

JUDICIAL INDEPENDENCE: THE HAWAII EXPERIENCE

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During the past twenty years, Hawaii, like many other states, has experienced a tremendous growth in the use of the judicial process. A 1976-77 review found that the caseload for Hawaii's circuit courts proper¹ and district courts had increased over the past decade by forty-four percent² and in excess of one hundred percent,³ respectively. During the five year

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This perspective of judicial independence reflects the author's personal experience in each branch of government. Immediately prior to appointment as chief justice, he served as elected Lieutenant Governor of Hawaii, and before that he was the Chief Clerk of the Territorial Senate for the 1955 and 1957 sessions.

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¹ There are four judicial circuits in the Hawaii judicial system corresponding to the four counties. The term "circuit courts proper" refers to the four circuit courts exclusive of the land court and tax appeals court, which are statewide courts of specialized jurisdiction, and the family and district courts, which are within the same territorial jurisdiction but have different subject matter jurisdiction. See notes 172-74 *infra*.

² [1976-1977] HAWAII JUDICIARY ANN. REP. 19.

³ This figure was derived by comparing the combined caseloads for all district courts for the appropriate years. *Id.* at 38, 44, 50, 55.

period from 1973-74 to 1978-79, the number of matters⁴ filed with the supreme court more than doubled.⁵ Projections for the year 2000 indicate that the filings for all circuit, family, and district courts will be more than 1.5 million,⁶ over twice the number recorded in 1977-78.⁷

The reasons for such expanding caseloads are many and complex: Population growth,⁸ an increased willingness on the part of our citizenry to involve the courts in resolving private disputes,⁹ the expansion of criminal defendants' rights,¹⁰ technological changes that have created whole new fields of law,¹¹ a rising awareness of the need to protect human and civil rights,¹² the creation of new administrative agencies,¹³ and the passage of numerous laws requiring interpretation by the courts.¹⁴ An additional fac-

⁴ The term "matters" includes both primary cases and supplemental proceedings filed with the court.

⁵ The number of matters filed in 1973-74 was 419 while the number of matters filed in 1978-79 was 963. [1973-1974] HAWAII JUDICIARY ANN. REP. 5; HAWAII SUP. CT., REPORT OF CASELOAD ACTIVITY, FISCAL 1978-1979 (1979).

⁶ [1976-1977] HAWAII JUDICIARY ANN. REP. 5 projects 1,557,358 filings in 2000.

⁷ The number of filings in 1977-78 was 749,886. [1977-1978] HAWAII JUDICIARY ANN. REP. 24.

⁸ For instance, estimates for 1978 indicated a population of 896,700 for Hawaii. The total population has risen from 154,000 in 1900 and 423,000 in 1940. DEP'T OF PLANNING AND ECON. DEV., THE STATE OF HAWAII DATA BOOK—1978, at 9 (1978). It is estimated that Hawaii's population will increase to 942,000 by 1980 and exceed 1 million by 1985. *Id.* at 23.

⁹ Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 904 (1971) [hereinafter cited as Hufstedler]; Ehrlich, *Legal Pollution*, N.Y. Times, Feb. 8, 1976, (Magazine), at 17.

¹⁰ See, e.g., *Carvalho v. Olim*, 55 Hawaii 336, 519 P.2d 892 (1974) (guilty plea must be made voluntarily and with full understanding of consequences); *State v. Alameida*, 54 Hawaii 443, 509 P.2d 549 (1973) (right to speedy trial); *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971) (Hawaii Constitution provides independent basis for informing arrested person of constitutional rights); *Wong v. Among*, 52 Hawaii 420, 477 P.2d 630 (1970) (double jeopardy protection).

¹¹ See, e.g., *Universal City Studios, Inc. v. Sony Corp.*, 48 U.S.L.W. 1053 (D.Cal. Oct. 2, 1979) (use of television recording machines in the home); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (1973), *aff'd*, 420 U.S. 376 (1975) (reproduction of copyrighted materials); *State v. Stachler*, 58 Hawaii 412, 570 P.2d 1323 (1977) (validity of helicopter surveillance); 17 U.S.C. § 108 (1976) (reproduction by libraries and archives); Hufstedler, *supra* note 9, at 904-05. See also Markey, *Needed: A Judicial Welcome for Technology—Star Wars or Stare Decisis?*, 79 F.R.D. 209 (1978).

¹² See, e.g., HAWAII CONST. art. I, § 3 (sexual equality), § 6 (the right to privacy), § 11 (grand jury counsel), art. XI, § 9 (environmental rights), art. XII, § 5 (Office of Hawaiian Affairs). The above constitutional provisions were adopted in 1978.

¹³ See, e.g., Act 246, 1974 Hawaii Sess. Laws 707 (creating environmental quality commission); Act 163, 1972 Hawaii Sess. Laws 539 (creating ethics commission); Act 171, 1970 Hawaii Sess. Laws 307 (creating public employment relations board); Act 226, 1967 Hawaii Sess. Laws 331 (creating criminal injuries compensation board).

¹⁴ See, e.g., *Hawaii State Teachers Ass'n v. Hawaii Pub. Employment Relations Bd.*, 60 Hawaii 364, 590 P.2d 993 (1979) (interpreting provisions of the public employees collective bargaining law); *State v. Ortez*, 60 Hawaii 107, 588 P.2d 898 (1978) (applying law providing for sentence resetting); *Life of the Land, Inc. v. Ariyoshi*, 59 Hawaii 156, 577 P.2d 1116 (1978) (interpreting requirements for environmental impact statements); *American Insur-*

tor is the growth of our legal community. In the last five years, the number of attorneys licensed to practice in Hawaii has increased by more than one-third and is expected to grow by two hundred each successive year.¹⁵

As new rights are identified and old rights are expanded—whether economic, environmental, or individual—and as the community prevails upon the legislative branch to legitimize and the executive branch to regulate and enforce them, society will turn more frequently to the courts to interpret and define the extent of these rights. This is in keeping with the judiciary's traditional role of resolving disputes and dispensing justice evenhandedly, efficiently, and speedily.

It is the duty of the judicial administrator to design a system which remains conducive to evenhanded, efficient, and speedy adjudication. This becomes an increasingly difficult task as society and its laws become more complex. In making administrative decisions, those who value justice must protect and balance numerous corollary principles.¹⁶ Among them are maintaining the high quality of the judicial process, improving the efficiency of the judicial system, maintaining public confidence in and respect for the courts, providing citizens greater yet equal access to the courts, and preserving the independence of the judiciary. These postulates are interrelated, but at times they may conflict. For instance, greater access to the courts could result in clogged dockets and decreased efficiency; methods used to improve the efficiency of the courts could threaten the quality of the adjudicative process.

Although all of the values mentioned above are important, my primary purpose in the following article is to discuss the significance of judicial independence and the growth of this principle in Hawaii. In doing so, I will present an overview of the many structural and administrative changes that have taken place within Hawaii's courts. I shall first touch upon the theoretical basis for the principle of judicial independence, examine its development during the early periods of our history, and comment on court unification and its impact on judicial independence. Finally, I will present some thoughts about the future of judicial administration and the problems the judiciary will face in maintaining its independence while dealing with its increasing responsibilities to the

ance Company v. Takahashi, 59 Hawaii 59, 575 P.2d 881 (1978) (interpreting provisions of uninsured motorists statute).

¹⁵ [1977-78] HAWAII JUDICIARY ANN. REP. 24. Simply put, more attorneys means more court cases filed.

¹⁶ See Shetreet, *The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts*, 13 U. BRIT. COLUM. L. REV. 52 (1979) [hereinafter cited as Shetreet]. Shetreet offers an excellent discussion of these values and the relative weight society attaches to each. See also Task Force III Report, *What Is the Proper Role of the Judiciary in Hawaiian Society as a Whole and in Relation to the Legislative and Executive Branches of Government?*, in FINAL TASK FORCE REPORTS, CITIZEN'S CONFERENCE ON THE ADMINISTRATION OF JUSTICE (1972).

public.

I. THE ROLE OF COURTS AND THE PRINCIPLE OF JUDICIAL INDEPENDENCE

Society entrusts to the courts the task of resolving disputes. Behind this simple statement is the recognition that this primary duty involves several functions.¹⁷ First, a court must apply the established law of the jurisdiction. Second, to the extent that the law of the jurisdiction is unclear, a court must interpret statutes or develop common law. Third, where a possible conflict exists between the law of the jurisdiction and the state or Federal Constitution, a court must determine the constitutionality of executive or legislative actions.

Thus, in resolving disputes, courts interpret and develop law and act as a check on the other branches of government. In order to effectively perform these functions the judiciary must be free from external pressures and influences. Only an independent judiciary can resolve disputes impartially and render decisions which will be accepted by rival parties, particularly if one of those parties is another branch of government.

There are two separate but necessary elements of judicial autonomy: institutional independence and independence of individual judges.¹⁸ The first element requires the executive and legislative branches of government to recognize the judiciary as a co-equal, honor its decisions, provide it with adequate financial support, and defer to its judgment on internal operations and matters peculiarly within its knowledge. The second element protects the freedom of individual judges in the decisionmaking process. Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision.

The principle of judicial independence in the American system has its theoretical foundation in the separation of powers doctrine, which holds that government power should be limited and therefore should be divided.¹⁹ In its theoretical form, the doctrine states that the functions of

¹⁷ Nowak, *Courts and the American System of Government*, in NATIONAL CENTER FOR STATE COURTS, *STATE COURTS: A BLUEPRINT FOR THE FUTURE* 139, 145 (1978) [hereinafter cited as Nowak].

¹⁸ Shetreet, *supra* note 16, at 57-62.

¹⁹ The essence of the doctrine was described by Montesquieu, whose writings were well known throughout Western Europe and the American colonies in the late eighteenth century:

When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehension might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of

government can be divided into three categories, legislative, executive, and judicial, and that each of these functions or powers should be lodged in separate branch. Consequently, the same person should not occupy positions concurrently in more than one branch; nor should one branch of government duplicate functions performed by another branch.

Although strict adherence to the doctrine allowed no overlapping of the executive, legislative, and judicial functions, the Drafters of the Federal Constitution made no clear distinction among those functions.²⁰ Instead, the Constitution established a system of checks and balances to prevent the accumulation of power in a single branch of government and to ensure the political independence of each.²¹ This blending and overlapping of functions takes several forms. For instance, the power of appointment is an executive power but can only be exercised with advice and consent of the Senate;²² Congress makes laws but those laws are subject to executive veto, and the veto is subject to legislative override;²³ the judiciary can neither enact nor execute laws but can declare legislative and executive acts unconstitutional.²⁴

Hawaii's governmental structure predictably reflects the federal prototype. Remarkably, the state judicial branch has surpassed the federal model by obtaining a larger measure of institutional independence. Yet, it was not always so.

II. HISTORICAL DEVELOPMENT

The theoretical underpinnings of the United States Constitution present a striking contrast to the earliest governments of Hawaii. Prior to

the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals.

I B. DE MONTESQUIEU, *SPIRIT OF THE LAWS* 152 (Nugent ed. 1823). See also Ervin, *Separation of Powers: Judicial Independence*, 35 *LAW AND CONTEMP. PROB.* 108 (1970); Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 *OR. L. REV.* 211 (1973).

²⁰ One criticism of the United States Constitution was that it failed to follow the pure separation of powers doctrine. James Madison answered this by arguing that separation of powers did not require an absolute division of functions and that unless the three branches of government "be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the [separation of powers] maxim requires, as essential to a free government, can never in practice be duly maintained." *THE FEDERALIST* No. 48, at 146 (Fairfield ed. 1966) (J. Madison).

²¹ Nowak, *supra* note 17, at 144.

²² U.S. CONST. art. II, § 2. *Accord*, HAWAII CONST. art. V, § 6, art. VI, § 3.

²³ U.S. CONST. art. I, § 7. *Accord*, HAWAII CONST. art. III, §§ 16-17.

²⁴ See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Powell v. McCormack*, 395 U.S. 486 (1969); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *State v. Shigematsu*, 52 Hawaii 604, 483 P.2d 997 (1971); *State v. Abellano*, 50 Hawaii 384, 441 P.2d 333 (1968).

unification of the islands by Kamehameha I²⁵ and promulgation of Hawaii's first constitution by Kamehameha III in 1840,²⁶ all legislative, executive, and judicial functions were vested in the highest chiefs:

[A]ll functions of government . . . were united in the same persons and were exercised with almost absolute power by each functionary over all under him, subject only to his superiors, each function being exercised not consciously as different in kind from the others but merely as a portion of the general power possessed by a lord over his own. There was no distinct judiciary and scarcely any conception of distinct judicial power, and yet judicial forms were to some extent observed.²⁷

Although there were no written laws, a substantial body of customary laws existed relating to water rights, fishing rights, land tenure, and taxation.²⁸ The government and social system were closely interwoven with religion so that the largest body of law consisted of the *kapus* or prohibitions, which have been characterized as highly oppressive.²⁹

In the reign of Kamehameha I, the land-owning chiefs continued to exercise both judicial and executive powers.³⁰ Kamehameha, however, introduced an innovation to the traditional government scheme. Since he could be present on only one island at a time, he appointed governors to act as his representatives on the other islands.³¹ Although no separate judiciary existed, the various levels of government acted as different levels of a judicial system:³² Kamehameha himself was the court of last resort; the governors appointed by Kamehameha presided over island courts; at the lowest level, tax officers adjudicated land and tax matters, and the chiefs decided all other disputes.³³

During the two hundred years after Western contact and through four radically different forms of government,³⁴ the separation of powers theory and its American refinement in the checks and balances concept slowly evolved to become the foundation of our present governmental structure.

²⁵ Kamehameha I had gained control of the islands of Hawaii, Maui, Molokai, Lanai, and Oahu by 1794. Kaumualii, chief of Kauai and its dependency, Niihau, acknowledged Kamehameha as King in 1810. I R. KUYKENDALL, *THE HAWAIIAN KINGDOM, 1778-1854*, at 44-51 (1938) [hereinafter cited as I R. KUYKENDALL].

²⁶ See note 35 *infra* and accompanying text.

²⁷ Frear, *The Evolution of the Hawaiian Judiciary*, HAWAIIAN HISTORICAL SOCIETY PAPERS No. 7, at 1-2 (1894) [hereinafter cited as Frear].

²⁸ I R. KUYKENDALL, *supra* note 25, at 10.

²⁹ *Id.* at 8; Frear, *supra* note 27, at 5-6.

³⁰ I R. KUYKENDALL, *supra* note 25, at 52.

³¹ *Id.* at 53.

³² Frear, *supra* note 27, at 6-7.

³³ *Id.* at 7.

³⁴ Hawaii has been a constitutional monarchy (1840-1893), republic (1893-1898), territory (1900-1959), and a State (1959 to present). After the overthrow of the monarchy in 1893, a provisional government was established until the Constitution of the Republic was promulgated in 1894.

The evolution of these two concepts shaped the development of our judicial system and resulted in a judiciary that is a truly separate and independent branch of government.

A. *The Constitutional Monarchy (1840-1893)*

Hawaii's modern judicial history begins with Kamehameha III's proclamation of the Constitution of 1840.³⁶ Although the legislative, executive, and judicial functions were distinguished in this Constitution, they were not clearly delineated; the same persons could exercise more than one type of power.³⁶ Thus, the rudimentary elements of the separation of powers principle were recognized, although not fully developed, in the Constitution of 1840.

That Constitution provided for legal redress of injury and punishment of crimes by trials according to law.³⁷ A Supreme Court, consisting of the King, the *Kuhina Nui* (Premier), and four other chiefs elected by the lower House of the Legislature, was established with final and appellate jurisdiction.³⁸

The King appointed tax officers, who were both assessors and collectors.³⁹ They were also judges in all cases arising under the tax law, "in all cases where land agents or landlords were charged with oppressing the lower classes and also in cases of difficulty between land agents and tenants."⁴⁰ The tax officers were directly subject to the various island governors appointed by the King, and from their judicial decisions an appeal could be made to the appropriate governor; further appeal could be made to the Supreme Court.⁴¹

In addition, the governors appointed two or more district judges for each island, whose terms were for an indefinite period, subject to impeachment.⁴² These judges had jurisdiction over all cases except those within the authority of the tax officers.⁴³

Although the Constitution did not mention governors' or island courts, these tribunals, presided over by the governors, existed prior to the 1840

³⁶ For a general discussion of events surrounding adoption of the Constitution, see Kuykendall, *CONSTITUTIONS OF THE HAWAIIAN KINGDOM* 7-9 (Hawaiian Historical Society Papers No. 21, 1940) [hereinafter cited as Kuykendall—*Constitutions*]; I R. KUYKENDALL, *supra* note 25, at 153-68.

³⁶ HAWAII CONST. of 1840, reprinted in *THE FUNDAMENTAL LAWS OF HAWAII* 1-9 (L.A. Thurston ed. 1904) [hereinafter cited as Thurston]; Kuykendall—*Constitutions*, *supra* note 35, at 9-14.

³⁷ HAWAII CONST. of 1840, §§ III, IV, reprinted in Thurston, *supra* note 36, at 2.

³⁸ *Id.* § "Of the Supreme Judges", Thurston at 8.

³⁹ *Id.* § "Respecting the Tax Officers", Thurston at 7.

⁴⁰ *Id.*, Thurston at 7-8.

⁴¹ *Id.*, Thurston at 8.

⁴² *Id.* § "Of the Judges", Thurston at 8.

⁴³ *Id.*

Constitution and continued to exist by custom and practice.⁴⁴ They occupied a position intermediate between the Supreme Court and district judges.⁴⁵

Between 1845 and 1847, while the Constitution of 1840 remained in force, the Legislature (House of Nobles and House of Representatives) passed three organic acts that completely reorganized the government and integrated the judiciary.⁴⁶ These acts are generally recognized as milestones in the movement toward the separation of legislative, executive, and judicial functions.⁴⁷ The Judiciary Act of 1847 gave judges independence from the Executive and provided that the King should not control judicial decisions,⁴⁸ "but this was understood to mean, not that judicial and executive, to say nothing of legislative functions, should not be exercised by the same person, but that the functions themselves when exercised by the same person should be kept separate and distinct."⁴⁹

The Act established a Superior Court of law and equity with appellate and original jurisdiction.⁵⁰ The Supreme Court continued to exist in name only and most of its work was assigned to the Superior Court.⁵¹ The legislation also created four circuit courts of record, one for each major island group.⁵² These courts were presided over by a Superior Court judge and two circuit judges appointed by the governor of each island.⁵³ The district courts remained substantially unchanged; there were twenty-four district courts, each with one or more judges.⁵⁴

The judiciary changed once more when a new Constitution was adopted in 1852⁵⁵ creating a three-tiered court structure that would not change

⁴⁴ Kuykendall—*Constitutions*, *supra* note 35, at 13.

⁴⁵ *Id.*

⁴⁶ An Act to Organize the Judiciary Department (1847), II STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, at 3-65 (Honolulu 1847) (government press) [hereinafter cited as II STATUTE LAWS]; An Act to Organize the Executive Department (1846), I STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, at 19-272 (Honolulu 1846); An Act to Organize the Executive Ministry (1845), *id.* at 9-17.

⁴⁷ Kuykendall—*Constitutions*, *supra* note 35, at 14; Frear, *supra* note 27, at 17. See also I R. KUYKENDALL, *supra* note 25, at ch. XIV.

⁴⁸ II STATUTE LAWS, *supra* note 46, at 3-4.

⁴⁹ Frear, *supra* note 27, at 17.

⁵⁰ II STATUTE LAWS, *supra* note 46, at 29.

⁵¹ I R. KUYKENDALL, *supra* note 25, at 263.

⁵² II STATUTE LAWS, *supra* note 46, at 26.

⁵³ *Id.* at 27.

⁵⁴ *Id.* at 10.

