

**REPORT OF THE SPECIAL COMMITTEE ON THE
MANDATORY RETIREMENT AGE OF STATE JUDGES –
THE AMERICAN JUDICATURE SOCIETY – HAWAII CHAPTER**

April 28, 2014

I. INTRODUCTION.

On September 7, 2012, the Hawai'i Chapter of the American Judicature Society established a Special Committee on the Mandatory Retirement Age of State Court Judges (the "Committee")¹ for the purpose of addressing whether the Hawai'i State Constitution should be amended to change the mandatory retirement age of state court justices and judges. Over the last eight years, the Hawai'i State Legislature has considered several proposals to amend Article VI, Section 3 of the Hawai'i State Constitution, which requires state justices and judges to retire upon attaining age 70. The Committee was created in light of renewed public interest in the issue of mandatory retirement when Justice James Duffy retired from the Hawai'i Supreme Court. Consideration of the issue is particularly timely in view of the recent retirement of Justice Simeon R. Acoba and the passage of SB No. 886 during the 2013 legislative session, as a result

¹ The Committee had 15 members. One was a retired Justice of the Hawai'i Supreme Court, the Hon. Steven Levinson (Co-Chair of the Committee). Four were active State judges: the Hon. Craig H. Nakamura, Chief Judge of the Hawai'i Intermediate Court of Appeals, the Hon. Rhonda Nishimura (First Circuit), the Hon. Faye Koyanagi (District Court, First Circuit), and the Hon. Nauanikinau Kamalii (Per Diem judge and Health Policy Dir., Papa Ola). Five were other attorneys: Mark Bennett, Esq. (former Attorney General, State of Hawai'i), Allen Hoe, Esq. (Member, Hawaii Federal Judicial Selection Commission), Colin O. Miwa, Esq. (Co-Chair of the Committee), Carol Muranaka, Esq. (former President, HSBA), and John "Jack" Tonaki, Esq. (State Public Defender). Also on the Committee were: Patty Foley, Sr., Vice President and Human Resources Manager, Central Pacific Bank, Ronald Migita, CEO (Ret.) of two Hawai'i banks, Kenneth Nakamatsu, Director (Ret.), Dept. of Human Resources for both the State of Hawai'i Judiciary and the City and County of Honolulu, James H. Pietsch, Professor, William S. Richardson School of Law, and Director, UH Elder Law Program (Committee Reporter), and Julia Zeghmi, Human Resources Specialist, HGEA. The Committee was also assisted by Kelsey Inouye, a law student at the William S. Richardson School of Law, and provided statistical information by the Office of the Chief Justice, Hawai'i Supreme Court, State of Hawai'i.

of which Hawai'i voters will decide this fall whether or not to amend the State Constitution to increase the mandatory retirement age for state justices and judges from 70 to 80 years.

The work of the Committee spanned more than a year, during which time the Committee met several times and Committee members consulted resource people, including personnel of the Hawai'i Supreme Court. Various resource materials were also reviewed.

The focus of the Committee was on two main areas, the first being a review of other states' mandatory retirement age legislation proposing to either raise or abolish the mandatory retirement age, as compared with past and current proposed legislation relating to the issue in Hawai'i. The second focus of discussion was whether the Hawai'i State Constitution should be amended to eliminate the current mandatory retirement age, or if not, whether the retirement age requirement should be amended in another manner (*e.g.* increase the mandatory retirement age).

II. MANDATORY RETIREMENT AGE LEGISLATION IN HAWAI'I AND OTHER STATES, AND SELECTED COURT DECISIONS.

States have set mandatory retirement ages for judges based in part on the rationale that states have an interest in "maintaining a judiciary fully capable of performing the demanding tasks of the judicial office"² and the implicit assumption that judges are no longer "fully capable" upon attaining a particular age. Although many states have laws setting forth mandatory retirement ages for judges, in recent years there has been an influx of state legislation proposing either to extend the mandatory retirement age for judges, or to abolish such requirements

² Scott Makar, *In Praise of Older Judges: Raise the Mandatory Retirement Age?* 71 APR Fla. B.J. 48, 48 (1997) (citing Jeffrey Shaman, *Supreme Court Upholds Mandatory Retirement of State Judges*, 75 *Judicature* 222, 2222 (Dec./Jan. 1992)).

entirely. In contrast, federal courts do not impose mandatory retirement ages on their judges, and a number of federal judges continue to work well past age 70.³

A. National Perspective.

1. Retirement Requirements in Other States:

Currently, 32 states and the District of Columbia have a judicial mandatory retirement age,⁴ usually established between ages 70 and 75. In 2013, there were 16 states that considered legislation proposing to either raise or abolish the mandatory retirement age.⁵ As of January 1, 2014, bills in at least 6 states were defeated,⁶ while bills in at least 5 states were either carried over to the 2014 session or reintroduced, including Hawai'i's proposed constitutional amendments.⁷ Successful bills included Washington's SB 5046, which passed in both the state senate and the house and was signed into law by the governor in April of 2013,⁸ and

³ Scott D. Makar. *In Praise of Older Judges: Raise the Mandatory Retirement Age?* THE FLORIDA BAR JOURNAL (April 1997), available at <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Articles/7A163459570EAB0885256ADB005D6121>.

