Judiciary continues to believe that the appellate system in place since 2006 is the best structure for appellate review.

When the Judiciary originally submitted its proposal in 2004, Hawai'i was one of only five states with an ICA that required all direct appeals to be filed with the supreme court and then be assigned to an ICA. The other states were Idaho, Iowa, Mississippi, and Oklahoma. Upon legislative approval of the proposal for all appeals to be filed directly to the Intermediate Court of Appeals, Hawai'i joined the vast majority of other states with ICAs, which include, among others, California, Colorado, Oregon, Washington, New York, New Jersey, and Massachusetts. Returning Hawai'i to the past system would be counterproductive and a waste of judicial resources. Under the pre-2006 system, the review process for assigning appeals to either the supreme court or the ICA required that significant judicial, professional, and clerical staff resources be dedicated to review every appeal that is briefed to determine whether the appeal meets the criteria for assignment to the supreme court or the ICA. These resources, especially the judicial resources, are better used for resolving cases pending before the courts of appeals and handling the other work of the supreme court. In addition to work related to appeals, the supreme court has other important duties involving attorney discipline matters, judicial discipline matters, original proceedings, certified questions from the federal court, reserved questions from the trial courts, and statewide rule amendments.

The present process has a number of options to accelerate the process for review when needed. For cases where litigants believe direct review by the supreme court is warranted, litigants can file applications to transfer cases to the supreme court, thereby bypassing review by the ICA. Within the last three years, the supreme court has received between 22 to 25 applications each year for review, and the court has granted approximately half of the applications.

Moreover, the supreme court's internal procedures are flexible enough to allow the court to implement procedures to enhance appellate review for certain types of cases when the need arises. For example, recognizing the importance of appeals taken from family court decisions issued in Child Protective Act cases, HRS chapter 587A, the supreme court instituted an expedited briefing schedule for such appeals. With the implementation of the expedited briefing schedule, these type of cases are resolved quickly by the ICA and litigants seldom seek further review by the supreme court.

Finally, as noted above, Act 48 now provides for appeals from administrative agencies directly to the supreme court in certain categories of cases. These include appeals from decision issued in contested case proceedings before the Commission on Water Resource Management, the Land Use Commission, the Public Utilities Commission, the Hawai'i Community Development Authority, and cases involving conservation districts.

In sum, over the last 12 years, since its implementation, the present appellate process has proved to be an efficient way to resolve appellate cases. The current structure is the choice of



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the vast majority of jurisdictions that have intermediate courts of appeals or the equivalent. Moreover, as noted above, Hawai'i has implemented steps to ensure flexibility so that certain types of cases can be prioritized when necessary. While we are always open to suggestions for improvement, a reversion to the pre-2006 system—with its inherent inefficiencies—would be a step backward.

Thank you for the opportunity to testify on this measure.

HB-2191

Submitted on: 2/12/2018 9:19:01 AM

Testimony for JUD on 2/13/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Richard K. Minatoya	Maui Department of the Prosecuting Attorney	Oppose	No

Comments:

The Department of the Prosecuting Attorney, County of Maui, **STRONGLY OPPOSES** HB 2191 - Relating to Appellate Jurisdiction. This measure will undermine the current, more orderly appellate process with the old appellate system. We believe in the old adage, "If it ain't broke, don't fix it." The Department requests that this measure be **HELD**.

Thank you very much for the opportunity to provide this testimony.

HB-2191

Submitted on: 2/9/2018 5:36:10 PM

Testimony for JUD on 2/13/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Circe Carr		Oppose	No

Comments:

HB-2191

Submitted on: 2/12/2018 11:16:32 AM

Testimony for JUD on 2/13/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dylan Gentaro Fujitani	Individual	Oppose	No

Comments:

Dear Chair Nishimoto, Vice Chair San Buenaventura, and members of the Judiciary Committee:

As a member of the Hawai'i State Bar Association and former Summer Law Clerk at the Hawai'i Supreme Court, I would like to express my opposition to HB2191. I substantively agree with the arguments put forth by the HSBA Appellate Section, whose testimony you have already received.

Sincerely,

D. Gen Fujitani

HSBA 9968

Hawaii State Bar Association Appellate Section

February 12, 2018

Chair Scott Y. Nishimoto
Vice Chair Joy A. San Buenaventura
Committee on Judiciary
House of Representatives, State of Hawaii

Re: **House Bill 2191 Relating to Appellate Jurisdiction,
House Bill 2194 Relating to the Judiciary
Testifying in STRONG OPPOSITION**

Dear Chair Nishimoto, Vice Chair San Buenaventura, and members of the Judiciary Committee:

On behalf of our colleagues in the Hawaii State Bar Association's Appellate Section,¹ we write in **STRONG OPPOSITION** to both **House Bill 2191** (relating to appellate jurisdiction) and **House Bill 2194** (relating to the Judiciary).