⁵⁵ For discussion of the historical setting from which the new Constitution emerged, see Kuykendall—*Constitutions*, *supra* note 35, at 14-17. A Commission consisting of Dr. G. P. Judd, Judge John Ii, and Judge William Lee drafted the new Constitution, which was extensively debated in the Legislature. R. C. Wyllie, Minister of Foreign Affairs from 1845-1865, was very critical of the document since he believed the monarch's prerogatives should be preserved and looked to the British Constitution as a model. As Historian Kuykendall noted, *id.* at 16, Judge Lee was responsible for the draft constitution, and it reflected his American and democratic point of view. Minister Wyllie, in later years, claimed that

for more than one hundred years.⁵⁶ The powerful Superior Court was renamed the Supreme Court, and the former Supreme Court, having been stripped of most of its powers in 1847, was abolished.⁵⁷

The Constitution of 1852 established a foundation upon which to build the separation of powers principle by providing: "The Supreme power of the Kingdom, in its exercise, is divided into the Executive, Legislative and Judicial; these are to be preserved distinct; the two last powers cannot be united in any one individual or body."⁵⁸ The judicial power of the kingdom was vested in the Supreme Court and such inferior courts as created by the Legislature.⁵⁹ The Supreme Court consisted of a Chief Justice and two Associate Justices appointed by the King with the advice of the Privy Council,⁶⁰ to hold office during good behavior, subject to impeachment.⁶¹ The Chief Justice was made Chancellor of the kingdom with equity jurisdiction, subject to appeal to the Supreme Court.⁶² The compensation of Justices could not be reduced during their term of office,⁶³ and any judge of a court of record could be removed for mental or physical inability by a two-thirds vote of both Houses of the Legislature.⁶⁴

The circuit courts, which had long existed by practice and were formally established as courts of record by the Act of 1847, obtained constitutional status.⁶⁵ From one to three circuit judges for each court was to be appointed by the King, with the advice of the Privy Council,⁶⁶ to hold office during good behavior, subject to impeachment.⁶⁷ The 1852 Constitution also incorporated the existing mechanism for appointment of district court judges by the island governors,⁶⁸ however, appointments required the advice of the Supreme Court.⁶⁹ District judges no longer served indefinite terms but instead took office for two years, subject to

Kamehameha III signed the Constitution with reluctance saying that "if it [should] work badly for me and my people, remember what I gave, I will take away." *Id.* at 17. Later, Kamehameha V followed this course of action. *See note 72 infra.*

⁵⁶ *See* Judd, *The Judiciary of Hawaii*, in THRUM'S HAWAIIAN ANNUAL OF 1898, at 36 [hereinafter cited as Judd]; Kuykendall—*Constitutions, supra* note 35, at 20; notes 164-74 *infra* and accompanying text. *Compare* HAWAII CONST. art. V, §§ 1, 2, 3 (1959 & 1968, amended and renumbered art. VI, §§ 1, 2, 3, 1978), with HAWAII CONST. of 1852, art. 81, 89, *reprinted in* Thurston, *supra* note 36, at 165-66.

⁵⁷ Frear, *supra* note 27, at 20-21.

⁵⁸ HAWAII CONST. of 1852, art. 23, *reprinted in* Thurston, *supra* note 36, at 157.

⁵⁹ *Id.* art. 81, Thurston at 165.

⁶⁰ *Id.* art. 89, Thurston at 166.

⁶¹ *Id.* art. 82, Thurston at 165.

⁶² *Id.* art. 86, Thurston at 165-66.

⁶³ *Id.* art. 82, Thurston at 165.

⁶⁴ *Id.*

⁶⁵ *Id.* art. 83, Thurston at 165.

⁶⁶ *Id.* art. 89, Thurston at 166.

⁶⁷ *Id.* art. 83, Thurston at 165.

⁶⁸ *Id.* art. 90, Thurston at 166.

⁶⁹ *Id.*

removal for cause by the circuit courts of their respective islands.⁷⁰

Kamehameha V, who became King in 1863, refused to take an oath to maintain the Constitution of 1852, which had severely limited the prerogatives of the Crown.⁷¹ After failing to gain a new charter by calling a Constitutional Convention,⁷² Kamehameha V abrogated the 1852 document and promulgated the Constitution of 1864.⁷³

That Constitution omitted the provisions relating to circuit and district courts, thereby allowing the Legislature to regulate both matters by statute.⁷⁴ The King gained the exclusive prerogative to appoint Supreme Court Justices and circuit court judges, with the advice of the Privy Council no longer required.⁷⁵ A new provision regarding removal of judges of courts of record conferred potential veto power in the monarch by requiring not only a two-thirds vote of the Legislature but also "good cause shown to the satisfaction of the King."⁷⁶

The crucial division of powers language lost some of its force in the Constitution of 1864. The general statement that executive, legislative, and judicial powers should be preserved distinct was retained, but the specific prohibition against uniting legislative and judicial powers in any one individual or body was changed to the more limited requirement that a judge of a court of record could not serve as a legislator.⁷⁷

⁷⁰ *Id.* art. 91, Thurston at 166.

⁷¹ The background to the promulgation of a new Constitution in 1864 is discussed extensively in Kuykendall—*Constitutions, supra* note 35, at 21-37. Kamehameha IV, who succeeded Kamehameha III in 1855, found many of the provisions of the Constitution of 1852 unacceptable limitations on his exercise of the royal prerogatives, and his reign "show[ed] an almost continuous history of efforts to get the constitution amended in accordance with [the views of the King and his advisors]." *Id.* at 21. These efforts were unsuccessful.

⁷² Kamehameha V's opposition to the Constitution resulted in the calling of a Constitutional Convention to enact a new Constitution. When the Convention became deadlocked over the issue of universal suffrage, which the King opposed, he dissolved the Convention and abrogated the Constitution of 1852 saying:

As we do not agree it is useless to prolong the session, and as at the time His Majesty Kamehameha III gave the Constitution of the year 1852, he reserved to himself the power of taking it away if it was not for the interest of his Government and people, and as it is clear that that King left the revision of the Constitution to my predecessor and myself therefore as I sit in His seat, on the part of the Sovereignty of the Hawaiian Islands I make known today that the Constitution of 1852 is abrogated. I will give you a Constitution

Id. at 36.

⁷³ For a week after Kamehameha V's abrogation of the Constitution of 1852, Hawaii had no written constitution. Kamehameha V signed a new Constitution drawn by him, the Cabinet, and A. G. M. Robertson, Associate Justice of the Supreme Court. The Constitution of 1864 thus reasserted the monarch's prerogatives as evidenced by the provisions on appointment and removal of judges and, more importantly, property qualifications for voters and representatives serving in the Legislative Assembly. *Id.* at 36-40.

⁷⁴ HAWAII CONST. of 1864, art. 64, reprinted in Thurston, *supra* note 36, at 177.

⁷⁵ *Id.* art. 71, Thurston at 178.

⁷⁶ *Id.* art. 65, Thurston at 177.

⁷⁷ *Id.* art. 20, Thurston at 171. Attempts were made in 1870 and in subsequent years to

The struggle over the King's prerogatives again led to a new Constitution in 1887. Kalakaua, who had been elected to the throne in 1874,⁷⁸ reluctantly signed a document which significantly reduced his powers and placed executive control in the Cabinet.⁷⁹ The Constitution of 1887 made no change of any significance to the judicial article,⁸⁰ but the specific prohibition in the separation of powers section was altered. For the first time it restricted the concentration of executive and legislative powers in a single person. The language adopted included all judges and was more detailed:

[N]o Executive or Judicial officer, or any contractor, or employee of the Government, or any person in the receipt of salary or emolument from the Government, shall be eligible to election to the Legislature of the Hawaiian Kingdom, or to hold the position of an elective member of the same. And no member of the Legislature shall, during the time for which he is elected be appointed to any civil office under the Government, except that of a member of the Cabinet.⁸¹

amend this provision by deleting the words "of a Court of Record" in order to prevent district judges from sitting in the legislature. The amendment consistently failed. Kuykendall—*Constitutions*, *supra* note 35, at 41.

⁷⁸ Kamehameha V left no successor and William Lunalilo was elected to the throne by the Legislative Assembly in 1873. Lunalilo proposed several amendments to the 1864 Constitution, among which was one that eliminated property qualifications for voters. Before the amendments could be finally acted upon by the Legislative Assembly, Lunalilo died. Kalakaua was elected King and also supported the amendment abolishing voter property qualifications. This amendment was subsequently adopted. Kuykendall—*Constitutions*, *supra* note 35, at 41-43.

⁷⁹ *Id.* at 44-46, gives an account of the events leading to the 1887 Constitution. Kalakaua yielded to pressures to appoint a new Cabinet whose first task would be to provide a new Constitution. His disinclination to endorse the Constitution was well explained by its purpose.

[The main objectives of the Constitution were] to take from the King the extensive and uncontrolled powers exercised by him under the Constitution of 1864 and reduce him to the status of a ceremonial figure somewhat like the sovereign of Great Britain; to place the executive power, as a practical matter, in the hands of a Cabinet appointed by the King but responsible to the legislature; to change the character of the legislature by making the Nobles as well as the Representatives elective; to re-define the qualifications of Nobles, Representatives, and electors.

Id. at 46.

⁸⁰ See *King v. Testa*, 7 Hawaii 201 (1888) (interpreting the constitutional provision relating to the composition of the Supreme Court). Article 65 of the Constitutions of 1864 and 1887 provided that the Supreme Court should consist of a Chief Justice and not less than two Associate Justices. The Legislature of 1886 enacted a law enlarging the Supreme Court from three to five Justices, and two additional Associate Justices were appointed. The Legislature of 1887 repealed the Act of 1886 and the Attorney General claimed that vacated the new offices. The Court held that under the Constitution a Supreme Court Justice held office during good behavior subject only to impeachment; therefore, the Legislature could not deprive a Justice of his office by repealing the act under which he was appointed.

⁸¹ HAWAII CONST. of 1887, art. 20, reprinted in Thurston, *supra* note 36, at 183.

During the monarchy period the Constitution changed four times in as many decades. Each change brought variations in the basic separation of powers approach to governance. While the turn of the century marked the end of the Monarchy, it would not erase the progress made toward establishing the judiciary as an independent institution.

B. *The Republic (1893-1898)*

After the overthrow of the Monarchy in 1893,⁸² the Republic of Hawaii continued the basic three-tier court structure created by earlier Governments. The Constitution of the Republic established a Supreme Court consisting of a Chief Justice and two Associate Justices⁸³ appointed by the President of the island government with the approval of the Senate.⁸⁴ The Justices were given lifetime tenure subject to impeachment,⁸⁵ and their salaries could not be diminished during their term of office.⁸⁶

The circuit courts formed the next highest level and circuit judges were appointed for six-year terms by the President subject to Senate ratification.⁸⁷ These judges had jurisdiction at chambers in equity, probate, and admiralty.⁸⁸ At general term, they also had jurisdiction in all felony prosecutions and civil cases where the amount in controversy exceeded three hundred dollars.⁸⁹

At the lowest level, there were twenty-nine judicial districts with one or more magistrates for each district appointed by the President and Cabinet.⁹⁰ The magistrates held office for two years, sitting without a jury,⁹¹ and their jurisdiction extended to all misdemeanor charges and civil cases involving less than three hundred dollars.⁹²

The Constitution of the Republic contained a general provision recognizing the three functions of government, but specific language carrying the separation of powers principle into effect was absent.⁹³ In fact, the

⁸² For a brief history of the overthrow of the Monarchy see Kuykendall—*Constitutions*, *supra* note 35, at 54-56; *see generally*, III R. KUYKENDALL, *THE HAWAIIAN KINGDOM, 1874-1893 (1953)* [hereinafter cited as III R. KUYKENDALL]. Revolution was the final step in the continuous struggle over the Constitution of 1887 and its curtailment of the monarch's prerogatives.

⁸³ HAWAII CONST. of 1894, art. 83, § 1, *reprinted in* Thurston, *supra* note 35, at 233.

⁸⁴ *Id.* art 26, § 1, Thurston at 209.

⁸⁵ *Id.* art 83, § 2, Thurston at 233.

⁸⁶ *Id.*

⁸⁷ *Id.* art. 26, § 1, Thurston at 209; CIVIL LAWS OF THE HAWAIIAN ISLANDS § 1141 (1897) (compiled from the Civil Code of 1859 and Session Laws of 1860-1896; published by authority) [hereinafter cited as CIVIL LAWS].

⁸⁸ CIVIL LAWS, *supra* note 87, at § 1145.

⁸⁹ *Id.* § 1134; Judd, *supra* note 56, at 96.

⁹⁰ CIVIL LAWS, *supra* note 87, at §§ 897, 1114-16.

⁹¹ *Id.* at §§ 1118-19.

⁹² *Id.* § 1119; Judd, *supra* note 56, at 96.

⁹³ HAWAII CONST. of 1894, art. 20, *reprinted in* Thurston, *supra* note 35, at 207.

section included the caveat that the judicial, legislative, and executive powers would remain distinct "except as herein provided."⁹⁴

Although in many ways the Republic was a radical break from the monarchy period,⁹⁵ the judicial system changed little. This period was one of transition between kingdom and territory,⁹⁶ and, like other departments of government, the judiciary's role was to maintain the balance of power until that transition could be completed.

C. The Territory (1898-1959)

Annexation to the United States came in 1898.⁹⁷ The Joint Resolution of Annexation created a five-person Commission to draft and recommend an organic act to govern the new territory.⁹⁸ The Commissioners found the judicial system of Hawaii so enlightened and excellent by the standards of the time that they urged its retention.⁹⁹ Thus, in 1900, when Congress formally established Hawaii as an organized territory by adopting the Organic Act,¹⁰⁰ it confirmed the existing judicial structure.¹⁰¹

The Organic Act served as Hawaii's constitution, and, while the Act did not contain a separation of powers clause, the new government generally reflected the political model of the sovereign. Yet, even though the judicial system remained independent from the other branches of Territorial Government, it suffered a long and difficult period of benign neglect and, sometimes, outright usurpation of judicial power.¹⁰²

The Organic Act continued the basic court structure established in 1852, but it drastically changed the selection method, tenure, and compensation of the judiciary. The President of the United States, with Senate approval, appointed supreme and circuit court judges.¹⁰³ Tenure was reduced in the case of supreme court judges from life to four years¹⁰⁴ and

⁹⁴ *Id.*

⁹⁵ For general background on the effects of the revolution in Hawaii and the response throughout the United States, see III R. KUYKENDALL, *supra* note 82, at 605-50.

⁹⁶ The express purpose of those supporting the Revolution of 1893 was union with the United States. See Proclamation of 1893, *reprinted in* Thurston, *supra* note 36, at 197-98.

⁹⁷ The formal transfer of sovereignty under the Joint Resolution of Annexation of July 7, 1898 took place August 12, 1898; the Organic Act, creating the Territory of Hawaii, took effect June 14, 1900. See notes 98, 100 *infra*.

⁹⁸ Joint Resolution of Annexation of July 7, 1898, § 1, 30 Stat. 750.

⁹⁹ Tavares, Address to the Citizen's Conference on the Administration of Justice 47 (Jan. 17, 1967).

¹⁰⁰ Act of Apr. 30, 1900, ch. 339, 31 Stat. 141 (organic act) (repealed in part by Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4 (admission act)).

¹⁰¹ *Id.* § 81.

¹⁰² See note 108 *infra* and accompanying text.

¹⁰³ Act of Apr. 30, 1900, ch. 339, § 82, 31 Stat. 141 (repealed by Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4, *reprinted in* 48 U.S.C. ch. 3, at 11744 (1970)).

¹⁰⁴ *Id.* § 80 (amended 1905, 1921, 1956, 1958).

in the case of circuit court judges from six to four years.¹⁰⁵ Judicial compensation was cut in half.¹⁰⁶

In effect, judges served at the pleasure of the President, if they served at all. Vacancies on the bench were allowed to continue for long periods. In one decade, two vacancies on the supreme court prevented the court from sitting for a total of eighteen months.¹⁰⁷ During World War II, Hawaii's courts were closed under martial law.¹⁰⁸ All of these factors seriously compromised the independence of the territorial judiciary.

Further, although many individuals serving on the bench were competent jurists, prestige and power were sometimes the impetus for accepting judgeships.¹⁰⁹ For instance, one source points out that it was common knowledge in Honolulu that the probate calendar was most desired because of the judge's ability to appoint the administrators of lucrative estates.¹¹⁰

Half a century after annexation, Hawaii's judiciary had relinquished its exemplary status. In his 1957 report to Territorial Chief Justice Philip Rice, the former Director of the Administrative Office of the United States Courts, Henry P. Chandler,¹¹¹ commented on the deficiencies:

¹⁰⁵ *Id.* The original six-year terms for circuit judges were eventually restored, but supreme court justices never enjoyed lifetime tenure again. In 1956, Congress increased their tenure to seven years. Act of May 9, 1956, Pub. L. No. 84-508, 70 Stat. 130.

¹⁰⁶ See Act of Apr. 30, 1900, ch. 339, § 92, 31 Stat. 141 (repealed by Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 4); Anthony, *The Judiciary Under the Constitution of the State of Hawaii*, 43 JUD. 13, 14 (1959).

¹⁰⁷ Associate Justice Samuel Kemp was appointed chief justice on June 20, 1941. His replacement on the court, Louis LeBaron, did not qualify until April 2, 1942. During the intervening period, no cases were submitted to or decided by the court. On July 11, 1949, Associate Justice Albert Christy died and his successor did not qualify until April 18, 1950. See *Menash v. Sutton*, 38 Hawaii 449 (1950), in which Chief Justice Kemp concluded that constitutional and statutory provisions allowing a circuit judge to sit in the absence of a justice did not apply where the absence was due to death and that the court could not hear or decide cases without full membership. Associate Justice LeBaron dissented in part. *Id.* at 464.

¹⁰⁸ The Governor placed the territory under martial law on the afternoon of December 7, 1941. Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833, 834 & n.7 (1946). Limited modifications occurred in 1942 and 1943, *id.* at 835-36, and the following year, the President terminated martial law and restored the privilege of the writ of habeas corpus effective October 24, 1944. Proclamation No. 2627, 9 Fed. Reg. 12831 (1944). See generally Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 YALE L.J. 27 (1947).

¹⁰⁹ H. CHANDLER, ADMINISTRATION OF TERRITORIAL COURTS 3 (1957) [hereinafter cited as CHANDLER].

¹¹⁰ *Id.*

¹¹¹ Henry P. Chandler was retained by Chief Justice Phillip Rice to survey the administration of justice in Hawaii and make recommendations for improvement. The report and proposed legislation implementing the recommendation was distributed to the territorial legislature. Chandler also appeared before the judiciary committee of both houses of the legislature to explain his recommended legislation. See note 121 *infra* and accompanying text.

From what I have been able to learn about the courts of the Territory of Hawaii, there is one conclusion that stands out: they are disjointed to an extreme degree. There is no such thing as a unified judicial system. Responsible direction is lacking not only for the separate courts as parts of a whole, but even for the one circuit court that presently has more than one judge. . . .¹¹²

Chandler had identified serious flaws. The chief justice, although possessing some administrative powers, exercised no control over the overall administration of the judiciary.¹¹³ The statutory provisions empowering the supreme court to promulgate rules of practice in criminal and civil cases¹¹⁴ contained no explicit authority to administer the lower courts, and the supreme court had not undertaken to do so.¹¹⁵ The several courts each submitted separate budgets to the legislature instead of presenting a coordinated plan for the entire judiciary.¹¹⁶ Chandler assailed the practice in one circuit¹¹⁷ of letting the judges divide the calendar among themselves.¹¹⁸ He also criticized the lack of uniform court hours, vacation times, and courtroom procedure, and the absence of a regular system for presenting and deciding motions.¹¹⁹

Chandler did have some words of praise for the administration of the district courts:

As the courts which come closest to the people, they are very important to the good order and contentment of the population of the Islands. It is greatly to the credit of Hawaii that it provides for the compensation of the district judges or magistrates by salary, not by fees, thus putting them in an impartial position.¹²⁰

Notwithstanding the imperfections of a system in which tenure was insecure, compensation inadequate, and judicial administration deficient, the territorial courts continued to perform their functions in a competent and efficient manner.

The findings and recommendations in the 1957 Chandler report formed the basis for legislative reform of the courts.¹²¹ Some major improvements already had been proposed by the Constitutional Convention of 1950,¹²² which was called in anticipation of statehood. However, it was

¹¹² CHANDLER, *supra* note 109, at 1.

¹¹³ *Id.* at 1-2.

