


**Report To:** The Board of Directors of the Hawai'i Chapter of the American Judicature Society

**From:** The Special Committee on Judicial Independence and Accountability 

**Date:** March 25, 2008

**Subject:** Judicial Independence and Accountability in Hawai'i

I. BACKGROUND ON THIS COMMITTEE AND ITS REPORT

A. The Committee's Charge

The Hawai'i Board of the American Judicature Society formed this Special Committee on Judicial Independence and Accountability (the "Committee") to consider the following:<sup>1</sup>

The American Judicature Society ("AJS") has always been in the forefront in promoting judicial independence. Judges must have the ability to make decisions free of corrupt influence, bias, prejudice, politics, campaign financing, and coercion, and they should be able to decide on the basis of the facts and the law at hand without legislative or executive interference. Judges have awesome powers — over individuals, companies, associations, whether or not someone goes to jail, whether someone loses his or her business, whether someone loses custody — powers which impact significantly our daily lives. Their decisions must have credibility in order to receive the continuing support of the public.

The judicial system requires judges to decide controversial issues, whether or not such decisions are popular. This sometimes results in vicious criticisms of the Judiciary, and in harassment, threats, and even attacks on judges and their families. Losing parties and lawyers often fault the judge, rather than themselves or their positions. Such activities undermine the public's perception of the Judiciary and, potentially, the judges' ability to fairly and impartially render decisions.

Hawai'i's systems providing for accountability of judges are not well understood by the public and even lawyers. Judges in Hawai'i are held accountable by constitutional and statutory limits on judicial powers, the appeals process, the Judicial Conduct Code, the Commission on Judicial Conduct ("CJC"), the Judicial Selection Commission's ("JSC's") judicial retention process, and the Judiciary's performance evaluations.

With such mechanisms in place, this Committee was asked to consider why is there such concern about the performance of our Judiciary? An understanding of why

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<sup>1</sup> The AJS Hawai'i Board's statement of the purpose of this Committee is attached hereto as Appendix 1.

such dissatisfaction occurs and continuing vigilance to protect judicial independence may be needed. The AJS Hawai'i Board's charge to the Committee was broad, potentially encompassing issues of national interest, as well as local issues. Bearing in mind the broader issues, the Committee decided to limit its review to issues of judicial independence and accountability here in Hawai'i. The Committee wrestled with how to make a meaningful contribution to the discourse on these critical and timely matters.

While recognizing the interrelation between the two, the Committee first separately considered the current state of judicial independence and judicial accountability here in Hawai'i. Part II of this Report sets forth the Committee's findings and recommendation on the topic of judicial independence. Part III addresses the Committee's review and thoughts on Hawai'i's systems for judicial accountability. Part IV briefly summarizes the Committee's observations and recommendations.

#### B. The Committee

The Honorable Sabrina S. McKenna and Donna A. Tanoue, Esq., Bank of Hawai'i Vice Chairman, acted as the Committee's Co-Chairs, with Katherine G. Leonard, Esq., serving as the Committee's Reporter. The Committee included both appellate and trial court level judges, present and former members of the JSC, concerned members of the public and active members of the Hawai'i bar. As with other committees formed by the AJS Hawai'i Board, the Committee's composition was roughly one-third judges, one-third practicing lawyers, and one-third members of the public.<sup>2</sup>

#### C. The Committee's Review Process

The Committee members circulated and reviewed a variety of materials during their consideration of the issues, as well as discussed additional materials considered by individual Committee members. The Committee met more than a dozen times. Several meetings involved frank discussions with resource persons including: (1) Chief Justice Ronald T.Y. Moon; (2) Leslie H. Kondo, Esq., Director of the Office of Information Practices ("OIP"); (3) Professor Randall W. Roth, Esq., co-author of the Broken Trust essay and book; (4) Gerald Y. Sekiya, Esq. the Chair of the CJC; (5) Walter H. Ikeda, Esq., the Chairman of the Judiciary Committee of the 1978 Constitution Convention; and (6) Ken Kobayashi, reporter for the Honolulu Advertiser; and (7) Stirling Morita of the Hawai'i Society of Professional Journalists.

