

Rep. Mark M. Nakashima, Chair
Rep. Scot Z. Matayoshi, Vice Chair
Committee on Judiciary & Hawaiian Affairs
House of Representatives of the State of Hawai'i

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

Tuesday, February 2, 2021
Support for HB 189

Relating to Designating Substitute Judges on the Intermediate Court of Appeals

I am in strong support of this measure. I am an attorney in private practice and have represented parties in nearly three dozen cases before the Intermediate Court of Appeals in the last fifteen years. In my view, this measure is definitely needed.

The intermediate court of appeals was established as part of the amendments to the state constitution adopted in 1978. The amendment included the power of the chief justice to appoint substitute judges to serve temporarily "as provided by law". Haw. Const. Article VI, Section 2

Act 111, SLH 1979 implemented the constitutional amendment by enacting the enabling statutory framework which included having panels of three judges decide cases and allowing the chief justice appoint a substitute judge when there were not enough judges to constitute a panel because of vacancy or disqualification. In 1979, the ICA established and made up of three judges.

In 1992, the number of judges on the intermediate court of appeals was increased to four. Section 2, Act 253, SLH 1992. However, the provision on appointment of substitute judges was not changed limiting the chief justice's power of temporary appointment to instances when a panel of three could not be created. Because the provision on the appointment of substitute judges was not modified, the intermediate court of appeal ability to obtain temporary substitute judges to fill vacancies was limited – an unusual and unique situation unlike any other court in this state.

In 2001, the number of judges on the intermediate court of appeals was increased to six. Act 248, SLH 2001. Again, the provision on temporary appointment of substitute judges was not modified.

In 2004, Act 202 modified the jurisdiction of the intermediate court to make it the first court of appeal for all trial courts in the state. The unintended limitation on the temporary appointment power of substitute judges was not modified.

In 2006, Act 4 was enacted to eliminate the chief judge's power to assign judges into panels in favor of the random selection of merit panel "to ensure fairness in the decision-making process." S.C.Rep. 2251, 2006 Senate Journal 1135 However, the unintended limitation on the temporary appointment power of substitute judges was not addressed.

Seventeen years after the passage of Act 202 and the nearly continuous vacancy on the court since the retirement of Judge Daniel Foley in 2016, we know that the unintended and unique limitation on the temporary appointment power for substitute judges to the intermediate court of appeals has had a significant impact on the ability of the court to decide appeals in a timely manner. Rule 3, Rules Int. C. App.

Finally, mathematically, there are twenty unique panels that can be created from a pool of six judges. But only ten unique panels from a pool of five judges. If one accepts the proposition that the greater number of panels decreases the chance of error, allowing for substitute judge will also have important secondary effects of lessening the need for Supreme Court review.

Thank you for this opportunity to testify.

Appellate Section Hawaii State Bar Association

Hearing on H.B. No. 189, Relating to Designating
Substitute Judges on the Intermediate Court of Appeals
February 2, 2021 at 2:00 p.m.

House Committee on Judiciary & Hawaiian Affairs
Honorable Mark. M. Nakashima, Chair
Honorable Scot Z. Matayoshi, Vice Chair

Dear Chair, Vice Chair, and Members of the Committee:

On behalf of our colleagues in the Hawaii State Bar Association's Appellate Section,¹ we write in **strong support** of H.B. 189. Members of the section are appellate practitioners, and we have a keen interest in the proper functioning of the state appellate courts.

The Intermediate Court of Appeals (ICA) resolves the vast majority of the state court appeals with only a chief judge and 5 associate judges. Vacancies on the ICA are common while cases are pending review. But under current law, when a vacancy occurs, five judges must do the work expected of six.²

Thus, every time there is a vacancy, it exacerbates the ICA's backlog. H.B. 189 would keep the ICA on track by designating judges under a mechanism already well established, publicly accepted, and commonly used by the Hawai'i Supreme Court when it has vacancies or disqualifications. This proposal will provide stability and help maintain public trust in the Judiciary as an institution that can provide timely justice.

In the end, H.B. 189 will allow the Judiciary to operate more efficiently. The current law was enacted when the ICA had only three judges, so it is restrictive simply because it is outdated. H.B. 189 modernizes the law to reflect the current composition of the ICA and provides a substantial public benefit.

Thank you for the opportunity to testify in **strong support** of H.B. 189.

