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Column

Ian Lind: Hawaii Lawmakers Needlessly Renew Assault On The Judiciary

As if they don't have enough to do this session, legislative leaders seem intent on grabbing the power to reappoint state judges.

14

By Ian Lind  / January 26, 2017

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“We have a lot on our plate for this session,” House Speaker Joe Souki said last week at the start of the annual 60-day legislative session.

And it's true. Legislators face a laundry list of big issues during this budget session, including sorting out the financial and political problems of Honolulu's massively over-budget rail system, facing the emotional issues of end-of-life care and “medical aid in dying,” funding new public worker union contracts and responding to the Ige administration's continuing push for new prison construction.

With so much to do and so little time to get it done, why in the world would Souki and other key legislators pick another unnecessary fight with the

Hawaii State Judiciary? But that's exactly what it appears they're doing.



Supreme Court Chief Justice Mark Recktenwald administered the oath of office in the Senate chamber on the opening day of the session. Some legislators have wasted no time renewing their attack on the judiciary's independence.

Several bills introduced this year would transfer decisions regarding the reappointment of state judges and justices to the Senate from Hawaii's independent [Judicial Selection Commission](#). It looks a lot like a replay of legislative moves made last year, which were widely interpreted as not-very-veiled threats against the justices of the state Supreme Court by unhappy legislators.

The very first bill introduced in the House this year calls for a constitutional amendment removing reappointment decisions from the commission and instead giving the Senate the final word in the reappointment of individual judges and justices.

The measure, [House Bill 1](#), was introduced by Souki, along with House Majority Leader Scott Saiki, Judiciary Committee Chair Scott Nishimoto, and Finance Committee Chair Sylvia Luke. That's a weighty list of sponsors.

Under the guise of promoting “transparency,” the bill would give the Senate the power “to [reverse the decision](#) of the judicial selection commission regarding the retention of a justice or judge.”

A similar measure, [Senate Bill 673](#) was introduced by Gil Keith-Agaran, chair of the Senate Judiciary and Labor Committee, along with Jill Tokuda, who chairs the powerful Ways and Means Committee. A separate Senate bill targets retirement benefits of future judges for a significant cut.

Last year, several bills in both houses threatened the independence of the judiciary. Some would have required judges to be elected, while others empowered the Senate to reject the reappointment of judges, presumably when senators or special interest groups disagreed with their legal decisions.

Daniel Foley, retired associate judge of the Intermediate Court of Appeals, said in a telephone interview Monday that legislators haven’t been candid about why these bills have been introduced.

“The bad thing is that we’re left to speculate on the real motives behind the bills,” Foley said.



House Speaker Joe Souki, right, and House Majority Leader Scott Saiki are both sponsors of a bill calling for a constitutional amendment that would transfer the ultimate power to reappoint state judges and justices to the Senate, taking it away from the Judicial Selection Commission.

Last year's bills were [widely seen as political retaliation](#) for court rulings that required the Legislature to provide sufficient funds for administration of the [Department of Hawaiian Home Lands](#), as provided by the state constitution.

The Hawaii Supreme Court found the Legislature had, for years, underfunded the department and shortchanged its Native Hawaiian beneficiaries. Legislative leaders bristled at being called out by the courts for failing to comply with the constitution and apparently felt the courts trampled on their legislative prerogatives by setting a specific dollar amount needed to achieve constitutional compliance.

The 2016 proposals died under the weight of overwhelming opposition from a broad spectrum of the legal community, and difficulty in securing necessary votes for the measures in committee and on the floor of both chambers.



“My plea is that everyone should just take a deep breath, step back, and let the judicial process play out.” — Daniel Foley, retired judge

Opponents pointed out that Hawaii's existing judicial selection process is considered the “gold standard” for keeping the courts free of direct political interference, and is seen as a model by other jurisdictions. And they stressed the public interest in shielding judges as much as possible from outside political pressure and influence.

This year, the ongoing contested case hearing on the permit for the Thirty Meter Telescope project may be contributing to unhappiness among legislators.

Saiki, one of the sponsors of HB 1, has publicly called on the Supreme Court to appoint a special master to manage the extensive testimony and exhibits piling up in the proceedings.

In [a Dec. 22 opinion piece](#) published in the Honolulu Star-Advertiser, Saiki said a bill passed into law last year allows the appointment of such a master, which he believes could go a long way toward removing bottlenecks that are slowing down the hearing process.

“The Legislature approved HB 1581 because it believes that our courts have a responsibility to ensure that disputes directed to contested case hearings are decided on the merits in a timely manner,” Saiki wrote. “Without supervision, contested case hearing decisions will undoubtedly be challenged and re-challenged particularly on procedural grounds.”

The judiciary’s defenders say legislators are wrong to blame the court for the decisions.

Foley said if legislators are unhappy with the rulings on DHHL funding, their beef is really with the constitution, not the the courts.

“Their problem isn’t with the judges. They (legislators) apparently just didn’t agree with the 1978 constitutional amendment,” Foley said.

Similarly, while the Supreme Court has not responded to Saiki’s call for a master to be appointed to oversee the Mauna Kea contested case hearings, the court can’t be blamed for foot-dragging.

Andrea Freeman, professor of constitutional law at the University of Hawaii William S. Richardson School of Law, [responded to Saiki’s call](#) for a special TMT master by pointing out that “it is not possible under Hawaii’s statutory and constitutional law.”

Freeman wrote that when passing the bill authorizing the court to appoint a special master, legislators failed to provide for retroactive application. And since the Supreme Court had already remanded the case to the [Board of Land and Natural Resources](#) before the bill became law, it lacks legal jurisdiction to take action on Saiki's request.

It's important to note that the Legislature already has more input in the judicial selection process than any other group. Four of the Judicial Selection Commission's nine members are appointed by legislative leaders (two by the Senate president, two by the House speaker). The chief justice, on the other hand, appoints only a single member. The governor and the state bar each appoint two members, rounding out the nine-member commission.

Commission members are prohibited from running for elected office, and from taking an active part in any political campaign. Commission members cannot be considered for a judicial appointment until three years after leaving the commission. These restrictions are all designed to preserve the commission's independence.

While not perfect, the system is designed to be as free from overt political pressure as possible, both in the appointment and reappointment process, so that judges are protected from outside influence.

The claim that this year's bills are motivated by a desire for more "transparency" rather than an attempt to influence judicial decisions through political intimidation can't be taken seriously.

If transparency were really the focus, legislators could address that issue directly by proposing a constitutional amendment for increased public disclosure of the commission's discussions and deliberations.

That's what was done in 2014, when the Legislature passed a constitutional amendment [requiring the public disclosure](#) of the names of judicial nominees at the same time the list is sent to the governor or the chief justice. The amendment was approved by the Legislature and voters, and

clearly established the public's right to know the names on the list of potential nominees.

By the way, the bill proposing that constitutional amendment was introduced by Saiki, so he clearly understands that an interest in providing more public information during the appointment process could be accomplished without adding that new political review by the Senate.

It remains to be seen whether there will be a serious push to pass HB 1 and other anti-judiciary bills this year. Although the No. 1 designation seems symbolic of legislative interest, none of the bills designated HB 1 over the past eight years has become law.

And Foley had some concise advice for all involved.

"My plea is that everyone should just take a deep breath, step back, and let the judicial process play out," he said.

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