¹¹⁴ See notes 256-59 *infra* and accompanying text.

¹¹⁵ CHANDLER, *supra* note 109, at 1.

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.* at 2-3 (referring to the circuit court of the first circuit).

¹¹⁸ *Id.* at 3-5.

¹¹⁹ *Id.* at 5-7.

¹²⁰ *Id.* at 23.

¹²¹ Act 259, 1959 Hawaii Sess. Laws 229 (codified at HAWAII REV. STAT. §§ 601-1 to -4 (1976)).

¹²² See text accompanying notes 126-30 *infra*.

not until Hawaii entered the Union nine years later that the convention's judicial article became effective.¹²³

D. Statehood and the Judicial Article

The 1950 constitutional convention delegates constructed the framework for a strong and independent judiciary. The judicial article, like the constitution as a whole, was simple and set forth a full grant of essential powers,¹²⁴ leaving detailed provisions, such as the jurisdiction of the courts, number of circuit courts, and amounts of judicial salaries, to legislative action.

The judicial power of the State was vested in one supreme court, circuit courts, and such inferior courts as established by the legislature.¹²⁵ The supreme court was given the power to promulgate rules of practice and procedure for all courts,¹²⁶ and the chief justice was made the administrative head of the courts¹²⁷ with the authority to appoint an administrative director, subject to the approval of the supreme court.¹²⁸ The chief justice also was given the power to assign circuit judges to temporary service on the supreme court¹²⁹ or in another circuit.¹³⁰

After extensive and heated floor debate,¹³¹ convention delegates accepted a judicial selection method that provided for the appointment of supreme court justices and circuit court judges by the Governor, with the

¹²³ The constitution proposed by the Constitutional Convention of Hawaii of 1950 was ratified on November 7, 1950, but it did not take effect until Hawaii was admitted as a State. The constitutional convention and the resulting document were not ends in themselves but part of a greater effort to achieve statehood:

The 1950 Constitution gave the Congress of the United States a preview of Hawaii the state. It showed and was meant to demonstrate how thoroughly the people of the Islands were imbued with American political and cultural traditions. The proposed constitution closely followed both the federal constitution, which it specifically adopted, and the requirements set forth in the statehood enabling legislation then pending before the Congress.

N. MELLER, *WITH AN UNDERSTANDING HEART: CONSTITUTION MAKING IN HAWAII* 84 (1971).

¹²⁴ As Meller points out, the articles on the legislative, executive, and judiciary followed the traditional American pattern:

The document was commendably short, some 14,000 words, and represented the victory of those who held for sketching the structure of government, positing its powers in general language, and leaving out everything specific that was not essential by way of overcoming negative legal interpretations or protecting the rights of the people.

Id. at 85.

¹²⁵ HAWAII CONST. art. V, § 1 (1959, amended and renumbered art. VI, § 1, 1978).

¹²⁶ *Id.* § 6 (1959, renumbered art. VI, § 7, 1978).

¹²⁷ *Id.* § 5 (1959, amended and renumbered Art. VI, § 6, 1978).

¹²⁸ *Id.*

¹²⁹ *Id.* § 2 (1959, amended 1968, 1978, renumbered art. VI, § 2, 1978).

¹³⁰ *Id.* § 5 (1959, amended and renumbered art. VI, § 6, 1978).

¹³¹ II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 386-415 (1961).

advice and consent of the senate.¹³² Tenure was set at seven years for supreme court justices and six years for circuit judges.¹³³ Retirement became mandatory at the age of seventy.¹³⁴ Compensation was to be determined by the legislature but could not be reduced during a judge's term of office, unless by a law generally applicable to all salaried officers of the State.¹³⁵

Judges could not hold another position for profit under the State or United States,¹³⁶ were required to have ten years tenure in the Hawaii bar,¹³⁷ and were compelled to leave the bench upon becoming a candidate for elective office.¹³⁸ They were subject to removal upon a two-thirds vote of each legislative house sitting in joint session¹³⁹ or could be retired for incapacity by the Governor after inquiry and recommendation by a board.¹⁴⁰

When the next constitutional convention convened in 1968, very few amendments to the judicial article were proposed: Terms of supreme court justices and circuit court judges were changed to ten years;¹⁴¹ retired supreme court justices became eligible for temporary service on the supreme court,¹⁴² and legislative removal of judges was abolished while the procedure on retirement for incapacity was extended to include removal for misconduct.¹⁴³ All of these amendments were subsequently ratified by the electorate.¹⁴⁴

The Constitutional Convention of 1978 proposed, and the voters approved, major revisions to the judicial article.¹⁴⁵ Among them were the creation of an intermediate appellate court,¹⁴⁶ the establishment of new judicial selection and retention procedures,¹⁴⁷ and the transfer to the su-

¹³² HAWAII CONST. art. V, § 3, para. 1 (1959, amended and renumbered art. VI, § 3, para. 1, 1978). District court judges, however, were not mentioned in the constitution, and were appointed by the chief justice, HAWAII REV. STAT. § 604-2 (1976) *as amended by Act 16, 1979 Hawaii Sess. Laws 28*. Cf. note 385 *infra* and accompanying text (chief justice limited to appointment from list of eligible candidates under new system).

¹³³ HAWAII CONST. art. V, § 3, para. 3 (1959, amended 1968 & 1978, renumbered art. VI, § 3, para. 5, 1978).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* para. 2 (1959, amended and renumbered art. VI, § 3, para. 4, 1978).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* para. 3 (1959, repealed 1968). See text accompanying notes 414-15 *infra*.

¹⁴⁰ *Id.* § 4 (1959, amended 1968 & 1978, renumbered art. VI, § 5, 1978).

¹⁴¹ *Id.* § 3, para. 3 (1968, amended and renumbered art. VI, § 3, para. 5, 1978). See text accompanying notes 390-93 *infra*.

¹⁴² *Id.* § 2 (1968, amended and renumbered art. VI, § 2, 1978). See note 221 *infra*.

¹⁴³ *Id.* § 4 (1968, amended and renumbered art. VI, § 5, 1978).

¹⁴⁴ OFFICE OF LIEUTENANT GOVERNOR, STATE OF HAWAII, RESULT OF VOTES CAST GENERAL ELECTION TUESDAY, NOVEMBER 5, 1968 (1968).

¹⁴⁵ See *Kahalekai v. Doi*, 60 Hawaii 324, 590 P.2d 543 (1979).

¹⁴⁶ HAWAII CONST. art. VI, § 1.

¹⁴⁷ *Id.* §§ 3-4.

preme court of the power to discipline, remove, or retire from office all state judges.¹⁴⁸ These and other recent amendments to the judicial article and their effect upon judicial independence are discussed in subsequent sections which examine court structure¹⁴⁹ and various aspects of the independence of individual judges.¹⁵⁰

Hawaii has been a State for less than half the time it was a territory. During this brief and dynamic period, the judiciary has recaptured its independence and its reputation for having an enlightened system, measured against prevailing standards throughout the nation. Despite such accolades, history has shown us that improvement is essential.

III. INSTITUTIONAL INDEPENDENCE OF THE JUDICIARY

The American constitutional system dictates that the judiciary form a separate branch of government. Our state constitution incorporates this familiar concept,¹⁵¹ which is not a passive notion. In order to function as an independent and respected entity, the judiciary must direct attention to its own problems. This includes "administering [its] affairs effectively, establishing and improving the skill and morale of . . . judicial and auxiliary personnel, developing the popular and legislative support required to secure adequate resources, and planning to meet future demands."¹⁵²

Hawaii's first judicial article adopted many of the features advocated by Arthur T. Vanderbilt, former Chief Justice of the New Jersey Supreme Court and one of the early proponents of court unification.¹⁵³ The unification movement was directed primarily at increasing the efficiency of courts, but it was no coincidence that its founders also viewed judicial independence as a prime motive for simplifying the structure and centralizing the administration of courts.¹⁵⁴ Unification and independence are

¹⁴⁸ *Id.* § 5.

¹⁴⁹ See text accompanying notes 175-93 *infra*.

¹⁵⁰ See text accompanying notes 381-89 *infra*; text accompanying notes 403-04 *infra*; text accompanying notes 424-37 *infra*.

¹⁵¹ The Hawaii Constitution does not contain a specific separation of powers clause. The doctrine, however, is implicit in articles separating the legislative, executive, and judicial branches. See HAWAII CONST. art. III, § 1 (vesting legislative power in a legislature), art. V, § 1 (vesting executive power in a Governor), art. VI, § 1 (vesting judicial power in one supreme court, one intermediate appellate court, circuit courts, district courts, and such other courts as the legislature may establish).

¹⁵² ABA COMM. ON JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION, Standard 1.00, Commentary at 1 (1974) [hereinafter cited as ABA—COURT ORGANIZATION].

¹⁵³ STAND. COMM. REP. NO. 37, Hawaii Const. Conv., reprinted in I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 174 (1961). See generally A. VANDERBILT, IMPROVING THE ADMINISTRATION OF JUSTICE (1957) [hereinafter cited as VANDERBILT].

¹⁵⁴ See A. VANDERBILT, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT DAY SIGNIFICANCE (1953). This is best exemplified by the stand Pound, Vanderbilt, and others took with regard to the judicial rulemaking power. See notes 233-41 *infra* and accompanying

complementary ideas.

The concept of unification was introduced to the American legal community by Dean Roscoe Pound in his now famous address before the American Bar Association in 1906.¹⁵⁵ His speech analyzed popular dissatisfaction with the administration of civil justice in America and identified the "archaic" nature of American judicial organization and procedure as one of the major causes of dissatisfaction.¹⁵⁶ He pointed to three areas in which the state court systems were deficient: First, in their multiplicity of courts; second, in preserving concurrent jurisdictions; and third, in wasting judicial power.¹⁵⁷ Pound recommended that American lawyers carefully study the English Judicature Act of 1873, which he viewed as a model of unification.¹⁵⁸ That Act established a two-tier judicial system that consolidated five appellate courts into one court of final appeals and similarly combined eight courts of first instance into a single trial court.¹⁵⁹

Pound's original model has undergone extensive revision,¹⁶⁰ and, although modern theory generally holds that unification is desirable, the precise definition of a unified court system remains somewhat elusive. A recent study conducted by the National Institute of Law Enforcement and Criminal Justice¹⁶¹ identified the essential elements of a unified system: Consolidation and simplification of court structure, centralized administration, centralized rulemaking, and state financing and centralized budgeting. In ranking the states according to these factors, Hawaii's court system was the most unified.¹⁶² The following sections examine these fac-

text. See also *Winberry v. Salisberry*, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950); Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 *JUD.* 25 (1940) [hereinafter cited as Pound, *Principles*]; Pound, *Procedure Under Rules of Court in New Jersey*, 66 *HARV. L. REV.* 28 (1952) [hereinafter cited as Pound, *Rules of Court*]; Pound, *The Rule-Making Power of the Courts*, 12 *A.B.A. J.* 599 (1926) [hereinafter cited as Pound, *Rule-Making*]; Wigmore, *All Legislative Rules for Judiciary Procedures Are Void Constitutionally*, 23 *ILL. L. REV.* 276 (1928) [hereinafter cited as Wigmore].

¹⁵⁵ Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 *ABA REP.* 395 (1906), reprinted in *NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, RESOURCE MATERIALS* 3 (1976) [hereinafter cited as Pound, *Causes*].

¹⁵⁶ *Id.* at 5. The other causes cited by Pound were (1) causes for dissatisfaction with any legal system, (2) causes lying in the peculiarities of the Anglo-American system, and (3) causes lying in the environment of judicial administration. *Id.*

¹⁵⁷ *Id.* at 17.

¹⁵⁸ *Id.* at 17-18.

¹⁵⁹ *Id.* at 17.

¹⁶⁰ See Ashman & Parness, *The Concept of a Unified Court System*, 24 *DEPAUL L. REV.* 1, 1-9 (1974); Berkson, *The Emerging Ideal of Court Unification*, 60 *JUD.* 372 (1977) [hereinafter cited as Berkson]; Gazell, *Lower Court Unification in the American States*, 1974 *ARIZ. ST. L.J.* 653; Pound, *Principles*, *supra* note 154.

¹⁶¹ Berkson, *Unified Court Systems: A Ranking of the States*, 3 *JUST. SYS. J.* 264 (1978) [hereinafter cited as Berkson, *Unified Court Systems*] (quoting National Institute of Law Enforcement and Criminal Justice, U.S. Justice Department (Grant No. N 76-NI-99-0124)).

¹⁶² *Id.* at 275.

tors and the role each plays in maintaining the judiciary as an independent branch of government.

A. Consolidation and Simplification of Court Structure

At the core of a unified court system is a simplified structure in which the jurisdiction of all courts at each level is the same and in which each stratum represents a simple jurisdictional division, such as the division between courts of original and appellate jurisdiction.¹⁶³ This structure promotes the perception of the judiciary as a single entity rather than a loose assemblage of parts. It permits a central authority to administer the entire system, provides great flexibility in assigning personnel resources, facilitates the prescription of uniform rules and standardized forms for all courts at the same level in the system, and leads to more accurate budgeting and planning. In this sense, by providing the foundation for a unified body, a simplified court structure contributes to judicial independence.

Pound originally had suggested that there be only one appellate court and one trial court of general jurisdiction,¹⁶⁴ but in 1940 he revised his model.¹⁶⁵ The top of the hierarchy, as in his original model, would be a single and final court of appeals. Next there was to be a court of general jurisdiction dealing with all cases "above the grade of small causes and petty offenses and violations of municipal ordinances."¹⁶⁶ Finally, minor trial courts would handle small actions. In 1970, passage of the District Court Reorganization Act¹⁶⁷ brought Hawaii's courts into harmony with Pound's revised model. The Act consolidated twenty-seven separate district courts, established a single district court for each county,¹⁶⁸ converted district courts into courts of record,¹⁶⁹ and provided for direct appeal from their decisions to the supreme court.¹⁷⁰ As a result of this reorganization, the state's judicial structure became one of the most simplified in the country, comprised of one supreme court, hearing all appeals,¹⁷¹ and one trial court¹⁷² with two components, the circuit¹⁷³ and

¹⁶³ ABA—COURT ORGANIZATION, *supra* note 152, Standard 1.11(a)-(b), at 3.

¹⁶⁴ See text accompanying notes 158-59 *supra*.

¹⁶⁵ Pound, *Principles*, *supra* note 154, at 226-29.

¹⁶⁶ *Id.* at 226.

¹⁶⁷ Act 188, 1970 Hawaii Sess. Laws 443.

¹⁶⁸ *Id.* § 8 (amending HAWAII REV. STAT. § 604-1 (1968)).

¹⁶⁹ *Id.* § 22 (amending HAWAII REV. STAT. § 604-17 (1968)).

¹⁷⁰ *Id.* § 3 (amending HAWAII REV. STAT. § 641-1 (1968)).

¹⁷¹ The Hawaii Supreme Court, until recently, see text accompanying notes 183-93 *infra*, was the sole and final appellate court in the State, although appeals from certain administrative agencies were heard in circuit court and were, in turn, appealable to the supreme court. See generally HAWAII REV. STAT. ch. 602 (1976 & Supp. 1978) (amended 1979).

¹⁷² In addition to a trial court of general jurisdiction, Hawaii has two specialized courts; one for tax appeals, the other for property matters. The land court is a statewide court of

district¹⁷⁴ courts.

Although neither of Roscoe Pound's models included an intermediate court of appeals, reformers¹⁷⁵ within the past two decades have recommended the addition "where the volume of appeals is such that the state's highest court cannot satisfactorily perform [the functions of reviewing trial court proceedings and formulating and developing the law]."¹⁷⁶ Until recently, the Hawaii constitution did not provide for an intermediate appellate court.

By the time the 1978 constitutional convention convened, it had become apparent that the supreme court could not keep abreast of the number of appeals filed each year. The court's backlog of cases, at that time numbering 670,¹⁷⁷ seemed likely to grow. Despite internal measures taken to increase efficiency,¹⁷⁸ the burgeoning caseload severely threatened the effective administration of justice. Litigants sometimes waited years for a final decision on appeal,¹⁷⁹ and the court's ability to adequately perform its "law-stating" function was jeopardized.¹⁸⁰ Thus, the primary function of the intermediate appellate court, as envisioned by

record with exclusive jurisdiction over all matters involving legal title to fee simple land and easements and administration of the land registration system. *See, e.g., City & County of Honolulu v. A.S. Clarke, Inc.*, 60 Hawaii 40, 587 P.2d 294 (1978); HAWAII REV. STAT. § 501-1 (1976). The tax appeal court is also a statewide court of record with original jurisdiction to hear all disputes between the assessor and taxpayer. HAWAII REV. STAT. ch. 232 (1976). The chief justice assigns judges of the first circuit court to hear cases in both the tax appeal court and the land court. *Id.* §§ 232-8, 501-2.

¹⁷⁵ All jury trials are held in the four circuit courts proper which have exclusive jurisdiction in all felony cases, civil cases involving more than \$5,000, and probate proceedings. Criminal misdemeanors and traffic cases are transferred from district to circuit court when a jury trial is requested. Circuit courts exercise concurrent jurisdiction with the district courts in civil actions involving amounts between \$1,000 and \$5,000. *See* HAWAII CONST. art. I, § 13; HAWAII REV. STAT. ch. 603 (1976 & Supp. 1979); *id.* § 604-5(b). The family courts, which are a specialized division of the circuit courts, deal with the family unit; their jurisdiction includes marital actions, adoptions and paternity actions, criminal cases involving abuse of a spouse or children, and juvenile cases. HAWAII REV. STAT. ch. 571 (1976 & Supp. 1979).

¹⁷⁶ The district courts are courts of limited jurisdiction where nonjury trials are conducted in both civil and criminal cases. They have exclusive jurisdiction in civil actions where the amount contested is not more than \$1,000. *See* note 173 *supra*. District courts have jurisdiction in all criminal misdemeanors and conduct preliminary hearings in felony cases. Additionally, district courts have jurisdiction in all traffic cases and in cases filed for violations of county ordinances. HAWAII REV. STAT. ch. 604 (1976 & Supp. 1979). A small claims division of the district court has exclusive jurisdiction over actions where the amount contested is below \$600 and litigants present their own cases and in landlord-tenant cases; no appeal is allowed from a small claims court judgment. *Id.* § 633-27.

¹⁷⁷ *See* Berkson, *supra* note 160, at 375 for a listing of organizations supporting the intermediate appellate court concept.

¹⁷⁸ ABA—COURT ORGANIZATION, *supra* note 152, Standard 1.13, at 32.

¹⁷⁹ HAWAII SUP. CT., REPORT OF CASELOAD ACTIVITY, FISCAL 1977-1978 (1978).

¹⁸⁰ *See* Richardson, *Remarks on Alternatives To Remedy Appellate Court Congestion in Hawaii*, XIV HAWAII B.J. 55, 59-60 (1978).

¹⁷⁹ *Id.* at 58.

¹⁸⁰ *Id.* at 55.

its advocates, was to review those more routine cases involving trial court error,¹⁸¹ thereby allowing the supreme court to concentrate on cases raising important legal, constitutional, and public policy questions.

The new constitutional language mandated an intermediate court, but the resolution of crucial questions regarding organization and jurisdiction was left to the legislative branch.¹⁸² In 1979, the legislature adopted the framework for an appellate court system¹⁸³ which is similar to only one other jurisdiction.¹⁸⁴ When it becomes operational,¹⁸⁵ the three-judge intermediate appellate court will exercise concurrent jurisdiction with the supreme court.¹⁸⁶ All appeals will be filed with the clerk of the supreme court, and one filing fee will be paid regardless of whether the case is heard by one or both courts.¹⁸⁷

¹⁸¹ *Id.* at 62-65. See also STAND. COMM. REP. NO. 52, 3d HAWAII CONST. CONV. 3-4, reprinted in I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19_).

¹⁸² HAWAII CONST. art. VI, § 1 provides:

The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. Such courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for the disposition of cases in accordance with their rules.

