



The Judiciary, State of Hawai‘i

Testimony to the Thirty-Second State Legislature
2023 Regular Session

House Committee on Judiciary and Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair

Tuesday, February 28, 2023, 2:00 p.m.
Conference Room 325 & Via Videoconference

by:

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Bill No. and Title: House Bill No. 1152, Relating to the Judiciary.

Purpose: Amends the period in which the supreme court and intermediate appellate court are in session to June 1 of each year through April 1 of the following year. Specifies that the Hawai‘i supreme court and intermediate appellate court shall issue decisions only during the time period these courts are in session. Requires a written decision to be issued during the same session in which the oral argument is heard.

Judiciary’s Position:

The Judiciary respectfully, but strongly, opposes House Bill No. 1152 which would radically change how the appellate courts operate.

Currently under Hawai‘i Revised Statutes (HRS) §§ 602-8 and 602-53, the Hawai‘i Supreme Court and the Intermediate Court of Appeals (collectively referred to herein as “the appellate courts”) operate “in continuous session”. The bill proposes to change the appellate courts to “term courts” that are “in session each year” from June 1st to the following April 1st. Thus, the courts would not be in session from April 2nd through May 31st of each year.



The mission of the Judiciary, as an independent branch of government, is to administer justice in an impartial, efficient and accessible manner in accordance with the law.¹ This bill would seriously undermine this core mission by reducing the efficiency and accessibility of the appellate courts in Hawai‘i. In addition, the bill’s proposal to require that decisions be issued “during the same session in which the oral argument is heard” could undermine the administration of justice by creating a super-priority case over all other cases which is in direct conflict with other Hawai‘i laws that require certain cases be given priority attention on appeal.

This measure also impacts the separation of powers among branches of state government, and may have constitutional infirmities because article 6 of the Hawai‘i Constitution allows the Hawai‘i Supreme Court to promulgate rules of procedure and vests judicial power with the courts to establish the schedule for disposition of cases.²

For these reasons, as further detailed below, the Judiciary respectfully requests this measure be held and not passed out of committee.

1. This Bill Would Undermine The Appellate Courts’ Ability To Address Cases Efficiently and Expeditiously

The current “continuous session” system at the appellate courts supports the Judiciary’s mission to administer justice in an efficient and accessible manner.

Under the current “continuous session” the appellate courts are active in April and May of each year and issue a substantial number of decisions on appealed issues and original jurisdiction matters, as well as orders on pending motions. In recent years during the months of April and May in 2020, 2021, and 2022 the appellate courts entered over 100 decisions on pending cases and motions each year.³

¹ See e.g., Hawai‘i Revised Statutes § 601-5 (“Independence of Judiciary”); Hawai‘i Rules of Civil Procedure, Rule 1(a); Hawai‘i Rules of Penal Procedure, Rule 2.

² Article VI, section 1 of the Hawai‘i Constitution vests judicial power with the courts to “establish time limits for disposition of cases in accordance with their rules.” And article VI, section 7 clarifies that this power to promulgate rules is with the Hawai‘i Supreme Court:

The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.

Haw. Const. art. VI, § 7.

³ See https://www.courts.state.hi.us/opinions_and_orders/opinions (providing a searchable database-by month/year-of all opinions and orders entered by the Hawai‘i appellate courts).



House Bill No. 1152’s proposal to change the appellate courts from a continuous session to a “term court” would be detrimental to the productivity of the appellate courts because it would preclude issuing decisions when the court is not in session, from April 2nd to May 31st of each year.

Under House Bill No. 1152 it appears the decisions currently issued during the months of April and May of each year would need to wait until the court is back in session. This is because House Bill No. 1152 proposes to limit the time period the appellate courts could “issue decisions” to “only during the time period the court is in session.”⁴ This proposed mandatory delay to the entry of court decisions is, in effect, a delay to the administration of justice and would be detrimental to litigants and the public.

