

STAND. COM. REP. NO.

8

Honolulu, Hawaii

AUG 05 2010

RE: GOV. MSG. NO. 4

Honorable Colleen Hanabusa
President of the Senate
Twenty-Fifth State Legislature
First Special Session of 2010
State of Hawaii

Madam:

Your Committee on Judiciary and Government Operations, to which was referred Governor's Message No. 4, submitting for study and consideration the appointment of:

CHIEF JUSTICE, SUPREME COURT, STATE OF HAWAII

G.M. No. 4 KATHERINE G. LEONARD,
for a term to expire in ten years,

begs leave to report as follows:

Testimony in support of the appointee was submitted by the State Attorney General; the State Public Defender; the Chief Executive Officer of the Office of Hawaiian Affairs; the Honolulu Prosecuting Attorney; Hawaii Women Lawyers; First Circuit Court Judge (retired) Eden Elizabeth Hifo; First Circuit Court Judge (retired) Colleen Hirai; First Circuit Court Judge (retired) Karen N. Blondin; the Chair of Hawaiian Homelands Assembly; First Circuit Court Judge (retired) Patrick K.S.L. Yim; six past presidents of the Hawaii State Bar Association; and ninety-three individuals. Testimony in opposition to the appointment of Judge Leonard was submitted by First Circuit Court Judge (retired) Marie Milks and five individuals. Comments were submitted by the Board of Directors of the Hawaii State Bar Association, as described further below, and ten individuals.

Written testimony presented to your Committee may be reviewed on the Legislature's website.

Judge Leonard received her Bachelor of Science degree from the University of Wisconsin-Parkside and received her Juris Doctor



degree from the University of Hawaii at Manoa, William S. Richardson School of Law. As a law student, Judge Leonard published one scholarly article in the University of Hawaii Law Review, for which she also served as Editor in Chief. Judge Leonard began her legal career as a law clerk, first in the First Circuit Court and then in the Hawaii Supreme Court with Associate Justice Robert G. Klein. She was hired by the law firm of Carlsmith Ball Wichman Murray Case Mukai & Ichiki and became a partner there in 1997 where she concentrated her practice in civil litigation issues. Judge Leonard was appointed to the Intermediate Court of Appeals in 2008 and has served on that body as an Associate Judge from that time through the present.

Judge Leonard was a founding member of the American Judicature Society's Hawaii chapter and served as a leader of several of its committees. She was the Chair of the Hawaii Access to Justice Commission's Hawaii Rules of Professional Conduct Rule 6.1 Task Force. In 2003, Judge Leonard was the Vice President of the Bankruptcy Section of the Hawaii State Bar Association. Additionally, Judge Leonard taught Environmental Law as an Adjunct Professor at the William S. Richardson School of Law. She is also active in scouting, serves as an American Youth Soccer Association coach, and has volunteered with the Honolulu Orchid Society.

Your Committee notes that the Hawaii State Bar Association (HSBA) Board of Directors (Board) found the appointee to be "not qualified" for the position of Chief Justice of the Hawaii Supreme Court, based upon a modified version of the American Bar Association Guidelines for Reviewing Qualifications of Candidates for State Judicial Office. These Guidelines include the following criteria: integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, financial responsibility, and public service, collegiality, and writing ability. The HSBA Board rating system includes the categories of "qualified" and "not qualified."

The process for the HSBA Board's rendering of its finding is as follows. As described to your Committee by the President of the HSBA Board, this finding is arrived at through a vote of the HSBA Board, which is composed of twenty elected members of the HSBA, after solicitation of all members of the HSBA through a confidential process for sharing their input and past experience with the appointee and review of the resulting comments by the members of the HSBA Board. Following submittal and review of these comments, the appointee is interviewed by the HSBA Board and



apprised of the nature of any negative comments so that the appointee may fairly address those concerns during his or her interview with the HSBA Board.

The President of the HSBA Board also explained that the criteria for the finding described above has always been applied with a specific view toward the vacancy being filled. Furthermore, information such as the final vote tally and the basis upon which each member voted is confidential and not subject to disclosure to your Committee or to the public.

It is uncommon that your Committee is faced with evaluating a judicial appointee who has been found to be "not qualified" by the HSBA Board for the position to which the appointee has been appointed. As noted above, findings by the HSBA Board regarding an appointee take into consideration comments from members of the HSBA, who presumably are knowledgeable about the appointee's qualifications.