⁴ Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wyoming, Washington D.C. See Bill Raftery, *Arizona Proposition 115: What Courts/States Have Mandatory Judicial Retirement and At What Age?*, GAVEL TO GAVEL (Oct. 11, 2012, updated Feb. 12, 2013), available at <http://gaveltogavel.us/2012/10/11/arizona-proposition-115-what-courtsstates-have-mandatory-judicial-retirement-and-at-what-age/>, a copy of which is attached hereto as Appendix A.

⁵ Arkansas, Florida, Hawaii, Indiana, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Virginia, Washington, Wyoming. (See Bill Raftery, *Update on Mandatory Judicial Retirement Legislation: Bills in 16 States, But So Far No Enactments; Hawaii Appears to be Closest But Has Choppy History on the Subject*, GAVEL TO GAVEL (March 19, 2013), available at <http://gaveltogavel.us/2013/03/19/update-on-mandatory-judicial-retirement-legislation-bills-in-17-states-but-so-far-no-enactments/>).

⁶ Arkansas, Florida, New Hampshire, New York, Virginia, Wyoming.

⁷ Hawaii, Louisiana, Massachusetts.

⁸ Washington SB 1266 (2013-2014) available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1266&year=2013>.

Pennsylvania's HB 79, which passed in the senate in October 2013.⁹ However, because Pennsylvania HB 79 is a constitutional amendment, it must pass in two sessions, and will be up for vote again in 2015.¹⁰

2. Examples of Retirement Legislation Defeated in 2013:

Arkansas: In January of 2013, Senator Bill Sample from Arkansas introduced a bill concerning the mandatory loss of retirement benefits for members of the Arkansas judicial retirement system who seek office after reaching seventy years of age.¹¹ The bill eliminated the use of the terms "under the age of seventy" or any reference to an age limitation for the purpose of receiving retirement benefits. By removing this language, the new proposed bill will allow judges to work past the age of seventy without forfeiting any retirement benefits. Under the current law, a judge may only work until the end of the term during which they reach age 70. "A judge working past age 70 who is eligible to retire will forfeit retirement benefits unless they leave office at the end of the term during which they turn age 70."¹² The bill died, however, in the state senate on May 17, 2013.¹³

⁹ Pennsylvania HB 79, Reg. Sess. 2013-2014, available at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2013&sind=0&body=H&type=B&BN=0079>.

¹⁰ Bill Raftery, *Pennsylvania Legislature Approves Increasing Mandatory Retire Age for Judges; Must be Reapproved*. GAVEL TO GAVEL (October 17, 2013), available at <http://gaveltogavel.us/2013/10/17/pennsylvania-legislature-approves-increasing-mandatory-retirement-age-for-judges-must-be-reapproved-in-20142015/>.

¹¹ State of Arkansas SB201, 89th General Assembly, Regular session, 2013.

¹² Letter from Mita D. Drazilov and David L. Hoffman (Gabriel Roeder Smith & Company) to Gale H. Stone, Executive Director Arkansas Judicial Retirement System, available at: <http://www.arkleg.state.ar.us/assembly/2013/2013R/Actuarials/SB201-S1.pdf>.

¹³ Arkansas SB 201, Reg. Sess. 2013, available at <http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillInformation.aspx?measureno=sb201>.

New York: New York's Proposition 6 would change the mandatory retirement age from 70 to (effectively) 80 for the Court of Appeals and allow judges of the New York Supreme Court to be recertified every two years from ages 70 to 80, making the 80-year-old retirement the second highest in the U.S.¹⁴ Essentially, while the judges would "retire" at 70, they would still be eligible to serve if recertified. SB 886 proposed an amendment to section 25(b) of Article VI of the New York State Constitution. However, voters defeated the bill on November 6, 2013. The proposition was opposed by 61 percent of the voters, while 39 percent were in favor.¹⁵

3. **Examples of Retirement Legislation that Passed in 2013:**

Pennsylvania: Under the Pennsylvania Constitution, Art. 5, § 16, justices and judges were required to retire at age 70. In 2013, several Pennsylvania judges filed suits challenging the mandatory retirement age, claiming their rights had been violated.¹⁶ The 2013 legislature saw several bills pending, including HB 79¹⁷ and SB 368¹⁸, which proposed to increase the retirement

¹⁴ Bill Raftery, *New York Proposal 6: Judges Would Have Second Highest Mandatory Retirement Age in Nation if Approved*. GAVEL TO GAVEL (October 2, 2013), available at <http://gaveltogavel.us/2013/10/02/new-york-proposal-6-judges-would-have-second-highest-mandatory-retirement-age-in-nation-if-approved/>.

¹⁵ New York SB 886A, available at <http://open.nysenate.gov/legislation/bill/S886A-2013>.

¹⁶ Debra Cassens Weiss, *Judges' Mandatory Retirement Challenge Fails in Pennsylvania Supreme Court*. ABA JOURNAL (June 18, 2013), available at http://www.abajournal.com/news/article/judges_mandatory-retirement_challenge_fails_in_pennsylvania_supreme_court/. ("The judges had alleged the mandatory retirement age conflicts with the state constitution's Declaration of Rights protecting the "inherent rights of mankind." They also claimed their election to a 10-year term gave them a property right to keep their jobs for the entire time. The unanimous opinion (PDF) rejected those claims."). See *Driscoll v. Corbett*, 69 A.3d 197 (Penn. 2013).