In contrast, the current “continuous session” framework set forth in HRS §§ 602-8 and 602-53 allows the appellate courts to issue decisions, including orders and opinions, throughout the year. The current system allows the appellate courts to remain open for business at all times and results in an appellate court system that is more efficient and accessible to the public than the bill’s proposed term court.

2. The Bill would Undermine the Current Priority System for Resolving Appeals as Established by the Hawai‘i Legislature

Under the current “continuous session” system, the pending appeals are addressed by the appellate courts based on the priorities established by the court and the Hawai‘i Legislature. Specifically, the appellate courts give priority to direct appeals in criminal cases where the defendant is in custody,⁵ and other appeals as required by statute including appeals involving child custody matters,⁶ actions to compel disclosure of government records under the Uniform Information Practices Act,⁷ decisions on temporary injunctions in labor disputes,⁸ “contested case appeals of significant statewide importance”,⁹ and numerous other matters as required by

⁴ See HB 1152 at 2:20-21 and 3:10-11

⁵ See e.g., *Chief Justice Mark Recktenwald Addresses Suggestions from the 2013 Bench-Bar Conference*, Haw. B.J., May 2014, at 12, 14 (2014) (discussing appeal priority); Ed Kemper, *Interview of Lisa Ginoza Chief Judge of the Hawaii Intermediate Court of Appeals*, Haw. B.J., September 2019, at 4, 11 (2019) (same).

⁶ See HRS § 571-54.

⁷ See HRS § 92F-15(f).

⁸ See HRS § 380-10.

⁹ See HRS § 91-14(j). Priority secondary agency appeals of significant statewide importance include those that relate to conservation districts (HRS § 183C-9), the Land Use Commission (HRS § 205-19), the Hawai‘i Community Development Authority (HRS § 206E-5.6), the Public Utilities Commission (HRS § 269-15.51), and the Commission on Water Resource Management. HRS § 174C-12.5(b).



law.¹⁰

House Bill No. 1152 would negatively impact the current priority system established by the legislature. First, it creates a super-priority appeal for any appeal where the appellate court has heard oral argument. The bill requires the appellate court to “issue a written decision during the same session in which the oral argument is heard.” Under the bill’s framework, the circumstance will arise where the appellate court would need to delay decision on a current priority appeal to resolve the super-priority appeals established by this bill. Any delay to a current priority appeal would undermine the current public policy established by the legislature for these matters to have actual priority on appeal.

Second, the bill’s proposal to limit when appellate court decisions are entered to June 1st through April 1st does away completely with the priority system between April 2nd through May 31st of each year. To recap, the bill proposes for appellate courts to “issue decisions only during the time period these courts are in session” and further proposes the time period of “June 1 of each year through April 1 of the following year.” Under the current system the appellate courts are able to continuously process cases based on the established priority system. In contrast, under the bill’s proposed framework the priority system is completely paused when the court is out-of-session between April 2nd through May 31st because no decisions could issue. This would impact, for example, the ability of the appellate courts to issue decisions in cases where the custody of children is at issue or where criminal defendants are incarcerated. Even if a decision was ready, this bill would require holding the decision until the appellate court came back into session.

¹⁰ See also HRS § 11-52 (prioritizing appeals from election registration decision); HRS § 37D-10 (prioritizing appeals on the validity of financing agreements between a financial institution and the State of Hawai‘i and its departments and agencies); HRS § 53-6(c) (prioritizing appeals related to the Urban Redevelopment Act); HRS § 101-34 (prioritizing appeals from eminent domain decision involving the issue of public use); HRS § 103D-710(f) (prioritizing appeals related to certain actions under the procurement code, including a governmental entity aggrieved by a determination of the chief procurement officer); HRS § 232-19 (prioritizing appeals from the Tax Appeal Court); HRS § 641-13(7) (prioritizing appeals by the state in criminal cases involving pretrial orders granting motions to suppress evidence, to suppress confessions, or for return of property); HRS § 641-13(8) (prioritizing appeals by the state in criminal cases involving orders denying requests by the state for protective orders under HRPP Rule 16(e) (4) for nondisclosure of witnesses for their personal safety); HRS § 803-46(i)(2)(B) (prioritizing appeals by the state from orders denying applications for orders of authorization or approval for interception of wire, oral, or electronic communication); HRS § 583A-314 (prioritizing appeals from a final family court orders which raise a question of the existence or exercise of jurisdiction under HRS Chapter 583A, the Uniform Child Custody Jurisdiction and Enforcement Act); HRS § 201B-15(e) (prioritizing appeals from circuit court decisions concerning the validity of HRS Chapter 201B or actions of Hawai‘i Tourism Authority); HRS § 206E-20(e) (prioritizing appeals from proceedings concerning the validity of HRS Chapter 206E involving Hawai‘i Community Development Authority).