¹⁸³ Act 111, 1979 Hawaii Sess. Laws 261 (codified at HAWAII REV. STAT. ch. 602, pt. II (Supp. 1979)). The conference committee report accompanying Act 111 indicates that the committee was very cognizant of the concerns that prompted the constitutional amendment and described the relationship between the two courts in the following manner:

- (a) require the Intermediate Appellate Court to handle the "more routine appellate cases;"
- (b) allow such court, together with the Supreme Court, to hear "all types of cases;"
- (c) allow the Supreme Court a "by-pass" in the hearing of "special types of appeals;"
- (d) afford the desired result of minimizing "double appeals;" and
- (e) preserve the "vital law-shaping function of the Supreme Court."

CONF. COMM. REP. NO. 73, 10th Hawaii Leg., 1st Sess. 4, reprinted in HOUSE JOURNAL 1121, 1122 (1979) (reprinted as "Conf. Com. Rep. No. 70 [sic] on H.B. No. 92"); SENATE JOURNAL 989, 990 (1979) (both versions quoting STAND. COMM. REP. NO. 52, 3d HAWAII CONST. CONV. 3, 4, reprinted in I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19_)).

¹⁸⁴ In 1977, an intermediate appellate court was established in Iowa. Under the Iowa system, the court of appeals only hears cases which are referred to it by the Iowa Supreme Court. IOWA CODE ANN., §§ 684.31 to .55 (West Supp. 1979).

¹⁸⁵ Implementing legislation was signed into law on May 25, 1979. However, the new judicial selection process, discussed in text accompanying notes 383-84 *infra*, delayed the selection and appointment of these judges. The Governor announced his choices for the new appellate court bench in mid-February 1980. Honolulu Advertiser, Feb. 16, 1980, at A-3, col. 1. The state senate confirmed the gubernatorial appointees, two circuit court judges and one practicing attorney, late in February. Letter from Seichi Hirai to Hon. George R. Ariyoshi (Feb. 27, 1980). Conceivably, the chief justice could have assigned circuit court judges to sit on the court temporarily, but, as explained in text accompanying notes 222-24 *infra*, the circuit courts are also short of judicial manpower.

¹⁸⁶ Act 111, § 3, 1979 Hawaii Sess. Laws 262 (codified at HAWAII REV. STAT. § 602-57 (Supp. 1979)).

¹⁸⁷ *Id.* § 5 (codified at HAWAII REV. STAT. § 607-5.5 (Supp. 1979)).

The chief justice or his designee will review each appeal and, within twenty days after the last document in the case is filed, assign it either to the supreme court or the intermediate court of appeals.¹⁸⁸ In making a case assignment, the judge will consider certain criteria indicating the importance of the issues raised. These criteria will include whether the case presents a question of first impression or a novel legal issue, requires constitutional interpretation, questions the validity of a state statute, county ordinance, or agency regulation, raises inconsistencies in supreme court or intermediate court decisions, or involves a sentence of life imprisonment without possibility of parole.¹⁸⁹

The supreme court will have discretionary power to reassign a case from the intermediate to the supreme court if the case concerns an issue of imperative or fundamental importance.¹⁹⁰ Also, a party may petition the intermediate court to have a case reassigned to the supreme court.¹⁹¹ However, even if the party's petition is successful, the supreme court may still reject the reassignment.¹⁹² Finally, after a decision by the intermediate court, parties may apply for a writ of certiorari to the supreme court on grounds which must include either grave errors of law or fact or obvious inconsistencies between the intermediate court's ruling and prior federal or state appellate decisions.¹⁹³

While the creation of an intermediate appellate court signals a major change in a judicial system, it need not detract from a simple court structure. The number of court levels in a particular jurisdiction is not as important as the method by which cases are handled.¹⁹⁴ Under the appellate procedures designed by the Hawaii Legislature, the supreme and intermediate courts have identical appellate jurisdiction¹⁹⁵ but will decide different types of cases and serve different functions.¹⁹⁶ Hence, these two courts may be viewed as two divisions of a unified appellate system which continue to adhere to the basic principles of a simplified court structure.¹⁹⁷

¹⁸⁸ *Id.* § 2 (codified at HAWAII REV. STAT. § 602-5(8) (Supp. 1979)).

¹⁸⁹ *Id.* (codified at HAWAII REV. STAT. § 602-6 (Supp. 1979)).

¹⁹⁰ *Id.* (codified at HAWAII REV. STAT. § 602-5(9) (Supp. 1979)).

¹⁹¹ *Id.* § 3. (codified at HAWAII REV. STAT. § 602-58 (Supp. 1979)).

¹⁹² *Id.*

¹⁹³ *Id.* (codified at HAWAII REV. STAT. § 602-59 (Supp. 1979)).

¹⁹⁴ See Berkson, *supra* note 161, at 266. After reviewing the literature on court unification, the author concluded that "the presence or absence of intermediate courts of appeals is not necessarily an indicator of whether a state system is unified." *Id.* See also *id.* at 278 & n.17.

¹⁹⁵ See note 183 *supra* and text accompanying note 186 *supra*.

¹⁹⁶ See text accompanying notes 177-81, 188-93 *supra*.

¹⁹⁷ See note 163 *supra* and accompanying text; ABA—COURT ORGANIZATION, *supra* note 152, Commentary at 33-8.

B. Centralized Administration

Once courts are established, jurisdiction conferred, and funding provided, their day-to-day operations should be managed and controlled from within the judicial branch. Executive or legislative control over the administration of courts would violate the principle of judicial independence.

Administration under a single authority directly affects the level of judicial independence. Fragmentation, with each court acting as an autonomous unit, inevitably leads to inefficiency and internal conflicts.¹⁹⁸ Centralized administration protects individual judges from outside pressures and allows the judiciary to act as a cohesive body. It provides greater flexibility in allocating personnel resources and results in more uniform delivery of judicial services. Further, centralized administration fixes the responsibility for judicial operations in one person or office which facilitates dealing with the coordinate branches of government.

The advocates of a unified court system attempted to apply basic business principles to the administration of the judicial system.¹⁹⁹ They recognized that if the courts were to be managed efficiently, administrative authority must vest in a single agency or individual.²⁰⁰ The chief justice of the supreme court was the obvious person to whom the responsibility should be given.²⁰¹ However, it was apparent that a chief justice already had extensive judicial duties and to adequately discharge the contemplated administrative duties, assistance would be needed. The answer was found in the professional court administrator whose main function would be to supply the chief justice with the information needed to make intelligent administrative decisions and then to assist in effectuating them.²⁰²

The concept of a strong, centralized administration was familiar to the framers of Hawaii's first state constitution, and, although the idea departs from the structure of the territorial judiciary,²⁰³ it nevertheless comports with the traditional framework of Hawaiian government.²⁰⁴ Thus, the first

¹⁹⁸ See text accompanying notes 110-18 *supra*.

¹⁹⁹ VANDERBILT, *supra* note 153, at 49-82; note 201 *infra*; see Pound, *Principles*, *supra* note 154.

²⁰⁰ VANDERBILT, *supra* note 153, at 68; Pound, *Principles*, *supra* note 154, at 229.

²⁰¹ Vanderbilt wrote:

A judicial system is a large statewide business and has all the problems that are present in the operation of any large business enterprise. Like a business it cannot function efficiently without proper administrative control. Just as every business has a president in whom the final administrative authority rests to carry out the policies of its board of directors, so every judicial system must have a single administrative head who has the power and responsibility for making the judicial establishment function efficiently. The administrative power should most naturally and logically be vested in the chief justice.

A. VANDERBILT, *CASES ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION* 1252-53 (1952).

²⁰² *Id.* at 1253-55.

²⁰³ For discussion of the territorial period, see text accompanying notes 102-19 *supra*.

²⁰⁴ For discussion of the period from Kamehameha I through the Republic of Hawaii, see

state constitution contained a provision,²⁰⁵ which remains unchanged,²⁰⁶ designating the chief justice as administrative head of the courts,²⁰⁷ with the power to appoint an administrative director, subject to approval of the supreme court.²⁰⁸ Additionally, specific administrative duties of both the chief justice and administrative director have been set by statute.²⁰⁹

Under our present scheme, the chief justice receives advice from a judicial council on policy matters pertaining to court administration.²¹⁰ The task of implementing policy decisions devolves upon the administrative director, who is also responsible for supervising nonjudicial personnel and the support systems for all of the courts.²¹¹ Throughout the year, administrators of the various courts²¹² meet on a regular basis with the administrative director to review operations and procedures. This coordination, supplemented by policy and procedure manuals developed for the courts, has allowed the judiciary to maintain a high degree of operational uniformity.²¹³

One of the great advantages of a centralized administration is the abil-

text accompanying notes 30-96 *supra*.

²⁰⁵ HAWAII CONST. art. V, § 5 (1959, amended and renumbered art. VI, § 6, 1978).

²⁰⁶ *See id.* art. VI, § 6. The 1978 amendments were stylistic rather than substantive.

²⁰⁷ *Id.* art. V, § 5 (1959, amended and renumbered art. VI, § 6, 1978).

²⁰⁸ *Id.*

²⁰⁹ *See* HAWAII REV. STAT. § 601-2 (1976 & Supp. 1979) for duties and powers of the chief justice. *Id.* § 601-3 lists the following responsibilities of the administrative director:

- (1) Examine the administrative methods of the courts and make recommendations to the chief justice for their improvement;
- (2) Examine the state of the dockets of the courts, secure information as to their needs of assistance, if any, prepare statistical data and reports of the business of the courts and advise the chief justice to the end that proper action may be taken;
- (3) Examine the estimates of the courts for appropriations and present to the chief justice his recommendations concerning them;
- (4) Examine the statistical systems of the courts and make recommendations to the chief justice for a uniform system of judicial statistics;
- (5) Collect, analyze, and report to the chief justice statistical and other data concerning the business of the courts;
- (6) Assist the chief justice in the preparation of the budget, the six-year program and financial plan, the variance report and any other reports requested by the legislature;
- (7) Carry out all duties and responsibilities that are specified in title 7 on public officers and employees as it pertains to employees of the judiciary; and
- (8) Attend to such other matters as may be assigned by the chief justice.

²¹⁰ HAWAII REV. STAT. § 601-4 (1976); *see* R. HAWAII SUP. CT. 18. The council is an advisory body composed of attorneys, judges, and lay persons who serve on a voluntary basis with the chief justice serving as its presiding officer.

²¹¹ *See* note 209 *supra*. For a more complete description of the administrative director's office, *see* [1977-78] HAWAII JUDICIARY ANN. REP. 54-60. The administrative director is aided by a deputy specifically responsible for the support functions of the district courts and for the judiciary's legislative initiative. *Id.* at 3, 13; *see* HAWAII REV. STAT. § 601-3 (Supp. 1979).

²¹² These administrators include, for example, chief clerks of the various courts and the family court director.

²¹³ *See also* note 450 *infra* on the development of the Hawaii Benchbook for trial judges.

ity to allocate judicial personnel resources. By constitutional provision,²¹⁴ the chief justice may assign judges from one circuit to another for temporary service and, by statute,²¹⁵ may assign circuit judges to specific calendars.²¹⁶ Similarly, he has the authority to transfer district judges temporarily from one district to another.²¹⁷

The ability to transfer judges laterally is complemented by the power to make temporary vertical assignments. Until recently this power extended only to assigning circuit judges to sit on the supreme court.²¹⁸ A 1978 amendment to the judicial article²¹⁹ now permits the chief justice to assign district court judges to circuit court, circuit court judges to both the new intermediate court and the supreme court, and intermediate appellate judges to the supreme court.²²⁰ Additionally, since 1968, retired justices of the supreme court have been eligible for temporary service on the supreme court.²²¹

The need for such a flexible mechanism in the assignment of judges is illustrated by recent vacancies on the supreme court and in the circuit courts.²²² Several district court judges have been assigned on a full-time basis to the circuit courts²²³ and calendar assignments within circuits have been changed in order to deal with the shortage of judicial personnel. These shifts have naturally created vacancies in the district courts, which in turn have been filled by per diem judges appointed by the chief justice.²²⁴

If the ability to assign judicial personnel is vitally important to the ad-

²¹⁴ HAWAII CONST. art. VI, § 6; *accord*, HAWAII REV. STAT. §§ 601-2(b)(1), 603-41 (1976).

²¹⁵ HAWAII REV. STAT. § 601-2(b)(2) (1976).

²¹⁶ The chief justice may not, however, assign circuit court judges to individual cases. *Id.*

²¹⁷ HAWAII REV. STAT. § 604-3 (1976).

²¹⁸ HAWAII CONST. art. V, § 2 (1968, amended and renumbered art. VI, § 2, 1978).

²¹⁹ *Id.* art. VI, § 2.

²²⁰ The period of a temporary appointment depends, of course, upon the circumstances that prompt it (for example, illness, resignation, or the removal process), but the onus is initially on the judicial selection commission to ensure timely permanent replacements since appointment deadlines are tied to commission action. *See id.* § 3.

²²¹ *Id.* art. V, § 2 (1968, amended and renumbered art. VI, § 2, 1978). By statute, a retired justice not actively engaged in the practice of law is eligible for service. HAWAII REV. STAT. § 602-10 (Supp. 1979).

²²² Justice Kobayashi retired on December 29, 1978 and Justice Kidwell retired on February 28, 1979. Family Court Judge Herman F. Lum and Honolulu Attorney Edward H. Nakamura recently assumed those positions. *See* letter from Seichi Hirai to Hon. George R. Ariyoshi (Jan. 24, 1980) (acknowledging senate confirmation of gubernatorial appointees). When this article was drafted, five vacancies existed in the first circuit court and one in the fifth circuit. These positions have since been filled, but the elevation of one circuit court judge to the supreme court and two circuit judges to the intermediate court of appeals, *see* note 185 *supra*, has left three vacancies in the first circuit court.

²²³ During the recent period when vacancies occurred in two circuits, *see* note 222 *supra*, district court judges were assigned temporarily to fill these positions.

²²⁴ The chief justice may appoint per diem judges who receive compensation for the days on which actual service is rendered. HAWAII REV. STAT. § 604-1 (1976 & Supp. 1979).

ministration of an efficient court system, supervision of nonjudicial personnel may be no less significant. In 1974, legislation was passed that increased the judiciary's authority over personnel matters, although employees remained under the state civil service system.²²⁵ Three years later, a major step in the development of an independent and unified judiciary came with new legislation giving the judiciary equal status with the executive branch and the several counties in personnel matters and recognizing the judiciary's civil service system as a separate part of the overall state system.²²⁶ Hence, under the present statute, the judiciary develops its own position classification plan, adopts personnel rules and regulations, and recruits, examines, and trains all employees.

There has been a clear and consistent trend toward centralization of administrative powers in the chief justice as evidenced by new constitutional and statutory provisions dealing with temporary judicial assignments and the separate status of the personnel system. At the same time, centralization has been tempered by internal and external operative forces. Within the judiciary itself, effective administration calls for a proper balance between central control and local autonomy. Therefore, administrative judges, court directors, and individual jurists must be accorded great deference in directing the operations of the courts for which they are responsible. Externally, the legislature acts as a potential limiting force since powers conferred by statute, if abused, may be rescinded.²²⁷ Legislative control of the judicial budget also can be a power-

²²⁵ Act 159, 1974 Hawaii Sess. Laws 298. The legislation (1) provided for representation from the judiciary at meetings of the state and county civil service commissioners and directors, (2) required the director of personnel services to consult with the chief justice in the development of a position classification plan, the formulation of personnel rules and regulations and administration of the personnel system insofar as they affected judiciary personnel, and (3) gave the chief justice final authority in any disputes arising between the chief justice and director of personnel services relating to the judiciary's requests for action. 1974 produced other legislative reforms which strengthened the judiciary's independence. See text accompanying notes 351, 360-61 *infra*.

²²⁶ Act 159, 1977 Hawaii Sess. Laws 318. The "findings" section of the Act stated:

The Constitution of the State of Hawaii provides for three separate and coequal branches of government, the executive branch, the judicial branch, and the legislative branch.

The legislature finds that this concept has been partially implemented, but that the statutes relating to personnel administration are not completely consistent with these constitutional principles.

This remains particularly so with respect to those statutes which appear to permit the executive branch to exercise various administrative controls over the personnel of the judiciary. The purpose of this Act is to conform the personnel laws of the state of Hawaii to the concept that the judiciary is a separate branch of government.

Id. § 1.

²²⁷ See, e.g., notes 225-26 *supra*, notes 351-53 *infra* and accompanying text. Quite apart from legislation designed to correct abuses of power, it should be noted that the legislature recently considered transferring the probation department from the judiciary to the executive branch. S.B. 170, 10th Leg., 1st Sess. (1979). The proposal was premised on the theory that the functions of probation are not judicial, but rather correctional and rehabilitative,

ful check.²²⁸

In the judicial selection process, the chief justice's authority extends solely to appointment of district judges and only from among candidates successfully screened by the judicial selection commission.²²⁹ While the fear associated with vesting power in one person or one branch of government may be genuine, each branch must be given sufficient authority to carry out its designated functions. The broad framework within which this authority operates in the Hawaii judiciary has been constructed in such a manner as to curtail its excessive or arbitrary use.²³⁰ e

C. The Rulemaking Power

The rulemaking power is an important element in maintaining the independence of the judiciary²³¹ and it is in this area that the greatest potential exists for conflict between the judicial and legislative branches of government.²³² The crucial issues in the controversy over rulemaking are

and therefore appropriately within the Hawaii State Department of Social Services and Housing. Notwithstanding the merits of that view, it may be seriously contended that the presentence investigation division of the probation department, as presently constituted, performs a peculiarly judicial function and that its transfer to the administrative branch would raise constitutional questions either under the separation of powers doctrine or with regard to the sentencing rights of defendants. The latter issue is beyond the scope of this article.

²²⁸ See notes 365-71 *infra* and accompanying text. However, use of the legislature's control over the judicial budget to influence administrative or judicial decisions is clearly improper under the separation of powers theory. C. BAAR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 158 (1975) [hereinafter cited as BAAR].

²²⁹ See text accompanying note 385 *infra*.

²³⁰ See text accompanying notes 19-24, 151 *supra* on the separation of powers theory and doctrine of checks and balances.

²³¹ The rulemaking power gives the judiciary the ability to promulgate rules and regulations for operation of the courts. These rules usually fall into two categories: administrative rules for internal operations and rules for practice and procedure before the courts. C. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY 3 (1978) [hereinafter cited as GRAU]. As Grau notes, rules do not fall neatly into these two categories since an administrative rule can have procedural effects.

²³² The most notable controversy occurred as a result of the New Jersey Supreme Court's decision in *Winberry v. Salisberry*, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950). The New Jersey court construed the phrase "subject to law", which appeared in the state constitution as a limitation on the court's rulemaking power, and upheld a court rule requiring appeals to be filed within a certain time limit even though that conflicted with a statutory provision. The court interpreted the constitutional language as a reference to substantive law and concluded that the rulemaking power of the supreme court with regard to pleading was not subject to overriding legislation. See Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisberry*, 65 HARV. L. REV. 234 (1951); Pound, *Rules of Court*, *supra* note 154. See also Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 CASE W. RES. L. REV. 16 (1978) [hereinafter cited as Giannelli]; Kay, *The Rule-making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975) [hereinafter cited as

the source and extent of the power and its proper allocation between the judiciary and legislature.

Early advocates of judicial rulemaking argued that the authority resides in the judiciary, not the legislature.²³³ Dean John H. Wigmore, in a famous editorial, went so far as to declare that all legislative rules for judicial procedure are constitutionally void.²³⁴ These proponents of judicial rulemaking based their arguments on historical precedent²³⁵ and policy considerations.²³⁶ Roscoe Pound asserted that the common law courts of England had exercised inherent powers to prescribe procedural rules and that the King's Court at Westminster had exerted rulemaking power for centuries before the early American States drafted their constitutions.²³⁷ Pound concluded that "if anything was received from England as a part of our institutions, it was that the making of these general rules of practice was a judicial function."²³⁸

Pound and Wigmore also advanced persuasive policy arguments.²³⁹ They observed that courts, not legislatures, are familiar with procedural problems and have the expertise to devise solutions; legislatures are intolerably slow to act and are isolated from the judicial process; legislatures are subject to outside pressures which may not result in the best procedural reforms; legislatures often amend rules on a piecemeal basis, and such amendments are sometimes inconsistent or defective; and courts, not legislatures, are held responsible by the public for the efficient administration of justice.²⁴⁰

Although Wigmore contended that the judiciary had inherent rulemaking power,²⁴¹ in most jurisdictions the legislature exercised ultimate control over the entire procedural area. Thus, the reform movement initially focused on legislation authorizing state supreme courts to prescribe rules of practice and procedure. The next step was to encourage constitutional grants of rulemaking power to the judiciary whenever the opportunity arose.