¹⁷ Pennsylvania House Bill No. 79, Reg. Sess. 2013-14 (HB 79), available at <http://www.legis.state.pa.us/cfdocs/billinfo/BillInfo.cfm?year=2013&sind=0&body=H&type=B&bn=79>.

¹⁸ Pennsylvania Senate Bill No. 368, Reg. Sess. 2013-14 (SB 368), available at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2013&sind=0&body=S&type=B&BN=0368>.

age to 75, and SB 85, which proposed to abolish entirely the mandatory retirement age.¹⁹ In July, HB 79 passed in the state house, and in October, it passed in the senate.²⁰ However, since it is a constitutional amendment, it must pass in two sessions, and will be up for vote again in 2015.²¹

Washington: SB 5046, which the governor signed on April 22, 2013, extends district judges' retirement age to the end of the term in which the judge turns 75.²²

4. Proposed Legislation in 2014:

Louisiana: Representative Mickey Firth of Louisiana introduced House Bill number 19 during the 2003 regular session. The resolution would allow judges attaining 70 years of age to complete their terms of office, amending Article V, Section 23(b) of the Louisiana Constitution. The bill passed, became Act No. 1296, and was approved on October 4, 2003, taking effect on January 1, 2004. Now, judges in Louisiana who attain the age of 70 while serving a term of office are allowed to complete the remaining term of office.²³ In 2013, Eric LaFleur sponsored a Senate Bill 5, which would effectively remove the mandatory retirement age. Although the bill failed to get the required 2/3-majority vote in the house, it was re-filed in January of 2014 as SB 11.²⁴

¹⁹ Pennsylvania Senate Bill 85. Reg. Sess. 2013-14 (SB 85), available at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2013&sind=0&body=S&type=B&BN=0085>.

²⁰ *Id.*

²¹ Bill Raftery, *Pennsylvania Legislature Approves Increasing Mandatory Retire Age for Judges; Must be Reapproved*. GAVEL TO GAVEL (October 17, 2013), available at <http://gaveltogavel.us/2013/10/17/pennsylvania-legislature-approves-increasing-mandatory-retirement-age-for-judges-must-be-reapproved-in-20142015/>.

²² <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5046&year=2013>

²³ Ark. Const. Article V Section 23(b) Judges, Retirement, Mandatory Retirement

²⁴ <http://www.legis.la.gov/Legis/BillInfo.aspx?s=14RS&b=SB11&sbi=y>

Massachusetts: In April 2013, the Committee on the Judiciary recommended that HB 68 not pass, and the bill was placed on file.²⁵ A joint session was held in October 2013, and recessed to March 2014.²⁶ HB 68 would amend the Massachusetts state constitution to increase the mandatory retirement age from 70 to 76.²⁷

Virginia: Although initially approved by the Senate in early 2013, SB 740 and SB 762 were defeated in the house later that year.²⁸ In 2014, the issue of a judicial mandatory retirement age will again be addressed via HB 279.²⁹ “However, this increase will not go into effect ‘unless and until the Judicial Performance Evaluation Program is funded and implemented under the provisions of § 17.1-00 of the Code of Virginia.’ ”³⁰

Washington: In addition to the earlier successful passage of SB 5046, which extended a district judge’s retirement age to the end of the term in which the judge turns 75,³¹ a second Washington bill, HB 1255, passed in the House in March 2013, was sent to the House Rules Committee for a third reading, then reintroduced and retained in May. In January 2014, this bill

²⁵ <https://malegislature.gov/Bills/188/House/H68>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Bill Raftery, *Effort to Increase Judicial Retirement Age Fails for 7th Year in a Row in VA, Faring Better in Other State Legislatures*. Gavel to Gavel (February 12, 2013), available at <http://gaveltogavel.us/2013/02/12/effort-to-increase-judicial-retirement-age-fails-for-7th-year-in-a-row-in-va-faring-better-in-other-state-legislatures/>.

²⁹ Bill Raftery, *Virginia Legislator Wants to Increase Judicial Retirement Age, But Only If Judicial Performance Evaluation System Put in Place is Funded*. GAVEL TO GAVEL (January 9, 2014), available at: <http://gaveltogavel.us/2014/01/09/virginia-legislator-wants-to-increase-judicial-retirement-age-but-only-if-judicial-performance-evaluation-system-put-in-place-is-funded/>.

³⁰ *Id.*

³¹ SB 5046, <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5046&year=2013>.

was again reintroduced and referred to the judiciary.³² HB 1255 is a companion bill to SB 5046.³³

B. Mandatory Retirement Age Legislation in Hawai'i.

1. Origin of the mandatory retirement age in Hawai'i:

The 1950 Hawai'i Constitutional Convention.

2. Current Law:

Article VI, Section III of the Hawai'i State Constitution states: "Justices and judges shall be retired upon attaining the age of seventy years."³⁴

3. Previous Proposals to Amend the Mandatory Retirement Age Requirement:

In 2006, SB 995, which proposed a constitutional amendment to eliminate the mandatory retirement age for justices and judges, was passed by the Hawai'i State Legislature.³⁵ However, the proposed amendment was voted down in the November 2006 elections. The vote was YES: 121,418 (34.8%); NO: 201,476 (57.8%); Blank Votes: 25,329 (7.3%).

