

## **Judicial Foresight: Then, now, and tomorrow for the Hawaii Judiciary**

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The last time I appeared before some of you, at the Judicial Foresight Conference of 1991, I was dressed as the Energizer Bunny perpetually beating the big bass drum of judicial foresight. You may not see my ears and drum today, but judicial foresight is still very much on my mind and in my heart.

### **The Evolution of Judicial Foresight:**

What eventually became judicial foresight actually was born in the world's first and so far still best exercise of citizen-based Anticipatory Democracy, called "Hawaii 2000", a set of extensive and intensive islandwide activities carried out in 1969-1970.

CJ William Richardson and Chief Court Administrator Lester Cingcade and other members of the Hawaii judiciary participated in those activities, and decided that the judiciary should have its own futures visioning conference which resulted in the Citizens' Conference on the Administration of Law in 1972, sponsored in part by the American Judicature Society. That conference was as groundbreaking and spectacular as was the culminating conference for Hawaii 2000, featuring outstanding speakers from around the world and in Hawaii. I recall a play produced by a group of inmates in Hawaii's prisons, and the impressive presence of Sammy Amalu who was himself just recently released from prison. We also produced a very extravagant multimedia presentation--with six slide projectors and two 16 mm motion picture projectors for that conference titled "A Dowager in a Hurricane: Futures of Law and Justice". Those WERE the days!

The citizen's conference resulted in the creation of a futures group within the judiciary in the early 1970s which included the CJ, Cingcade, Bambi Weil, Nathan Kim, Greg Sugimoto, and Wayne Yasutomi, among others. One of the results was the first state judicial plan which among other innovations identified and then planned for the five different dimensions for the judiciary--a groundbreaking document that inspired judiciaries worldwide.

Strategic planning is heavily influenced by who participates--and who does not. We learned, through bitter experience, that when we drew up a plan based largely upon extensive participation by the people who work in the courts, the resulting plan may address their needs, but not those of most other people who use the courts. It turned out,

after a year of workshops, that the number one issue that the personnel working in the courts wanted the strategic plan to solve was parking--specifically, the fact that the secretaries and clerks of newly-appointed judges got better parking spots than did secretaries and clerks of standing judges. It was unfair, they said, and something should be done about it.

Well, it probably was, but that is not what we planners thought the main focus of our plan should be. We imagined it might be about equal access of all parties to the courts, or justice, or speedy trials, or the like. Those simply weren't things that concerned people who viewed the courts as merely a place where they happened to work.

And so we took time out and thought carefully about all the things the judiciary actually does, and ended up identifying the five dimensions of the judiciary. We then drew up a plan that paid appropriate attention to each dimension.

Chapter Six, "The Conceptual Framework of the Judiciary", of *Comprehensive Planning in the Hawaii Judiciary*, (1981), lists the five dimensions, along with their respective mission statements:

**Dimension I: The Judiciary as a Branch of Government**

Mission 1: To uphold the Constitution--the government it creates, the rights and liberties it guarantees, and the policies and principles which it embodies.

**Dimension II: the Judiciary as a Dispute Resolution Forum**

Mission 2: To ensure to the people of the State the highest standard of justice attainable under our system of government by assuring an equitable and expeditious resolution of all cases and controversies properly brought to the state courts.

**Dimension III: The Judiciary as a Public Agency**

Mission 3: To provide for, promote, and ensure the effective, economical, and efficient utilization of public resources in the administration of the judicial system.

**Dimension IV: The Judiciary as a Subsystem of the Legal System**

Mission 4: To promote the effective and expeditious administration of justice by and among the various subsystems of the legal system.

**Dimension V: The Judiciary as an Institution of a Changing Society**

Mission 5: To anticipate and respond to the changing judicial needs of society.