While your Committee is concerned over the HSBA Board's "not qualified" finding, due to the HSBA Board's inability to inform your Committee as to the reason for its "not qualified" finding, your Committee concludes that while it must be considered, the HSBA Board's finding is not dispositive on Judge Leonard's appointment. Nonetheless, the "not qualified" finding of the HSBA Board remains a concern for your Committee.

Your Committee would like to emphasize three criteria, raised in testimony as areas of potential bias, that it did not consider when evaluating whether the Judge Leonard is qualified for the office of the Chief Justice of the Hawaii Supreme Court:

- (1) Judge Leonard's gender. Notwithstanding Senate Resolution No. 26 (2010), Judge Leonard's gender is entirely irrelevant to your Committee's prima facie determination of whether she is qualified for the office of the Chief Justice of the Hawaii Supreme Court. While your Committee certainly appreciates the historic nature of the appointment and, if Judge Leonard is confirmed, her status as the first female Chief Justice of the Hawaii Supreme Court, gender is not germane to the qualification issue.

Nor did your Committee, contrary to suggestions in submitted testimony, require additional proficiency or



qualifications from Judge Leonard simply because she is a woman or hold her to a different "temperament" standard than would be applied to a male candidate. Heightened scrutiny of a qualified candidate based on gender is foolish and deprives all of us of necessary expertise for no good reason. Your Committee would definitely prefer, all other things being equal, that the Judiciary (including the position of Chief Justice) reflect the diversity of our State, including an appropriate gender balance; but the initial consideration of a candidate's qualifications must be gender-blind and ascertained upon the merits;

- (2) Judge Leonard's political philosophy. Your Committee is unacquainted with Judge Leonard's political philosophy. Nor was her political philosophy identified in testimony, although one testifier indicated that he had known Judge Leonard for years and still did not know if she was a Democrat or a Republican. Your Committee understands that the appointing authority, Governor Lingle, is, in fact, a Republican; and
- (3) Judge Leonard's law school. While your Committee acknowledges that, if Judge Leonard is confirmed, she will be the first graduate of the William S. Richardson School of Law to hold the position of Chief Justice, this factor, too, is entirely irrelevant to your Committee's prima facie determination of whether she is qualified for the office of the Chief Justice of the Hawaii Supreme Court. Your Committee notes that two of its members are graduates of the same law school.

The Hawaii State Constitution, article VI, section 6, establishes the Chief Justice of the Hawaii Supreme Court as the "administrative head of the courts. . . ." Your Committee is mindful that, through the appointment and confirmation process, the Executive Branch and the Legislative Branch are, together, choosing the head of the Judicial Branch of our State. The choice is an important one. Your Committee believes that it is when all three branches of government are strong and capable that our state government is able to perform at its peak and serve its people well.

The role of the Chief Justice is not only enshrined in our constitution, but also in our statutes. Hawaii Revised Statutes



(HRS) section 601-2(a) states that "[t]he chief justice shall be the administrative head of the judiciary. . . . The chief justice shall direct the administration of the judiciary, with responsibility for the efficient operation of all of the courts and for the expeditious dispatch of all judicial business." The Chief Justice is therefore responsible for the administration of the Judiciary's 1,917 employees and an annual budget of \$141,747.129. The Chief Justice also serves as the primary representative of the Judiciary and the State in the community and nationally.

Your Committee does not believe that it is necessarily only administrative experience that makes for a good Chief Justice. Rather, it is leadership. Leadership may come in the form of prior administrative experience, but it may also come with significant time spent serving in the Judiciary as a judge or justice, or from holding a prominent position in the community. Clearly, keen intelligence and facility with a judicial opinion are only part of the skill set that must be displayed by the Chief Justice. The ability to lead and administer are equally important roles of the Chief Justice.

It should be noted that previous Chief Justices have either served on the bench for a significant time, had administrative experience, or had recognized leadership experience. For example, Chief Justice Ronald T.Y. Moon was a partner in a law firm for fourteen years prior to being appointed as a circuit court judge in 1982. Eight years later in 1990, he was elevated to the position of Associate Justice of the Hawaii State Supreme Court. Three years later, Chief Justice Moon was once again elevated to become Chief Justice.

Chief Justice William S. Richardson was lieutenant governor under Governor John A. Burns. Previous to that tenure, he was in the Army Air Corps and led an infantry platoon into combat. From 1956 to 1962, he was chairman of the Hawaii Democratic Party during its formative years. His leadership qualities are unquestioned.

Chief Justice Herman T.F. Lum had both significant administrative and judicial experience. He was the chief attorney for the Territorial House of Representatives, followed by a tenure as the chief clerk of the House, during which time, he also engaged in private practice. He then served as the United States Attorney for Hawaii between 1961 and 1967. For seven years





thereafter, he was a circuit court judge, and was then appointed as an Associate Justice of the Hawaii Supreme Court, a position he held for two years prior to his elevation as the Chief Justice.