In the 2008 legislative session, HB 2344 was introduced, proposing to increase the mandatory retirement age from 70 to 72. In addition, SB 3202 was introduced, proposing to increase the retirement age from 70 to 80 for judges who were appointed after November 4, 2008. Both bills failed to pass the Hawai'i Legislature, however.³⁶

³² *Id.*

³³ Washington HB 1255, Reg. Sess. 2013, available at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1266&year=2013>.

³⁴ Haw. Const. Art. VI, §3.

³⁵ Bill Raftery, *Update on Mandatory Judicial Retirement Legislation: Bills in 16 States, But So Far No Enactments; Hawaii Appears to be Closest But Has Choppy History on the Subject*. GAVEL TO GAVEL, (March 19, 2013), available at <http://gaveltogavel.us/2013/03/19/update-on-mandatory-judicial-retirement-legislation-bills-in-17-states-but-so-far-no-enactments/>.

³⁶ *Id.*

During the 2011 legislative session, SB 650 was introduced, proposing a constitutional amendment that would authorize the Chief Justice of the Hawai'i Supreme Court to appoint "emeritus judges" who would otherwise have retired due to the age restriction, as per diem judges or judicial mentors for a limited period of time.³⁷ Ultimately, the proposed constitutional amendment was defeated in the 2012 elections, although the vote was close: 49.6% voted "yes"; 39.9% voted "no"; and 10.4% did not vote.³⁸ Under the Hawai'i Constitution, in order for an amendment to be adopted at a general election, it must be approved "by a majority of all the votes tallied upon the question, this majority constituting at least fifty per cent of the total vote cast at the election."³⁹ This requirement essentially converted the blank votes to "no" votes.

C. *Constitutional Amendments Proposed During the 2013 Session:*

In the 2013 legislative session, several bills were introduced, proposing to amend Article VI, Section 3 of the Hawai'i State Constitution, which currently sets the mandatory retirement age for judges at 70.⁴⁰

1. **HB 275 & SB 346:** These bills were essentially identical to the prior proposal that was on the 2012 ballot, except that the House version applied to retired judges and justices whether or not they had been required to retire by the age requirement.⁴¹ The Senate version referred only to "judges" but was otherwise the same as the 2012 proposal.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Haw. Const. Art. XVII.

⁴⁰ Haw. Const. Art. VI, §3.

⁴¹ Bill Raftery, *Update on Mandatory Judicial Retirement Legislation: Bills in 16 States, But So Far No Enactments; Hawaii Appears to be Closest But Has Choppy History on the Subject.* GAVEL TO GAVEL,

2. **HB 792, SB 886, SB 1022:** These bills all proposed to increase the mandatory retirement age for judges and justices from 70 to 80.⁴² SB 886 was passed by the Hawai'i State legislature, and will be on the November 2014 ballot.

D. *Case Law & the Age Discrimination Employment Act (ADEA).*

The ADEA was enacted in 1967, and protects workers over the age of 40 by prohibiting employers from firing or not hiring employees based on their age.⁴³ The ADEA does not, however, apply to “any person elected to public office” and those who work at the “policymaking level.”⁴⁴ Under this exception, courts have found that the ADEA does not apply to elected judges.⁴⁵ Whether the ADEA applies to appointed judges has been somewhat more controversial, resulting in several actions in the past few decades.⁴⁶ However, the general consensus seems to be that even appointed judges are not covered by the act, as they fall under the category of policymakers. For example, the U.S. Supreme Court held in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that appointed state judges “constitute appointees ‘on a policymaking level,’ within the meaning of the exclusion to Federal Age Discrimination in Employment Act....” The Court further held that Missouri’s mandatory retirement clause was rationally

(March 19, 2013), available at <http://gaveltogavel.us/2013/03/19/update-on-mandatory-judicial-retirement-legislation-bills-in-17-states-but-so-far-no-enactments/>.

⁴² *Id.*

⁴³ 29 U.S.C.A. §§ 621-634 (1988) (Current through P.L. 113-72 (excluding P.L. 113-66 and 113-67) 2013).

⁴⁴ 29 U.S.C. A § 630(f) (1988) (Current through P.L. 113-72 (excluding P.L. 113-66 and 113-67) 2013). (Defining the term “employee” within the scope of the ADEA).

⁴⁵ Alan L. Bushlow, *Mandatory Retirement of State-Appointed Judges Under the Age Discrimination Employment Act*. 76 CORNELL L. REV. 476, 477-478 (1991).

⁴⁶ *Id.*

related to the purposes underlying the legislation.⁴⁷ More recently, in *Lerner v. Corbett* (2013 WL 5314894), a federal district court dismissed the claim of Pennsylvania judges that the state constitutional provision of mandatory retirement at age 70 violated the Equal Protection and Due Process Clauses.⁴⁸ The court found that the provision was rationally related to a legitimate government interest in a well-functioning state judiciary, and noted that the provision was a state constitutional provision which was for the electorate to amend, not the court. Two other suits brought in Pennsylvania state courts saw similar results.⁴⁹

In *Kimel v. Florida Bd. of Regents*, the U.S. Supreme Court held that states have Eleventh Amendment immunity from ADEA private lawsuits filed in federal court.⁵⁰ States can discriminate on the basis of age without violating the Fourteenth Amendment, so long as the discrimination is rationally related to a legitimate state interest.⁵¹ Further, individuals “still have remedies in state court if state -- rather than federal -- law prohibits age discrimination.”⁵²

⁴⁷ *Gregory v. Ashcroft*, 501 U.S. 452, 470-472 (1991).