The Judiciary respectfully opposes this bill because the inability of the appellate courts to act quickly on priority matters would be detrimental to the administration of justice. Under the current “continuous session” established by the legislature the appellate courts are able to administer justice in an efficient manner throughout the year, which includes the ability to issue decisions for priority appeals on an expedited and continuing basis.¹¹

3. The Appellate Courts Must Remain In Continuous Session

The Judiciary also opposes the bill because the administration of justice requires the Hawai‘i Supreme Court and Intermediate Court of Appeals to remain in continuous session.

The Hawai‘i Supreme Court must remain in continuous session to address new and pending matters. Throughout the year, including in the months of April and May, the court will receive requests from parties to grant a writ of certiorari (i.e., to review a decision entered by the ICA) or to transfer appeals from the ICA to the Hawai‘i Supreme Court. These requests are time sensitive and generally must be resolved within 30 days after a response is filed.¹² The bill’s proposal to preclude the court from entering any decisions in the months of April and May would cause significant conflict with existing deadlines set by statutes and rules, and would be detrimental to the administration of justice in these cases.

The Hawai‘i Supreme Court also has exclusive jurisdiction over original jurisdiction matters (e.g., election contests, petitions for extraordinary relief towards a judge or public officer, writs of habeas corpus) that require it to be in continuous session.¹³ These original jurisdiction matters are filed throughout the year and are typically resolved without oral argument. The current “continuous session” allows the court to address these matters on an expedited basis.

As for the Intermediate Court of Appeals, it must remain in continuous session to address the court’s extremely heavy docket and the multitude of time-sensitive matters that come before the court. The ICA decides hundreds of appeals and thousands of motions each year. Motions include emergency motions for injunctive relief or for a stay of a lower court/agency decision. The lower courts and agencies across the state issue decisions daily. The ICA must resolve motions for injunctive relief or for a stay on an expedited basis, because a party is typically claiming that immediate, irreparable harm will otherwise occur (for instance, in a foreclosure case, losing possession of a residence). Numerous motions are also filed

¹¹ See HRS §§ 602-8 and 602-53.

¹² See HRS § 602-59(c); Hawai‘i Rules of Appellate Procedure Rule 40.2(f).

¹³ See HRS § 602-5(a)(3)-(4); HRS § 11-172.



seeking extension or relief from the many deadlines required in an appeal (such as filing the record on appeal, filing briefs, and obtaining transcripts). If the court is precluded from being in session for almost two months, it would preclude the ICA from timely resolving time-sensitive motions and will cause significant disruption to the parties and to the court in processing appeals.

- 4. This Bill's proposal to establish a term court system at the Hawai'i Appellate Courts would create a rigid term system that is very different from the flexible system of the United States Supreme Court.**

While the U.S. Supreme Court is a "term court" for purposes of establishing its oral argument schedule, in practice the Court sits in continuous session and will regularly move cases filed during one term to the next term for disposition. For example, in the month of June 2022, the U.S. Supreme Court entered 33 dispositions and of these 16 were docketed in 2020, and 2 were docketed in 2019.¹⁴ Thus, a majority of the decisions by the court in June 2022 were on appeals and original jurisdiction cases that were filed over 1 year earlier.