Some of these dimensions--especially number one--were quite controversial. In spite of paying lip service to belief in the "separation of powers" of government into three equal branches--legislative, executive and judicial--in fact courts, especially state courts, are not very "independent", typically being highly dependent on the legislature for funding, and on the executive for budgeting, supplies, and personnel administration. That the Hawaii judiciary proudly proclaimed independence according to the separation of power doctrine, and actively sought it, is still a point of political contention.

And of course, Dimension V, which announces the judiciary's obligation to engage in judicial foresight, is the most inspiring, from my point of view, and perhaps the most controversial, of all.

But the Hawaii judiciary assumed its responsibilities under this dimension.

Initially, for meetings of the futures group, the HRCFS presented lists of scans of things to come, and the group then decided what from the list to analyze in more detail for their possible impact on the judiciary and how to prepare for them. That process eventually led to the creation of a futures unit within judiciary's Office of Statistics and Planning, and for a decade graduate students in the UH futures program provided two kinds of futures reports for the judiciary--one called "On the horizon"--things that were about to hit the judiciary in two or three years, and the other titled "Over the horizon"--reports about things with a longer time scale, such as the challenges of genetic engineering, which, as you know, have emerged rapidly after the completion of the human genome project a few years ago. Another example of an "over the horizon report" was the very first serious paper ever written on the rights of robots. And as you may also know, last year, first the government of the UK and then the government of Korea have established formal committees to come up with guidelines dealing with ethical relations between humans and artificial intelligence and robots. Both of these committees cite the Hawaii judicial foresight report of 1987 as the prime source in this area.

There are many other examples of Hawaii's leadership in judicial foresight over the years. But equally significant is that Hawaii's pioneering example is continuing to flow as a growing tsunami around the world. Hawaii's work in judicial foresight was initially repeatedly presented from the mid 1970s through the early 1990s at the annual meetings of the National Conference of Chief Justices and the National Conference of Court Administrators especially during the time when CJ Richardson and Chief Court Administrator Cingcade were active in the leadership of those organizations.

Among many other things, those presentations inspired Chief Justice Harry Carrico, Court Administrator Ron Baldwin, and Kathy Mays, head of the planning department of the Virginia judiciary, to study, institute, and substantially improve upon the futures work of the Hawaii judiciary. After a statewide futures conference in 1987, Virginia adopted a judicial plan that incorporates futures goals and policies into it, and has hired personnel with sufficient budgets to see that they are routinely carried out and that the long-range vision is regularly revisited and renewed. As part of that process, the HRCFS has conducted long-range environmental scans every two or three years so that the Virginia judiciary can update its policies, plans and actions.

In 1990, there was a nationwide conference on the Future and the Courts in San Antonio, co-sponsored by the State Justice Institute and the American Judicature Society, in which Hawaii and Virginia were prime actors. A book based on the conference, and an instruction manual and video on how to do judicial foresight were all subsequently

produced by the HRCFS and the Institute for Alternative Futures in cooperation with the National Center for State Courts.

In addition, the SJI, led by John Daffron, Chief Judge for the 12th Judicial Circuit of Virginia, made "Futures and the Courts" a major funding category, and a decade of futures work of many varieties was carried out in all state judiciaries with SJI funding. "Futures and the Courts" as a SJI funding category ended in 2000, but currently the National Center for State Courts is actively evaluating and elevating futures work within state judiciaries. During the month of May this year, the NCSC conducted an online discussion of judicial foresight and is considering engaging in futures scanning activities for state judiciaries.

When "Futures and the Courts" was a SJI funding category and subsequently, the Hawaii Research Center for Futures Studies worked with all state or commonwealth courts indirectly and with 15 state or commonwealth judiciaries directly. We also have worked with the Federal Judicial Center and many federal courts or federal court associations; and with many state and national bar associations (most recently including the National Conference of Bar Association Presidents last August and the Hawaii Bar convention at the end of this month).

Internationally, among our more interesting work has been with the Singapore judiciary since 1996, most recently last January. We have also worked with Australian national and state courts on several occasions, and with the national courts of New Zealand, as well as the New Zealand national police last November.

