

AFJ NOMINEE SNAPSHOT

**MARK**

**BENNETT**

*U.S. Court of Appeals for the Ninth Circuit*

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# INTRODUCTION

On February 12, 2018 President Trump [nominated](#) Mark J. Bennett to fill a seat on the U.S. Court of Appeals for the Ninth Circuit. Bennett was nominated to [replace](#) Judge Richard R. Clifton, who assumed senior status on December 31, 2016.<sup>1</sup>

# BIOGRAPHY

Bennett was born in Brooklyn, New York in 1953. He earned his B.A. from Union College and his J.D. from Cornell Law School. After law school, Bennett clerked for Chief Judge Samuel P. King of the United States District Court for the District of Hawaii.

Bennett spent nine years as an assistant United States attorney for the District of Columbia and the District of Hawaii, and then several years in private practice at the firm McCorrison Miller Mukai McKinnon LLP.

From 2003 to 2010, Bennett served as the attorney general of Hawaii, where he represented the State of Hawaii in both civil and criminal matters. In that capacity, Bennett argued two cases before the U.S. Supreme Court: [Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 \(2009\)](#) and [Lingle v. Chevron USA Inc., 544 U.S. 528 \(2005\)](#). In 2003, Bennett was [criticized](#) for accepting

over \$1,300 for air travel, hotel accommodations and meals from the Republican Attorneys General Association, to attend a conference in Las Vegas.

Bennett [returned](#) to private practice in 2011. He currently serves as a director of the Honolulu law firm Starn O'Toole Marcus & Fisher, where he practices complex civil and appellate litigation. In 2016, he joined the Federalist Society.

# LEGAL AND OTHER ISSUES

The following are notable cases and positions Bennett took as attorney general.

## I. NATIVE HAWAIIAN REORGANIZATION ACT

As attorney general, Bennett was an outspoken proponent of legislation introduced by then-Senator Daniel Akaka to establish a process for U.S. recognition of Native Hawaiians. He also was vocal in objecting to conservative criticism of the bill. See, e.g., [Akaka bill fair, overdue and lawful; Legislation provides overdue fairness, justice to Hawaiians; Akaka Bill Does Not Balkanize the United States or Set Up a Race-Based Government – Response to the U.S. Senate Republican Policy Committee's Opposition to S.147 \(the](#)

<sup>1</sup> On April 5, 2018, Bennett submitted additional materials to the Senate Judiciary Committee to supplement his questionnaire. Bennett failed to disclose at least 18 items deemed responsive to the questionnaire.

[Akaka Bill](#)). However, Bennett [opposed](#) an amended version of the bill that was reported out of the Senate Indian Affairs Committee.

## II. CEDED LANDS CASE

When the United States annexed Hawaii, the Hawaiian government ceded 1.8 million acres of land to the federal government. In 1959, when Hawaii became a state, the Hawaii Admission Act required that all the ceded land be held in trust to be used exclusively for certain purposes, including the benefit of Native Hawaiians and the promotion of homeownership. In 1978, the Office of Hawaiian Affairs (OHA), was established to receive and manage a portion of the funds derived from the ceded lands. In 1993, Congress issued an Apology Resolution that described Hawaii's monarchy's overthrow and acknowledged that neither Native Hawaiians nor their government had consented to the cessation of land.

[Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 \(2009\)](#) involved the efforts by the state to develop and sell as residential property a 500-acre parcel of land in West Maui. Negotiations between the State and OHA regarding OHA's compensation for the sale broke down, and OHA sued, seeking an injunction prohibiting the state from selling any of the ceded land.

The state supreme court ordered an injunction. It held that the Apology Resolution evinced congressional recognition "that the Native Hawaiians

have unrelinquished claims over the ceded land."

As attorney general, Bennett appealed to the U.S. Supreme Court. Bennett [argued](#) that the state supreme court "wrongly interpreted the Apology Resolution enacted by Congress in 1993[]" and "that the Apology Resolution does not, and should not, strip the powers given to the state upon admission into the union and through various acts of Congress." Bennett continued: "The Hawaiian people have a moral claim to the land, but not a legal one[.]"