Deirdre Marie-Iha, Section Chair

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

² By the numbers, the ICA does the work of more than six judges. H.B. 189, however, does not require significant expenditure of taxpayer monies to start addressing that issue because it allows the Judiciary to allocate existing resources rather than incurring the cost of additional permanent ICA judges.

February 1, 2021

RE: Testimony **In Strong Support** of House Bill No. 189, Relating to Designating Judges on the Intermediate Court of Appeals

Dear Chair Nakashima, Vice-Chair Matayoshi, and Members of the Committee:

The undersigned Hawai`i civil and appellate practitioners **strongly support** HB 189, which would allow the chief justice to temporarily designate circuit court judges, and retired Intermediate Court of Appeal (ICA) judges and supreme court justices to temporarily fill vacancies on the ICA. HB 189 will enhance judicial efficiency, promote timely determination of civil appeals, and reduce the Court's substantial backlog.

Most civil appeals are disproportionately and greatly delayed because they take a backseat to new appeals that have priority by law or policy (e.g., criminal cases where a defendant is incarcerated pending appeal, certain criminal appeals by the prosecution, those involving child protective or custody proceedings, eminent domain actions, appeals from tax court, appeals in actions to compel access to public records, and certain appeals related to the procurement code, to name a few). In other words, the ICA must handle those cases first, even if other assigned cases have been waiting for years.

When there is a judicial vacancy, the priority-appeal load increases for each of the existing judges, and reduces the number of non-priority cases each is able to address. The impact of COVID-19 is exacerbating the backlog (many appeals from pending/stayed criminal trials will take priority post-pandemic, and those involving the tens of thousands of criminal citations for violations of the pandemic emergency orders will add to the backlog).

The fastest and most efficient way to address the backlog is to allow the chief justice to enlist circuit court judges, and retired appellate judges/justices to fill out the full complement of judges, as and when needed.

We strongly urge this Committee to recommend passage of HB 189. Thank you for the opportunity to testify.

Very truly yours,

Paul Alston
Dentons US LLP

Erika Amatore
Dentons US LLP

Nadine Y. Ando
McCarriston Miller Mukai MacKinnon LLP

Sidney Ayabe

Testimony In Strong Support of House Bill No. 189, Relating to Designating Judges on the Intermediate Court of Appeals

Lisa A. Bail
Goodsill Anderson Quinn and Stifel

Claire Wong Black
Dentons US LLP

Sherry P. Broder
Law Offices of Sherry P. Broder

Dianne Winter Brookins
Dentons US LLP

Pamela Bunn
Dentons US LLP

Daniel Cheng
Dentons US LLP

John Duchemin
Cades Schutte LLP

Michael W. Gibson
Ashford & Wriston, LLLP

Madisson L. Heinze
Dentons US LLP

Kristin Holland
Dentons US LLP

Thomas J. Hughes
Goodsill Anderson Quinn and Stifel

Louise Ing
Dentons US LLP

Hugh R. Jones
Ashford & Wriston, LLLP

Amanda Jones
Cades Schutte

Nickolas A. Kacprowski
Dentons US LLP

James Kawachika
Deeley King Pang & Van Etten

John Komeiji

Kelly G. LaPorte
Cades Schutte LLP

Dale W. Lee

David M. Louie
Kobayashi Sugita & Goda, LLP

Howard K.K. Luke
Law Offices of Howard K.K. Luke

Greg Markham
Chee Markham Kato and Kim

John-Anderson L. Meyer
Dentons US LLP

David J. Minkin
McCorriston Miller Mukai MacKinnon LLP

Testimony In Strong Support of House Bill No. 189, Relating to Designating Judges on the Intermediate Court of Appeals

Laura P. Moritz
Dentons US LLP

Carol Muranaka

Barron Oda
Roeca Luria Shin LLP

Jeffrey S. Portnoy
Cades Schutte LLP

John S. Rhee
Dentons US LLP

J. Blaine Rogers
Davis Levin Livingston

Jeffrey Sia
Chong, Nishimoto, Sia,
Nakamura & Goya LLLP

Lisa M. Swartzfager
Cades Schutte LLP

Richard Turbin
Turbin Chu Heidt, Attorneys at Law

Alan Van Etten
Deeley King Pang & Van Etten

Wayne Wagner
Goodsill Anderson Quinn and Stifel

Craig P. Wagnild
Bays Lung Rose & Voss

Dallas Walker
Porter McGuire Kiakona LLP

Calvin E. Young
Goodsill Anderson Quinn and Stifel

William W.L. Yuen
Dentons US LLP

Rachel A. Zelman
Goodsill Anderson Quinn and Stifel



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary and Hawaiian Affairs

Representative Mark M. Nakashima, Chair
Representative Scot Z. Matayoshi, Vice Chair

Tuesday, February 2, 2021, 2:00 PM
State Capitol, Conference Room 325

by
Randall A. Pinal
Supervising Staff Attorney
Intermediate Court of Appeals

Bill No. and Title: House Bill No. 189, Relating to Designating Substitute Judges on the Intermediate Court of Appeals.

