

STAND. COM. REP. NO.

7

Honolulu, Hawaii

AUG 05 2010

RE: GOV. MSG. NO. 3

Honorable Colleen Hanabusa
President of the Senate
Twenty-Fifth State Legislature
First Special Session of 2010
State of Hawaii

Madam:

Your Committee on Judiciary and Government Operations, to which was referred Governor's Message No. 3, submitting for study and consideration the appointment of:

CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII

G.M. No. 3 FAAUUGA L. TO'OTO'O,
for a term to expire in ten years,

begs leave to report as follows:

Testimony in support of the appointee was submitted by the State Attorney General; the State Public Defender; the Department of the Prosecuting Attorney of the City and County of Honolulu; and numerous individuals, including community members and attorneys. Comments were submitted by the Board of Directors of the Hawaii State Bar Association, as described more fully below. Additionally, at the request of a committee member, your Committee received comments from Judge Michael A. Town, Circuit Judge of the First Circuit.

Written testimony presented to your Committee may be reviewed on the Legislature's website.

Faauga L. To'oto'o received a Bachelor of Arts degree from Missouri Valley College and a Juris Doctor degree from St. Louis University School of Law. Since 1994, Judge To'oto'o has been a District Judge of the District Court of the First Circuit, where he has handled numerous criminal and civil cases of all types. From 1984 to 1994, Judge To'oto'o was a Deputy Prosecutor in the Prosecuting Attorney's Office of the City and County of Honolulu.



Judge To'oto'o has also been an active contributor to the community. He has served as a Director on the Board of the Kaneohe Cultural Foundation and a member of the Board of Directors of Palama Settlement. He volunteers with Hawaii Youth Challenge academy, which is sponsored by the Hawaii National Guard, Mookini Heiau Foundation, and Big Brothers Big Sisters, among many of his community endeavors.

Your Committee notes that the Hawaii State Bar Association Board of Directors (HSBA Board) found the appointee to be "not qualified" for the position of Circuit Court Judge of the First Circuit, based upon a modified version of the American Bar Association Guidelines for Reviewing Qualifications of Candidates for State Judicial Office. These Guidelines include the following criteria: integrity, legal knowledge and ability, professional experience, judicial temperament, diligence, financial responsibility, and public service, collegiality, and writing ability. The HSBA Board rating system includes the categories of "qualified" and "not qualified."

The process for the HSBA Board's rendering of its finding is as follows. As described to your Committee by the President of the HSBA Board, this finding is arrived at through a vote of the HSBA Board, which is composed of twenty elected members of the Hawaii State Bar Association, after solicitation of all members of the Hawaii State Bar Association through a confidential process for sharing their input and past experience with the appointee and review of the resulting comments by the members of the HSBA Board. The President of the HSBA Board also explained that, following submittal and review of these comments, the appointee is interviewed by the HSBA Board and apprised of the nature of any negative comments so that the appointee may fairly address those concerns during his or her interview with the HSBA Board.

The President of the HSBA Board also explained that the criteria for the finding described above has always been applied with a specific view toward the vacancy being filled. As also explained to your Committee, information such as the final vote tally and the basis upon which each member voted is confidential and not subject to disclosure to your Committee or to the public.

It is uncommon that your Committee is faced with evaluating a judicial appointee who has been found to be "not qualified" by the HSBA Board for the position to which the appointee has been



appointed. As noted above, findings by the HSBA Board regarding an appointee are based on comments from the appointee's peers, who presumably are very knowledgeable about the appointee's legal qualifications but who may not feel comfortable coming forward with public testimony against the appointee for fear of reprisals or retaliation from the appointee or the appointee's supporters. Your Committee acknowledges that this avenue of comment by an appointee's peers is an important tool in determining the appointee's qualifications in order to avoid a chilling effect on input from members.

For purposes of your Committee, however, this "not qualified" finding has raised concerns, because, as explained by the President of the HSBA Board in oral testimony in response to questions posed by your Committee, the HSBA Board is unable to give specific reasons or an explanation for the finding due to confidentiality mandates in its policies and procedures. Accordingly, it is incumbent upon your Committee to determine the weight to give the HSBA Board's finding.

Your Committee is highly cognizant of its role in the judicial confirmation process. For circuit court judges, article VI, section 3, of the Hawaii State Constitution requires the Judicial Selection Commission to present to the Governor a list of nominees for a vacancy. The Governor then selects one of the individuals from the list, appointing the person to the judicial position. Thereafter, the Senate reviews the appointment and, in its discretion, may consent or reject an appointment. During the Senate's review, public testimony is taken and evaluated. Prior to the Senate's evaluation of the appointment, the HSBA Board, as mandated by its constitution and bylaws, reviews the qualifications of the appointments and submits comments to the confirming authority (i.e., the Senate).

All of the actors in the appointment process are essential in assuring that the individual who ultimately assumes the weighty mantle of judicial responsibility has been thoroughly vetted, is qualified for the position, and possesses the requisite qualities to fairly, intelligently, and impartially interpret and apply the law that governs our society. As described in the Hawaii Revised Code of Judicial Conduct, "the judiciary plays a central role in preserving the principles of justice and the rule of law. . . . [J]udges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."