So it is my most devout hope that today is the beginning of renewed affiliation between Hawaii Judiciary--the mother of all judicial foresight--and HRCFS of the University of Hawaii.

### **What the future looks like now, compared to then.**

Now, after that brief reminder of the history of judicial foresight, let's look at some substantive factors--some of the similarities and differences in Hawaii and the world--then, now and the futures.

In the late 60s and early 70s, the future of Hawaii and the world looked bright. The Hawaii 2000 activity and the Citizens' Conference on the Administration of Law were widely participative and extremely optimistic activities, generating many alternative futures for Hawaii that most people say still look very good.

Even though futures studies is about inventing the future and not about predicting it, it is amazing how many things we got right about the future back then. For example consider our modes of communication and transportation.

When I first visited Hawaii in 1960 while on my way to teach at Rikkyo University in Tokyo for six years, Hawaii had just achieved statehood. While I did fly on a jet plane

and not a prop, and did not sail on the President Cleveland, my Pan Am airplane lost two of its engines on the flight from San Francisco--fortunately we had four and so we made it--and jets did blow up or crash with alarming frequency then--remember the famous Comet jet build in the UK?

Moreover, when I did come to Hawaii to live for good, in 1969, most of my friends in America waved goodbye sadly, assuming we would never meet again, nor would they ever hear from me again. Airplane tickets cost almost as much as they do now--not adjusting for inflation; in actual dollar amounts--so that transportation was much more costly then than now.

Also, it was a long distance call to phone from Waikiki to my mother in law in Lanikai, while phoning overseas was expensive and time consuming. I had to go to a central office downtown to send a fax.

Television shows from the mainland came on videotape--itself a new technology--shipped by air, so we saw all of our national TV programs--including football games-- a week after they had been shown on the mainland. Information to me at the University of Hawaii came in the form of books and journals that floated leisurely over on ships, arriving here many months after my mainland colleagues had read them. It was very hard to be a futurist back then given how long it took me to get even current information.

However, it is worthwhile to remember that Terence Rogers and other members of the Task Force on Science and Technology for the "Hawaii 2000" activities of 1969 and 1970 DID forecast the emergence of the Internet pretty well, though we in Hawaii then generally failed to take full advantage of their foresight.

The Task Force Report wrote, in discussing "Electronics":

"Small size and small power requirements will also lead to extremely flexible personal communications, with pocket radiotelephones linked to the regular telephone system only a very few years away. We predict that improved equipment and simpler techniques for computer information storage and retrieval will lead to generations of personalized, potentially pocket-sized computers. Through these, the individual citizen will have instant access to vast stores of information. It is already clear that the source of power in the world of today and the future is largely through access to information, as it was once through control of land, and then of raw material supplies and manufacturing facilities. Accordingly, we can expect the government (and other groups) to endeavor to limit access to some kinds of information, and we will see many constitutional battles fought over principles we can only dimly perceive at this time. Related to this is the vast problem of secret electronic surveillance of our citizens--good or bad. Devices already commonplace in 1970 make it possible to bug anyone almost anywhere, and the scale and sophistication of surveillance described in Orwell's *1984* can already be regarded as underestimated for that date."

From the "Task Force Report on Science and Technology 2000", by Terence Rogers, in *Hawaii 2000*, edited by George Chaplin and Glenn Paige. University of Hawaii Press, 1973, p. 257f.

In this day of the PATRIOT Act, the Military Commissions law, and all the rest, I don't need to say anything to you folks about the validity of that forecast.

However, a few years after those words were published, I was invited to become a member of what was called "EIES--Electronic Information Exchange System", an experiment being conducted by Murray Turoff of the New Jersey Institute of Technology. By using a Texas Instrument keyboard in the Social Science Research Institute, which had a telephone modem attached, I was able to dial a toll-free number, place the handset on an acoustic coupler, eventually connect with a computer in New Jersey, and then retrieve messages that other people involved in the experiment around the world had sent--but I could only read them on a monitor, or print them out on a printer--the Texas Instrument keyboard I was using had no memory whatsoever. I was not able to record what I read electronically at all--only by printing it out on paper--and I still have those pieces of paper if anyone is interested.