The Committee acknowledges and appreciates the prior assessments and analyses of judicial independence in Hawai'i and the resources provide to Hawai'i by the national AJS organization. Among a variety of other resources, the Committee considered and discussed: (1) the League of Women Voters' July 2003 report entitled "Judicial Independence in Hawai'i"; (2) the July 2003 study conducted by Ward

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<sup>2</sup> A list of the Committee members is attached hereto as Appendix 2.

Research, for the Judiciary, entitled "Openness in the Courts: A Final Report of Responses of Focus Groups from Members of the Bench, Bar, Media and General Public"; (3) the January 2000 Report of the Special Committee on Judicial Evaluations, appointed by the AJS Hawai'i Chapter; (4) the November 2005 Report of the Special Committee on the Judicial Selection System, appointed by the AJS Hawai'i Chapter; (5) the written thoughts and outline of comments prepared by Professor Randy Roth in conjunction with his meeting with the Committee; (6) Chief Justice Moon's December 2004 Remarks and other materials from the November 2004 Judicial Independence Conference sponsored by the League of Women Voters; (7) the Hawai'i Constitution, various statutes, rules, cases, legal research materials, and information available on the Judiciary's website; and (8) numerous news articles and other local and national publications related to attacks on judicial independence, the preservation and fostering of judicial independence and issues of judicial accountability.

To the fullest extent possible, the conclusions and recommendations in this report represent the consensus view of the Committee. As with any group including diverse backgrounds, viewpoints and interests, consensus was not always achievable and therefore, in some instances, the majority view is reported.

## II. JUDICIAL INDEPENDENCE

### A. Do We Have an Independent Judiciary in Hawai'i?

"Judicial independence" is not easily defined. At its root, the concept of judicial independence embodies the notion that judges should make decisions based only on the rule of law, principles of equity, and the facts of the cases before them, free from undue influences. The administration of justice free from external pressure from the executive or legislative branches of government, public opinion or special interests, or individual bias, interest or prejudice, *i.e.* judicial independence, is fundamental to our system of government. Judicial independence is intended to protect the principles of due process and equal protection under the law, and to ensure fair treatment for every citizen who comes before the courts, regardless of means, position in society, or popularity.

Committee members generally agreed that Hawai'i has a strongly independent judiciary. Hawai'i's merit selection process for appointment and retention of judges was thought to provide a solid foundation for judicial independence in Hawai'i. Based on the views and experiences of the Committee members, the Committee finds that judges in Hawai'i are able to execute their duties without interference, retribution or retaliation from external forces. That said, the Committee identified a variety of potential threats to judicial independence in Hawai'i.

## B. Threats to Judicial Independence in Hawai'i.

The Committee submits that, left unchecked, the following issues could undermine judicial independence in Hawai'i:

- Possible legislative initiatives, including initiatives to provide for election of judges; unwarranted criticism of the judicial branch by legislators or the executive branch of government, especially when the Judiciary performs its duty to restrain excesses by the other branches;
- Lack of adequate funding for the judicial branch, leading to shabby courthouses (e.g. Kona) and lack of maintenance (leaky ceilings at First Circuit Court building, District Court building). There is a perception that the Judiciary in Hawai'i has to "beg" for money;
- Lack of public confidence in judicial accountability procedures;
- Lack of public confidence in Hawai'i's merit selection process; the Committee debated whether there is too much confidentiality/secretcy in the judicial selection process and whether opening up some aspects of the process to further public access would invigorate public confidence in the process;
- Lack of public understanding of the flaws and weaknesses in the alternatives to the merit selection process, *i.e.* elections for selection and/or retention of judges;
- Lack of public understanding regarding the constitutional duty of the Judiciary to decide based on existing law and to provide constitutional and/or statutory "checks and balances" to actions of the other branches, sometimes including actions enjoying strong public support;
- Lack of transparency in certain administrative actions within the Judiciary, such as: (a) the process for the replacement of recused appellate judges by lower court judges; and (b) the reassignment of trial level judges;<sup>3</sup> and

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<sup>3</sup> This issue is multi-faceted and may be an appropriate topic for a future committee discussion. On the one hand, there are administrative advantages to maximizing flexibility in assignments and reassignments and the current practices allow confidential and discreet reassignments when circumstances suggest that a judge is a poor fit for a particular calendar. On the other hand, the lack of guidelines or explanation can lead to speculation or the appearance of improper motivation for an assignment or reassignment. It can also make it difficult to recruit or retain judges because potential candidates and judges seek a degree of stability in their professional lives and may have concerns about potentially arbitrary or undesirable reassignments.

