

State of the Judiciary
Chief Justice Ronald T. Y., Hawaii Supreme Court
Message to the Hawaii Legislature
January 24, 2007, in Honolulu, Hawaii

President Hanabusa, Speaker Say, Governor Lingle, Lieutenant Governor and Mrs. Aiona, distinguished members of the twenty-fourth Legislature, fellow judges, Judiciary and other state employees, judges of the federal bench, members of local and federal law enforcement, former Washington State Chief Justice Richard Guy, my fellow members of the Royal Order of King Kamehameha, the First members of the Hawaiian Royal Societies, other special guests, family, friends, and fellow citizens:

I am privileged and honored to have this opportunity to address this joint session of the Hawai'i State Legislature and extend my sincere appreciation for your kind invitation to speak about the state of the Judiciary. I extend congratulations to Governor Lingle and Lieutenant Governor Aiona on their successful bid for a second term of office and thank them, again for allowing me the honor of administering their oaths of office last month. I also extend a special aloha to the new legislators whom I had the pleasure and honor of swearing in last week and thank you for joining us in service to the people of Hawai'i. We, in the judiciary, look forward to working with all of you. There is no doubt that we – that is, all three branches of government – are well aware that we share in the quest for fairness, justice and good government as we work both collaboratively and separately to serve the people of Hawai'i. And speaking of awareness -- I am reminded of the vampire bat that came flapping in from the night covered in fresh blood and parked himself on the roof of the cave to get some sleep. Pretty soon, all the other bats smelled the blood and began hassling him about where he got it. He told them to go away and let him sleep, but they persisted until he finally gave in.

"Okay, follow me," he said and flew out of the cave with hundreds of bats behind him. Down through a valley they went, across a river, and into a forest of trees. Finally, he slowed down and the other bats excitedly milled around him:

"Now, do you see that humongous tree over there?" he asked.

"Yes, yes, yes!!!" the bats all screamed in a frenzy.

"Good!" said the first bat, "because I sure didn't."

Fair and Impartial Courts/Access of Justice:

Ladies and gentlemen -- the state of the Judiciary remains sound due in large part to the efforts of our hard-working employees and volunteers. I, therefore, take this opportunity to publicly thank each and every one of our judges, administrators, and other Judiciary employees for their continuing commitment, dedication, and outstanding work in helping to promote the effective, efficient, and fair administration of justice. To the many volunteers who give unselfishly of their time and talents to help our overburdened staff, as well as to those who serve on the many Judiciary commissions and committees, we extend a big "mahalo" for your service. Would you

please help me acknowledge these dedicated Judiciary employees and volunteers, many of whom are here today, by giving them a round of applause?

As I stated earlier, the state of the Judiciary remains sound; however, I continue to be concerned about the perception of many that our justice system is not functioning as it should and that some of our citizens, therefore, feel they need to take matters into their own hands to fix it. I am, of course, not opposed to our citizens taking a greater interest in public affairs. In fact, I firmly believe that we need to find ways to better motivate our citizens to more actively participate in government and in such civic matters as voting and jury service. However, I am concerned about some of the initiatives that appeared on other state ballots in the most recent elections -- some of which were proposed and promoted as a way to fix our justice system. For example, the citizens of South Dakota voted on a radical constitutional amendment, entitled Judicial Accountability Initiative Law -- commonly referred to as "JAIL for Judges" -- that proposed, among other things, the creation of a new grand jury that would allow citizens to sue judges for decisions they did not like. Although the amendment did not pass, the fact that it was even proposed underscores fundamental misunderstandings of the duties of legislators and judges and how judges are held accountable.

Legislators, as you well know, enact laws in accordance with what they understand to be the popular will and in the public interest. Judges, however, apply the law that is the result of longstanding common law traditions and legislative processes to the evidence in individual cases. Judges do so even when the loudest voices at the time may have other conceptions about what the law or result should be in a particular case. In short, a judge's first and foremost duty is to fairly and impartially apply the constitution and the law to the facts of the case. A judge's personal feelings about what the law "should be" has no place in his or her deliberations. The determination of such broad policy matters as to what the law should be is your kuleana, and you are in a much better position to make that assessment than is a judge hearing the evidence in an individual case.