⁴⁸ *Lerner v. Corbett*, 2013 WL 5314894. See Jessica M. Karmasek, *Federal Court Dismisses Suit by Pa. Judges Over Mandatory Retirement Age*. LEGAL NEWSLINE (September 25, 2013), available at <http://legalnewsline.com/news/244455-federal-court-dismisses-suit-by-pa-judges-over-mandatory-retirement-age>.

⁴⁹ *Driscoll v. Corbett*, 69 A.3d 197 (Pa. 2013); see Jessica M. Karmasek, *Pa. SC Dismisses Judges' Suits Challenging Mandatory Retirement Age*. Legal Newsline (June 18, 2013), available at <http://legalnewsline.com/news/242323-pa-sc-dismisses-judges-suits-challenging-mandatory-retirement-age>.

⁵⁰ *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

⁵¹ *Id.*

⁵² Dianna B. Johnston. *ADEA Suits Against States* (April 27, 2007), available at http://www.eeoc.gov/eeoc/foia/letters/2000/ada_suits_against_states.html.

III. WHETHER HAWAII'S MANDATORY RETIREMENT AGE PROVISION SHOULD BE ELIMINATED OR AMENDED.

A. Arguments for and Against a Mandatory Retirement Age.

Historically, a primary argument in favor of imposing a mandatory retirement age for judges has been the concern expressed by the drafters of many other state constitutions – viz. that the natural aging process lends to a decline in mental capacity that adversely impacts the efficiency of older judges. Forcing judges to retire at a particular age combats the possibility of age-induced decreases in mental capacity, and in addition, opens up spots on the bench for younger lawyers.⁵³

However, life expectancy has increased since many judicial retirement age laws were enacted. For instance, when New York State's mandatory retirement age was first adopted in 1869, the average life expectancy was in the 40s.⁵⁴ But as of 2001, the average American could expect to live 78.7 years.⁵⁵ Women have an even longer life expectancy (over 80), and so raising the retirement age may provide more opportunities for women to serve as judges.⁵⁶ Hawai'i has a particularly high life expectancy.⁵⁷ Measured from birth, residents of Hawai'i are now

⁵³ Jamie Inferrera, *Casting the Vote: Raising the Constitutional Mandatory Retirement Age for Pennsylvania Judges*, Juris Magazine (October 21, 2013), available at <http://jurismagazine.com/casting-the-vote-raising-the-constituional-mandatory-retirement-age-for-pennsylvania-judges/>.

⁵⁴ Report of the [New York] Task Force on Mandatory Retirement of Judges, June 1999 (the "New York Task Force Report").

⁵⁵ U.S. Life Expectancy Ranks 26th In the World, OECD Report Shows. Huffington Post (November 21, 2013), available at http://www.huffingtonpost.com/2013/11/21/us-life-expectancy-oecd_n_4317367.html.

⁵⁶ Jamie Inferrera, *Casting the Vote: Raising the Constitutional Mandatory Retirement Age for Pennsylvania Judges*, Juris Magazine (October 21, 2013), available at <http://jurismagazine.com/casting-the-vote-raising-the-constituional-mandatory-retirement-age-for-pennsylvania-judges/>.

⁵⁷ Life Expectancies at Age 65 Highest in Hawaii, Lowest in Mississippi. CENTER FOR DISEASE CONTROL AND PREVENTION (July 18, 2013), available at <http://www.cdc.gov/media/releases/2013/p0718-life-expectancy.html>.

estimated to have an average life expectancy of 81.3 years.⁵⁸ Thus, age-induced decreases in mental capacity, at least as of a particular age (e.g. 70), have become less of a factor in favor of a mandatory retirement age.

Moreover, mandatory retirement fails to consider the high value of a judge's accumulated wisdom and experience on the bench. Judge Posner, a prominent jurist and scholar who has studied the issue, wrote, "Judging is a learning-by-doing sort of job . . . As in certain forms of leadership, [], judges have to make many decisions in a limited amount of time, and speed and confidence in judicial decision-making are functions of experience."⁵⁹ Judging is generally a "late-peak" occupation in that judicial performance improves with age and may remain stable for many productive years after age 70.⁶⁰ Many other professions do not impose such retirement ages, even though the same rationale that applies to mandatory judicial retirement (age-related decreases in mental capacity) could be applied to them (doctors, engineers, teachers, etc.).

In summary, the Committee considered the following arguments that have been raised in favor of and against eliminating Hawai'i's mandatory retirement age for state judges:

Arguments in favor of eliminating the mandatory retirement age requirement

- Advancements in health care have resulted in greater life expectancy
- Retains high performing judges on the bench
- Encourages experienced attorneys to apply for service on the bench
- Encourages the appointment of experienced judges to the upper levels of the Judiciary (i.e. the appellate courts)
- Local culture places great value in the wisdom of our Kupuna

⁵⁸ The Measure of America 2013-2014, available at http://www.measureofamerica.org/measure_of_america2013-2014.

⁵⁹ Richard A. Posner, AGING AND OLD AGE 197 (1995).

⁶⁰ *Id.* Indeed, retired state judges and justices have continued to serve as masters, mediators, and arbitrators, even past age 70, providing an invaluable service.