- Criticism of and attacks on the Judiciary and/or particular judicial decisions, actions, policies, and practices, whether arguably warranted or patently unwarranted.

Notwithstanding the Committee's concern that these issues might erode judicial independence, the Committee felt that virtually all of these matters were legitimate and healthy subjects of examination and debate. Perhaps paradoxically, public scrutiny and periodic re-examination of these issues also increases the public's understanding of and confidence in Hawai'i's Judiciary, thereby fostering judicial independence.

#### C. Current Safeguards for Judicial Independence in Hawai'i

The Committee found that the most important and effective protection for judicial independence in Hawai'i is the merit selection and retention processes applicable to judges in Hawai'i. Recognizing that these systems may be strengthened or weakened by the integrity and caliber of the individuals participating in them, the Committee felt that the balance of political influences, the mix of legal professionals and lay people, and the inherent procedural protections provide the best available means to ensure judicial independence. The good character, high quality, and strong resolve of Hawai'i's judges is equally critical to the maintenance of judicial independence. From the formation of our judicial branch of government, the Judiciary has been subjected to attacks and criticisms, some justified and some not. Judges simply have to make tough decisions, to the best of their ability, without regard to possible fallout. Finally, there are some external supports for the protection of the independence of Hawai'i's Judiciary, such as the federal bar's "fire brigade"<sup>4</sup> and HSBA's task force, which were formed to respond to public criticisms of the Judiciary. The continued vigilance of these groups, as well as individual lawyers, organizations such as AJS and the League of Women Voters, educators, members of the press, and the public, can help ensure that judicial independence is not compromised by offering balanced reports, explanations, and responses when judges are subjected to unfair attacks.

#### D. Recommendations on Judicial Independence

Based on the foregoing observations, the Committee finds that the most important and effective protection for judicial independence in Hawai'i is the existing merit selection and retention processes applicable to judges in Hawai'i. The widespread lack of public understanding and knowledge of the importance of judicial independence is, however, a perennial problem that should be attacked on many fronts, including

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<sup>4</sup> The "fire brigade" refers to a group of about twelve lawyers that gets together to respond to criticisms of federal judges. The group includes attorneys from varying practice areas, including plaintiffs' lawyers, defense lawyers, and business lawyers. In the last five years, members of the group have submitted about three editorial opinion pieces or letters to the editors of the local newspapers.

enhanced efforts by the Bar and the Judiciary to foster civic education in Hawai'i's schools. The Judiciary's current efforts through the Judiciary History Center offer both a successful model for educational programs and a possible springboard for outreach. Individual members of the Bar should consider volunteering for educational efforts and actively participating in activities that promote judicial independence. The Committee recommends that the Hawai'i Chapter of AJS reconstitute a special committee on judicial independence at least every four years, continue to monitor current affairs tending to impact judicial independence, and periodically initiate forums or other means of public discourse on issues related to judicial independence.

### III. Judicial Accountability

#### A. Current Procedures for Ensuring Judicial Accountability in Hawai'i

##### 1. Commission on Judicial Conduct

An analysis of judicial accountability in Hawai'i begins with Article VI, Section 5, of the Hawai'i Constitution, which provides for the retirement, removal, and discipline of judges:

The supreme court shall have the power to reprimand, discipline, suspend with or without salary, retire or remove from office any justice or judge for misconduct or disability, as provided by rules adopted by the supreme court.

The supreme court shall create a commission on judicial discipline which shall have authority to investigate and conduct hearings concerning allegations of misconduct or disability and to make recommendations to the supreme court concerning reprimand, discipline, suspension, retirement or removal of any justice or judge.