It is within this context that your Committee reviewed the testimony submitted regarding the appointment of Judge Leonard, including her own testimony, to your Committee and evaluated her qualifications for the position of Chief Justice of the Hawaii Supreme Court.

Testimony in support of Judge Leonard's appointment indicates that she is a skilled and highly competent attorney and jurist. She is described as being highly intelligent and knowledgeable, with sound judgment and integrity. In her two years as an ICA judge, Judge Leonard's opinions have been characterized as articulate, well-reasoned, and respectful of legal precedents. She is a hard worker and characterizes herself (as do others) as a "moderate."

Testimony attempting to address Judge Leonard's qualifications as an administrator or leader refer primarily to her civil litigation background. In particular, Judge Leonard worked on the termination of the Campbell Estate as the primary drafter of the termination plan. This endeavor involved transitioning a \$2.5 billion ongoing enterprise from a trust structure to a corporate structure. The termination plan was, by all accounts, complex in structure and implementation.

Testifiers also discussed Judge Leonard's participation in the management of the Carlsmith law firm. Those activities included serving as co-chair of the Litigation Department and as a member of the firm's Compensation Committee and Hiring Committee.

Testimony also highlighted Judge Leonard's participation in and leadership of several committees of the American Judicature Society. Moreover, she has also been involved with the Hawaii Access to Justice Commission as described above.

Judge Leonard also submitted a statement to your Committee regarding her participation in some review of potential funding adjustments in the various circuit courts and Judiciary administration. Judge Leonard also reviewed certain budget reports and bills submitted to the Legislature. She also participated directly in the consideration of operating expenses, personnel, and positions at the courts of appeal.



On the other hand, your Committee received comments from individuals with concerns regarding the appointment. Several testifiers raised concerns about the lack of proven administrative or leadership abilities. These testifiers highlighted the qualities of leadership and then questioned whether those qualities were present in Judge Leonard, and, if not, whether it was wise to take a chance on an unproven entity for the important position of Chief Justice, who is, as explained above, the head of one of the three co-equal branches of our state government. The qualities these comments mentioned include being able to inspire and motivate others for the common good of all and to instill confidence in those who are unwilling to take risks. Upon review of all the information presented to it, your Committee remains concerned over Judge Leonard's ability to serve as the administrative head of the Judiciary. This concern is very problematic.

On balance, your Committee does not believe that there is sufficient evidence to reflect the administrative or leadership qualities that are necessary to head one of the three co-equal branches of state government. Your Committee acknowledges that it is a tall order to expect someone who has clearly excelled in the area of legal skill to also possess the administrative or leadership qualities that your Committee is looking for, but, as noted by one testifier who submitted comments regarding Judge Leonard's appointment, Judge Leonard "comes with none of these credentials of a proven leader. She may have the potential for leadership, but the traits have yet to be demonstrated. Some proof is required before [your Committee] gives consent to such an important appointment." Your Committee agrees with the concern raised by this testimony.

Your Committee is cognizant of the Senate's responsibility to ensure that the Judiciary is helmed by the best possible candidate. To do otherwise, particularly in these difficult economic times, is unacceptable and an abdication of the Senate's responsibility. There is no probationary period for this job.

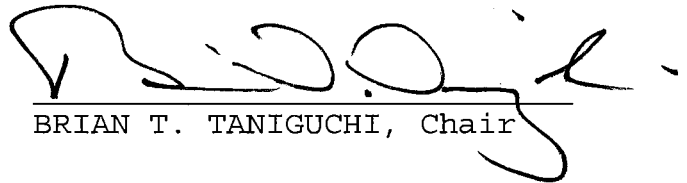
Accordingly, based on submitted testimony and the statement provided by the appointee, your Committee finds that while Judge Leonard appears to be a capable Associate Judge with the ICA, for purposes of the position of Chief Justice of the Hawaii Supreme Court, your Committee believes that Judge Leonard is not qualified



to administer the Judiciary, one of the three co-equal branches of the state government.

As affirmed by the record of votes of the members of your Committee on Judiciary and Government Operations that is attached to this report, your Committee, after full consideration of the background, experience, and qualifications of the appointee, recommends that the Senate not consent to the appointment.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Government Operations,

A handwritten signature in black ink, appearing to read 'B. Taniguchi', written over a horizontal line.

BRIAN T. TANIGUCHI, Chair