Today, the predominant source of judicial rulemaking authority is constitutional.²⁴² In thirteen states,²⁴³ however, the function is delegated to

Kay]; text accompanying notes 281-329 *infra*.

²³³ Wigmore, *supra* note 154; Pound, *Rules of Court*, *supra* note 154.

²³⁴ Wigmore, *supra* note 154.

²³⁵ Pound, *Rule-Making*, *supra* note 154, at 601.

²³⁶ Wigmore, *supra* note 154, at 278.

²³⁷ Pound, *Rule-Making*, *supra* note 154, at 601.

²³⁸ *Id.*

²³⁹ See Levin & Amsterdam, *Legislative Control Over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 4 (1958) [hereinafter cited as Levin & Amsterdam]; Kay, *supra* note 232, at 27-28.

²⁴⁰ Pound, *Rules of Court*, *supra* note 154, at 44-45; Pound, *Rule-Making*, *supra* note 154, at 602; Wigmore, *supra* note 154, at 278-79.

²⁴¹ Wigmore, *supra* note 154.

²⁴² GRAU, *supra* note 231, at 18.

²⁴³ *Id.* These states are Arkansas, Delaware, Idaho, Indiana, Iowa, Kansas, Massachusetts,

the courts solely by statute. This is also the case in the federal system. The United States Supreme Court has no constitutional authority to prescribe rules; ultimate rulemaking authority resides in Congress.²⁴⁴ In a series of enabling statutes,²⁴⁵ Congress has delegated the authority to prescribe rules of "practice and procedure" to the Supreme Court.²⁴⁶ A third source of rulemaking power is the "inherent power" of a court to perform those actions which are indispensable to the exercise of judicial power.²⁴⁷

There is great variation among the states in the allocation of the rulemaking power between the judiciary and legislature. In some states, court rules are effective unless disapproved by the legislature;²⁴⁸ in other jurisdictions, court rules do not become effective unless approved by the legislature;²⁴⁹ in ten states, court rules may be repealed by the legislature;²⁵⁰ and in thirteen more, the legislature may amend court rules.²⁵¹ In all of these approaches, judicial expertise is utilized in prescribing rules, but the legislature retains ultimate control over practice and procedure in

Mississippi, New Mexico, Oklahoma, Rhode Island, Tennessee, and Wyoming.

²⁴⁴ See, e.g., *Sibbach v. Wilson*, 312 U.S. 1 (1941); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §§ 1001-1008 (1969) (history of procedure in the federal courts).

²⁴⁵ See 18 U.S.C. § 3771 (1976) (criminal); 28 U.S.C. § 2072 (1976) (civil and admiralty); 28 U.S.C.A. § 2075 (1959 & Supp. 1979) (bankruptcy).

²⁴⁶ See, e.g., 28 U.S.C.A. § 2075 (1959 & Supp. 1979) which states:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under [the bankruptcy laws].

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice

²⁴⁷ See, e.g., *State v. Clemente*, 166 Conn. 501, 353 A.2d 723 (1974), discussed in *Kay*, supra note 232; *Goldberg v. Judges of the Eighth Dist. Ct.*, — Nev. —, 572 P.2d 521 (1977); *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978), discussed in 1977 B.Y.U. L. REV. 493.

Although statutory provisions give the Hawaii Supreme Court authority to act with regard to matters relating to the practice of law, HAWAII REV. STAT. ch. 605 (1976 & Supp. 1979), the supreme court has recognized the inherent power concept in a number of areas. See, e.g., *Reliable Collection Agency, Ltd. v. Cole*, 59 Hawaii 503, 584 P.2d 107 (1978) (unauthorized practice of law); *In re Ellis*, 55 Hawaii 458, 522 P.2d 460, cert. denied, 419 U.S. 1109 (1974) (unauthorized practice); *In re Bar Ass'n of Hawaii*, 55 Hawaii 121, 516 P.2d 1267 (1973) (professional corporations); *In re Ellis*, 53 Hawaii 23, 487 P.2d 286 (1971), cert. denied, 405 U.S. 1075 (1972) (unauthorized practice); *In re Integration of the Bar*, 50 Hawaii 107, 432 P.2d 887 (1967) (matters affecting practice of law and the bar); *In re Trask*, 46 Hawaii 404, 380 P.2d 751 (1963) (attorney discipline); *In re Bouslog-Sawyer*, 41 Hawaii 403 (1956) (discipline). See also notes 255, 333-35 *infra* and accompanying text.

²⁴⁸ See, e.g., MONT. CONST. art. VII, § 2(3); OHIO CONST. art. IV, § 5(b), discussed in *Gianelli*, supra note 232. See generally GRAU, supra note 231, at 18-21.

²⁴⁹ Specifically, these jurisdictions are Georgia and Tennessee. GRAU, supra note 231, at 18-19.

²⁵⁰ These states are Florida, Maryland, Minnesota, Missouri, New York, North Carolina, Oregon, Texas, Vermont, Wisconsin. *Id.*

²⁵¹ These states are Alabama, Alaska, Indiana, Iowa, Maryland, Minnesota, Missouri, New York, North Carolina, Oregon, South Dakota, Vermont, Wisconsin. *Id.*

the courts.

In every state, the legislature has the concurrent power to enact statutes dealing with court procedure and thus may act in areas untouched by court rule.²⁵² However, in half of the states, procedural rules adopted by the court supersede conflicting statutes, giving the judicial branch final authority over procedure.²⁵³

In Hawaii, the supreme court's rulemaking power is derived primarily from the constitution,²⁵⁴ although an inherent power to make procedural rules was recognized even before the constitutional grant.²⁵⁵ Prior to statehood, the supreme court also had statutory power²⁵⁶ to prescribe general rules of practice in criminal²⁵⁷ and civil courts,²⁵⁸ and these rules had the force and effect of law, superseding any conflicting statute.²⁵⁹

The language of the 1959 constitution, which survives unchanged, granted the supreme court extensive rulemaking authority by providing: "The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedures and appeals, which shall have the force and effect of law."²⁶⁰ Although the constitutional history is not explicit, it appears that the legislature may regulate procedure by statutes which are effective unless in conflict with a court rule.²⁶¹

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ HAWAII CONST. art. VI, § 7.

²⁵⁵ *Cardozo v. Sociedade Portuguesa de Santo Antonio Beneficente de Hawaii*, 19 Hawaii 319 (1909). *See also* note 247 *supra*.

²⁵⁶ REV. LAWS HAWAII ch. 214 (1955) (current version at HAWAII REV. STAT. ch. 602 (1976 & Supp. 1979)).

²⁵⁷ REV. LAWS HAWAII § 214-18 (1955) (corresponded with HAWAII REV. STAT. § 602-31 (1968) (repealed 1972)).

²⁵⁸ REV. LAWS HAWAII § 214-14 (1955) (current version at HAWAII REV. STAT. § 602-11 (Supp. 1979)).

²⁵⁹ REV. LAWS HAWAII §§ 214-17, -21 (1955) (corresponded with HAWAII REV. STAT. §§ 602-24, -34 (1968) (repealed 1972)).

²⁶⁰ HAWAII CONST. art. V, § 6 (1959, renumbered art. VI, § 7, 1978).

²⁶¹ *See* 67-6 OP. HAWAII ATT'Y GEN (1967) in which it is concluded that the legislature has concurrent power with the supreme court in the realm of procedure. But several Hawaii cases have indicated that rules of court take precedence over conflicting statutes. *Asato v. Furtado*, 52 Hawaii 284, 294 n.6, 474 P.2d 288, 295 (1970); *Kudlich v. Ciciarelli*, 48 Hawaii 290, 300, 401 P.2d 449, 455 (1965); *State v. Hawaiian Dredging Co.*, 48 Hawaii 152, 159, 397 P.2d 593, 599 (1964). These cases were decided under HAWAII REV. STAT. § 602-24, -34 (1968) (repealed 1972), which provided that civil and criminal rules of practice and procedure had the force and effect of law and superseded any conflicting statutes. None of these cases, however, cites the statutory provisions as authority for concluding that a court rule takes precedence over a conflicting statute. They seem to rely, rather, on the constitutional grant of rulemaking power to the court. This principle that a court rule takes precedence over a conflicting statute follows from the constitutional provision since rulemaking power with regard to practice and procedure is explicitly lodged in the supreme court, while such power is not granted to the legislature. Judicial supremacy in the regulation of practice and procedure also can be upheld on an inherent powers theory. *See* note 247 *supra* and accom-

Even after the adoption of the 1959 constitution, the statutory grant of rulemaking power enacted during the territorial period remained on our law books. In 1970, a committee on coordination of rules and statutes was formed²⁶² to prepare revisions to the statutes and rules relating to civil procedure²⁶³ in order to eliminate inconsistencies and transfer procedural matters to the rules. The committee's deliberations resulted in legislation²⁶⁴ deleting the old provisions granting the court rulemaking power²⁶⁵ and adopting the constitutional language with the proviso that court rules could not "abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations."²⁶⁶ This statute remains in effect today.

1. *Administrative Rules.*—In many jurisdictions, administrative rules have been promulgated for the internal operations of the courts.²⁶⁷ These rules cover such matters as establishing the position and defining the duties of the administrative director of the courts,²⁶⁸ setting out the duties of chief judges,²⁶⁹ and providing for assignment of judges.²⁷⁰

No constitutional or statutory provision expressly authorizes the Hawaii Supreme Court to prescribe rules for the administration of the

panying text.

²⁶² The committee was appointed and functioned pursuant to appropriations made for the office of administrative director of the courts. Act 68, 1971 Hawaii Sess. Laws 64; Act 175, 1970 Hawaii Sess. Laws 326; Act 154, 1969 Hawaii Sess. Laws 210.

²⁶³ The committee's work related solely to civil procedure. However, in working on the statutes dealing with the court's rulemaking power, the committee found the provisions relating to rulemaking in criminal courts unnecessary and recommended their deletion. I REPORT OF COMMITTEE ON COORDINATION OF RULES AND STATUTES § 602-21 (1971) [hereinafter cited as REPORT COORDINATING COMMITTEE].

²⁶⁴ The committee submitted a report covering all volumes of the Hawaii Revised Statutes showing deletions and insertions with notes explaining the changes as well as draft bills to enact the revisions. These materials were reviewed by joint interim committee. H. SPEC. COMM. REP. NO. 9, 6th Hawaii Leg., 1st Sess., reprinted in HOUSE JOURNAL 1115 (1972); S. SPEC. COMM. REP. NO. 7, 6th Hawaii Leg., 1st Sess., reprinted in SENATE JOURNAL 697 (1972). At the 1972 session, 17 bills based on the committee's work were enacted, followed by 12 more in 1973.

²⁶⁵ See notes 256-59 *supra* and accompanying text.

²⁶⁶ HAWAII REV. STAT. § 602-21 (1976) (renumbered § 602-11, 1979) provides:

Rules. The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.

Whenever in a statute it is provided that the statute is applicable "except as otherwise provided," or words to that effect, these words shall be deemed to refer to provisions of the rules of court as well as other statutory provisions.

²⁶⁷ Alaska, Michigan, New Jersey, Ohio, Pennsylvania, and Wisconsin make extensive use of administrative rules. GRAU, *supra* note 231, at 31.

²⁶⁸ See, e.g., ALASKA R. CT., AD. R. 1; WIS. R. PRAC. & P., JUD. AD. R. 1-7, 10, 13.

²⁶⁹ E.g., N.J. R. GENERAL APP. 1.33-4; WIS. R. PRAC. & P., JUD. AD. R. 19-21.

²⁷⁰ E.g., ALASKA R. CT., AD. R. 33; PA. R. CT., JUD. AD. R. 701; WIS. R. PRAC. & P., JUD. AD. R. 23-24.

courts.²⁷¹ Such a statutory provision did exist prior to 1972²⁷² but was deleted as part of the effort to coordinate statutes and court rules.²⁷³ The coordination committee believed that the enactment was unnecessary due to the court's extensive rulemaking power,²⁷⁴ and the constitutional history of the rulemaking provision confirms that belief.²⁷⁵

In practice, the supreme court has rarely exercised its rulemaking power in the administrative area.²⁷⁶ This is due primarily to the administrative role given to the chief justice by the constitution.²⁷⁷ Since the chief justice also has extensive authority to assign judicial personnel,²⁷⁸ and because the administrative director has assumed a major role in management of nonjudicial personnel,²⁷⁹ the court has found it unnecessary to promulgate standards in many of the areas that could be the subject of administrative rules. This does not diminish the unquestionable authority of the court to establish such rules.²⁸⁰

2. *Rules of Practice and Procedure.*—In other jurisdictions the rulemaking controversy may revolve around the source and allocation of the rulemaking power.²⁸¹ In Hawaii, the source of judicial rulemaking authority is the constitution, and its language is explicit. Hawaii Supreme Court decisions consistently have held that where a statute and rule conflict in matters of procedure, the rule takes precedence.²⁸²

Court rules, under a statutory limitation, may not alter the substantive rights of a litigant.²⁸³ However, this limitation also may be implied from the constitutional grant since it relates solely to "process, practice, procedure and appeals."²⁸⁴ Thus, the major issue which must be resolved in any use of the rulemaking power in Hawaii is whether a particular matter

²⁷¹ Cf. HAWAII REV. STAT. § 601-2(b) (1976 & Supp. 1979) (identifies the administrative powers of the chief justice, "subject to such rules as may be adopted by the supreme court").

²⁷² *Id.* § 602-16 (1968) (repealed 1972).

²⁷³ See text accompanying notes 262-64 *supra*.

²⁷⁴ REPORT COORDINATING COMMITTEE, *supra* note 263, at § 602-16.

²⁷⁵ The judiciary committee report comments on the rulemaking provision:

[This section] deposits full rule-making power in the supreme court. Under this section, the court may by the promulgation of rules of court abolish archaic procedures relating to practice, procedure, process, appeals and general administration of the business of the courts. It has flexibility in that amendments to rules can be made from time to time by the court without resort to the slower legislative process.

STAND. COMM. REP. NO. 37, Hawaii Const. Conv., reprinted in I PROCEEDING OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 175 (1961) (emphasis added).

²⁷⁶ *But see* R. HAWAII SUP. CT. 1(b), 1(c), 1(d), 12.

²⁷⁷ See text accompanying notes 205-07 *supra*.

²⁷⁸ See notes 214-21 *supra* and accompanying text.

²⁷⁹ See notes 211, 225-26 *supra* and accompanying text.

²⁸⁰ See sources cited in notes 274-75 *supra*.

²⁸¹ See text accompanying notes 248-51 *supra*; authorities cited in note 232 *supra*.

²⁸² See cases cited in note 261 *supra*.

²⁸³ See note 266 *supra* and accompanying text.

²⁸⁴ See note 260 *supra*.

is procedural and therefore subject to judicial control or whether it is substantive and therefore subject to legislative control.

As numerous scholars have pointed out,²⁸⁵ there is no clear line between substance and procedure. Substantive rules are said to be those "which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals" while procedural rules "merely . . . prescribe machinery and methods to be employed in enforcing these positive provisions."²⁸⁶ In an attempt to abandon the substance-procedure dichotomy, one authority has defined the legislature's domain as the enactment of laws that are "declarations of public policy" and the judiciary's realm as the promulgation of rules that "promote the prompt, inexpensive administration of justice."²⁸⁷ Another authority focuses on whether a particular rule involves "something more than the orderly dispatch of judicial business."²⁸⁸ If it does, the matter is within the purview of the legislature. A more recent formulation differentiates between rules that only regulate the manner in which judicial decisions are made and those which "go further and affect people's conduct outside the litigation context."²⁸⁹ These different analyses highlight the difficulty, perhaps the futility, in trying to draw a neat line between substance and procedure. The problem is aggravated because the meaning of these two terms may shift according to the context in which they are used.²⁹⁰

The procedure versus substance enigma is nowhere better illustrated than in the area of evidence rules and the manner in which such rules are adopted. Many authorities have concluded that, although the rules of evidence are primarily procedural, some rules do affect substantive rights.²⁹¹ There does not seem to be a clear consensus on the issue among the jurisdictions that have adopted rules of evidence. In some jurisdictions, the legislature has enacted rules of evidence,²⁹² in others, the courts, pursu-

²⁸⁵ Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482 (1940); Levin & Amsterdam, *supra* note 239, at 14-15; Riedl, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 601, 604 (1940) [hereinafter cited as Riedl].

²⁸⁶ Riedl, *supra* note 285, at 605 n.31 (quoting W.F. WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* 8 (19_)).

²⁸⁷ *Id.*

²⁸⁸ Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 629-30 (1957).

²⁸⁹ Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 194-95 (1979) [hereinafter cited as Martin].

²⁹⁰ Giannelli, note 232 *supra* at 34-35; Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467 (1957) [hereinafter cited as Morgan].

²⁹¹ See, e.g., Giannelli, *supra* note 232, at 46-55; Levin & Amsterdam, *supra* note 239, at 20-24; Martin, *supra* note 289, at 183-200; Riedl, *supra* note 285. *But see* Grinnell, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 24 JUD. 41, 49 (1940); Morgan, *supra* note 290, at 467.

²⁹² See, e.g., CAL. EVID. CODE §§ 1-1605 (West 1966 & Supp. 1979); FLA. STAT. ANN. chs.

ant to statutory grants of procedural rulemaking power, have established evidence rules.²⁹³ In four states whose constitutions contain rulemaking provisions similar to Hawaii's, the courts have adopted such rules.²⁹⁴

In 1972, the United States Supreme Court prescribed the Federal Rules of Evidence and transmitted them to Congress. The Supreme Court obviously believed that the rules were procedural,²⁹⁵ since the Court's rulemaking power extends only to "practice and procedure".²⁹⁶ Under the enabling acts, Congress had ninety days in which to disapprove the rules; however, before the ninety days tolled, Congress enacted legislation deferring the effective date of the rules.²⁹⁷ Subsequently, Congress revised the Court's proposed rules, particularly those relating to privilege, and codified them.²⁹⁸

The legislative history of the federal rules²⁹⁹ indicates that Members of the House of Representatives believed that rules of evidence were substantive in nature and not within the scope of the enabling acts authorizing the Supreme Court to adopt procedural rules.³⁰⁰ However, the act codifying rules of evidence also gave the Supreme Court amendatory power.³⁰¹ Court amendments become effective absent congressional intervention, except that rules of privilege require affirmative congressional approval. This would suggest that Congress viewed rules of evidence (other than privileges) as procedural, rather than substantive.

The evidence rules controversy has not been limited to the federal level. In Ohio, the debate has produced a constitutional crisis with the Ohio Supreme Court twice promulgating and the Ohio General Assembly twice disapproving the proposed Ohio Rules of Evidence.³⁰² In *Ammer-*

90, 92 (West 1979); KAN. STAT. §§ 60-401 to -471 (1976 & Supp. 1979); NEB. REV. STAT. ch. 27 (1975 & Supp. 1978); NEV. REV. STAT. tit. 4 (1980); OKLA. STAT. ANN. tit. 12, ch. 40 (West Supp. 1979-80).

²⁹³ Arkansas, North Dakota, and Wisconsin statutes authorize their respective supreme courts to make rules but omit explicit reference to rules of evidence. See ARK. STAT. ANN. §§ 22-242, -245 (Supp. 1979); N.D. CENT. CODE §§ 27-02-08, -09 (1974); WIS. STAT. ANN. § 751.12 (West Supp. 1979). The enabling statutes of Maine, Minnesota, and Wyoming expressly mention evidence rules. ME. REV. STAT. tit. 4, § 9-A (1979); MINN. STAT. ANN. § 480.0591 (West Supp. 1980); WYO. STAT. ANN. §§ 5-2-114, -115 (1977).

²⁹⁴ ARIZ. CONST. art. 6, § 5; MICH. CONST. art. VI, § 5; MONT. CONST. art. VII, § 2; S.D. CONST. art. V, § 12.

