

REPORT OF THE HOUSE RESOLUTION 21 COMMITTEE OF THE AMERICAN JUDICATURE SOCIETY

November 2019

I. EXECUTIVE SUMMARY

On Saturday, September 28, 2019, acting upon House of Representatives Resolution 21, H.D. 1, adopted during the Twenty-Ninth Legislature of the State of Hawai'i, Regular Session of 2018 (**HR 21**), the American Judicature Society (**AJS**) hosted a four-hour forum, *Hawaii's Three Branches of Government: A Frank and Open Discussion*, at Kapi'olani Community College in Honolulu, Hawai'i. More than 100 attendees from the three branches of state government, the federal judiciary and community leaders engaged in table discussions regarding the respective roles and responsibilities of the co-equal branches of government, the separation of powers doctrine, the importance of an independent judiciary and the judiciary's constitutional role in protecting individual rights and freedoms. As a next step, many participants stated, either during the forum or in post-forum comments, that more opportunities for dialogue among the leaders and members of the different branches would help resolve differences and promote a deeper understanding of the role of the judiciary within the constitutional framework of government in the state of Hawai'i.

II. HR 21

HR 21, titled "Urging the Hawai'i Chapter of the American Judicature Society and the Hawai'i State Bar Association to Analyze and Assess the Role of the

Judiciary Within the Constitutional Framework of Government in the State of Hawai'i" was adopted on March 8, 2018 (Exhibit "A"). Following preamble language, the resolution stated:

BE IT RESOLVED by the House of Representatives of the of the Twenty-Ninth Legislature of the State of Hawai'i, Regular Session of 2018, that the Hawai'i Chapter of the American Judicature Society and the Hawai'i State Bar Association are urged to analyze and assess the role of the Judiciary within the constitutional framework of government in the State of Hawai'i, including but not limited to topics such as the political question doctrine, the Judiciary's interrelationship with the legislative and executive branches, the Judiciary's role in ensuring a workable government, the Judiciary's role in protecting individual rights and freedoms, and the importance of judicial independence in fostering the rule of law; and

BE IT FURTHER RESOLVED that certified copies of his Resolution be transmitted to the Chair of the Board of Directors of the Hawai'i Chapter of the American Judicature Society, the President of the Hawai'i State Bar Association, the Chief Justice of the Hawai'i Supreme Court, and the Governor of the State of Hawai'i.

On June 6, 2018, members of the Board for AJS¹ first met to review HR 21 and discuss a response. AJS then formed a committee (**Committee**) to reach out to leaders in the three branches of state, gather input regarding the objectives of HR 21, and take appropriate action.

¹ In 2014, AJS national operations shifted from the Dwight D. Opperman Center at Drake University to the Hawai'i Chapter of the AJS. AJS was then incorporated on November 26, 2014, under the Hawai'i Nonprofit Corporations Act, Hawai'i Revised Statutes Chapter 414D, with nearly all the same directors who had previously served in the Hawai'i Chapter.

III. OUTREACH AND PLANNING

The Committee, facilitated by **Larry Okinaga**, Esq., first met on September 27, 2018. Members included, in alphabetical order:

- **Douglas S. Chin**, former Attorney General, State of Hawai'i;
- Judge **Richard R. Clifton**, U.S. Court of Appeals, Ninth Circuit;
- Judge **Walter Kirimitsu**, Intermediate Court of Appeals, State of Hawai'i (ret.);
- **Howard K. K. Luke**, President, Hawai'i State Bar Association (2018-2019);
- **Melody Kapilialoha MacKenzie**, Professor, William S. Richardson School of Law, University of Hawai'i;
- **Daniel Padilla**, attorney;
- **Randy Perreira**, Executive Director, Hawai'i Government Employees Association, AFSCME Local 152, AFL-CIO
- Judge **J. Michael Seabright**, U.S. District Court, District of Hawai'i; and
- **Sylvia Yuen**, Executive Director, Research Corporation of the University of Hawai'i.

For several months, Committee members met with individual leaders in the Hawai'i state legislature, judiciary and executive branch, researched historical issues related to the separation of powers, and gathered information from colleagues in other states, including California, in which a Legislative-Judicial Summit had been held on February 27, 2019. Members reported findings to the Committee at near-monthly meetings.