In some cases, the U.S. Supreme Court will hold argument in one-term and then hold the case until the next term for re-argument, with the opinion to then follow. Here are some examples:

Brown v. Board of Education of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954). In Brown, the U.S. Supreme Court heard oral argument in the 1952 term on December 9, 1952, and then re-argument was held during the 1953 term (i.e., Oct. 1953 to ~ July 1954) over the course of three days in December 1953.¹⁵ The case was decided towards the end of the 1953 term on May 17, 1954.¹⁶

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). In Citizens United, the U.S. Supreme Court heard argument during the 2008 term (i.e., Oct. 2008 to ~July 2009) on March 24, 2009.¹⁷ After oral argument, towards the end of the 2008 term, the Court directed the parties to file supplemental briefing to address issues identified by the Court, and set the case for re-argument on September 9, 2009 immediately before the Court's 2009 term (i.e., Oct. 2009 to ~ July 2010). Subsequently, the Court's decision was entered on January 21, 2010, during the 2009 term.¹⁸

¹⁴ June 2022 was part of the U.S. Supreme Court Term Year for 2021. *See e.g.*, <https://www.supremecourt.gov/opinions/slipopinion/21> (last checked 1/31/23).

¹⁵ *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 488 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

¹⁶ *See* <https://supreme.justia.com/cases/federal/us/347/483/>.

¹⁷ *See* <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/08-205.htm>.

¹⁸ *See* <https://supreme.justia.com/cases/federal/us/558/310/>.



Jennings v. Rodriguez, 138 S.Ct. 830 (February 27, 2018); Sessions v. Dimaya, 138 S.Ct. 1204 (April 17, 2018). In Jennings and Sessions the U.S. Supreme Court heard oral argument during the 2016 court term (i.e., October 2016 to ~ July 2017). Towards the end of the 2016 court term, the Court set the case for re-argument in the 2017 court term (i.e., October 2017 to ~ July 2018). Subsequently, the Court’s decisions were entered in the 2017 term.¹⁹

Thus, in Brown, Citizens United, Jennings, Sessions and possibly a hundred or more cases, the U.S. Supreme Court did not enter its decisions “in the same session in which the oral argument was heard” as is proposed by House Bill 1152.

Conclusion

The Judiciary’s mission is to administer justice in an efficient and accessible manner. The proposed bill, as written, would undermine this core mission by eliminating the ability of the appellate courts to issue decisions in the months of April and May.

While the Judiciary appreciates the intent of the bill to improve “caseflow management”,²⁰ the unintended consequences of the measure would be the exact opposite, and would limit the time period the appellate courts are able to act. Recently the Hawai‘i Legislature created a new associate judge position at the Intermediate Court of Appeals. 2022 Haw. Sess. Laws Act 90. This new position will allow the Intermediate Court of Appeals to reduce its backlog of cases. The Judiciary looks forward to collaborating with the Hawai‘i Legislature to continue to improve the efficiency of the appellate court system.

Respectfully, the Judiciary strongly opposes this bill. Thank you for the opportunity to testify.

¹⁹ See https://www.supremecourt.gov/opinions/17pdf/15-1498_1b8e.pdf (Opinion); See https://www.supremecourt.gov/opinions/17pdf/15-1204_f29g.pdf (Opinion).

²⁰ See HB No. 1152 at 1:17 (citing “[e]ffective caseflow management”).

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee on
Judiciary & Hawaiian Affairs

February 28, 2023

H.B. No. 1152: RELATING TO THE JUDICIARY

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. No. 1152.

This measure amends the period in which the Hawai‘i Supreme Court and the Intermediate Court of Appeals (“ICA”) are in session from June 1 of each year through April 1 of the following year and will require the Hawai‘i Supreme Court and the ICA to issue decisions only during the time period these courts are in session. The measure also requires a written decision to be issued during the same session in which the oral argument is heard.

Currently, the appellate courts are in continuous session. This allows the appellate courts to issue decisions, rule on motions, and hold arguments year round. Reducing the session from twelve months to ten months will effectively shut down the appellate courts for two months.