²⁹⁵ See Reporter's Note, 409 U.S. 1132 (1972). But see *id.* at 1132, 1133 (Douglas, J., dissenting).

²⁹⁶ See notes 245-46 *supra* and accompanying text.

²⁹⁷ Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9.

²⁹⁸ The Federal Rules of Evidence were signed into law on January 2, 1975, and became effective July 1, 1975. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. § 2071 (1976)). The rules have been amended three times.

²⁹⁹ H.R. REP. No. 650, 93d Cong., 1st Sess. 2 (1973) (on H.R. 5463), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075.

³⁰⁰ *Id.* at 7076.

³⁰¹ Pub. L. No. 93-595, § 2, 88 Stat. 1926 (1974) (codified at 28 U.S.C. § 2076 (1976)).

³⁰² See Giannelli, *supra* note 232.

man v. Hubbard Broadcasting, Inc.,³⁰³ the New Mexico Supreme Court struck down a statutory news reporter privilege and held that the court had inherent and *exclusive* power to prescribe rules of practice and procedure, including rules of evidence.³⁰⁴ The New Mexico tribunal based its holding on the court's constitutional power of "superintending control over all inferior courts."³⁰⁵

In New Jersey, where the pertinent constitutional provision³⁰⁶ resembles Hawaii's,³⁰⁷ the adoption of evidence rules represented a cooperative effort by all three branches of government in order to "avoid a constitutional confrontation on the matter and to find a practical course by which the administration of justice could be served."³⁰⁸ Some rules were passed by the legislature and others were adopted by the court, but in either case they were subject to disapproval by the other branches.³⁰⁹ The New Jersey Supreme Court, in a subsequent case,³¹⁰ explained the rationale for such an arrangement:

Thus we did not pursue to a deadlock the question whether "evidence" was "procedural" and therefore . . . the sole province of the Supreme Court. Nor were we deterred by the spectre of the criticism that, if "evidence" is "substantive," it was unseemly or worse for the Court to participate in the "wholesale" promulgation of substantive law. The single question was whether it made sense thus to provide for the administration of justice, and the answer being clear, we went ahead.³¹¹

Hawaii's evidence rules are found both in statutes³¹² and court rules,³¹³ but most of the relevant legal principles have been developed through case law.³¹⁴ In 1977, the state legislature filed a bill which would have

³⁰³ 89 N.M. 307, 551 P.2d 1354 (1976).

³⁰⁴ *Id.* at 312, 551 P.2d at 1359.

³⁰⁵ *Id.* at 310, 551 P.2d at 1357.

³⁰⁶ The New Jersey provision reads: "The Supreme Court shall make rules governing the administration of all courts in the State and subject to law the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted." N.J. CONST. art. VI, § 2.

³⁰⁷ Compare *id.* with HAWAII CONST. art. VI, § 7, quoted in text accompanying note 260 *supra*.

³⁰⁸ *Rybeck v. Rybeck*, 141 N.J. Super. 481, 510, 358 A.2d 828, 843 (1976).

³⁰⁹ N.J. STAT. ANN. § 2A:84A-1 to -46 (West 1976).

³¹⁰ *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571, *appeal dismissed*, 414 U.S. 1106 (1973), upheld the validity of a rule authorizing prejudgment interest in tort actions which had been challenged on the basis that the rule was a matter of substantive law and thus beyond the court's rulemaking power. Chief Justice Weintraub, in his plurality opinion, reviewed the process by which the New Jersey Rules of Evidence were adopted.

³¹¹ *Id.* at 368, 307 A.2d at 580.

³¹² HAWAII REV. STAT. ch. 621 (1976 & Supp. 1979).

³¹³ *E.g.*, HAWAII R. CIV. P. 43-44; HAWAII R. PENAL P. 26-28.

³¹⁴ See, *e.g.*, *Graham v. Washington Univ.*, 58 Hawaii 370, 569 P.2d 896 (1977) (extrinsic evidence may be considered by court in determining intent if there is controversy as to

established an evidence code based on the Federal Rules of Evidence.³¹⁵ In written testimony on the bill,³¹⁶ the administrative director of the courts recognized that evidence rules have both substantive and procedural aspects³¹⁷ and suggested that the judicial council³¹⁸ form a committee to study the federal rules and make recommendations for adoption. Subsequently, the house judiciary committee deferred consideration of the bill, and the judicial council established an evidence rules committee.³¹⁹ Following a year of intensive study, the committee submitted a final draft of the rules to the legislature³²⁰ and supreme court in 1979. The legislature formed an interim committee to study the rules, and new draft legislation was submitted in the 1980 legislative session that is expected to pass.³²¹

An issue addressed by the proposed legislation is the proper method of adopting the rules.³²² Given the supremacy of judicial rulemaking in procedural matters,³²³ a cooperative effort is advisable. While the legislature could act unilaterally, rules adopted in such a manner would be subject to revision, amendment, or nullification either by the court's promulgation of new rules³²⁴ or by case law interpreting the legislative rules.³²⁵ This would raise the spectre of uncertainty and confusion in the law and un-

meaning of language in a written instrument); *State v. Olivera*, 57 Hawaii 339, 555 P.2d 1199 (1976) (chain of custody showing not required for fingerprint records where there is direct testimony of their unchanged condition and there is no evidence indicating tampering); *Apo v. Dillingham*, 57 Hawaii 64, 549 P.2d 740 (1976) (declaration of deceased person is admissible to show relationships within a family of which declarant was a member and to show declarant's membership in the family); *Gum v. Nakamura*, 57 Hawaii 39, 549 P.2d 471 (1976) (parol evidence admissible to show intent where provision in agreement is reasonably susceptible to construction); *State v. Pokini*, 57 Hawaii 17, 548 P.2d 1397 (1976) (evidence of other crimes allegedly committed by defendant which are collateral to the issue at trial are ordinarily inadmissible); *In re Pioneer Mill Co.*, 53 Hawaii 496, 497 P.2d 549 (1972) (a reviewing court may take judicial notice of a fact whether or not trial court did so).

³¹⁵ See H.B. 22, 9th Hawaii Leg., 1st Sess. (1977).

³¹⁶ Letter to Hon. Richard Garcia from Lester E. Cingcade at 2 (February 22, 1977).

³¹⁷ *Id.* at 3.

³¹⁸ See note 210 *infra* and accompanying text.

³¹⁹ The judiciary originally had requested a legislative appropriation to aid the committee's work. The legislature did not act on the request but the committee was established with Judge Masato Doi as its chairperson and Professor Addison Bowman of the University of Hawaii School of Law as its recorder.

³²⁰ These rules were introduced as H.B. 1009, 10th Hawaii Leg., 1st Sess. (1979).

³²¹ S.B. 1827-80, S.D. 1, 10th Hawaii Leg., 2d Sess. (1980).

³²² See note 326 *infra*. Although the administrative director originally had suggested that the evidence rules committee address this topic, the committee's role was purely that of recommending rules to both bodies.

³²³ See notes 282-84 *supra* and accompanying text.

³²⁴ See note 261 *supra* and cases cited therein which indicate that rules of court take precedence over conflicting statutes.

³²⁵ See, e.g., *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971) (statute allowing introduction of evidence of a prior conviction upon witness' denial unconstitutional as applied to criminal defendant).

necessarily enhance the possibility of conflict between the judiciary and legislature. The proposed legislation contains a mutually agreeable adoptive method, reflecting the concerns of both branches, designed to preserve the intent of the constitution's rulemaking provision and to avoid dispute over the efficacy of legislative action.³²⁶

Ample precedent for this pragmatic approach is found in the work of the committee on coordination of rules and statutes³²⁷ as well as in other joint endeavors of the judiciary and legislature toward reforming the substantive law.³²⁸ These highly successful efforts attest to the cooperative nature of the relationship between the Hawaii judiciary and the legislature. Undoubtedly, in adopting evidence rules, Hawaii will "find a practical course by which the administration of justice will be served"³²⁹ while giving due recognition to the proper functions of the legislature and judiciary in this complex area.

D. State Financing and Central Budgeting

If courts are to operate in an independent manner, they must be assured of adequate financial resources. Moreover, the method by which funding is obtained should minimize the possibilities for conflict between the judiciary and other branches of government.

The legislature and executive jointly control the governmental budget process. The legislature raises and appropriates public monies; the executive allocates funds, and most expenditures support activities in the executive branch. The executive also has the power to veto appropriations. The judiciary does not have a decisionmaking role in this process and is required to compete with other institutions for scarce financial resources. Ideally, however, the financing procedure should recognize that the judiciary is distinct from other public entities because it is an independent branch of government.

1. *The Source of Funding.*—A major issue in seeking sufficient court financing is the source of funding. In many states, trial courts are financed by local governmental units such as counties, usually with tax

³²⁶ As of this writing (March 1980) the relevant section of the pending legislation reads as follows: "If any other provision of law, including any rule promulgated by the supreme court, is inconsistent with this chapter, this chapter shall govern unless this chapter or such inconsistent provision of law specifically provides otherwise." S.B. 1827-80, S.D. 1, 10th Hawaii Leg., 2d Sess. § 16 (1980).

³²⁷ See notes 262-64 *supra* and accompanying text.

³²⁸ For example, the Hawaii Penal Code was drafted by a special committee of the judicial council. After revision by the legislature, it was adopted in 1972. Act 9, 1972 Hawaii Sess. Laws 59. The initial work on the Hawaii Probate Code was also undertaken by a special committee of the judicial council. It was first presented to the legislature in 1972, and a revised version was adopted in 1976. Act 200, 1976 Hawaii Sess. Laws 372.

³²⁹ *Rybeck v. Rybeck*, 141 N.J. Super. 481, 510, 358 A.2d 828, 843 (1976).

revenues.³³⁰ This practice has been characterized as "perhaps the greatest barrier to the functional independence of the judicial system."³³¹ Local control of judicial financing exacerbates conflicts over the allocation of limited funds.³³² For example, the refusal to fund essential court operations has precipitated lawsuits in which local governments have been required to pay for such services.³³³ These lawsuits are based on the "inherent powers" doctrine.³³⁴ Inherent powers consist of "all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective."³³⁵

While some advocates of inherent powers lawsuits view them as powerful tools in securing adequate judicial financing,³³⁶ the need for such liti-

³³⁰ For a listing of such states see BAAR, *supra* note 228, at 10, Table 1-2, Category 1.

³³¹ Nowak, *supra* note 17, at 149.

³³² As Nowak points out:

Assigning financial responsibility to local government units has an inherent tendency to lead to conflict between the local financing authority and the court system. Local officials are responsible to voters within a small location and they need not have any deep concern for the theory of independent powers at the state level. In view of increasing problems of limited resources to support governmental services, members of the local population will almost surely resent allocating their tax dollars to funding the state judicial system. Local finances most commonly are raised through a tax on real property with, perhaps, some small supplementation from personal property taxes or sales taxes. Property taxes weigh heavily upon persons of moderate incomes, who find it increasingly difficult to meet expenses in an inflationary economy.

Id. at 150.

³³³ See, e.g., *O'Coin's, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507, 287 N.E.2d 608 (1972) (under inherent powers, judge has authority to protect his court from impairment resulting from inadequate supplies and thus could purchase equipment even without specific authorization; Massachusetts Supreme Judicial Court would promulgate rule requiring judge to first obtain approval from chief justice); *Judges for the Third Cir. v. County of Wayne*, 383 Mich. 10, 172 N.W.2d 436 (1969), *modified on rehearing*, 386 Mich. 1, 190 N.W.2d 228 (1971) (judiciary has inherent power to determine requirements for supporting personnel and to compel county officials to provide necessary funds; burden of proof is on the court to show necessity but nonavailability of county funds is not a sufficient defense); *Commonwealth v. Tate*, 442 Pa. 45, 274 A.2d 193, *cert. denied*, 402 U.S. 974 (1971) (judiciary has inherent power to determine amounts and to compel monetary payments from city of sums that are reasonable and necessary to carry out its mandated responsibilities; court bears burden of proving reasonable necessity, but judicial finding of reasonableness supersedes prior city determination that funding was not necessary); *In re Salary of Juvenile Director*, 87 Wash. 2d 232, 552 P.2d 163 (1976) (under its inherent power, court may increase salaries of court personnel, but power should only be exercised upon showing of clear, cogent, and convincing proof that salary increase is reasonably necessary). For an excellent discussion of such lawsuits, see BAAR, *supra* note 228, at 143-49. See Carrigan, *Inherent Powers and Finance*, 7 TRIAL 22 (Nov./Dec. 1971) [hereinafter cited as Carrigan]; Hazard, McNamara & Sentilles, *Court Finance and Unitary Budgeting*, 81 YALE L. REV. 1286 (1972) [hereinafter cited as Hazard, McNamara & Sentilles].

³³⁴ See note 247 *supra* for cases discussing inherent powers of the courts to prescribe procedural rules.

³³⁵ Carrigan, *supra* note 333, at 22.

³³⁶ See, e.g., *id.*; Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L.

gation indicates a breakdown in the financing system and poses a serious threat to judicial independence.³³⁷ The threat exists no matter how the issue is resolved. A ruling for local officials would signify the demise of co-equal status. Yet, the opposite result may be regarded by the other branches of government as so institutionally self-serving as to erode respect for court decisions.

In spite of the problems attributed to local funding of courts,³³⁸ there does not seem to be a significant movement to abandon this method.³³⁹ However, many authorities believe that the independent role of the judiciary is best protected through total funding by the state.³⁴⁰

Hawaii followed the common pattern of court funding to the extent that individual counties financed the district courts until 1965.³⁴¹ In that year, the State assumed responsibility for administration of these courts and integrated them into the larger judicial network.³⁴² Hawaii was one of the first and remains one of only five states in which the judicial system is entirely financed from state revenues.³⁴³

2. *The Budgetary Process.*—The source of judicial funding is closely related to the determination of who requests the money, who reviews such requests, and who ultimately decides the amounts the judiciary receives. Each of these steps in the funding process highlights the judiciary's relations with the executive and legislature. Ideally, the judiciary's position as an equal branch of government should be appreciated at every stage.

There are four traditional models of court budget preparation: External preparation, in which the budget is prepared by an executive agency based upon data obtained from the judiciary; separate submission, in which all courts or courts of different jurisdictions submit separate budgets either directly to the legislature or to an executive officer for review; central review, in which all courts submit requests to a central office or

REV. 975 (1979); 54 JUD. 138 (1970).

³³⁷ BAAR, *supra* note 228, at 147-49, advances the following hypotheses about the impact of inherent power law suits: (1) There may be a breakdown in the working relationship between the judiciary and other branches of government on administrative and financial matters if the court goes outside the normal political process and files suit, (2) public support for the judiciary may weaken as a result of these suits, (3) success at the local rather than state level in winning these suits may be greater, and (4) the bargaining position of the judicial branch in negotiations with officials of other branches may increase.

³³⁸ See note 332 *supra*.

³³⁹ BAAR, *supra* note 228, at 115; Baar, *The Limited Trend Toward State Court Financing*, 58 JUD. 322 (1975).

³⁴⁰ See, e.g., ABA—COURT ORGANIZATION, *supra* note 152, Standard 1.50, at 97-98; BAAR, *supra* note 228, at 121; Hazard, McNamara & Sentilles, *supra* note 333, at 1293.

³⁴¹ See, e.g., REV. LAWS HAWAII § 220-2 (1955) (current version at HAWAII REV. STAT. § 608-2 (1976)).

³⁴² Act 97, 1965 Hawaii Sess. Laws 116.

³⁴³ Alabama, Connecticut, South Dakota, and West Virginia are other states which provide total state financing. BAAR, *supra* note 228, at 5-7.

the state's high court for review and unified presentation to the executive or legislative branches; and central preparation, in which a state court administrator develops a single budget that is presented to the executive or legislature.³⁴⁴ Hawaii has utilized various models.

During the territorial period, our courts submitted separate budgets to the legislature.³⁴⁵ After 1959, and as a result of the Chandler report,³⁴⁶ the administrative director's office prepared one budget for all state-funded courts. The document did not include the county-funded district courts until their integration into the state system in 1965.³⁴⁷

Since then, Hawaii has followed the central preparation model. Central budget preparation combined with statewide funding is often described as a unitary budget system.³⁴⁸ Such a system is, in effect, a complement to central administration of the state's courts. "It locates in one central authority the ultimate responsibility for planning, channeling, and auditing all judicial expenditures within a state."³⁴⁹ It also promotes planning within the judicial system and allows a more equitable distribution of judicial services.

Although Hawaii was a leader among the states in adopting a unitary budget system, until recently the judiciary submitted its request to the State Department of Budget and Finance, which actively reviewed and deleted items before sending the proposal to the legislature as part of the executive budget.³⁵⁰ Judiciary spokesmen could then go to the legislature to justify restoration of any items cut by the executive. In 1974, legislation passed authorizing the judiciary to submit its budget directly to the legislature and in 1978 that procedure was constitutionally mandated.³⁵¹ Consequently, Hawaii is one of the few states to fully recognize and respond to the problem involved with executive review of the judicial budget.³⁵² Such review threatens the independence of the judiciary and

³⁴⁴ *Id.* at 11-12. See also Berkson, *supra* note 160, at 380-81.

³⁴⁵ See text accompanying note 115 *supra*.

³⁴⁶ See note 121 *supra* and accompanying text.

³⁴⁷ See notes 341-42 *supra* and accompanying text.

³⁴⁸ BAAR, *supra* note 228, at 15.

³⁴⁹ Hazard, McNamara & Sentilles, *supra* note 333, at 1293-94.

³⁵⁰ See, e.g., HAWAII REV. STAT. §§ 37-62, 40-1, 601-1 to -3 (1968) (amended 1974).

³⁵¹ HAWAII CONST. art. VII, § 8; Act 159, 1974 Hawaii Sess. Laws 298 (codified at HAWAII REV. STAT. § 601-2(c) (1976)). 1974 was a significant year for court reform legislation. See text accompanying note 225 *supra* & notes 360-61 *infra*.

³⁵² The findings section of the 1974 reform legislation declared:

The legislature finds that, although the Constitution incorporates the principle of separation of powers and the principle that no one branch of government shall dominate another branch, the Hawaii Revised Statutes are not completely consistent with these constitutional principles. This is particularly the case with respect to those statutes which appear to permit the executive branch to exercise various administrative controls over the judiciary and its courts and the legislature and its agencies. Such statutes are in conflict with the constitutional status of the judicial branch and the legislative branch as separate and co-equal branches of government.

Act 159, 1974 Hawaii Sess. Laws 298. Baar called this legislation "the most far-reaching

violates the separation of powers doctrine because "it constitutes a limitation on the functioning of an independent branch of government rather than the review of budget requests of agencies properly within the executive control."³⁵³

Judicial independence also may be threatened after the legislature passes the judicial budget and sends it to the executive. The Governor may exercise the veto power.³⁵⁴ As a general rule, a chief executive should veto a judicial budget only when appropriated funds are totally out of proportion to the judiciary's reasonable needs and when the allocation would seriously damage the state's financial position.³⁵⁵

In almost all states the Governor has an "item veto,"³⁵⁶ and a few states allow a "reduction veto."³⁵⁷ Use of the item veto power with regard to court budgeting could significantly restrain the functions of the judiciary.³⁵⁸ By triggering the veto and override mechanism, a Governor can exercise extraordinary political control over the judicial budget.³⁵⁹ A reduction veto presents similar dangers. The difficulty with both vetoes is that the judiciary must either develop an independent political and popular constituency to affect an override or submit to executive control. In

attempt to disentangle a court system from administrative supervision of the executive branch." BAAR, *supra* note 228, at 29 n.(b).

³⁵³ Nowak, *supra* note 17, at 146-47.

³⁵⁴ Hawaii's Governor may return any disapproved bill to the legislature; if the legislature is not in session the Governor must give 10 days' notice of intention to disapprove and the legislature may reconvene to consider the veto. HAWAII CONST. art. III, § 16. *See also* Schwab v. Ariyoshi, 58 Hawaii 25, 564 P.2d 135 (1977) (item veto provision does not require the legislature to enact a separate bill on salary increases for each branch to facilitate exercise of Governor's general veto power).