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A sample of issues raised by certain stakeholders included:

- Disagreement with Court decisions due to perceived incursions by the Judiciary into the Legislature’s “power of the purse”;
- A lack of understanding regarding the budgetary or practical implications of Judiciary decisions upon the other branches of government and the public, particularly related to controversial matters;
- Statutory interpretation of state statutes and improving clarity in legislative history and reports;
- Training and educating newer state judges and members of the Legislature regarding the roles and responsibilities of the three branches of government; and
- The need to improve communications among the three branches of government.

Based on its outreach and the information gathered, by consensus, the Committee felt the best way AJS could address the myriad issues raised by HR 21 would be to host a forum that would bring together the stakeholders and create the opportunity for an open dialogue regarding the roles and responsibilities of the three branches of government. Hawai‘i state legislators, the Hawai‘i Governor and members of the Cabinet, and full-time judges of the Hawai‘i state judiciary were invited. In addition, invitations were extended to representatives of organizations from a broad cross-section of the community. AJS provided and secured funding to cover the Forum’s costs.

A media advisory regarding the Forum was sent to major news and media sources on September 27, 2019 (Exhibit “B”). Members of the press responded to the advisory but did not attend the Forum.

The Committee members' efforts, starting from the initial meeting until the Forum was held, occurred over more than a year.

IV. THE FORUM

According to the attendance count, 115 persons attended the Forum, including many participants from neighbor islands. Hawai'i Governor **David Ige** opened the Forum with remarks. **Linda Colburn** facilitated the discussion which followed presentations from distinguished panelists and table discussions among the participants.²

Panelists included, in alphabetical order, former state Administrative Director of the Courts and the current President and Chief Executive Officer for the YMCA of Honolulu **Michael Broderick**, Hawai'i Attorney General **Clare E. Connors**, former member of Congress and State Senate President **Colleen W. Hanabusa**, and William S. Richardson School of Law Dean **Avi Soifer**.

AJS produced a program containing the agenda and format of the Forum (Exhibit "C").

V. FEEDBACK

A total of 75 respondents completed an evaluation of the Forum (Exhibit "D"). The rating scale contained 5 choices: poor, fair, good, very good and excellent. The

² AJS acknowledges and thanks the following additional volunteers who donated their time and effort to help the Forum run smoothly: Susan Asato, Susan Gochros, Esq., Jan Kagehiro, Daniel Luke, Esq., Avery Matro, Esq. and Ian Wesley-Smith, Esq., and other staff at Carlsmith Ball LLP.

following percentages of respondents gave “good” to “excellent” ratings to these aspects of the Forum:

- Forum overall – 100%
- Panelist presentations – 100%
- Table discussions – 100%
- Ability to get to know and interact with the other branches of government – 98%
- Question and answer session – 97%

Also, 96% of the respondents indicated they would recommend the Forum to a colleague, 89% felt the length of the Forum was “just about right,” and 84% felt the Forum increased their understanding of the three branches of government.

Consistent with the survey results, written comments from participants were mostly positive and included the following:

- “This conference has inspired me to meet with my legislator in my district to discuss general issues (within the code of judicial conduct of course).”
- “Thanks for convening this forum.”
- “Excellent! Kudos to the AJS!”
- “Great.”
- “Actually, this was a very helpful activity. Similar forums would be beneficial.”
- “Good, frank exchange. Enjoyed it!”
- “Thank you AJS for what you do. It was helpful to hear personally and firsthand the concerns and pressures legislators face.”
- “Continue program sponsored by UH law school – annually.”
- “Difficult process, well-done.”

- “Great opportunity for substantive, one-on-one.”
- “Mahalo for including judges and legislators from outer islands. Suggestion to include and continue to have trainings for newly elected and appointed on 3 branches, each branch’s role, challenges, and code of ethics and judicial ethics.”
- “Both judiciary and leg [sic] can use further education about the process.”

Other participants wrote constructive comments in which they suggested greater participation by individuals from all three branches of government, and questioned whether the presence of the press, had they attended, might have “chilled honest discussion” among those present.

VI. NEXT STEPS

On October 31, 2019, the Committee met to debrief and discuss next steps. From that meeting, the Committee respectfully recommends the following:

1. AJS should encourage further opportunities for members of the three branches of government to convene – informally or formally, in smaller groups or other large forums, and among persons from the same island – due to the benefits to participants that may come from increased dialogue and understanding of the other branches’ priorities and concerns.
2. AJS should encourage the Hawai’i State Legislature and Judiciary to explore mechanisms in other jurisdictions that allow judges to provide input regarding the language of certain statutes in the absence of a published opinion.