As a consequence, I had access to information that no other civilian in Hawaii had for the two years of the experiment, and so my ability to predict the future went up tremendously! I was indeed considered to be a fortune teller by many of my colleagues when I was able to tell them of things to come so accurately beforehand.

However, when the experiment ended and the funding ran out, I tried to get people at UH to provide funds so I could stay online, but no one understood what I was talking about: "Computer conferencing?" they asked? "Do you need money to go to a conference about computers?" No, I said, I need money to participate in a conference via computers, and that no one understood at the time.

But when UH did finally provide access to what came to be known as email and chatrooms and computer conferencing, I was among the first UH professors to use it in my classes, and it totally revolutionized my teaching and my relationship with my students. Students who would sit silently for a semester in class, suddenly told me their deepest secrets online, and eventually the chatter on the list was so frequent and insistent that I stopped being the teacher and soon became just one of the gang trying to get a word in edgewise.

And it was indeed email that made it possible for me to be first Secretary General and then President of the World Futures Studies Federation, with my Secretary General being in Finland, while my president, when I was Secretary General, was in Rome. It would have been impossible for me to be so globally active from Hawaii without the jet plane and what eventually become the Internet.

As a futurist, I of course study carefully the way communication technologies have transformed law from what it was in the old days, before the printing press, when law

was in the mind of judges, and scribes only wrote summary decisions without any elaboration of reasoning involved. Moreover, given difficulties in transportation then, and the fact that all writing was hand writing, for most of premodern history, while the American judicial system was being formed in England, Judge A in County A probably didn't know what Judge B in County B decided in similar cases, so law was overwhelmingly very local and specific, and not at all national and uniform.

That all changed with the invention and evolution of the printing press--which pretty much changed everything else in the world at the time. Government for the first time became something ruled by reference to words on papers. Governments were based for the first time on certain precious written documents grandly said to "constitute" the nation-state. As a consequence, law came to be what some privileged people in supreme courts said the Constitution and the written laws and rules based on their interpretation of that Constitution meant. Suddenly, a government of written laws and not of human minds emerged.

But then a few decades ago came the first "word processors" where text could easily be cut and pasted into other documents, so that everything became a draft or plagiarized. Soon after came the World Wide Web and Internet, thus ending libraries and librarians, and expertise in general--especially legal expertise.

Now, if most people want to know something, they don't ask an expert if they can help it. Rather, they go online and Google their question, or, increasingly, they text message their friends and see what they think.

Currently folks post pictures of their boobs and other bodily parts on YouTube for all the world to see, so that the law once again must become highly flexible and both global and local, with precedence meaning nothing but the dead-hand of the past trying to squelch highly fluid and transitory new ideas and behavior which themselves become old ideas and behavior in a split nanosecond.

In the meantime, lawyers and clerks and judges are struggling to keep up with what all this new technology is allowing and indeed requiring, both in terms of presenting new challenges, and in resolving old limitations. The substance of the law and the administration of justice is changing once again, from dealing with the rights of robots and test-tube babies on the one hand, to the elimination of all but a handful of human judges who handle exceptional and non-routine cases, while most routine decision-making is done by artificial intelligence, on the other hand.

Yes, if there is one thing we got right about the future back then, it was the technology--at least the communication technology, including biology, which is essentially just a very important kind of communication technology.

Indeed, the Hawaii 2000 Science and Technology Task Force of 1970 that I quoted before was even more spectacularly right in what it called its "straight-line projections" in medicine and genetics. They stated that "virtually all infectious diseases will be

controlled or have been eradicated prior to 2000 even though new, mutant forms will occur and there will be a continuing fight to handle both new vectors and agents, and to maintain our immunological resistance to common organisms" (p. 282). Absolutely the case.