The ultimate method of accountability for failure to properly discharge the duties of judicial office stems from this provision. The CJC was established on June 1, 1979, by the Supreme Court of Hawai'i, to investigate allegations of judicial misconduct and disability, and has jurisdiction over all justices and judges of the State of Hawai'i. Rule 8 of the Hawai'i Supreme Court Rules governs the organization, jurisdiction, powers and procedures of the CJC.

Judicial misconduct is any violation of the Hawai'i Revised Code of Judicial Conduct. Disability involves the physical or mental inability to perform judicial duties and functions. Complaints about state judges should be sent in writing to the CJC and include case numbers and the names of corroborating witnesses when available, as well as supportive material such as transcripts, copies of motions, etc.

The CJC consists of four lay members and three attorneys, one of whom serves as chair. The Supreme Court appoints commission members for staggered three-year terms. There is no term limit for CJC members and the current CJC members have all been serving for more than one term, currently ranging from four years to over fourteen years of service.

During its review, the Committee gained an appreciation of the enormity of the charge and the responsibilities of the CJC. The CJC members are all volunteers, who are aided only by an administrative assistant and a Deputy Attorney General, whose duties are not well defined and who carries various other responsibilities within the Department of the Attorney General. The CJC executes at least three different functions: (1) receiving and reviewing complaints against judges, including complaints initiated by judges, lawyers, court personnel, members of the public, and upon the CJC's own initiative;<sup>5</sup> (2) an adjudicatory function, leading to findings, conclusions and recommendations to the Supreme Court; and (3) an advisory function, whereby judges may request (or the CJC can initiate) advisory opinions, either through formal or informal written opinions or through discussions with judges.

The Committee also appreciates the generous commitment of time from each of the CJC members. While recognizing the benefits of the continuity of the service of the CJC members, the Committee is concerned about the lack of turn-over of CJC membership. The repeated reappointment of CJC members by the Hawai'i Supreme Court raises potential for the appearance of an unhealthy closeness between the CJC and the Judiciary.

The Committee is sensitive to the lack of resources available to the CJC, which functions on a budget of approximately \$60,000 per year (most of which goes to pay the administrative assistant). The impact of this lack of resources includes no avenue for training and getting new CJC members up to speed, past occurrences of lengthy delays between the initiation of complaints and their resolution, and little opportunity for the CJC to undertake activities beyond its most basic charge. While the dedication and professionalism of the CJC members is noteworthy, the Committee notes that the CJC has not requested additional resources, such as a permanent staff attorney or full-time director, other support staff, or other resources. The Committee is concerned that the repeated reappointment of CJC members is inconsistent with the spirit of a three-year term of office. The Committee finds that there is a lack of transparency in the activities of the CJC, which leads to an appearance of underperformance of its charge and a lack of public confidence in its execution of its purpose.

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<sup>5</sup> Questions were raised to the Committee about whether the CJC has taken sufficient initiative in reviewing matters that are not necessarily the subject of a formal complaint. However, the Committee is reluctant to urge the mandate of a more inquisitorial charge to the CJC in situations where not a single judge, lawyer, court employee, or member of the public has informally or formally complained to the CJC. Such "active" scrutiny of judicial actions by the CJC could itself be a threat to judicial independence.

The Committee concludes that steps should be taken to improve the execution of the duties of the CJC. Specific consideration should be given to: (1) adoption of term limits, staggered to mitigate the impact of the loss of the valuable institutional knowledge and experience of the current CJC members; (2) the hiring of a permanent, dedicated, staff attorney and/or executive director, similar to the position currently held by Dan Mollway with the State Ethics Commission; (3) a review of the process for appointing CJC members, with consideration of the pros and cons of appointment of some members by governmental bodies or other institutions outside of the Judiciary; (4) a review of the level of reporting on the activities of the CJC, with a focus on ways that more meaningful information might be made available to complainants and the general public; and (5) the regular publication of information about the CJC, on its internet Judiciary website page (and perhaps elsewhere), including access to its formal opinions (subject to redaction to protect confidential information) and other information and reports that might aid in the public's understanding of the CJC's execution of its responsibilities.