Nevertheless, as evinced by initiatives like South Dakota's JAIL for Judges, an alarming number of our citizens continue to believe that the role of the courts is to bend to the whims of the press or, at least, those who have the money to mount advertising campaigns and get press attention. Thus, when some of our citizens disagree with a judge's decision because it is not in conformity with what they perceive as the "popular will," they often cry out for reforms, like the election of judges. Indeed, rumor has it that this legislature may be asked to consider proposals calling for the election of judges. And, although such a proposal is not "new," it seems rather ironic since many other jurisdictions are attempting to repeal the election process in their respective states because of the effect judicial elections have on preserving a fair and impartial justice system. Under an elective system for judges, there is the constant threat that an unpopular decision could result in the loss of popular votes -- a consideration that has no place in a judge's decision-making process. And, sadly, judges in elective jurisdictions who have adhered to the high standards of fair and impartial judicial decision-making have paid the ultimate price at the polls -- that is, they have lost their jobs. But, a decision that is made fairly, impartially, and in accordance with the constitution and the law -- even though unpopular -- is, in the words of the late United States Supreme Court Chief Justice William Rehnquist, one of the crown jewels of

our democracy. Those who favor electing judges often do because they believe judges are not held accountable for their actions or decisions. They are wrong.

Hawaii judges are held accountable in more ways than any other public office. First, each judge's legal decision is subject to review and reversal by Hawaii's appellate courts and, depending on the issues, by the United States Supreme Court. Each judge's performance, demeanor, and competence are subject to review and sanction by the Commission on Judicial Conduct, which may recommend a judge's removal from office. A judge seeking retention is also subject to review and sanction by the Judicial Selection Commission, which may -- and does -- refuse to retain judges. In addition, the supreme court's Rule 19 committee administers the Judicial Performance Evaluation program under which each judge's performance is evaluated one or more times during the judge's term of office. A Judicial Performance Review Panel -- composed of a retired judge, a retired attorney, and a member of our lay community -- discusses the evaluation results with the judge so that the judge may improve his or her performance for the benefit of the public. In addition, the Hawai'i State Bar Association conducts its own judicial evaluation program and provides the results of its surveys to our judges.

Judges are, to the best of my knowledge, the only public officers in Hawai'i whose decisions, performance, competence, and demeanor are subject to probing, professional, and systematic scrutiny. In short, judges are held accountable by mechanisms that assure accountability without undermining the impartiality of our courts. Fair and impartial courts provide the balance that is essential to the workings of our government and not only makes our democracy the envy of many of our foreign neighbors but ensures equal access to justice for all. Undermining the impartiality of the courts jeopardizes the very access our citizens expect. Indeed, without access to the courts, there can be no justice for our citizenry.

Intermediate Sanctions and Problem-Solving Courts:

The public's assessment of how well the courts are helping our citizenry also affects the public's perception of the Judiciary. As you know, substance abuse, mental illness, and other social problems are the underlying causes of many of the crimes in our community. Acknowledging that the greater majority of offenders who experience these problems will ultimately return to our communities, we have been effectively addressing some of those problems by combining court supervision with treatment and other alternatives to incarceration. These "problem-solving" courts utilize practices that are referred to as intermediate sanctions. Over the past five years, the judiciary has achieved great success and learned important lessons regarding the effective use of intermediate sanctions through our adult drug court programs, which are operational statewide. We have expanded the philosophy to our family drug court programs on O'ahu and Maui, as well as juvenile drug courts on O'ahu and Kaua'i.

In a recent 306-page evaluation report written under contract by the National Center for State Courts, the Center found that Hawai'i is satisfactorily meeting nearly all of the key components, strategies, and characteristics for adult, juvenile, and family drug court programs. In commenting on the Judiciary's on-going efforts to develop and implement drug court performance standards, the Center report states, "These measures place Hawai'i far in advance of many states[.]" Indeed,

your support of our drug court initiatives -- for which we are truly grateful -- have allowed Hawaii's drug courts to do well and garner national respect and attention.