"Progress in genetics," they also wrote, "suggests that it will soon be possible to alter human genetic makeup, and perhaps even to change the course of human evolution" (283). Most observers agree that is a major challenge over the foreseeable future as well.

Finally, at a time when food shortages were being widely experienced, and even greater one's forecasted, our task force in 1970 boldly said that because of what we now would call genetically-modified food, "Our conclusion is that our ability to feed any population present in 2000 will be easily within the grasp of mankind as far as science and technology are concerned", correctly anticipating that the reason 1/3 of the world is starving now in 2007 is not because of insufficient food to feed them but because the poor do not have enough money to buy the food that exists in great abundance now. In other words: "It's the economy, stupid!"

Global over-population was of considerable concern then, and for many years thereafter, and in fact enormous efforts have been made to control population growth, from China's One Child policy, to policies that enable women to obtain greater educational and job opportunities. Indeed, even though global population continues to grow dangerously, most parts of the so-called developed world are now experiencing population decline. This is true very dramatically in the former soviet bloc, and to a lesser extent throughout all of Europe. But the lowest fertility in the world is experienced today in Korea and Japan. There is a kind of strange race to extinction between those two countries, and forecasts have been made as to when the last Japanese or Korean will vanish from the face of the Earth if fertility remains as low as it is now. And yet, I know from a report I wrote for the Korean government, that no policies exist, short of abandoning the global capitalist system entirely, that can convince Japanese and Korean women that their freedom to consume and travel should be given up so they can have children. Those women have wisely decided that husbands and children are burdens that are not worth bearing .

However, it is important to remember that one of the biggest policy dilemmas in the 1920s and 30s was also population decline. In researching the report we wrote on the future of families for the Korean government, I read many forecasts from the pre-World War II period that said global population would level out at about 2 billion people around 1960, and thereafter begin to decline. I think you know that because of the unpredicted worldwide baby boom after World War II, global population in now is over 6 billion and growing.

I rather suspect that something might happen to reverse declining fertility now, but maybe not. However, in the meantime how to have a growing economy and a declining population at the same time is confounding most economists whose theories are based on the assumption that continued population growth will fuel continued economic growth.



The conflicting trends are challenging us here in Hawaii where it is immigration, and not local fertility, that is keeping our population, and the US generally, growing while all other developed nations are declining in total population.

Big changes are also continuing in ethnicity as well. Globally, white people continue to shrink in numbers while people of color are growing rapidly. Twenty years ago I began saying that around 2050 white people will be so rare in the world that the rest of us will begin holding walks for white people, or participating in "take a white person home for Christmas" programs. The era of white, and thus western, dominance is over.

At the same time, we here in Hawaii seem to be moving against this global trend because while we still have no ethnic majority in Hawaii, white people are increasing, along with part-Hawaiians and Pacific Islanders, while Asians are rapidly declining in numbers and proportion.

As far as age-cohort or generational changes are concerned, we have gotten much better at anticipating social change caused by cohorts abruptly moving into or out of power because of the excellent work done by William Strauss and Neil Howe about 15 years ago, and continuing. Personnel officers used to tell me how much they dreaded hiring the self-centered Gen Xers. Now they tell me how different are the Millennials they are just beginning to encounter. In contrast to the selfish and lazy Gen Xers, the Millennials are very group-oriented, amazingly well-educated, and disciplined, hard workers. But they expect to be praised continually for everything they do and don't respond to criticism well at all.

Instead of Employee of the Month awards--something we Protestant Ethic old-timers never understood to begin with--the Millennials seem to want to be designated Employee of the Day. However they insist the honor be shared among all of them. They see competition that rewards a few but ignores or punishes the many to be unfair and undesirable. And they expect you to congratulate them very warmly for simply showing up on time.