## 2. Judicial Performance Review Committee (the Rule 19 Committee)

The Judicial Performance Program was established in September 1993 by Chief Justice Ronald T.Y. Moon to promote judicial competence and excellence among Hawai'i state judges. The goals of the program are to:

- Improve each individual judge's performance;
- Increase the efficiency of judicial management within the Judiciary;
- Provide the JSC with a potential source of information for retention and promotion decisions;
- Improve the design and content of judicial education programs; and
- Promote public trust and confidence in the courts.

The Judicial Performance Review Committee, the Judiciary, and the Hawai'i State Bar Association have developed this process to evaluate and provide feedback to judges. All eligible full-time and a limited number of per diem judges are evaluated by attorneys who have appeared before the judge on substantive matters. The attorneys are asked to respond confidentially to a series of questions applying scores that range from one for Poor to five for Excellent, and to provide any helpful written comments. There is no limit to the number of times a judge can and will be evaluated.

The process takes twelve months and begins with a three-week evaluation period. The sample size of this evaluation varies, but does not exceed 150 questionnaires per judge. The data is then collected and analyzed by the Judicial Performance Committee, the committee responsible for the Judicial Evaluation Program. All results are given to the Chief Justice and the Judicial Evaluation Review Panel (beginning in 2001) to be discussed with the individual judges.



The Committee was informed that only about one-third of the questionnaires are completed and returned. To some extent, this reflects the lack of technological means within the Judiciary to readily identify the practitioners who have appeared before a particular judge within a particular period of time. Notwithstanding the limited number of responses, the Committee was also informed that the results of the questionnaire responses have been very similar to and consistent with the results of the HSBA surveys (discussed below), which tends to support the validity of the Judiciary's evaluation process as a tool for improving judicial performance.

### 3. HSBA's Process for Seeking Input on Judicial Retentions

Separate from the periodic reviews by the Rule 19 Committee, the HSBA solicits input from its members on the retention of judges. Pursuant to HSBA's written policy and procedures intended to ensure the confidentiality of bar members who submit comments, the HSBA conducts an annual judicial evaluation. The HSBA solicits comments for all state judges who will be seeking retention in the following year, as well as all judges who are mid-way through their term. Only lawyers who attest to having "personal knowledge" are allowed to respond. The tabulated results for each judge are shared with that judge and with the Chief Justice. In addition, a chart tabulating (anonymously) the collective results for all judges evaluated that year is prepared and shared with each judge and the Chief Justice. When a judge is under retention review, this information is also shared with the JSC.

### 4. The Judicial Evaluation Review Panel

The role of the Judicial Evaluation Review Panel is to assist the Chief Justice in talking to judges about the evaluations -- this panel does not evaluate judges. The panel consists of former judges, members of the public knowledgeable in the law, and retired practitioners. The panel is separated into three groups, each consisting of one former judge, one non-practicing attorney, and one member of the public. The three groups are responsible for working with judges from the Circuit, Family, and District Courts, meeting with recently evaluated judges to discuss the judges' performance, and providing guidance and counsel to the judges.

Although judges' individual evaluation results are confidential, the Chief Justice Moon makes public a summary of the evaluation results. Copies of the reports are available on the internet and from the Judiciary.

### 5. The Judicial Selection Commission

In addition to addressing the constitutional qualifications for and process for appointment of judges, Article VI, Section 3, of the Constitution provides that:

At least six months prior to the expiration of a justice's or judge's term of office, every justice and judge shall petition the judicial selection commission to be retained in office or shall inform the commission of an intention to retire. If the judicial selection commission determines that the justice or judge should be retained in office, the commission shall renew the term of office of such justice or judge for the period provided by this section or by law.

(This procedure is also described in the Judicial Selection Commission Rules, Rule 12.)

The JSC determines whether a justice or judge shall be retained in office. The JSC publicizes the fact that a justice or judge is seeking retention so that all persons who might have an interest in the matter be informed of the opportunity to comment. The JSC is composed of nine members, no more than four of whom may be lawyers. The members serve staggered six-year terms, are selected or elected as follows: (1) two members are appointed by the Governor; (2) two members are appointed by the Senate President; (3) two members are appointed by the House Speaker; (4) two members are elected by the members of the Hawai'i State Bar Association; and (5) one member is appointed by the Chief Justice.