Arguments in favor of maintaining the mandatory retirement age requirement

- Health problems inevitably affect everyone in older age groups
- Promotes periodic change in the Judiciary, and is the equivalent of a *de facto* term limit, as Hawai'i's constitution has no explicit term limit
- Prevents a Judiciary dominated by septo and octo-generians who might be resistant to change and innovation
- Prevents judges from “overstaying” their effective years (i.e. avoids “lead in the okole”)
- Prevents one political philosophy from dominating the court for extended periods of time
- Increases diversity by increasing the chances for appointment of groups underrepresented at the time of initial appointments

In view of these arguments, the consensus of the Committee was that imposing a mandatory retirement age does not appear to be well-founded. There is no scientific or other rational basis upon which one may conclude that, at a particular age, a judge loses sufficient mental capacity.

However, the next step to take was less apparent to the Committee. The Committee concluded that the current mandatory retirement age provision should not simply be repealed or eliminated entirely. That was proposed before and decisively rejected by Hawai'i voters. In view of the Hawai'i electorate's 2006 rejection of a proposed amendment to eliminate the mandatory retirement age, the Committee does not believe it would be advisable to simply resubmit to the electorate another Constitutional amendment to eliminate the mandatory retirement age provision. Thus, the primary focus of the Committee's deliberations was on alternatives to eliminating the provision, such as increasing the mandatory retirement age.

B. *Alternatives: SB 866 & Proposed Constitutional Amendment to Increase the Mandatory Retirement Age from 70 to 80.*

The Committee discussed at length the Constitutional amendment that will be on the ballot in November 2014, proposing to increase the mandatory retirement age of state justices and judges from 70 to 80, rather than eliminate the mandatory retirement age. Although the

Committee was generally in favor of increasing the mandatory retirement age for the reasons stated above, several Committee members expressed a desire to include safeguards against any actual decline in the mental capacity of the judges.

For instance, some Committee members stressed the need to incorporate a mechanism for ensuring turnover among the ranks of the judiciary, inasmuch as regular turnover invigorates the judiciary by bringing in fresh ideas and greater diversity to the bench. As suggested by the New York Task Force Report,⁶¹ increasing the mandatory retirement age of judges while at the same time ensuring adequate opportunities for judicial service by minorities and women may be achieved by a “senior judge” system in which older judges, subject to periodic certification of mental and physical capacity beginning at age 62, may continue to serve on the bench, optionally at less than full time, up until age 78. Under the New York model, once a judge attains “senior status,” a judicial vacancy is created, which helps to ensure turnover in the ranks of the judiciary. There was also some sentiment for combining elimination of or change in the mandatory retirement age with appellate court term limits. There was also some sentiment for making changes to the retirement age prospective only, as opposed to applying to currently serving judges in addition to newly-appointed judges.

However, some Committee members believe that Hawai’i’s judicial system has already incorporated the means to monitor the quality of the State’s judges, and to ensure timely turnover. As the Hawai’i Chapter of the American Civil Liberties Union has previously testified: “Hawaii provides an appropriate system of judicial review that operates regardless of age. The Hawaii Commission on Judicial Conduct investigates reports of judicial misconduct and may recommend dismissal to the Hawaii Supreme Court. The Judicial Performance program

⁶¹ New York Task Force Report, at 13.

periodically conducts performance reviews and evaluations after soliciting comments from the attorneys who practice before that judge. For disability or impairment, judges are referred to the Supreme Court's Attorneys and Judges Assistance program. In addition, for those judges who wish to continue in office at the end of their terms, the Judicial Selection Commission reviews their performances, including soliciting public comment through notices published in the newspapers. If the electorate has concerns about judges' performances, then this system should be examined and improved. However, many committee members believe that these checks ensure that it is highly unlikely that an unqualified judge would be able to remain on the bench."⁶²

The Committee considered various mechanisms to guard against declining capacity, including the following:

- Periodic medical certification of competency of judges attaining "senior status"
- Prospective application of the increased mandatory retirement age, so that the option is open only to new judges, as current judges applied on condition that they must retire at age 70
- Impose term limits (e.g. maximum number of retentions or years of service)
- Increase mandatory retirement age only for appellate court judges and justices

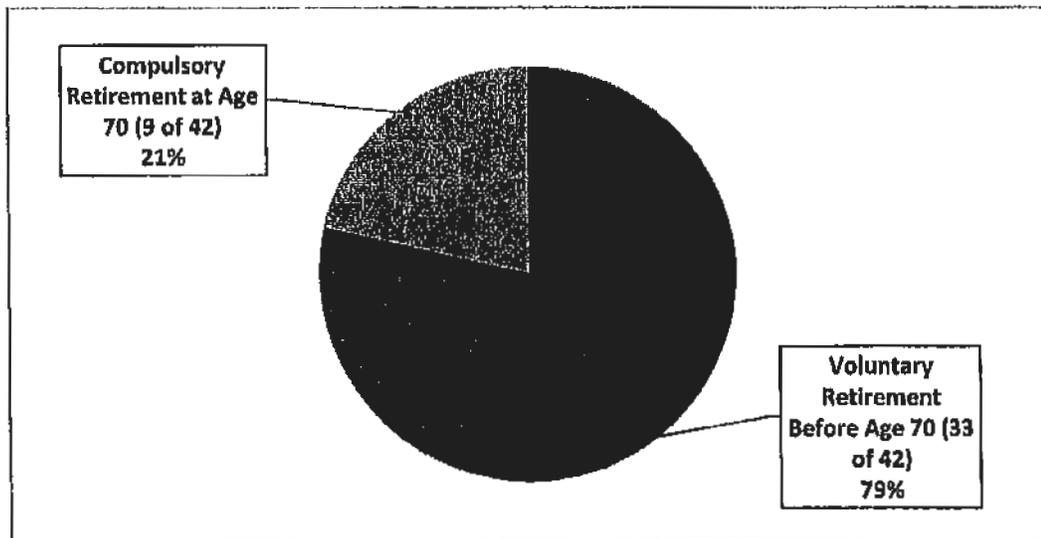
C. Statistics Relating To The Number of State Judges Retiring at Age 70.