Purpose: Provides statutory authorization for the Chief Justice to designate circuit court judges, retired intermediate appellate judges, or retired supreme court justices to temporarily fill a vacancy on the intermediate court of appeals.

Judiciary's Position: Support.

The bill would amend Section 602-55 of the Hawaii Revised Statutes (HRS) to allow the intermediate court of appeals to have a full complement of six judges to address its heavy case load, even when there is a vacancy on the court.

To put the bill into perspective, the intermediate court of appeals was created in 1979 as a result of the 1978 Constitutional Convention. See 1979 Haw. Sess. Laws, Act 111, § 3. Initially, the intermediate court of appeals consisted of a chief judge and two associate judges. Id. The intermediate court of appeals began operations in April 1980. In the years that followed, the Legislature approved doubling the size of the intermediate court of appeals to six judges. A fourth judgeship was approved in 1992 and two more judgeships were approved in 2001. 1992 Haw. Sess. Laws, Act 253, § 2; 2001 Haw. Sess. Laws, Act 248, § 1. The intermediate court of appeals has a significant and complex caseload. With more flexibility and opportunity to address temporary vacancies on the court, while any vacancies are in the process of being filled, the court is better able to effectively and timely decide appeals.



House Bill No. 189, Relating to Designating Substitute Judges on the
Intermediate Court of Appeals
House Committee on Judiciary and Hawaiian Affairs
Tuesday, February 2, 2021, 2:00 PM
Page 2

Currently, HRS § 602-55 requires the intermediate court of appeals to decide cases in panels of not less than three judges, and authorizes the Chief Justice to designate circuit court judges, retired intermediate appellate judges, or retired supreme court justices to temporarily fill a need on the intermediate court of appeals when “the number of available intermediate appellate judges is insufficient to make up a panel because of vacancy or disqualification[.]”

The statute, previously codified at HRS § 602-16, originally appeared in the 1979 law that created the intermediate court of appeals. 1979 Haw. Sess. Laws, Act 111 § 3. The statute’s genesis is from a time when the intermediate court of appeals was comprised of only three judges. At that time, if there was a vacancy on the intermediate court of appeals, then the intermediate court of appeals necessarily could not make a three-judge panel and the Chief Justice could temporarily fill the vacancy. But now that the court is comprised of six judges, and the Chief Justice’s authority to designate a substitute judge arises only when the number of “available” intermediate court of appeals judges is insufficient to make up a panel, the threshold is met only when four of the six intermediate court of appeals judges are disqualified, or there is a combination of disqualifications and vacancies that leave fewer than three intermediate court of appeals judges available to comprise a panel.

The proposed amendment would allow the Chief Justice to designate the same category of circuit court judges, retired intermediate appellate judges, or retired supreme court justices to serve temporarily to fill a vacancy on the intermediate court of appeals, thus maintaining its full complement of six judges to address its heavy case load without compromising efficiencies.

In 2019, the Legislature considered an identical bill in House Bill No. 513 / Senate Bill No. 189. On February 7, 2019, the House Committee on Judiciary held a hearing on House Bill No. 513, and unanimously recommended the measure be passed with a minor revision. On February 21, 2019, the Senate Judiciary Committee held a hearing on the companion bill, Senate Bill No. 189, and approved Senate Bill No. 189, S.D. 1, with a technical, nonsubstantive amendment for the purposes of clarity and consistency. On March 21, 2019, the House Committee on Judiciary held a hearing on Senate Bill No. 189, S.D. 1 and recommended the measure be deferred. The Legislature took no further action on House Bill No. 513 or Senate Bill No. 189, S.D. 1. The version before the Committee now in House Bill No. 189 is identical to the version approved by the Senate Judiciary Committee in Senate Bill No. 189, S.D. 1 in 2019. The Judiciary requests the Committee pass House Bill No. 189 in its current form.

Thank you for the opportunity to testify on this measure.