The Committee discussed, at some length, the strengths and weaknesses of the JSC's composition and procedures. The role and practices of the JSC was a topic of discussion with nearly every resource person. Some of the major issues of potential concern, specifically the level of confidentiality that applies to the JSC's work and the composition of the JSC, stem from constitutional mandates. Although the Committee heard and considered criticisms of the composition of the JSC, the Committee finds that the composition of the JSC is one of its greatest strengths, with appointees from each branch of government and the bar, acting as checks and balances to any real or perceived bias that might result from lesser diversity. While the Committee understands the inherent mistrust and suspicion that often accompanies decision-making processes that exclude the public, the majority of the Committee members believe that a relatively high degree of confidentiality is necessary to recruit and retain high quality judges and to protect the legitimate privacy interests of judicial candidates and judges.

That said, more transparency is desirable and may be critical to preserving Hawai'i's robust merit selection and retention processes. The Committee believes that there are aspects of the JSC's work and areas of information that should be made more open to the public. For example, more information about the procedures followed by the JSC should be made available on the JSC link on the Judiciary website.<sup>6</sup> The form of the questionnaires given to judicial applicants should be posted on the Judiciary website, so

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<sup>6</sup> This concept has already been embraced by the JSC, but various administrative hurdles have delayed its implementation.

the public could see what kind of information is being provided by candidates. General information might be made available to the public about the number of candidates, their general areas of experience, and other facts that would give interested members of the public information about the process. The JSC arguably could share more information about how they gather information about candidates and judges, general information describing who they interview, what resources they use, and what kind of procedures are in place to ensure that all JSC members have received and reviewed all relevant submissions and materials. These ideas are by no means exhaustive, but are examples of what should be considered in a process of re-examination, short of a constitutional overhaul. The Committee recommends that AJS or the JSC itself undertake a study or focused discussion to consider how the JSC might provide more information to the public, with the limited resources available to it (or with identified additional resources), within its constitutional charge. The Committee rejects the notion that any major modification of the JSC is warranted at this time. However, the issue of "too much" confidentiality or secrecy has arisen in many contexts and should be considered further.

#### B. What is the Hawai'i Public's Perception of Judicial Accountability?

The Committee finds that Hawai'i's judges have been subjected to a relatively high level of public criticism in recent years.<sup>7</sup> It was suggested to the Committee that the attacks on judges escalated in about 1993 in the context of the same sex marriage issue. The Hawai'i Supreme Court's (discontinued) involvement in the appointment of Bishop Estate trustees was the genesis of considerable criticism in the wake of the Broken Trust essay, which was published by the Star Bulletin in 1997, and the subject of further public debate after the Broken Trust book was published in 2006. Other highly publicized court actions and the recently rejected proposal to amend the age limit for judges may indicate that the public remains concerned about the level of judicial accountability.

The *sub rosa* contentions in the Broken Trust discussion, that the Supreme Court's trustee appointments were essentially political pay-offs, rather than based on merit, and that the settlement of the legal actions involving the former trustees was improperly permitted by the Judiciary, may have cast lingering shadows on the public's view of the Judiciary. The CJC did not take any action to review or investigate assertions or suggestions of possible wrongdoing or impropriety by the Judiciary, but then no one -- not the Attorney General, not HSBA or members of the bar, members of the Judiciary, the CJC members, or even the Broken Trust authors -- made any attempt to initiate a review. Why not? Is it because there were no grounds for any action, as many have said,

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<sup>7</sup> The criticism of judges is neither unique to Hawai'i nor unique in historical context. Nationally, judges have faced even more aggressive attacks in the press, in proposed legislation, and against their person. Throughout history, there has been a tension between majoritarian views and the role of judges in enforcing existing laws and upholding minority rights under the law. Sometimes, however, criticism has been well-founded and has led to improvements in the law and in the administration of justice.

or is it because individuals failed to step forward to take on the task, or is it because the system for judicial accountability is "broken?" This Committee is not qualified or inclined to pass judgment on anyone's conduct in the matter. The Committee does not find, however, that the system is inherently flawed.