³⁵⁵ Nowak, *supra* note 17, at 146.

³⁵⁶ BAAR, *supra* note 228, at 48, reports that as of 1970, the Governors of 43 states had item veto powers. At that time, Hawaii's Governor had the power to strike out or reduce specific items in all appropriation bills, *see* notes 360-61 *infra* and accompanying text.

³⁵⁷ At least two states, Pennsylvania and West Virginia, confer this power on their respective Governors. *Id.* at 51.

³⁵⁸ BAAR, *supra* note 228. On the basis of questionnaires sent to state budget officers and state court administrators, Baar concluded that the item veto is rarely used on judicial appropriations. However, he cites three instances in which the item veto has been used recently. In 1969, the Governor of Texas deleted \$91,000 from the judicial budget approved by the legislature on the grounds that no justification had been provided for the money. In Connecticut, the Governor reduced appropriations for all budgeted agencies, including the judiciary, by five percent for fiscal years 1971 and 1972. In 1971, the Governor of California struck \$350,741 from state judicial appropriations which were scheduled to be used for an increase in judicial salaries mandated by a statute providing automatic increases in salaries in accordance with a cost of living index. For a discussion of the background and resolution of this controversy, *see id.* at 53.

³⁵⁹ Baar notes that the rare use of the item veto nevertheless illustrates that it has been used without regard for the differences between courts and executive agencies and without regard for limitations on the appropriate exercise of executive power. He concludes that "it remains the most substantial grant of legal authority that State officials possess over court budgets." *Id.* at 53-54.

the former situation, the judiciary will become involved in politics to such a great extent that judicial independence may be compromised. In the latter instance, the separation of powers doctrine is clearly violated.

Until 1974, our state constitution gave the Governor power to strike out or reduce any specific item in any appropriation bill.³⁶⁰ Recognizing possible executive dominance, the legislature proposed, and the voters passed, an amendment excluding the judicial and legislative budgets from such vetoes.³⁶¹

Executive control over allocation of appropriated funds is another sphere in which the independence of the judiciary could be threatened. The Governor could either withhold funds or try to regulate judicial spending by timing the release of appropriations.³⁶² This potential danger has been eliminated in Hawaii through legislation that gives the judiciary complete authority over the expenditure of funds and requires appropriated amounts to be made available to the judiciary.³⁶³

Although separation of powers problems in the context of financing a statewide judiciary usually arise in relation to the executive,³⁶⁴ conceivably the legislature could decline to fund the judiciary to a level necessary to ensure adequate judicial services.³⁶⁵ Clearly, the legislature must play a significant role in determining judicial funding. It is primarily responsible for overseeing state finances through the enactment of revenue producing measures and the appropriation of monies, and the legislature would be derelict in its duty if it did not carefully scrutinize the judiciary's budget.³⁶⁶

Securing adequate financial support for the judicial branch has not been a problem during Hawaii's statehood years.³⁶⁷ Several factors contribute to the judiciary's recent success in obtaining funds. First, by ex-

³⁶⁰ HAWAII CONST. art. III, § 17 (1959, amended 1974, renumbered § 16, 1978).

³⁶¹ This was effectuated by a constitutional amendment proposed by the legislature and adopted by the voters in 1974. See S.B. 1943-74, 1974 Hawaii Sess. Laws 735. For a discussion of other legislative reforms significantly affecting the judiciary, see text accompanying notes 225, 351 *supra*.

³⁶² See BAAR, *supra* note 228, at 95-114.

³⁶³ Act 159, 1974 Hawaii Sess. Laws 298 (codified at HAWAII REV. STAT. § 40-1(c) (1976)).

³⁶⁴ See notes 358-59 *supra* and text accompanying notes 350-55 *supra*.

³⁶⁵ Nowak, *supra* note 17, at 148-49, suggests that if the legislature fails to fund the judiciary at a level that allows the courts to perform their basic functions, a basis for an inherent powers lawsuit may exist. As a practical matter, however, such suits usually have been directed at county-level budget authorities. See Hazard, McNamara & Sentilles, *supra* note 333, at 1288.

³⁶⁶ 1978 amendments to the state constitution were designed to ensure such scrutiny. See HAWAII CONST. art. VII, §§ 5, 6, 7, 8, 9 (budget estimates and expenditure ceiling).

³⁶⁷ For instance, the judiciary budget for fiscal year 1977 was \$13,629,774 or 1.68% of the state general fund; the budget for fiscal year 1978 was \$14,528,579 or 1.64% of the state general fund; and for fiscal year 1979, the budget was increased to \$16,756,878. See Act 197, 1975 Hawaii Sess. Laws 679; Act 233, 1976 Hawaii Sess. Laws 748; Act 11, 1977 Hawaii Sess. Laws 757; Act 208, 1979 Hawaii Sess. Laws 430.

empting the judicial budget from executive controls,³⁶⁸ the legislature has acknowledged that the courts' requirements must be viewed as those of a coordinate branch of government rather than another agency. Second, the judiciary's centralized budgeting process³⁶⁹ results in submission of a single document reflecting the needs of the entire system. Additionally, in presenting the budget, the judiciary provides extensive information³⁷⁰ on its program and operational needs which increases the credibility of the budget request. Finally, the long history of cooperation between the judiciary and legislature³⁷¹ may be reflected in a greater willingness to accept the judiciary proposal as an accurate assessment of the courts' needs.

IV. INDEPENDENCE OF INDIVIDUAL JUDGES

Although the independence of the judiciary as an institution is vital to maintaining the integrity of the judicial process, we must not forget that it is judges who decide cases and make law. In making their decisions, individual judges must be subject to no other authority than the law itself.³⁷² Further, judges must have personal independence, which means that judicial terms of office, tenure, and compensation must be secure. The method of choosing judges also relates to judicial independence; a selection process must result not only in qualified and unbiased judges, it also must remove them from political pressure. Finally, if the need arises to discipline a judge, the separation of powers doctrine and its corollary requirement of individual judicial independence suggest that the disciplinary mechanism be lodged within the judiciary.

Each of these issues—judicial selection and tenure, compensation, and discipline—has been studied at great length in the literature discussing the judicial process.³⁷³ It is not my intent to repeat that dialogue except

³⁶⁸ See text accompanying notes 351-53 *supra*. Although the chief justice submits the judiciary's budget request directly to the legislature, cooperation between the executive and judicial branches is implied by the constitutional requirement that aggregate general fund proposed budget figures for both branches not exceed the expenditure ceiling. HAWAII CONST. art. VII, § 8.

³⁶⁹ See text accompanying notes 348-49 *supra*.

³⁷⁰ The budget and fiscal office prepares the biennial multi-year program and financial plan and budget, which is a six-year projection of operational and capital improvement needs. Two other documents outline current operational and construction needs for the biennium, which is the legislative budgeting period in Hawaii. See HAWAII CONST. art. VII, § 8. The budget office prepares supplemental requests for the legislature's consideration in even-numbered years. The administrative director and budget and fiscal officer each testify at budgetary hearings.

³⁷¹ See notes 264, 328 *supra* and accompanying text.

³⁷² Independence of individual judges may be divided into two elements: substantive independence and personal independence. "Substantive independence means that in the making of judicial decisions and the exercise of other official duties individual judges are subject to no other authority than the law." Shetreet, *supra* note 16, at 57.

³⁷³ See, e.g., ABA—COURT ORGANIZATION, *supra* note 152, at 39-65; ABA JOINT COMM. ON

as it relates to the independence of the individual judge and recent changes in our state constitution.

A. Selection and Tenure

The quality of justice in our society relates closely to the competency, fairness, and effectiveness of our judges. Although the characteristics of a good judge are not easily measured, a judge should have sound legal training and experience, intellectual skill, personal integrity, and an ability to understand and relate to people.³⁷⁴ The search for the most competent judges is essentially a search for the best method of judicial selection.

The goal of a judicial selection system is not merely to find good judges. An effective mechanism also removes judges from political pressure in order to ensure judicial independence. The process should also encourage public confidence in the judiciary; that is, the public must be assured

PROFESSIONAL RESPONSIBILITY, STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT (Tent. Draft 1977) [hereinafter cited as ABA—JUDICIAL DISCIPLINE]; AMERICAN JUDICATURE SOCIETY, JUDICIAL RETIREMENT AND DISABILITY COMMISSIONS PROCEDURES (G. Winters & R. Lowe eds. 1969); A. ASHMAN & J. ALFINI, THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS (1974); W. BRAITHWAITE, WHO JUDGES THE JUDGES? (1971) [hereinafter cited as BRAITHWAITE]; R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND BAR (1969); Cannon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 L. & SOC'Y REV. 579 (1972); Frankel, *Who Judges the Judges*, 11 TRIAL 55 (Jan./Feb. 1975); McConnell, *Judicial Salaries and Retirement Plans 1972*, 56 JUD. 140 (1972); Comment, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267 (1977); Note, *Judicial Discipline in California: A Critical Re-evaluation*, 10 LOY. L.A.L. REV. 192 (1976); Comment, *The Procedures of Judicial Discipline*, 59 MARQ. L. REV. 190 (1976); Comment, *Judicial Discipline, Removal and Retirement*, 1976 WIS. L. REV. 563; 54 JUD. 182 (1970).

³⁷⁴ Arthur Vanderbilt, in a series of lectures at Boston University, made these comments about the attributes of a good judge:

The requirement of integrity of character is primary; in order for judges to be independent and impartial they must be courageous and able to withstand external influences whether in the form of bribes, pressure of friend or family, antipathies of class or religion. The importance of the ethics of a judge cannot be overemphasized. Judges require that true humility of character that is found in an awareness of one's own limitations and deficiencies and finds expression in a willingness to hear the other side of the question. Wisdom, that deepening of the intellect which is more than mere intelligence, including comprehension of the effects of their decisions, is fundamental if a judge is to be able to resolve all the ramifications of the various kinds of litigation coming before him. Knowledge in the fullest sense of learning and education, legal and general, and professional experience, are the handmaidens of such wisdom. Social relations embrace personal conduct, the maturity which comes with experience of people, the ability to get along with other men, to understand their actions and to decide in accordance with such understanding, and to evoke the respect of other men by attitudes of courtesy and cooperation. A judge does not function in the isolation of an ivory tower; he must deal with the disputes of actual people and he must know and understand them.

II SELECTED WRITINGS OF ARTHUR T. VANDERBILT 113-14 (F. Klein & J.S. Lee eds. 1967).

that its judges are competent and that their decisions are made on an impartial basis.

From its early days, Hawaii has had an appointive judiciary. The Constitutions of 1852, 1864, 1887, and the Constitution of the Republic all provided for an appointive judiciary.³⁷⁵ When Hawaii became a territory, judges of the supreme court and circuit courts were appointed by the President and confirmed by the Senate.³⁷⁶ After statehood, and until recently, supreme court justices and circuit court judges were appointed by the Governor with the advice and consent of the senate.³⁷⁷ District court judges, by statute, were appointed by the chief justice.³⁷⁸

The method of selecting judges was a controversial issue at the 1950 and 1968 constitutional conventions.³⁷⁹ At both conventions, the judiciary committee divided on whether to retain the appointive system or adopt a selection commission plan in which a nonpartisan nominating committee would review candidates and arrive at a list of names from which the appointing authority would be required to choose.³⁸⁰ At the 1978 constitutional convention, a selection commission plan was proposed again, and a rather unusual blend of both the commission plan and our traditional appointive system finally was adopted and subsequently ratified.

The convention's judiciary committee was concerned primarily with the potential for political influence and abuse under the appointive system.³⁸¹ The committee recognized that such influence could not be eliminated completely but determined that a nonpartisan commission would minimize the risk because a greater number of people, including attorneys and lay persons, would be involved. From this, the committee inferred that judicial nominees would be chosen on the basis of qualifications rather than political affiliation or personal friendship.³⁸²

³⁷⁵ HAWAII CONST. OF 1887, art. 71, *reprinted in* Thurston, *supra* note 36, at 192; notes 60, 75, 84 *supra* and accompanying text.

³⁷⁶ See note 103 *supra* and accompanying text.

³⁷⁷ See notes 131-32 *supra* and accompanying text.

³⁷⁸ See note 132 *supra*.

³⁷⁹ See II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 343-69 (1972); note 131 *supra* and accompanying text.

³⁸⁰ See MIN. REP. NO. 2, 2d Hawaii Const. Conv., *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 333-36 (1973); STAND. COMM. REP. NO. 37, Hawaii Const. Conv., *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1950, at 175 (1961).

³⁸¹ STAND. COMM. REP. NO. 52, 3d Hawaii Const. Conv. 7-8, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at — (19 —).

³⁸² The committee listed the following reasons in support of a commission system:

1. It removes the selection of judges from the political consideration of one person and places it in the hands of a nonpartisan board of citizens;
2. The choice of nominees is made without consideration or influence of partisan politics;
3. It forms an independent panel of commissioners whose sole and exclusive function is to seek out, encourage and screen all candidates for judicial appointment;
4. It includes both lawyer and laypersons' views in the selection of judges; and

The constitution now provides that vacancies in the supreme court, intermediate appellate court, and circuit court are to be filled by gubernatorial appointment from a list of not less than six nominees submitted by the judicial selection commission.³⁸³ Senate confirmation is still required.³⁸⁴ In the district court and district family court, appointments are to be made by the chief justice, again from a list submitted by the judicial selection commission, but senate confirmation is not required.³⁸⁵

Until passage of the constitutional amendment, Hawaii's judges had to seek reappointment by their respective appointing authorities. The amendment places the power of retention with the newly created judicial selection commission.³⁸⁶ Six months prior to the end of a judge's term, the judge must indicate whether reappointment is desired. If it is, the commission reviews past performance to decide whether the judge should be retained for another term.³⁸⁷ A judge determined by the commission to be qualified will remain on the bench without going through the entire appointment process.³⁸⁸ The convention history indicates that the primary purpose of the new retention process is to exclude or, at least, reduce partisan political action.³⁸⁹

Selection and retention procedures affect the length of time a judge will serve on the bench. Thus, the process is intimately tied to tenure. Provisions relating to tenure should be guided by two principles: they should be adequate enough to attract highly qualified persons to the bench and to retain them in judicial service, and they should be designed to ensure judicial independence.

With the exception of the territorial period,³⁹⁰ Hawaii's judges have generally served for long judicial terms.³⁹¹ For example, supreme court justices, intermediate appellate judges, and circuit judges presently serve for ten years,³⁹² while district court judges serve for six years.³⁹³ Hence, Hawaii's judges serve for longer periods than the Governor or legislators, and longer judicial tenure is seen as a safeguard to individual independence.

Lengthy terms are desirable for several reasons. First, the longer the

5. It permits many more qualified candidates who might otherwise be overlooked by one person to be considered.

Id. at 8.

³⁸³ HAWAII CONST. art. VI, § 3, para. 1-3.

³⁸⁴ *Id.* para. 1.

³⁸⁵ *Id.* para. 3.

³⁸⁶ *Id.* para. 6.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ STAND. COMM. REP. NO. 52, 3d Hawaii Const. Conv. 14, reprinted in I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at — (19 —).

³⁹⁰ See notes 104-05 *supra* and accompanying text.

³⁹¹ See, e.g., notes 61, 85 *supra* and accompanying text.

³⁹² HAWAII CONST. art. VI, § 3, para. 6.

³⁹³ HAWAII REV. STAT. § 604-2 (Supp. 1979).

term, the more likely it will be that a qualified candidate will accept a judgeship. Attorneys in private practice—even those in government service—are reluctant to give up lucrative, permanent positions unless they are assured of a long-term commitment. Second, substantial tenure serves to insulate the judiciary from control by the executive, legislature, or outside political forces. A judge who must be reelected or reappointed after a short term may find it difficult to make impartial decisions on controversial cases. In addition to “job security and independence from the appointing authority,” the 1978 constitutional convention’s judiciary committee suggested that longer terms “would allow a new judge enough time to learn and mature into his[or her] role as an arbiter of the law.”³⁹⁴

Compulsory retirement is another aspect of tenure addressed by the constitution. Hawaii, like many states, requires a judge to relinquish his position upon reaching the age of seventy.³⁹⁵ The American Bar Association endorses mandatory retirement because it “makes possible the orderly termination of service of people who, on the average, have reached an age when their physical and mental powers do not permit them to carry a full workload.”³⁹⁶ To a limited extent, our constitution and statutes allow the chief justice to recall retired judges to active service.³⁹⁷

B. Judicial Compensation

Judicial salaries should be sufficient to attract competent and qualified individuals to the bench. This is especially true since judges are prohibited by our constitution from practicing law³⁹⁸ and are required by ethics canons to forego any form of financial activity that would lead to even an appearance of conflict or inability to decide a case in a fair and impartial manner.³⁹⁹

In any discussion of judicial salaries, the central concern must be how to assure adequate compensation and at the same time insulate judicial salaries from political control. However, it should be recognized that the legislature, as the body responsible for overseeing the state’s finances, must play a major role in setting judicial salaries.

Hawaii’s early constitutions contained provisions safeguarding judicial salaries against encroachment by the other branches of government. The

³⁹⁴ STAND. COMM. REP. NO. 52, 3d Hawaii Const. Conv. 14, reprinted in I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at _ (19 _). Another reason for longer judicial terms in Hawaii is to provide for adequate accrual toward retirement pensions after one term on the bench, especially for those judges with no prior government service. See STAND. COMM. REP. NO. 40, 2d Hawaii Const. Conv., reprinted in I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 196, 200 (1973).

³⁹⁵ HAWAII CONST. art. VI, § 3, para. 7.

³⁹⁶ ABA—COURT ORGANIZATION, *supra* note 152, at 64.

³⁹⁷ See note 221 *supra* and accompanying text.

³⁹⁸ HAWAII CONST. art. VI, § 3, para. 5.

³⁹⁹ R. HAWAII SUP. CT. 19, Exhibit B, Code of Judicial Conduct, Canons 5C, 5F.

Constitution of 1852 provided that the compensation of Justices of the Supreme Court could not be reduced during their terms of office, and the Constitution of the Republic contained a similar provision.⁴⁰⁰ The first state constitution prohibited the reduction of supreme court justices' and circuit court judges' salaries unless the decrease applied to all salaried officers of the State.⁴⁰¹ The 1968 constitution not only continued this prohibition but also set a minimum amount below which judicial salaries could not fall.⁴⁰²

The 1978 amendment to the constitution retained the old prohibition against reduction of judicial salaries and extended its applicability to all full-time state judges.⁴⁰³ The minimum salary figure was replaced by a general mechanism for periodic salary review by a commission, although the commission's recommendations are not binding upon the legislature.⁴⁰⁴

C. *Judicial Discipline, Removal, and Retirement*

The process used for disciplining, removing, or retiring a judge is a most important element in promoting the independence and impartiality of the judiciary. While judicial independence is of prime importance, judges also must be accountable for improper conduct. Society looks to the judiciary and the individuals administering justice to settle disputes and define and enforce laws in an impartial and rational manner. Honesty and integrity are expected in all actions of a judge, whether in fulfilling duties on the bench or in private life. When a judge's conduct fails to meet these standards, society's confidence in the decisions of the courts and in the judicial system as a whole is undermined.

Additionally, a disciplinary and retirement mechanism must assure a judge of freedom in the decisionmaking process. A judge must be able to

⁴⁰⁰ See notes 63, 86 *supra*.

⁴⁰¹ See note 135 *supra*.

⁴⁰² HAWAII CONST. art. V, § 3, para. 3 (1968, amended and renumbered art. VI, § 3, para. 7, 1978) (minimum annual salary for chief justice, associate justices, and circuit judges \$28,000, \$27,000, and \$25,000, respectively).

⁴⁰³ *Id.* art. VI, § 3, para. 7.

⁴⁰⁴ *Id.* See also ABA—COURT ORGANIZATION, *supra* note 152, Standard 1.23, at 58. The commentary to the standard notes:

The task of periodically reviewing judicial compensation levels should be performed in a systematic way by people who have qualifications to do so. Review of judicial compensation by the legislature alone involves the risk of indifference, and frequently involves also the complication of relating increases in judicial salaries to increases in the legislators' own compensation. Review of judicial compensation by the judiciary itself is self-serving and entails unseemly advocacy of personal interest. A more satisfactory method of performing the task is the creation of an independent agency having this specific responsibility. The suggested agency is similar to ones that have been constituted to review and recommend salary structures in the executive branch of government.