Girls Court:

In 2004, the Judiciary initiated "Girls Court" in the Family Court of the First Circuit -- one of the first courts in the United States to build a full range of gender-specific programming for female juvenile offenders. The program incorporates practices to help girls get back on a positive development track and to avoid future delinquent behavior. Last month, we celebrated the journey of nine more young women and their families who successfully completed the Girls Court program. We also celebrated the ongoing journey of two "alumni" who had completed the program in the previous year and continued their relationship with the program in order to help those who followed them. The goal of Girls Court is to empower and build on each girls' strengths, focusing on developing the skills necessary to make positive choices in their lives that will stop them from becoming, for example, involved in the criminal justice system as adult women, or from becoming victims of domestic violence or defendants in the child protective service system later in their lives. By all accounts, thus far, Girls Court is garnering positive and encouraging results. For example, the Girls Court Program has reduced recidivism by 47 percent, runaways by 60 percent, and arrests by nearly 63 percent. Please join me in acknowledging Girls Court Presiding Judge Karen Radius, the Girls Court staff, and some of their clients, with their parents, who are here today in the gallery.

HOPE Program:

Also in 2004, the Judiciary launched a pilot program designed to reduce probation violations by drug offenders and others at high risk of re-offending. This high-intensity supervision program -- called Hawaii's Opportunity Probation with Enforcement, or HOPE -- received a major vote of confidence in the form of a 1.2 million dollar appropriation from the 2005 legislature, which we truly appreciate. First Circuit Judge Steven Alm is responsible for bringing the concept of the HOPE Program to the Judiciary, which we believe is the first and only such program in the nation. This past September, representatives from the National Institute of Justice visited our Judiciary to learn more about this unique, innovative program. More recently, on December 8, 2006, both chambers of Congress passed a federal bill authored by Congressman Adam Schiff of California that calls for frequent, mandatory drug testing for chronic drug offenders and includes immediate sanctions for violators. The measure, which has been sent to the President to be signed into law, was modeled after the Hawai'i Judiciary's HOPE Program, of which Congressman Schiff said: "This approach is currently finding great success in Honolulu, Hawai'i, where previous drug tests turned up 21.9% positive and 10% missed appointments altogether. With this program in place, the positive drug tests dropped to 3.8% and the missed appointment rate dropped to 1.3%."

Our probation office, like those across the nation, is overwhelmed and severely under resourced. As a result, probationers who violate their terms of probation -- including continued drug use -- often receive no more than a verbal warning from their probation officers. Continued violations, however, do eventually result in revocation of probation and incarceration, thus compounding our crowded prison situation and increasing costs to the state. Notwithstanding their already

heavy workload, our probation officers have demonstrated their commitment to helping probationers succeed by working collaboratively with Judge Alm and other major players in the HOPE Program, such as the prosecutors and public defenders. Such collaboration and teamwork has been the catalyst to the effectiveness of one of the major components of the HOPE Program, which is its pattern of swift, predictable, and immediate sanctions -- typically resulting in several days in jail -- for each detected violation, such as drug use or missed appointments with a probation officer. Originally under the watchful eye of Judge Alm, selected-probationers -- since August of last year -- are now being admitted to the HOPE Program and supervised by each of our nine criminal judges handling felony cases.

Family Court:

As is evident from the programs that focus on juveniles and their families, the Judiciary adheres to the proposition that "the state of the family determines the state of our society." Family courts throughout the nation have been likened to hospital emergency rooms—and ours is no exception. People who come to family court are usually in crises and often at their worst. On a daily basis, our family court judges deal with every family situation imaginable.

Children, sometimes as young as eleven, following arrest, are brought to family court for making poor choices. Our judges must decide if they should be sent to the Hawai'i Youth Correctional Facility, referred to a treatment program, or released back into the community. What does a judge do when parents of a 14-year-old runaway girl, who is pregnant, addicted to ice, and in love with her pimp, look to the judge for "the answer"?