### C. The Committee's View on Judicial Accountability in Hawai'i

The Committee finds that the Hawai'i Judiciary is subject to a high level of scrutiny and a variety of somewhat independent, somewhat overlapping, procedures to ensure high standards of ethical, appropriate, and competent judicial conduct. It could be argued that members of the Judiciary are subject to more review processes than any other public employee. The Committee finds, however, that this high level of scrutiny is appropriate given the level of public trust bestowed upon judges, the impact that judges have on people's lives, and the available alternatives, such as elections for judges.

The Committee rejects the notion that the system of accountability is "broken," but acknowledges that there are aspects of it that might be improved or better executed in particular instances. Important commissions such as the JSC and CJC should be adequately staffed and funded to carry out their missions.<sup>8</sup> Further thought should be given to the level of confidentiality applicable to their work, with a goal being to foster greater public understanding and trust by taking a fresh look at what needs to be kept confidential and what could be made available to the public. Greater public understanding may lead to greater public trust and, sometimes, public criticism can be a healthy way to re-invigorate or improve existing practices. The Judiciary and judiciary-related commissions cannot rely on the news media to educate and get information to the public about the policies and practices implementing judicial accountability in Hawai'i. The media has its own institutional and business challenges with increasing competition and time pressures related, at least in part, to the expanded universe of information available on the internet. The Judiciary, the JSC, the CJC, and others, such as AJS and HSBA, need to be proactive in re-examining established practices, making changes if warranted, and making information about judicial accountability more readily available to the public.

## IV. Summary

The Committee finds that there is a high degree of judicial independence in Hawai'i, but that AJS and other interested parties must actively work to maintain it. Ensuring the public's trust and confidence in Hawaii's system of judicial accountability is an important element in fostering judicial independence. The Committee finds that the systems in place to hold Hawai'i judges to high standards of ethical and competent

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<sup>8</sup> The Committee notes that proposed legislation has been submitted to the current Legislature, seeking greater administrative autonomy for the JSC. The Committee is taking no position on this particular proposal or any other proposed legislation or constitutional amendment.

conduct are solid, but might be subject to some re-examination and improvements. More promulgation of information to the public should be actively considered, without jeopardizing legitimate issues of confidentiality. Further examination of the policies and practices of the CJC and JSC within their current constitutional framework is encouraged, including examination of whether adequate resources are devoted to the execution of their charges and institution of more transparency to the fullest extent possible. The Committees' specific conclusions and recommendations include:

- The most important and effective protection for judicial independence in Hawai'i is the merit selection and retention processes applicable to judges in Hawai'i.
- Hawai'i's elected officials should work to ensure adequate funding for the judicial branch of government, including funding for the work of vital commissions such as the JSC and CJC.
- Lack of public understanding and knowledge of the importance of judicial independence is a perennial problem that should be attacked on many fronts, including enhanced efforts by the Bar and the Judiciary to foster civic education in Hawai'i's schools.
- The AJS Hawai'i Chapter should reconstitute a special committee on judicial independence at least every four years, continue to monitor current affairs tending to impact judicial independence, and periodically initiate forums or other means of public discourse on issues related to judicial independence.
- Steps should be taken to increase public confidence in the CJC and to improve the CJC's administration of its charge. Specific consideration should be given to: (1) adoption of term limits; (2) the hiring of a permanent, dedicated, staff attorney and/or executive director; (3) a review of the process for appointing CJC members; (4) a review of the level of reporting on the activities of the CJC; and (5) the regular promulgation of information about the CJC, including access to its formal opinions (subject to confidentiality protections), and other information and reports that might aid in the public's understanding of the CJC's execution of its responsibilities.
- The Judiciary should improve the targeting of and increase the number of participants in its Judicial Performance Review questionnaires, to the extent that (or as soon as) it is technologically feasible to do so.
- Greater transparency should be a priority in the practices and procedures related to judicial selection and retention, to the fullest extent practicable.