Id. at 63.

interpret the law independently and honestly and know that disciplinary measures will not be imposed for writing an unpopular opinion or because an attorney disagrees with a ruling.

In the past, the sole disciplinary mechanism in most jurisdictions⁴⁰⁵ involved legislative removal of an incompetent or dishonest judge.⁴⁰⁶ These sanctions were reserved only for the most severe forms of judicial misconduct or disability and have been criticized as cumbersome and inefficient.⁴⁰⁷ During the last twenty years, in recognition of the general ineffectiveness of traditional mechanisms, forty-eight states and the District of Columbia have adopted new procedures for disciplining and removing judges.⁴⁰⁸ At least thirty-eight states have established judicial discipline commissions⁴⁰⁹ modeled after the California commission on judicial performance.⁴¹⁰

⁴⁰⁵ As of 1971, 46 state constitutions as well as the Federal Constitution contained impeachment provisions, 28 states had address procedures, and a few others had resolution provisions. BRAITHWAITE, *supra* note 373, at 12. See note 406 *infra* for a description of these legislative mechanisms. In addition, Braithwaite identifies seven states with recall procedures. *Id.* Recall is analogous to initiative and referendum; if a certain percentage of the voters sign a petition to recall a judge, a special election is held to determine whether the judge should be retained.

⁴⁰⁶ The traditional legislative mechanisms are impeachment, address, and resolution. In a typical impeachment proceeding, the lower house of a bicameral legislature acts as a grand jury, drafting charges against the official to be removed, and the upper house acts as the judge and jury. Address is a formal request from the legislature to the governor seeking the removal of a judge. Resolution, very much like address, requires a resolution and vote by two-thirds of the legislature for the removal of a judge to be effected.

⁴⁰⁷ Comment, *The Procedures of Judicial Discipline*, *supra* note 373, at 196-97; Comment, *Toward a Disciplined Approach to Judicial Discipline*, 73 Nw. U.L. Rev. 503, at 508-10 (1978). For instance, by 1960 California's three methods were so cumbersome that the State had rarely used them; it impeached only two judges (in 1862 and 1929), used recall only once (in 1929), and introduced only one concurrent resolution to remove a judge (in 1936). BRAITHWAITE, *supra* note 393, at 81-83. Note, *supra* note 373, at 193-99.

Evidence on the effectiveness and extent of use of the traditional procedures is scant. In 1936 it was reported that during the period 1900-25 two judges were removed by impeachment—one in Montana and one in Texas—and three by address, all in Virginia. In 1952 it was reported that during the period 1928-48 there were only three impeachments of judges, and all three judges were acquitted. A 1960 article states:

Replies to inquiries in 1960 disclose that in forty of forty-five states, as far back as can be recalled or determined, legislative attempts to invoke impeachment procedures have been made in only seventeen states in a total of fifty instances. The results were nineteen removals and three resignations. In one case the result was unknown.

The present research, though not exhaustive, found only five states that have used impeachment within the last fifteen years, and no instance of the use of address or recall within the last three decades.

BRAITHWAITE, *supra* note 373, at 12-13 (citations omitted).

⁴⁰⁸ I. TESITOR, JUDICIAL CONDUCT ORGANIZATIONS (American Judicature Society 1978).

⁴⁰⁹ *Id.* at 2.

⁴¹⁰ The California commission, originally created by a 1960 constitutional amendment, has nine members: two judges of courts of appeals, two judges of superior courts, and one judge of a municipal court, each appointed by the supreme court; two members of the state

Hawaii has participated in the national trend toward more effective disciplinary and disability retirement methods. Our early constitutions provided for legislative removal of judges.⁴¹¹ During the territorial period, supreme and circuit court judges could be removed by the President,⁴¹² while district magistrates were subject to removal by the supreme court when "necessary for the public good."⁴¹³ When Hawaii first became a State, the only mechanism for dealing with misconduct of a circuit or supreme court judge was removal from office upon concurrence of two-thirds of the membership of each legislative house.⁴¹⁴ No proceeding was ever brought under this provision, and, indeed, the legislature did not promulgate rules or procedures for the implementation of the mechanism.⁴¹⁵ The constitution contained a separate provision dealing with retirement for disability.⁴¹⁶

In 1968, the constitution was amended to merge the disciplinary mechanism with the retirement for disability provision,⁴¹⁷ requiring the Governor to appoint a board to inquire into removal or retirement of a circuit or supreme court judge after a commission certified probable cause.⁴¹⁸

bar appointed by its governing body; and two lay persons appointed by the Governor with the advice and consent of the senate. The commission employs a full-time secretary and is empowered to receive and investigate complaints from any source and to hold confidential adversary hearings. Prior to 1976, the commission itself had no powers. However, it could make public recommendations to the supreme court for retirement of a disabled judge where the disability seriously interfered with the performance of the judge's duties and was or was likely to become permanent, or it could recommend censure or removal for action that constituted "wilful misconduct in office, wilful and persistent failure to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." CAL. CONST. art. VI, § 18 (1879, amended 1976). In 1976, the constitution was amended to authorize the commission to privately admonish a judge found to have engaged in an improper action or a dereliction of duty. In addition, the grounds upon which a judge could be disciplined were enlarged to include an "inability" to perform judicial duties. In the past, only a "wilful and persistent failure" of performance could lead to discipline.

⁴¹¹ See, e.g., notes 61, 76, 85 *supra* and accompanying texts. The following cases concerned removal of district court judges: *In re Helekunihi*, 10 Hawaii 285 (1896); *In re Kaaa*, 8 Hawaii 298 (1891); *In re Mahelona*, 8 Hawaii 296 (1891); *In re Kalai*, 7 Hawaii 257 (1888); *In re Kahulu*, 5 Hawaii 283 (1885); *In re Kakina*, 5 Hawaii 669 (1878).

⁴¹² Act of Apr. 30, 1900, § 80, 31 Stat. 141 (repealed 1959). Section 80 was superseded by the Hawaii Constitution, adopted on August 21, 1959, which provided for appointment and removal by the Governor. The constitutional provision was amended in 1968 and 1978.

⁴¹³ REV. LAWS HAWAII § 2296 (1915) (amended various years and codified at *id.* § 2273 (1925); *id.* § 3761 (1935); *id.* § 9672 (1945); *id.* § 26-12 (1955)) (current version at HAWAII REV. STAT. § 604-2 (Supp. 1979)); see *In re Soares*, 27 Hawaii 509 (1923).

⁴¹⁴ HAWAII CONST. art. V, § 3, para. 3 (1959, amended 1968, 1978, renumbered art. VI, § 3, para. 6, 1978).

⁴¹⁵ See STAND. COMM. REP. NO. 40, 2d Hawaii Const. Conv., reprinted in I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 196, 201 (1973).

⁴¹⁶ HAWAII CONST. art. V, § 4 (1959, amended 1968, 1978, renumbered art. VI, § 5, 1978).

⁴¹⁷ *Id.* (1968, amended and renumbered art. VI, § 5, 1978).

⁴¹⁸ *Id.*

The following year a commission was formed,⁴¹⁹ but since then only two complaints have required investigation.⁴²⁰ In both instances, the commission found no probable cause to recommend removal.⁴²¹

In 1977, the supreme court adopted the Code of Judicial Conduct, modeled after the ABA Code of Judicial Conduct.⁴²² No formal disciplinary mechanism existed, however, to handle those instances where a judge's conduct might call for reprimand or censure but not for the severe sanction of removal.⁴²³

The 1978 constitutional amendment to the judicial article lodged the disciplinary mechanism within the judiciary by vesting in the supreme court full power to reprimand, discipline, suspend, retire, or remove from office any justice or judge.⁴²⁴ It significantly enlarged disciplinary powers, giving the supreme court ultimate authority over all state judges⁴²⁵ and expanding the range of disciplinary measures which could be imposed.

Pursuant to the amendment, the supreme court has promulgated rule 26⁴²⁶ creating a seven-member commission, composed of three attorneys and four lay persons, to receive, screen, and conduct preliminary investigations of all complaints regarding judges.⁴²⁷ Upon the commission's request, the supreme court will appoint special counsel to carry the investi-

⁴¹⁹ Pursuant to the constitutional amendment, a plan for judicial removal and disability retirement was enacted by the legislature in 1969 which provided for a commission consisting of five members appointed by the Governor, from a panel nominated by the judicial council and confirmed by the senate. The commission was empowered to receive and investigate complaints, subpoena witnesses, administer oaths and take testimony relative to complaints. If a majority of the commissioners determined that there was probable cause to believe that a judge appears "so incapacitated as substantially to prevent him from performing his judicial duties or has acted in a manner that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute" the commission would certify its findings to the Governor, who in turn would appoint a board of judicial removal consisting of the chief justice or an associate justice designated as chairperson and two other members. HAWAII REV. STAT. § 610-3(a) (1976). The board after conducting a full hearing would submit its findings and recommendations to the Governor who was required to remove or retire the judge within thirty days if the board recommended such action. *Id.* § 610-13. Although not explicitly repealed, this provision may have been impliedly repealed by passage of the 1978 constitutional amendment on judicial discipline, see note 424 *infra*.

⁴²⁰ COMM. FOR JUDICIAL QUALIFICATION ANN. REP. (1977).

⁴²¹ *Id.*

⁴²² R. HAWAII SUP. CT. 19, Exhibit B.

⁴²³ Although the court lacked explicit constitutional authority to discipline judges, such discipline could have been imposed under the inherent powers concept. See ABA—JUDICIAL DISCIPLINE, *supra* note 373, Standard 1.1 & Commentary, at 3-4.

⁴²⁴ HAWAII CONST. art. VI, § 5.

⁴²⁵ Formerly, the constitutional provision covered only supreme and circuit court judges while district court judges could be removed by the supreme court whenever the court deemed it necessary for the public good. HAWAII REV. STAT. § 604-2 (1976) (amended 1979).

⁴²⁶ R. HAWAII SUP. CT. 26 (amended Nov. 6, 1979, effective Jan. 2, 1980).

⁴²⁷ *Id.* 1(a), 2(a).

gation forward and, if necessary, file formal proceedings.⁴²⁸ Such proceedings include a complaint and answer⁴²⁹ and a hearing before the commission, at which the judge may be represented by counsel, confront the complainant, cross-examine witnesses, compel attendance of witnesses and documents, and present evidence.⁴³⁰ Prior to instituting formal proceedings, the commission may close the case or recommend disciplinary action to the supreme court.⁴³¹ At any time after the judge files an answer to a complaint, the commission may dismiss the matter upon a determination of insufficient cause.⁴³² After the formal hearing, the commission will make a report and recommendation to the supreme court for review and action.⁴³³ All disciplinary and disability procedures are confidential until and unless the supreme court imposes public discipline or the judge requests the matter be made public.⁴³⁴

Appointment of special counsel is a unique feature of rule 26. This provision removes the commission from involvement in any but preliminary investigations and helps to maintain the commission's impartiality at later stages in the procedure. It also ensures that the case will be presented to the commission by an attorney who will have knowledge of applicable evidentiary and procedural rules.

Under the rule, various types of conduct are subject to disciplinary actions, including a felony conviction, willful misconduct in office, willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute, conduct prejudicial to the administration of justice or that brings the judicial office into disrepute, and conduct that violates the Code of Judicial Conduct.⁴³⁵ Additionally, the rule lists the sanctions which the commission may recommend⁴³⁶ and sets out procedures for cases involving mental or physical disability and involuntary retirement.⁴³⁷

It is clear that an independent judiciary requires that the mechanism for dealing with incompetent or disabled judges function within the judiciary. In implementing such a procedure, rule 26 attempts to protect the independence of the individual judge in the decisionmaking process while also assuring public accountability in judicial conduct.

⁴²⁸ *Id.* 7.

⁴²⁹ *Id.* 9(a)-9(b).

⁴³⁰ *Id.* 9(c).

⁴³¹ *Id.* 6(h)-6(i).

⁴³² *Id.* 9(c).

⁴³³ *Id.* 9(f).

⁴³⁴ *Id.* 4.

⁴³⁵ *Id.* 5(a).

⁴³⁶ *Id.* 9(f).

⁴³⁷ *Id.* 13-14.

V. CONCLUSION

Roscoe Pound's classic 1906 address called attention to basic defects in the structure and procedures of the existing legal system.⁴³⁸ The courts that had served the small, agrarian society of the nineteenth century no longer sufficed in the newly industrialized, urban culture of America. Pound's speech inspired the legal community to examine and seek solutions to those problems he identified, and, in the nearly three-quarters of a century since, our courts have experienced radical alterations.

Through constitutional amendment and legislation, through administrative practices and exercise of the rulemaking power, the independence of the Hawaii judiciary has been strengthened. At the same time, enlightened constitutional provisions have secured the independence of individual judges in their roles as dispute resolvers and law interpreters. Many of these advancements evolved as a direct result of Pound's original exhortation.

This tradition of reform has brought the Hawaii judiciary national recognition as a model for unified court systems.⁴³⁹ Yet, just as the legal system of Pound's day had become archaic in an industrial-revolutionized society, today's legal system soon may be obsolete in our scientifically revolutionized society. The most realistic approach to change is a flexible one. The painstaking restructuring of the Hawaii judiciary over the last twenty years has given us a broader perspective and provided us with a firm basis from which to meet an uncertain future.

Our unified court system, with a centralized administration, possesses the necessary versatility to implement changes in response to shifting values and expectations. The potential use of the court's rulemaking power is also of great significance. In the past, the rulemaking power has been utilized to adopt uniform criminal and civil rules of procedure to speed the adjudicative process. Delay continues to be a major problem which may necessitate reexamination and revision of our procedures.⁴⁴⁰ In response to a constitutional mandate,⁴⁴¹ the supreme court has already promulgated rules setting time limits for appellate case disposition.⁴⁴²

In addition, alternative methods of dispute resolution, such as establishing neighborhood justice centers⁴⁴³ and expanding the use of small

⁴³⁸ Pound, *Causes*, *supra* note 155.

⁴³⁹ Berkson, *supra* note 160.

⁴⁴⁰ See ABA, REPORT OF THE POUND CONFERENCE FOLLOW-UP TASK FORCE (1979), reprinted in 74 F.R.D. 159, 171, 191-92 (1977); Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288-90 (1978) [hereinafter cited as Erickson]; 91 HARV. L. REV. 1925 (1978).

⁴⁴¹ HAWAII CONST. art. VI, § 1.

⁴⁴² R. HAWAII SUP. CT. 33 (amended Nov. 6, 1979, effective Jan. 2, 1980); R. HAWAII INTER. CT. APP. 21 (adopted Nov. 6, 1979, effective Jan. 2, 1980).

⁴⁴³ See, e.g., OFFICE OF STATE COURTS ADMINISTRATOR, CITIZENS DISPUTE SETTLEMENT PROGRAM DEVELOPMENT IN FLORIDA, A REPORT TO THE CONFERENCE OF CHIEF JUSTICES (1978);

claims courts,⁴⁴⁴ arbitration,⁴⁴⁵ and administrative hearings⁴⁴⁶ are being advanced as mechanisms to decrease court congestion and provide more expeditious relief to litigants. The impact of these and other contemplated reforms has not been determined. However, any proposal, once adopted, must not be sanctified but must be the subject of constant re-evaluation. Even the most far-reaching changes are useless unless continually assessed.

The Hawaii courts have begun the deliberate process of evaluating present goals and looking at the future administration of justice. With the establishment of the office of court planner in 1976,⁴⁴⁷ the judiciary initiated a formal master planning procedure to aid in meeting the community's demands for services. The completed statewide plan will address fundamental questions about the judiciary's function in a society where values and expectations may be more transitory and ephemeral than permanent.

To ensure a successful design, the judiciary must be able to exchange information with other court systems. Recently, the states have formed a network which expands the planning assets of each member. The nucleus of this web is the National Center for State Courts⁴⁴⁸ which collects data from the various jurisdictions and acts as a catalyst in setting guidelines for fair and expeditious judicial administration. The proper utilization of this resource will contribute greatly to our own mobility in preparing for

Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 7 (1978) [hereinafter cited as Bell]; Erickson, *supra* note 440, at 281-82; Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 12 (1976) [hereinafter cited as Kaufman].

⁴⁴⁴ See, e.g., Act 172, 1979 Hawaii Sess. Laws 349 (expanding small claims court jurisdiction); Erickson, *supra* note 440, at 282-83; Kaufman, *supra* note 443, at 13-14; King, *Measuring the Scales: An Empirical Look at the Hawaii Small Claims Court*, XII HAWAII B.J. 2 (1976); Muir, *The Hawaii Small Claims Court: An Empirical Study*, XII HAWAII B.J. 18 (1976) (assessing the effectiveness of Hawaii's small claims court).

⁴⁴⁵ See, e.g., Bell, *supra* note 443, at 7; Erickson, *supra* note 440, at 283-84; Rosenberg, *Devising Procedures that Are Civil To Promote Justice that Is Civilized*, 69 MICH. L. REV. 797 (1971), in NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, RESOURCE MATERIALS 83-89 (1976); Schulman, *Compulsory Arbitration in Pennsylvania*, *id.* at 91-93 (reprinted from H. CHADBURN, A. LEVIN & P. SHUCHMAN, CASES AND MATERIALS ON CIVIL PROCEDURE 1006 (2d ed. 1974)).

⁴⁴⁶ See, e.g., Erickson, *supra* note 440, at 285-86.

⁴⁴⁷ Office of the Administrative Director of the Courts, State of Hawaii, A Progress Report to the Chief Justice on a Plan for the Judiciary: A Summary Report, Attachment 2, at 1 (1977).

⁴⁴⁸ The National Center for State Courts is a nonprofit organization established in 1971 and committed to improving the administration of justice at the state and local levels. It serves as an ongoing resource institution, aiding in the perfection of procedure and substance in state courts, through research and problem studies and education and training of judicial officers and administrators. The center is financed by contributions from all fifty states as well as funds solicited from the private sector. Headquartered in Williamsburg, Virginia, with five regional offices located throughout the United States, the center possesses a staff with backgrounds in 18 separate academic disciplines and 38 court-related specialties. 60 JUD. 39, 41 (1976). See generally NATIONAL CENTER STATE CTS. ANN. REP. (1978).

tomorrow. Suggested solutions to our problems may be tested against alternatives employed elsewhere⁴⁴⁹ and the experience of other states may be considered in forming our own objectives.

In looking to the future, the judiciary's relationship with the executive and legislature will continue to be of primary importance. Our tripartite form of government contemplates not only independence and separateness of each branch, but also coordination among the branches deriving from a common purpose. Like the society in which these government institutions function, the relationship among them will remain fluid and dynamic. The ingenuity of our constitutional structure is that it precludes any one branch of government from dominating the other. While each can significantly affect the other, each can also limit the effect. In this interdependent setting, cooperation among the branches takes on added significance. It is, in part, the long and productive tradition of cooperation among Hawaii's governmental branches that has gained for the judiciary a full measure of independence and promises to safeguard it hereafter.

The future can never be wholly predictable. Our best efforts to anticipate concerns and needs may fail to disclose circumstances of profound consequence. Nevertheless, the Hawaii judiciary, with a solid foundation of independence, will continue to fulfill its constitutional directive by consciously shaping the form and substance of justice itself.

⁴⁴⁹ In 1977, the center conducted a study of the Hawaii appellate system and recommended the establishment of an intermediate appellate court. NATIONAL CENTER FOR STATE COURTS, THE HAWAII APPELLATE REPORT (1977). As discussed earlier, see text accompanying notes 183-93 *supra*, such a court was subsequently proposed by the 1978 Constitutional Convention, ratified, and implemented by Act 111, 1979 Hawaii Sess. Laws 259. In 1978, the center assisted the Hawaii judiciary in drafting the Hawaii Benchbook for trial judges which was published in May 1979. On a national level, the center is currently evaluating guidelines for sentencing and small claims courts' procedures and focusing on facilitating the planning process at individual state levels. NATIONAL CENTER STATE CTS. ANN. REP. at 12-14 (1978).