3. AJS should encourage additional educational opportunities for public servants and members of the community to better understand the roles and responsibilities attached to the three branches of government.

4. AJS should invite Forum participants to attend the 2019 AJS Annual Meeting and Reception on December 5, 2019, at which Chief Justice **Mark Recktenwald**, Hawai'i Supreme Court, will deliver a keynote address and **Erwin Chemerinsky**, Dean of the University of California, Berkeley, School of Law, will deliver remarks on the "The Judicial Role of Government."

5. The AJS mission, to work locally and nationally to protect the integrity of the American justice system, and to secure and promote an independent and qualified judiciary and a fair system of justice, should be communicated to members of the three branches of government and the community at all times.

The Committee appreciated the opportunity to tackle the issues presented by HR 21. It sees great opportunities to improve relations among the branches of government in Hawai'i over the long term.

Exhibit A

HOUSE OF REPRESENTATIVES
TWENTY-NINTH LEGISLATURE, 2018
STATE OF HAWAII

H.R. NO. 21
H.D. 1

HOUSE RESOLUTION

URGING THE HAWAII CHAPTER OF THE AMERICAN JUDICATURE SOCIETY AND
THE HAWAII STATE BAR ASSOCIATION TO ANALYZE AND ASSESS THE
ROLE OF THE JUDICIARY WITHIN THE CONSTITUTIONAL FRAMEWORK
OF GOVERNMENT IN THE STATE OF HAWAII.

1 WHEREAS, our Nation and our State were founded upon the
2 constitutional principle of maintaining separate but equal
3 branches of government to ensure an equal distribution of power;
4 and

5
6 WHEREAS, in *Trustees of Office of Hawaiian Affairs v.*
7 *Yamasaki*, 69 Haw. 154 (1987), the Hawaii Supreme Court clarified
8 the separation of powers doctrine as follows:

9
10 [W]hile the object was to "divide and allocate the
11 sovereign power among three co-equal branches, . . . the
12 separate powers were not intended to operate with absolute
13 independence."

14
15 The Constitution "contemplates that practice will integrate
16 the dispersed powers into a workable government. It enjoins
17 upon its branches separateness but interdependence,
18 autonomy but reciprocity."; and

19
20 WHEREAS, the separation of powers doctrine ensures a
21 workable government by precluding a branch from encroaching into
22 the jurisdiction of another; and

23
24 WHEREAS, discussion about the role of the Judiciary should
25 include consideration of the Judiciary's constitutional role in
26 protecting individual rights and freedoms, and the importance of
27 an independent judiciary in preserving the rule of law. As
28 former Hawai'i Supreme Court Chief Justice William S. Richardson
29 stated: "Only an independent judiciary can resolve disputes



1 impartially and render decisions that will be accepted by rival
2 parties, particularly if one of those parties is another branch
3 of government."
4

5 WHEREAS, continual discourse and reflection upon the
6 respective roles and responsibilities of the three branches is
7 necessary to ensure responsible governance; and
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9 WHEREAS, Hawaii attorneys and judges have a continuing
10 responsibility to assess the constitutional framework of
11 government in Hawaii, including the separation of powers
12 doctrine; now, therefore,
13

14 BE IT RESOLVED by the House of Representatives of the
15 Twenty-ninth Legislature of the State of Hawaii, Regular Session
16 of 2018, that the Hawaii Chapter of the American Judicature
17 Society and the Hawaii State Bar Association are urged to
18 analyze and assess the role of the Judiciary within the
19 constitutional framework of government in the State of Hawaii,
20 including but not limited to topics such as the political
21 question doctrine, the Judiciary's interrelationship with the
22 legislative and executive branches, the Judiciary's role in
23 ensuring a workable government, the Judiciary's role in
24 protecting individual rights and freedoms, and the importance of
25 judicial independence in fostering the rule of law; and
26

27 BE IT FURTHER RESOLVED that certified copies of this
28 Resolution be transmitted to the Chair of the Board of Directors
29 of the Hawaii Chapter of the American Judicature Society, the
30 President of the Hawaii State Bar Association, the Chief Justice
31 of the Hawaii Supreme Court, and the Governor of the State of
32 Hawaii.
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