Justice Alito, writing for a unanimous Court, reversed the Hawaii Supreme Court's ruling, holding that the Apology Resolution did not create any new substantive rights. See [Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 \(2009\)](#).

## III. AFFIRMATIVE ACTION

Kamehameha Schools is a private school system in Hawaii, established by the Bernice Pauahi Bishop Estate. By the terms of its founding, the schools' admission policy prefers applicants with Native Hawaiian ancestry. In 2003, a lawsuit was filed by a non-Hawaiian student, claiming that preferring Hawaiian applicants violates Section 1981 of the Civil Rights Act of 1866, which prohibits racial discrimination in private contracts.

The district court judge [dismissed](#) the claims, finding that the Kamehameha Schools' policy served a "legitimate remedial purpose by addressing the

socioeconomic and educational disadvantages facing Native Hawaiians[.]” See [Doe v. Kamehameha Schools/Bernice Pauahl Bishop, 295 F. Supp. 2d 1141, 1172 \(Dist. Haw. 2003\)](#). However, the Ninth Circuit reversed 2-1, striking down the Kamehameha’s Native Hawaiian admissions policy as an illegal “racial” contract. As state attorney general, Bennett [filed](#) a brief supporting Kamehameha Schools in a case involving their admissions policy. The petition called for the Ninth Circuit to rehear the case en banc.

The Ninth Circuit agreed to rehear the appeal, and in December 2006, ruled 8-7 to reverse its earlier decision, and thus affirm the district court’s initial ruling. The Ninth Circuit held that Kamehameha’s policy did not violate civil rights law because the admissions policy “is designed to counteract the significant, current educational deficits of Native Hawaiian children in Hawaii, and because in 1991 Congress clearly intended § 1981 to exist in harmony with its other legislation providing specially for the education of Native Hawaiians[.]” See [Doe v. Kamehameha Schools/Bernice Pauahl Bishop Estate, 470 F.3d 827, 849 \(9th Cir. 2006\)](#).

Following the decision, attorneys appealed to the Supreme Court. However, before the Court decided whether to hear the case, it was settled.

## IV. GUN SAFETY

In 2008, Bennett was one of five state attorneys general supporting the District of Columbia in *D.C. v. Heller*.

Bennett [opined](#) that “a decision that the Second Amendment prohibits strict gun-control laws is just wrong.”

After the Supreme Court decided *Heller*, Bennett [stated](#) that he did not believe the decision would lead to any Hawaii gun laws being struck down.

## V. MARRIAGE EQUALITY

In 2010, Lambda Legal and the American Civil Liberties Union of Hawaii threatened to bring a lawsuit after the state House voted to indefinitely postpone taking action on civil unions. Bennett [stated](#) that “he does not believe the state’s laws on the matter are unconstitutional.”

However, most recently in 2013, Bennett urged Hawaiian lawmakers to pass marriage equality. Bennett submitted testimony to the Hawaiian Senate Judiciary Committee, [arguing](#) that extending marriage rights to gay and lesbian couples “would be right, fair, just and consistent with the ideals and principles upon which our nation was founded.”

## VI. FURLONGHS

In 2009, Governor Linda Lingle [furloughed](#) state employees. Specifically, Lingle [ordered](#) “state employees other than those in the school system take 72 workdays off without pay for two years[.]” State employees sued, and Bennett defended Governor Lingle, arguing that she had the right to furlough employees in order to relieve the state’s budget deficit.

In 2009, a state judge [enjoined](#) the act, and in 2010, the Hawaii Supreme Court [reversed](#) that decision on procedural grounds.

## VII. EDUCATION

In 2004, the Lingle administration [announced](#) that the state's preliminary budget would cut the number of special-education teachers, raising concerns about the school system's ability to comply with a 1994 court order that requires the Department of Education to provide adequate services to students with disabilities. In 2005, Bennett [wrote](#) an article for the Hawaii Reporter defending the state's position that it remained in compliance with the Individuals with Disabilities Education Act (IDEA).