Parents, too, are brought to family court for harming their children, and our judges must decide whether to terminate their parental rights. What is a judge to do when an infant has been severely injured, but no one can say for sure if either parent did it?

Our family court judges are routinely asked to play the role of Solomon in deciding which parent will be awarded physical custody of children. Such decisions inevitably alter forever the lives of the children and the parents. What does a judge do when a divorcing parent receives a better job opportunity on the mainland and wishes to take the child out-of-state, but the other parent wants the child to remain in Hawai'i?

These are just a few of the gut-wrenching decisions that our family court judges must not only make on a daily basis but must do so expeditiously because of their crowded dockets. On any given morning -- I repeat, just the morning, with another calendar of cases in the afternoon -- a family court judge has ten to fifteen child protective service cases on the calendar. Another judge might have a morning calendar of twelve to fifteen restraining order cases. Still another judge is hearing a divorce case, involving child custody and property division issues, that must be completed by the end of the day because the judge has another trial -- on another case -- the very next day, AND still another new case the day after that. The high volume of cases in the family court places extreme pressures upon our judges -- and, undoubtedly, creates a great deal of internal stress -- as they strive to make the right decision in the best interest of the children.

Kapolei Court Complex and Additional Family Court Judges:

Adding to this stark reality is the fact that family court users, as well as our family court judges and staff, are subjected to crowded physical conditions, creating unnecessary tension and heightened security concerns. The waiting area for court users on the second floor of the First Circuit court building -- on any given day of the week -- makes the waiting area of a hospital emergency room seem like an oasis. People are packed together; you can definitely feel the emotions and hostility in the room; and the noise level might lead you to think you're in a train station rather than a courthouse. And, once the parties enter the courtroom, things aren't much better as parties are literally just a few feet away from each other and no more than five to six feet away from the judge. It is not uncommon to have twelve to fifteen people on a case in a courtroom that was designed to accommodate no more than six to eight people. Such conditions are, to say the least, untenable.

We are, therefore, deeply grateful for the giant step you took toward improving the situation in family court when you originally authorized 95 million dollars during the 2005 legislative session to build the Kapolei Court Complex. On behalf of the many children, families, and the myriad of other family court users in our community that desperately need the help of our family court, we thank you for supporting our efforts to provide improved services to your constituents. We must now, however, move forward and ensure that the facility is not only large enough, but that we secure an adequate number of judges in order to better meet the needs of family court users as well as to avoid "bumming out" our current judges as a result of the extreme stress and high volatility of cases.

As you know, since your original appropriation in 2005, construction costs -- following Hurricane Katrina -- have risen substantially, resulting in our having to significantly scale-down our original design. Nevertheless, we remained confident that the facilities would still be able to accommodate a full range of judicial services for the Ewa region. However, since then, the cost of construction -- statewide -- has continued to increase, thereby requiring additional reductions to the facilities.

In light of the increased construction costs, I reluctantly approved the redesign of the new juvenile detention facility. Rather than the 78 beds originally planned, the scaled-down detention facility will have a total of 66 beds. Moreover, in order to stay within the amount of the original appropriation, two of the twelve non-jury courtrooms in the Kapolei court building will have to remain unfinished and unusable. In addition, the original plan for one jury courtroom, associated jury deliberation room, and secure holding cells will necessarily have to wait, unless an additional appropriation is made this session. The loss of these courtrooms and related facilities will seriously impact family court functions, postpone the closure of the Waianae District Court, which is currently housed in leased space, and delay providing a fuller range of court functions at Kapolei. Without an additional appropriation this session, the acquisition of other critical design elements will also be delayed. Indeed, any delay in the construction and/or completion of any aspect of the facilities will lead to increased costs. Consequently, the Judiciary respectfully asks for your support and consideration of an additional appropriation of 15.5 million dollars this session in order that the Kapolei Court Complex, slated for completion in 2010, will open with a full complement of courtrooms and a safer, although slightly smaller juvenile detention facility.