In short we have seen big changes in generational behavior from the old GI's, the Baby Boomers, the Gen Xers, and now the Millennials that fill my classrooms and soon will become lawyers, clerks and judges--and defendants--in your system. Are you ready for them?

Nonetheless, I think you have to agree that we did a pretty good job of forecasting new technologies and their impacts on society, law and the administration of justice.

But we didn't do nearly so well in forecasting social developments.

For example, even though there was a heavy presence of Hawaiians in the Hawaii 2000 conference of 1970, not least of which was George Kanaha, and Chief Justice Richardson himself, there was general agreement that by 2000, Hawaiians and Hawaiian culture would pretty much fade away, being replaced by the Golden Men of the Pacific--a

new pan-ethnic local culture that had Hawaiian elements, but was much, much more than that.

We totally failed to see the Hawaiian renaissance that is so vigorous now.

Well, not everyone did. There was a youth conference held in old Frear Hall on the UH campus just before the main conference at the Ilikai Hotel, and the youth conference voted for three things--free milk for poor people, the legalization of marijuana, and Hawaii's secession from the United States.

If you look over the Hawaii 2000 documents, and also the many statements and acts during the 1970s, you will see considerable concern about environmental issues and especially energy issues. But there was general agreement then that these issues were so obvious and so urgent, that OF COURSE we would move immediately and quickly from dependence on oil to reliance on all of the many abundant renewable energy sources available to Hawaii--solar, wind, geothermal, tidal, and OTEC--Ocean Thermal Energy Conversion. There was also considerable discussion about Hawaii's Carrying Capacity, and talk about finding ways to limit population growth as well as urban sprawl on the one hand and beach front development on the other.

But here we are in 2007, with a Legislative Task Force on Hawaii Sustainability 2050 about to issue a report on September 22 that I am pretty sure will show we are far, far away from being locally sustainable, even though more and more people are fearful of what global climate change and variable warming, sea-level rise, ocean pollution, fresh water scarcity, new and renewed global pandemics, and the rest might do.

There is even concern about the future of tourism--that bulwark of our economy. I am doing a lot of consulting with representatives of the tourist industry worldwide, and with the School of Travel Industry Management here at UH, and I can assure you there is deep and widespread apprehension about the future of what is both the world's largest and the world's most fragile industry now.

However, I don't think anyone in 1970--during the last days of the Vietnam War--(or even during the 1980s or 1990s) believed for a moment that a handful of scruffy people from the Middle East who we knew little about and cared less about, would crash three hijacked airplanes into three highly symbolic American buildings and set the US off on the direction it did go--from being the self-proclaimed land of the free and the home of the brave, to becoming the manifest land of people afraid of their own shadow; from proudly proclaiming "give me liberty or give me death," to hunkering down and begging, "give me shelter."

There is no doubt that in addition to energy and environmental challenges that have been long ignored but are now surging towards their own kinds of 9/11 attention getting, the US is not quite the nation in the eyes of the world that it used to be, while places we considered in the past to be basket cases--such as Korea or China and India--are now expected to be, along with a unified Europe, the major economic and political actors of

the 21<sup>st</sup> Century, while the US perhaps slides to the number four or five slot--if we are lucky.

I think you all understand that it is impossible to predict the future. Futures studies does not try to predict the future. Instead we help individuals and organizations contemplate the implications of several feasible alternative futures, and then to envision and strive to achieve preferred futures.

And, most importantly, we believe this process of forecasting and assessing alternative futures, and then of envisioning and striving towards preferred futures, should become a routine part of the decision making of all public institutions, most certainly judiciaries whose power and influence is so very great in our society, and who are often the very first people in the public sector to be asked to decide controversies concerning new technologies or life styles. Judges are typically the applied futurists in our system. You often are asked to resolve controversies that are so novel that they may appear to be science fiction to the ordinary citizen--or legislator-- and so you need to get better at it.

I very much hope the Hawaii judiciary will decide to renew its leadership in judicial foresight--for itself, for Hawaii, and for future generations everywhere.

Thank you.