I. HB 2191—Direct Appeal to the Supreme Court; Advisory Opinions

A. Direct Appeal to Supreme Court

By reversing the last twelve years of progress and returning the appellate process to the way it was prior to the well-received and useful changes adopted by the Legislature in 2006, House Bill 2191 would make our appellate courts much less efficient and timely by making the Supreme Court of Hawaii the first stop in Hawaii's appellate process, not the last.

HB 2191 would amend the "appellate jurisdiction of the supreme court and the intermediate appellate court to conditions as they existed prior to July 1, 2006, [and require] that most appeals be filed with the supreme court instead of the intermediate appellate court." As lawyers who practice in the appellate courts of Hawaii, we believe HB 2191 represents a step backwards that will not be helpful to the goal of prompt and fair administration of justice, and in fact will only make the appellate process more confusing and costly.

The measure would deprive the Intermediate Court of Appeals (ICA) of Hawaii of its primary jurisdiction to consider appeals from District and Circuit courts and certain agencies in the first instance, and shift that burden to the Hawaii Supreme Court. Our experience informs us that the current system—in which most cases are first appealed to the ICA as of right, and then considered by the Supreme Court on a discretionary basis by way of an application for certiorari—is the most efficient and least costly process to consider and dispose of appeals.

¹ The views and opinions expressed in this testimony are those of the HSBA's Section on Appellate Law. The HSBA Board has not reviewed or approved of the substance of the testimony submitted.

It is also the process that most likely results in the orderly development of the common law by permitting legal arguments to be analyzed and developed by the judges of the ICA and the parties' lawyers prior to the Supreme Court being presented with the case. The existing process efficiently winnows cases and arguments, and while not perfect, is certainly better and less obtuse than the pre-2006 process in which appeals would go directly to the Supreme Court from District and Circuit courts. Under the old system, the Supreme Court was required to undertake the inefficient, time-consuming process of reviewing each appeal to determine whether the Supreme Court would retain that appeal or assign it to the ICA for decision. Moreover, in cases decided by the ICA upon assignment, the losing party could still seek further review by the Supreme Court, giving those cases the opportunity for an extra level of appeal versus those retained by the Supreme Court in the first instance. Under the current system, which mirrors those of almost every other state as well as the federal court system, all appeals are subject to review by the ICA, and those warranting further discretionary review will still be heard by the Supreme Court. Moreover, the current system also already permits parties to apply to transfer cases pending in the ICA to the Supreme Court, so that the Supreme Court may decide those cases without waiting for a decision by the ICA.

In our view, the system as it is now structured works well with the ICA disposing of most of the cases on appeal, with the Supreme Court considering on secondary appellate review those cases which, in the court's discretion, are of statewide interest or public importance, or where a decision is needed to correct outdated or conflicting case law. Prior to the 2006 amendments, Hawaii's appellate system was among the few in the nation where jurisdictions with an intermediate court of appeals was not the first stop in the appellate process, and this process originated in a time when the caseload of the appellate courts was significantly lower than it is today.

Statistically, most appeals to the ICA involve family law and criminal matters. If these cases were required to be considered by the Supreme Court in the first instance, this would simply shift any delays from one court to another. If what is motivating HB 2191 is a concern about appeals taking a long time to be resolved, returning to the pre-2006 process will only make any delay worse by shifting the burden from the ICA which is able to sit in three-judge panels in most appeals, to the Supreme Court, which sits as an entire court (en banc) in practically every case.

As a whole, it appears that the primary goal of HB 2191 is to resurrect the outdated and inefficient process that existed prior to 2006, and we do not recommend that this committee pursue such a course of action. Our experience is that the appellate process is inherently more speedy under the current system.

B. Advisory Opinions

Section 51 of HB 2191 would also amend Haw. Rev. Stat. § 602-5 to grant the Supreme Court jurisdiction to issue advisory opinions. We oppose this amendment.

Currently, Hawaii's courts—including the Supreme Court of Hawaii—do not have the jurisdiction to consider a legal issue outside of the context of an actual controversy between the parties, and seek to avoid doing so, even though our courts are not bound by the Article III justiciability requirements which govern federal courts. *See Corboy v. Louie*, 128 Haw. 89, 103-

04, 283 P.3d 695, 709-10 (2011). Although not subject to this formal limitation, the jurisdiction of Hawaii courts is generally limited to “actual controversies.” *Wong v. Board of Regents*, 62 Haw. 391, 394-95; 616 P.2d 201, 204 (1980); *see also State v. Hoang*, 93 Haw. 333, 336, 3 P.3d 499, 502 (2000). The jurisdiction of the courts is limited by whether the plaintiff has alleged “injury in fact” by the defendant. *Hanabusa v. Lingle*, 119 Haw. 341, 347, 198 P.3d 604, 610 (2008).

We believe this is an appropriate limitation on the power of courts, and the ability to institute a case in Hawaii’s courts—including the Supreme Court—should continue to be a prudential doctrine of judicial self-restraint grounded in separation of powers, designed to insulate the courts from becoming entangled in politics. *See Kapuwai v. City & Cnty. of Honolulu*, 121 Haw. 33, 41, 211 P.3d 750, 758 (2009). The limited circumstances in which the courts are granted jurisdiction to consider legal issues without a present “case and controversy” should not be expanded. *See, e.g., Haw. Rev. Stat. § 37D-10.*

We strongly urge your Committee and the House of Representatives to decline to adopt HB 2191.