Each actor in the appointment process may have different criteria for evaluating an appointee, and each actor represents different stakeholders and aspects of society. As such, no actor can, in good conscience, shirk its responsibility by simply "rubber stamping" the evaluation of another actor; otherwise, the voice of those who are to be represented by the actor is ignored and rendered superfluous.

As stated above, your Committee is very concerned over the HSBA Board's "not qualified" finding. However, because of the Senate's constitutional duty to evaluate the appointee and the HSBA Board's inability to inform your Committee as to the reason for its "not qualified" finding of the HSBA Board, your Committee must conclude that the HSBA Board's finding is not dispositive on your Committee's evaluation of Judge To'oto'o's appointment but must be considered along with the testimony submitted to your Committee regarding the appointment and your Committee's own conclusions regarding Judge To'oto'o's qualifications for the appointment to the Circuit Court of the First Circuit. Nonetheless, the "not qualified" finding of the HSBA Board remains a "red flag" for your Committee to carefully consider all information into the appointee's qualifications.

Your Committee initially notes the overwhelming weight of testimony from community members regarding Judge To'oto'o's community endeavors and positive personal qualities, including his humble and generous nature. For purposes of evaluating Judge To'oto'o's legal qualifications, however, your Committee specifically and carefully reviewed and considered testimony from attorneys who have practiced with Judge To'oto'o prior to his elevation to the bench and in front of him as litigants in his court. Your Committee notes that the testimony submitted by attorneys who have practiced in his court indicate that Judge To'oto'o is well-respected in the legal community for his integrity, fairness, compassion, and sound judgment. Testifiers praised his extensive knowledge of the law, good communication skills, professionalism, and excellent judicial temperament. As observed by more than one attorney who has appeared before Judge To'oto'o many times, he has an excellent grasp of the law and possesses the ability to make quick decisions based upon the applicable law and facts.

Other testifiers also pointed out that Judge To'oto'o has, indeed, already performed the responsibilities of a Circuit Court



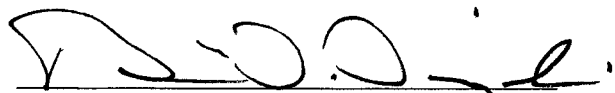
judge during instances when he has substituted for a circuit court judge. One testifier recalled a case where Judge To'oto'o was called in as a last-minute replacement for a circuit court judge and presided over a felony trial from jury selection to verdict. The testifier praised Judge To'oto'o's decisions on law, evidence, and procedure. Judge Town testified that all parties and court staff were satisfied with Judge To'oto'o's handling of the duties of the circuit court in Judge Town's stead.

Based on testimony submitted, your Committee finds that, notwithstanding the HSBA Board's finding of Judge To'oto'o as "not qualified" for the position of Circuit Court Judge of the First Circuit, Judge To'oto'o has actually stepped into this role on prior occasions and has performed very well in these instances. As observed above, your Committee is not aware of the basis for the HSBA Board's finding and while your Committee respects the HSBA Board's comments regarding the appointee, your Committee must respectfully conclude that Judge To'oto'o is, indeed, qualified to be a Circuit Court judge.

Your Committee finds that, based on the testimony submitted on his behalf, Faauuga L. To'oto'o has the experience, temperament, judiciousness, and other competencies to be a Circuit Court judge, and has a good sense of where the equities, rights, and responsibilities lie in a case, which is essential for a Circuit Court judge.

As affirmed by the record of votes of the members of your Committee on Judiciary and Government Operations that is attached to this report, your Committee, after full consideration of the background, experience, and qualifications of the appointee, has found the appointee to be qualified for the position to which appointed and recommends that the Senate consent to the appointment.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Government Operations,


BRIAN T. TANIGUCHI, Chair



The Senate
Twenty-Fifth Legislature
State of Hawaii

Record of Votes
Committee on Judiciary and Government Operations
JGO
Consent

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|--|--|------------------------|-----|---------|
| Gov. Msg./Jud. Comm. No.:* GM No. 3 | Committee Referral: JGO | Date: 8/5/10 | | |
| <input type="checkbox"/> The Committee is reconsidering its decision | | | | |
| The Recommendation is: | | | | |
| <input checked="" type="checkbox"/> Consent 2347 | <input type="checkbox"/> Not Consent 2349 | | | |
| Members | Aye | Aye (WR) | Nay | Excused |
| TANIGUCHI, Brian T. (C) | ✓ | | | |
| TAKAMINE, Dwight Y. (VC) | ✓ | | | |
| GABBARD, Mike | ✓ | | | |
| NISHIHARA, Clarence K | ✓ | | | |
| SLOM, Sam | ✓ | | | |
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| TOTAL | 5 | | | |
| Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted | | | | |
| Chair's or Designee's Signature: | | | | |
| Distribution: Original File with Committee Report Yellow Clerk's Office Pink Drafting Agency Goldenrod Committee File Copy | | | | |

*Only one Judiciary Communication per Record of Votes