



## **TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-SEVENTH LEGISLATURE, 2013**

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### **ON THE FOLLOWING MEASURE:**

S.B. NO. 886, PROPOSING AN AMENDMENT TO ARTICLE VI, SECTION 3, OF THE HAWAII STATE CONSTITUTION TO INCREASE THE MANDATORY RETIREMENT AGE FOR STATE JUSTICES AND JUDGES.

### **BEFORE THE:**

HOUSE COMMITTEE ON FINANCE

**DATE:** Thursday, March 27, 2013

**TIME:** 4:45 p.m.

**LOCATION:** State Capitol, Room 308

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Charleen M. Aina, Deputy Attorney General

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Chair Luke and Members of the Committee:

The Department of the Attorney General supports passage of this bill, which proposes an amendment to Article VI, section 3, of the Hawaii State Constitution, to raise the mandatory retirement age for state justices and judges to age eighty.

When Hawaii's Constitution was originally adopted in 1959, the framers established a retirement age of seventy and also provided for limitations on judicial terms. Since then, the terms of justices and judges, but not the retirement age, have been extended. We believe that the retirement age of seventy, while perhaps appropriate in 1959, is now outdated. People now live longer, healthier, and more productive lives and are contributing to their community and their jobs well past the age of seventy. In the local legal community, some of the finest minds and best attorneys are older than seventy.

This amendment would also bring Hawaii in line with the federal judiciary and many other states. For example, the federal judiciary system has no age limit for justices and judges. Likewise, at least twenty states have no such age limit. These jurisdictions have recognized that removing the accumulated wisdom of these judges because they have reached the relatively young age of seventy makes little sense. Many well-recognized and highly esteemed justices of the United States Supreme Court have served beyond the age of seventy, including several sitting justices. Justice John Paul Stevens did not retire until he was ninety and when he did retire, he was still an active member of the court.

This bill will prevent the loss of the services of intelligent and effective justices and judges simply because they have reached the age of seventy years. Because appointments are made for terms of a specified number of years, there is still ample opportunity for the community and the bar to scrutinize whether a judge over the age of seventy who applies for reappointment to another term is still capable of being effective.

The Department of the Attorney General requests the passage of this bill.

Thank you for the opportunity to testify.



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Thank you for the opportunity to testify.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

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**THE HONORABLE SYLVIA LUKE, CHAIR  
HOUSE FINANCE COMMITTEE  
Twenty-Seventh State Legislature  
Regular Session of 2013  
State of Hawai'i**

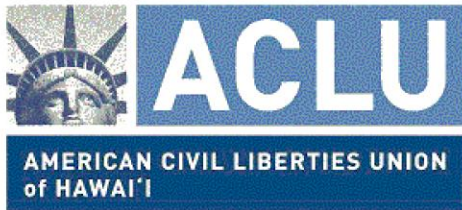
March 27, 2013

**RE: S.B. 886; PROPOSING AN AMENDMENT TO ARTICLE VI, SECTION 3, OF THE  
HAWAII STATE CONSTITUTION TO INCREASE THE MANDATORY  
RETIREMENT AGE FOR STATE JUSTICES AND JUDGES.**

Chair Luke, Vice Chair Nishimoto, Vice Chair Johanson, and members of the House Committee on Finance, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition of S.B. 886, which proposes a constitutional amendment to increase the mandatory retirement age for justices and judges from 70 to 80 years of age.

While the Department of the Prosecuting Attorney of the City and County of Honolulu supports judges and justices who are knowledgeable of the law and respectful to attorneys, staff, and witnesses pursuant to the Hawaii Revised Code of Judicial Conduct, the department notes that the mandatory retirement of judges and justices who reach the age of 70 provides opportunity for judicial nominees who have a fresh approach in analyzing the laws and a strong commitment to treating all participants in the court in a professional manner. Moreover, the mandatory retirement of age 70 for justices and judges is sometimes our only opportunity for change.

For the following reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of S.B. 886. Thank you.



Committee: Committee on Finance  
Hearing Date/Time: Wednesday, March 27, 2013, 4:45 p.m.  
Place: Room 308  
Re: Testimony of the ACLU of Hawaii to Offer Comments on S.B. 886

Dear Chair Luke and Members of the Committee on Finance:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes to offer comments on S.B. 886, which proposes a constitutional amendment to increase the mandatory retirement age for state justices and judges to 80.

The Legislature should attempt to propose a constitutional amendment to eliminate any age requirement in the judicial system rather than continue it.<sup>1</sup> Although increasing the mandatory retirement age is a step in the right direction, any mandatory retirement age constitutes age discrimination.

#### Mandatory retirement for judges constitutes age discrimination

When a competent judge is forced to retire solely because he or she reaches a certain arbitrary age, that judge is denied equal protection of the law. The sole criterion for employment decisions relating to age should be the judge's competency.

#### Hawaii provides a variety of ways to address performance absent age discrimination

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 disability (which includes physical or mental inability to perform judicial duties and functions) of all justices and judges in the Hawaii and may recommend to the Hawaii Supreme Court removal from office, retirement, or imposition of limitations and other conditions on the performance of judicial duties. The Judicial Performance program 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

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<sup>1</sup> The ACLU of Hawaii notes that language for an outright repeal cannot be inserted in S.B. 886 given the title of the bill, which specifies that the contemplated constitutional amendment is to "increase the mandatory retirement age for state justices and judges." See *Taomae v. Lingle*, 108 Haw. 245, 118 P.3d 1188 (2005).

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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, these many checks ensure that it is highly unlikely that an unqualified judge would be able to remain on the bench.

### Repealing the Mandatory Retirement Age is Good Public Policy

Simply put, the ACLU of Hawaii suggests that the Legislature consider (in future years) proposing a constitutional amendment to repeal the mandatory retirement age because it's the right thing to do. Age alone does not determine whether someone is competent. Hawaii should follow the example set by the federal system, which does not subject Supreme Court or other federal judges to mandatory retirement. Forcing judges to retire at 70 denies Hawaii's citizens of the experience, ability, efficiency and productivity that older judges can offer.

In 1959, when the mandatory retirement clause was included in Hawaii's Constitution, the average life expectancy was only 71.55 and the committee report admits that the fixing of the compulsory retirement age is debatable. Improvements in health and medicine have improved the average life expectancy to 78.7 years and, as such, the need for mandatory retirement must be examined.<sup>2</sup>

Thank you for this opportunity to testify.

Sincerely,

Lois K. Perrin  
Legal Director  
ACLU of Hawaii

*The American Civil Liberties Union ("ACLU") is our nation's guardian of liberty - working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country.*

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<sup>2</sup> Center for Disease Control and Prevention, *Deaths, Final Data for 2010 (2010)*, available at [http://www.cdc.gov/nchs/data/dvs/deaths\\_2010\\_release.pdf](http://www.cdc.gov/nchs/data/dvs/deaths_2010_release.pdf).

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