- The Hawai'i Judiciary is subject to an appropriately high level of scrutiny and a variety of somewhat independent, somewhat overlapping, procedures to ensure high standards of ethical, appropriate, and competent judicial conduct.
- The Judiciary, the JSC, the CJC, and others, such as AJS and HSBA, need to be proactive in re-examining established practices, making changes if warranted, and making information about judicial accountability more readily available to the public.

In closing, the Committee members wish to thank the AJS Hawai'i Board for the opportunity to serve on this committee. It has allowed each of us to express and critically examine our own views, as well as the views of others, on these important issues. We appreciate AJS' dedication to the improvement of the administration of justice in Hawai'i.

## ***Judicial Independence and Judicial Accountability***

The American Judicature Society has always been in the forefront in promoting judicial independence. It is a cornerstone of our U.S. and State Constitutions that our third branch of government, the Judiciary, retains the kind of independence that was envisioned in our respective Constitutions.

Judges must have the ability to make decisions free of corrupt influence, politics, campaign financing, coercion and influence, and they should be able to decide on the basis of the facts and the law at hand without legislative or executive interference. AJS has stood firmly for judicial independence. Judges must make decisions free of bias and prejudice. Their decisions must have credibility in order to receive the continuing support of the public.

Judges have awesome powers — over individuals, companies, associations, whether or not someone goes to jail, whether someone loses his or her business, whether someone loses custody — powers which impact significantly our daily lives. This power requires an independent Judiciary that support the principles of checks and balances inherent in our Constitution.

In the present day of sometimes vicious criticisms on the Judiciary, on threats of and actual attacks and harassment on judges and their families, on fears by the judges themselves as they make controversial decisions on such hot-topic issues as abortion, the public is increasingly concerned about such independence and related issues of accountability.

The judicial system requires judges to decide, whether or not such decision is popular. Sometimes, it's because the legislature has failed to act on a controversial topic.

Whenever a lawyer or party loses a case, it is often heard that the judge did not understand, did not review the issues carefully, did not decide correctly, and therefore, is at fault — not the lawyer, the party nor its actions. Judicial accountability issues arose in Hawaii recently when two presidents of the Hawaii State Bar were elected who had openly campaigned largely on the basis of judicial performance and evaluations of such judges. Their elections signal some misunderstanding and undercurrent of dissatisfaction among some about judicial performance.

Yet, our systems provides for accountability of judges, and the public and even lawyers may not fully understand and appreciate the systems in place. Constitutional limits on judicial powers, the appeals process, the highly demanding Judicial Conduct Code and its enforcement by the State's Judicial Conduct Commission [or, for federal judges, the Judicial Council of the Ninth Circuit], our judicial retention process as carried out by our Judicial Selection Commission, and our Judiciary's involvement in its own performance evaluations.

Most states have these same elements of accountability. One huge difference — most states rely on some form of judicial election rather than selection by appointment or retention by a commission. Without an elective system of accountability, accountability rests in nine Commissioners with respect to whether or not judges are retained.

With such mechanisms, why is there such concern about the performance of our Judiciary? Unwarranted criticism tends to undermine the Judiciary and our system of accountability. Examples are: a judge receiving very favorable ratings on performance evaluations yet being denied by the Commission a few months later; long delays in deciding on appeals; the confidentiality inherent in Judicial Selection Commission proceedings which create uncertainty and apprehensions; concerns expressed that lawyers, parties and concerned citizens



were afraid to voice criticisms against judges; festering among some lawyers about judicial decision-making or lack thereof after an unfavorable decision; media attention on difficult decisions — all of these together contribute to create the kinds of uncertainty that tend to undermine judicial independence.

An understanding of why such dissatisfaction occurs and a need for continuing vigilance to protect judicial independence may be needed. Certainly, more understanding of our existing systems of accountability is needed. Perhaps this greater understanding may also promote elements of reform.

Of all the three branches of government, studies have shown that the Judiciary is the least known. An educational program that seeks to understand our system of judicial independence and accountability may well be in order to further support our valued merit selection system of judicial selection in Hawaii.

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