II. HB 2194—Certified Questions to the Supreme Court from the District, Circuit, and Intermediate Appellate Courts

Similarly, HB 2194 will not help resolve cases more quickly or efficiently. Instead, it will make the process more confusing and time-consuming. That measure provides “that a court of inferior jurisdiction may certify to the Hawaii Supreme Court a question or proposition of law on which the court of inferior jurisdiction seeks instruction for the proper decision of a remanded case,” and “[r]equires the Supreme Court to answer the question within 15 calendar days.”

We believe that Hawaii’s District, Circuit, and ICA judges are fully capable of determining what the applicable law is, and do not need instruction about how to process a remanded case, beyond the current process which already allows for interlocutory review in appropriate cases. Currently, the trial courts have the power to allow the parties to seek appellate review prior to a final judgment, either through the interlocutory appeal process, or by certifying that an issue has been resolved for or against a party and there is no reason to delay entry of final judgment. Moreover, the parties to an appeal in the ICA may seek transfer of the case to the Supreme Court if they believe that the law is not certain and that immediate resolution by the Supreme Court is necessary. Thus, the current system already gives lower courts and litigants the ability to ask for the Supreme Court’s immediate instruction and guidance, and we believe there is no need for the amendment which HB 2194 would implement.

We strongly urge your Committee and the House of Representatives to decline to adopt HB 2194.

Thank you for the opportunity to provide testimony on House Bills 2191 and 2194.

Very truly yours,

Christopher J.I. Leong
Chair, Appellate Section

Ewan C. Rayner
Vice-Chair, Appellate Section

Robert T. Nakatsuji
Treasurer, Appellate Section

Benjamin E. Lowenthal
Secretary, Appellate Section

Rebecca A. Copeland
Appellate Section Liaison to the Hawaii Appellate Pro Bono Project

Robert H. Thomas
Advisor to the Appellate Section Board

LATE

HB-2191

Submitted on: 2/12/2018 6:22:15 PM

Testimony for JUD on 2/13/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jane Sugimura	Individual	Oppose	No

Comments:

I oppose this on the basis of separation of powers doctrine.

LATE

HB-2191

Submitted on: 2/12/2018 10:37:25 PM

Testimony for JUD on 2/13/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
lynne matusow	Individual	Oppose	No

Comments:

I fail to see the reason this bill was introduced. You want to revert to an old procedure, which existed prior to some time in 2006. Was this requested by the judiciary? If not, why are you infringing on separation of powers? The system works well as it is. Leave it alone. Also, by adding to the supreme court caseload, decisions will take longer to be made. We need faster decisionmaking, not slower.

Lynne Matusow

Rep. Scott Y. Nishimoto, Chair
Rep. Joy A. San Buenaventura, Vice Chair
Committee on Judiciary

House of Representatives of the State of Hawai'i

Lance D. Collins, Ph.D
Law Office of Lance D. Collins

Tuesday, February 13, 2018
Opposition to House Bill No. 2191, Relating to Appellate Jurisdiction

My name is Lance D. Collins. I am an attorney in private practice. I strongly oppose House Bill No. 2191, Relating to Appellate Jurisdiction

I regularly practice before the appellate courts in Hawai'i. Unlike the thoughtful, inclusive and deliberate manner in which appellate procedure was reformed in 2006, this bill appears to have surfaced with no thought, inclusion or deliberation by those who will be effected by it. There have been no task forces, study groups or objective studies conducted on possible further reforms of appellate procedure. As an appellate practitioner, I do not recall seeing any advertisements for any such panels and my colleagues and I have not been solicited for our views.

Court statistics show that, between FY2016 and FY2017, the Intermediate Court of Appeals saw a 25% increase in primary cases filed (20% increase from FY2012). Meanwhile, both the Supreme Court and Intermediate Court of Appeals increased the number of cases decided on the merits.

Yet, I have not seen any bills proposing to increase the number of judges on the intermediate court of appeals or appropriating money for that purpose.

Instead, since 2006, the legislature has passed laws modifying appellate procedure for certain agencies that entirely bypasses the circuit and intermediate appellate courts requiring the Supreme Court to be the first and last appeals court – increasing their overall load and the amount of time necessary to go through the record. The legislature has also passed laws that require nearly half of all appeals, filed and considered, to be given “highest priority” without any guidance on the order of importance among those cases and without additional funding or judicial positions to allow these “highest priority” cases to be expedited.

If legislators are seeking to express unhappiness with the time it takes for an appeal to be decided, they can start by looking to the bills they have already passed in the last ten years as well as the inadequacies in the annual judiciary appropriation.

There is always room for improvement but that requires some nominal effort to discover what the problems are, looking at the system as a whole and including the views of the people who actually practice and adjudicate appeals.

Thank you for this opportunity to testify.

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