The Committee further discussed statistical information provided by the Hawai'i Supreme Court, Office of the Chief Justice, which indicates that since 2002, 42 full-time state

⁶² *Testimony of the ACLU of Hawaii to Offer Comments on SB 3202, Proposing an Amendment to Article VI, Section 3, of the Hawaii Constitution to Extend the Mandatory Retirement Age By Ten Years For State Justices and Judges: Hearing before the House Committee on Judiciary, (2008) (written testimony of the ACLU).*

justices and judges retired from judicial office.⁶³ As shown below, 33 out of the 42 state justices and judges retired before reaching the age of 70.⁶⁴ Nine (9) of the 42 retired at age 70 on a “compulsory” basis (meaning, each would have continued to serve but for the mandatory retirement age). Some on the Committee concluded, therefore, that the concerns regarding an increase in the mandatory retirement age may be moot in that there have been relatively few state judges that would have continued in office but for the mandatory retirement age limit. Others disagreed.

**Number of State Judges Retiring
Before Age 70: 2002-2012⁶⁵**



⁶³ Chief Justice Mark Recktenwald, whose assistance was greatly appreciated by the Committee, facilitated the expeditious provision of this information.

⁶⁴ The Committee notes that it is possible certain of the judges included in the "retired" category did so after learning that they would not be retained by the Judicial Selection Commission.

⁶⁵ Source: Hawai'i Supreme Court, State of Hawai'i, Office of the Chief Justice.

In addition, a review of the data for this time period indicates the following:

- ❖ With respect to the 33 justices and judges who retired before reaching age 70:
 - average starting age: 45 (ranging from 35 to 58 years of age, with a median of 45)
 - average years of service: 14 (ranging from 5 to 24 years, with a median of 13)
 - average age at retirement: 58 (ranging from 53 to 66 years of age, with a median of 59)

- ❖ With respect to the nine (9) justices and judges who retired upon reaching the age of 70:
 - average starting age: 52 (ranging from 39 to 65 years of age, with a median of 52)
 - average years of service: 18 (ranging from 5 to 31 years, with a median of 18)
 - average age at retirement: 70

IV. COMMITTEE CONCLUSIONS AND RECOMMENDATIONS:

Based on the foregoing, the Committee found, as follows:

- All members of the Committee agreed that age alone does not constitute a basis to question the capability of a judge to function, and that there does not exist a basis on which one may conclude that a judge loses sufficient mental capacity at age 70 or upon attaining any particular age.

- However, the Committee does not recommend that a constitutional amendment to eliminate entirely the mandatory retirement age provision be again presented to voters for approval because approval is highly unlikely in view of past experience in Hawai'i and other states.

- There was general consensus in the Committee, but not unanimity, that the current proposal (SB 886) to increase the mandatory retirement age from 70 to 80, should be approved.
- However, over the course of the Committee’s deliberations, concerns were expressed by one or more Committee members, including the following:
 - implementing an increase in the retirement age without other safeguards could allow certain judges to “overstay” their effective years; and
 - increasing the retirement age results in less turnover among the ranks of the judiciary, which limits the influx of fresh ideas, greater diversity, and/or alternative political philosophies to the bench;
 - any changes in the mandatory retirement age should be prospective only and should not affect those judges already serving, because, among other things, prospective application would actually increase the ability for older lawyers to apply for and serve as judges.
- Other Committee members believe though that these concerns are arguably moot, or are at least outweighed, given the fact that most state judges retire well before age 70 (e.g. only 21% of the 42 state judges and justices that retired between 2002 and 2012 did so at age

70, and of the 79% who retired before age 70, their average retirement age was 58).

V. **APPENDICES:**

- A. Bill Raftery, *Arizona Proposition 115: What Courts/States Have Mandatory Judicial Retirement and At What Age?*, GAVEL TO GAVEL (Oct. 11, 2012, updated Feb. 12, 2013)

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APPENDIX A:

Bill Raftery, Arizona Proposition 115: What Courts/States
Have Mandatory Judicial Retirement and At What Age?,
GAVEL TO GAVEL (Oct. 11, 2012, updated Feb. 12, 2013)

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Arizona Proposition 115: What courts/states have mandatory judicial retirement and at what age?

October 11th, 2012 by Bill Raftery [Leave a reply »](#)

In addition to extending most judicial terms to 8 years, Arizona's Proposition 115 would also change the state's mandatory judicial retirement age from 70 to 75.

As I noted last year when this subject came up in the Ohio ballot, 32 states plus D.C. have age limits for at least some of their judges. While Arizona's current 70 is the most typical age, several states use 75: Kansas, Missouri (municipal court judges), Oregon, Texas (Appellate + District), Utah, and Washington.