We also respectfully request your help in ensuring the sustainability of our current family court judges by providing them with assistance in the form of two additional family court judges.

Parental Rights Termination Cases: Attorneys and Guardians Ad Litem:

The parties in family-related disputes and our Family Court judges are only part of the equation in family court. The attorneys appointed by the court also play a critical role in representing parents in cases involving the termination of parental rights. In these cases, one of society's most important privileges -- that of being a parent -- is at stake. Parents involved in these termination cases often qualify for court-appointed attorneys because a majority of them are economically disadvantaged.

Guardians ad litem, appointed by the court to represent the children in these cases also play a critical role -- perhaps the most critical role because these guardians often become "ohana" to the children with whom they interact. They respond to a child's telephone call for help at all hours of the day, they facilitate therapeutic placements, and, as importantly, they listen. A five-year-old girl who was being adopted by her grandmother after the mother's parental rights had been terminated, was asked by the presiding judge, "Who is that man standing next to you?" The child looked up at her court-appointed guardian ad litem, then looked back at the judge and said, "He is my guardian angel!"

For the past twenty years, court-appointed attorneys have been protecting the rights of parents -- and guardians ad litem have been protecting the well-being of children -- at \$40.00 an hour for work performed outside of court and \$60.00 for in-court time -- which is significantly less than any other type of attorney-work in the State.

We certainly appreciate the fact that, in 2005, you saw fit to raise the hourly rate for attorneys defending indigent criminal defendants, which became effective on July 1, 2006. As you recognized when considering and passing the 2005 legislation, the courts were finding it difficult to secure competent attorneys to accept court appointments, which created serious concerns among those who prosecute and those who defend indigent criminal defendants, such as increased cases on appeal and cases of ineffective assistance of counsel. I submit that considerations similar to those which prompted you to increase the hourly rate to \$90 for the attorneys representing indigent criminal defendants are applicable here. Thus, on behalf of the parents and especially the children involved in these termination cases, the Judiciary respectfully requests' your support and consideration of hourly fee increases for court-appointed attorneys and guardians ad litem in these parental rights cases.

Ladies and gentlemen -- my focus this morning has been primarily on our family court and the related issues regarding Kapolei, additional judges, and increased pay for attorneys and guardians ad litem in parental rights termination cases because the Judiciary is convinced that one of our state's greatest challenges is to provide our children a safe, loving, and nurturing environment in which they can flourish and grow into productive and law-abiding citizens, many of whom will become tomorrow's leaders. They certainly deserve no less. They -- along with the rest of our citizenry--also deserve to have a justice system that is fair, impartial, and free of any undue influences.

In an interview shortly before her retirement, Justice Sandra Day O'Connor said: "The Framers [of our Constitution] understood quite well that, without judges who could enforce the Constitutional rights and guarantees without fear of retaliation, the Constitution would be meaningless. . . The many calls for retaliation against judges for rulings in particular cases run directly counter to the concept of the Framers of the Constitution."

Given the current environment, with its various citizen-initiatives aimed at the judicial decision-making process, our challenge -- as judges, lawyers, and lawmakers -- is to maintain the integrity of the third branch of government and to protect the courts from pressures -- political or otherwise -- that may affect, or be perceived as affecting, the decisions of the court. Whether our decisions are correct must be dictated by the law that applies equally to everyone and not by popular concerns of the moment that have not passed through legislative scrutiny. Generally, in any given case, the "winner" will be happy, and the "loser," including those sympathetic to their cause, will not. Ultimately, however, it is the rule of law -- equally and equitably applied -- that we Americans choose to help us resolve our differences and to ensure civic order. In that regard, the Judiciary remains committed to the constitution and the rule of law and to rendering fair and impartial decisions, based upon the facts and the applicable law.

On behalf of all of the dedicated employees of the Judiciary, we pledge our continued support and look forward to working collaboratively with each of you. Thank you.