Precluding the appellate courts from issuing decisions during the months of April and May will conflict with appellate deadlines set by existing laws. For example, pursuant to HRS § 602-59(c),¹ the Supreme Court must rule on an application for writ of certiorari within thirty days after a response is filed or could have been filed. Therefore, if the thirtieth day falls in April or May, the Supreme Court will be

¹ HRS § 602-59(c) provides in pertinent part:

An application for a writ of certiorari may be filed with the supreme court no later than thirty days after the filing of the judgment or dismissal order of the intermediate appellate court. . . . ***The supreme court shall determine to accept the application within thirty days after a response is or could have been filed. The failure of the supreme court to accept within thirty days shall constitute a rejection of the application.***

precluded from ruling on the application. And according to HRS § 602-59(c), the application is deemed rejected.

Another unintended consequence of this measure is that aggrieved parties in the lower courts will be precluded from filing urgent matters via writ of mandamus or writ of prohibition with the Hawai'i Supreme Court during the month of April and May. Essentially the parties filing these extraordinary petitions will be denied the immediate relief they are seeking. They must wait until June 1 to file their petitions.

Furthermore, requiring that a written decision is to be issued during the same session in which an oral argument is heard will not reduce the backlog of appellate cases. On the contrary, the backlog will increase. Oral arguments will likely be held only in the beginning of each session to allow the appellate courts the necessary time to research, discuss, and prepare an opinion. The appellate courts cannot afford to hear oral arguments throughout the year. Rather than schedule oral arguments later in the session, the appellate courts will need to delay oral arguments to the following session, thus causing an unnecessary delay of the resolution of cases.

Finally, this measure may violate the Hawai'i Constitution, which empowers the Supreme Court, not the Legislature, to manage the session schedules of the appellate courts and dictate when the appellate courts must issue their decisions. Article VI, section 7 of the provides,

The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.

Therefore, H.B. No 1152 would likely be unconstitutional, as it seeks to divest the Hawai'i Supreme Court of its constitutionally endowed superintendence over process, practice, procedure and appeals in the ICA and Supreme Court.

Thank you for the opportunity to testify on H.B. No. 1152.

Appellate Section Hawaii State Bar Association

Hearing on H.B. No. 1152, Relating to the Judiciary
February 28, 2023, at 2:00 p.m.

House Committee on Judiciary and Hawaiian Affairs
Honorable David A. Tarnas, Chair
Honorable Gregg Takayama, 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 **opposition** to H.B. 1152. Members of the section are appellate practitioners, and we have a keen interest in the proper functioning of the State appellate courts.

H.B. 1152 would: (1) amend the period in which the Hawai'i Supreme Court and the Intermediate Court of Appeals are in session to June 1 of each year through April 1 of the following year; (2) require that these two Courts only issue opinions during that time period; and (3) require both Courts to issue a written decision during the same session in which the oral argument is held. Currently, under existing law, both the Hawai'i Supreme Court and the Intermediate Court of Appeals (ICA) are in session continuously. HRS §§ 602-8, 602-53.

H.B. 1152 should be held or deferred indefinitely because, if enacted, it will exacerbate rather than improve the backlog of appellate cases awaiting decision at both Courts. The bill's goal of improving the pace of appellate decision-making is an understandable and laudable objective. Pragmatically speaking, however, neither Court possesses the resources to be able to conduct its work in only 10 months out of 12. This means that, if this measure is enacted, existing delays would be worsened rather than improved. The impact would be most strongly felt where the appellate backlog currently poses the greatest challenge (the ICA). Furthermore, there are urgent matters that may (and do) arise at any time of year, in particular petitions for writ of mandamus or prohibition (at the Hawai'i Supreme Court) or motions for stay pending appeal (typically at the Intermediate Court of Appeals). These matters could not be delayed for months without potentially prejudicing many appellate litigants in a wide variety of cases.

Thank you for the opportunity to testify in **strong opposition** of H.B. 1152.

On behalf of the Appellate Section Board:
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.

HB-1152

Submitted on: 2/24/2023 4:25:34 PM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

They get payed BY the people of Hawaii therefore We the people say they should work ALL YEAR and not for just a few months!!!