A chart listing all mandatory retirement ages for state judges is below. *(Updated 2/12/2013)*

State	Appellate	Trial	Constitution or Statute	Notes
Alabama	70	70	Constitution: Art. VI, Sec. 155 (Amended), Amendment 328	May not be elected or appointed after 70.
Alaska	70	70	Constitution: Art. IV, Sec. 11	
Arizona	70	70/Varies	Constitution: Art. VI, Secs. 20 & 39	Municipal courts: Varies

Arkansas	70	70	Arkansas law does not specify a retirement age for judges, however a judge that fails to resign at age 70 forfeits all pension/retirement benefits. See Arkansas Code § 24-8-215(c)	
California				
Colorado	72	72	Constitution: Art. VI, Sec. 23	
Connecticut	70	70	Constitution: Art. V, Sec. 6	
Delaware				
District of Columbia	74	74	Statute: 1-204.31(c)	
Florida	70	70	Constitution: Art. V, Sec. 8	May complete term if more than 50% of it has been served at age 70.
Georgia		Some but not all Municipal courts have mandatory retirement ages.		
Hawaii	70	70	Constitution: Art. VI, Sec. 3	
Idaho				
Illinois	*	*	Constitution: Art. 6, Sec. 15	May serve out term in which

			Statute: 705 ILCS 55/1*	turns 75. Statute was declared by the Supreme Court of Illinois to be unconstitutional, as written, because the Act violated the doctrine of equal protection. See: <i>Maddux v. Blagojevich</i> , 233 Ill. 2d 508 (2009).
Indiana	75		Statute: IC 33-38-13-8	
Iowa	72	72	Statute: 602.1610	
Kansas	75	75	Statute: 20-2608(a)	May serve out term in which turns 75.
Kentucky				
Louisiana	70	70/None	Constitution: Art. V, Sec. 23	May serve out term in which turns 70. Mayors' court judges have no age limit.
Maine				
Maryland	70	70/None	Constitution: Art. IV, Sec. 3	Orphan's Court Judges have no mandatory retirement age.
Massachusetts	70	70	Constitution: Art. 1, Part 2, Ch. 3	
Michigan	70	70	Constitution: Art. VI, Sec. 19	May not be elected or appointed after

				70.
Minnesota	70	70	Constitution: Art. 6, Sec. 9 Statute: 490.121(21d) & 490.125	May serve to end of month turns 70.
Mississippi				
Missouri	70	70/75	Constitution: Art. V, Sec. 26 Statute: 479.020(7)	70 for Circuit Court, 75 for Municipal Court.
Montana				
Nebraska				
Nevada				
New Hampshire	70	70	Constitution: Art. 78	
New Jersey	70	70	Constitution: Art. XI, Sec. IV	
New Mexico				
New York	70	70/None	Constitution: Art. VI, Sec. 25	Generally: May serve until end of year in which 70 is reached. Town/Village: No age limit.
North Carolina	72	72	Constitution: Art. IV, Sec. 6 Statute: 7A-4.20	May serve to end of month turns 72.
North Dakota				
Ohio	70	70/None	Constitution: Art. IV, Sec. 6	Section interpreted as

				meaning may serve until end of term turns 70. Mayors' court judges have no age limit.
Oklahoma				
Oregon	75	75	Constitution: Art. VII (Amended), Sec. 1a	Constitution allows age to be reduced to as low as 70 by statute or initiative.
Pennsylvania	70	70	Constitution: Art. V, Sec. 16	May serve until end of year in which 70 is reached.
Rhode Island				
South Carolina	72	72	Statute: 9-8-40 & 9-8-60	No limit for Probate or Municipal Courts.
South Dakota	70	70	Statute: 16-1-4.1	May serve into the January after attaining age 70.
Tennessee				
Texas	74	74/None	Constitution: Art. 5, Sec. 1-a	Legislature may set at any age from 70 to 75. District & Criminal District Court: May serve out term in which turns 75 if completed at least 4 years of 6 year term.

				Municipal: Varies. All other trial courts: No limit.
Utah	75	75	Constitution: Art. VIII, Sec. 14 Statute: 49-18-701	
Vermont	90	90	Constitution: Sec. 35 Statute: 4-609	Legislature may set anywhere from end of the calendar year in which judge attains 70 to end of the term when judge attains 90. Legislature has opted for end of year attain 90.
Virginia	70	70	Constitution: Art. VI, Sec. 9 Statute: 51.1- 305(B1)	May serve until 20 days after the convening of the next regular session of the General Assembly.
Washington	75	75	Constitution: Art. IV, Sec. 3(a)	May serve until end of year in which 75 is reached.
West Virginia				
Wisconsin				
Wyoming	70	70/None	Constitution: Art. 5, Sec. 5	District: 70 Circuit & Municipal: None

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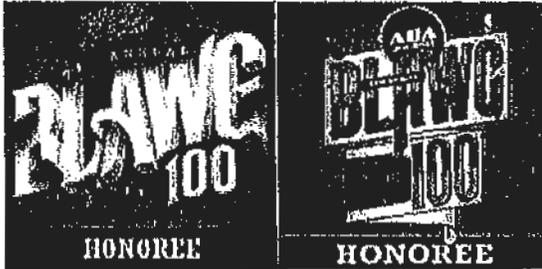
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