Special education students challenged the furlough plan, [arguing](#) that "shutting schools on Furlough Fridays violated their rights under the Individuals with Disabilities Education Act." Bennett defended the law, and in 2009 a district court denied the students' motion for a temporary injunction. In 2010, the Ninth Circuit [upheld](#) the state's public school furlough plan. The court found that system wide changes are not meant to be covered by the IDEA's "stay put" provision.

Bennett [commented](#): "The fact that special needs students are entitled to these services doesn't mean the state can't adopt a furlough plan. And the court said this furlough plan was in conformance with federal law."

Bennett also filed an amicus brief in [Schaffer v. Weast, 546 U.S. 49 \(2005\)](#), which addressed the question of which party has the burden of proof in an administrative hearing: the parents of children seeking a "free [and] appropriate education" under the IDEA, or the school district. The IDEA itself is silent on the question. In *Schaffer*, an administrative judge placed the burden of proof on the school board, and ruled in favor of the parents. The Fourth Circuit Court of Appeals [reversed](#) the decision, holding that the burden of proof should have been placed on the parents. In his amicus brief, Bennett [argued](#) that the burden of proof should fall on the parents. He argued that placing the burden on the school system instead of the parents would "make it more difficult to defeat unreasonable demands of parents seeking to abuse the system." Further, it would "only encourage parents to make borderline or unreasonable demands." It would also "force" school districts to "divert scarce resources to satisfy (or litigate) against borderline or unreasonable claims." In a 6-2 decision, the U.S. Supreme Court held that the party bringing the suit bears the burden of proof, regardless of whether the party is a parent or the school system. See [Schaffer v. Weast, 546 U.S. 49 \(2005\)](#).

In another case involving education, in 2005, a state judge ruled in favor of substitute teachers who claimed they were underpaid. The judge concluded that Hawaii's Department of Education failed to follow a 1996 law requiring the state to pay substitute teachers the

same daily rate as certain full-time employees.

The state appealed the decision. Bennett [argued](#) that the judge's determination was "legally incorrect." The Intermediate Court of Appeals also [ruled](#) in favor of the teachers. In 2010, the Hawaii Supreme Court rejected the state's appeal.

In another relevant case, as attorney general, Bennett signed off on a [memorandum](#) which concluded that a school voucher program would violate the Hawaii State Constitution.

Finally, Bennett signed off on a [memorandum](#) that determined that suspicionless random drug testing of public school teachers was constitutional and did not violate the United States Constitution or the Hawaiian Constitution.

## VIII. FREE SPEECH

In 2004, Bennett [defended](#) a state law that allowed police to ban people from public property for up to one year without a specific reason. The law was passed to remove squatters from public campgrounds, parks, beaches and other public places where they illegally put up tents and other temporary shelters. Under the law, those who "knowingly enter or remain unlawfully" on premises after a "reasonable warning" faced charges of second-degree trespass, a misdemeanor, except in cases where actions are protected under federal labor laws.

The ACLU filed a lawsuit, challenging the law's constitutionality, arguing that "[t]he law could potentially be used to keep voters out of polling places or bar groups such as native Hawaiians from the grounds of the state Capitol, thereby chilling their constitutional rights to free speech[.]" The ACLU dropped its suit after the legislature repealed the law.

## IX. EMPLOYMENT DISCRIMINATION

As attorney general, Bennett joined an amicus brief in [Arbaugh v. Y & H Corp., 546 U.S. 500 \(2006\)](#) arguing that Title VII's limit to employers with fifteen or more employees was a limit on a court's jurisdiction, rather than a substantive element of a Title VII claim. He [argued](#) that:

Only a holding that Title VII's 15-employee threshold limits courts' subject-matter jurisdiction respects Congress' clear intent to shield small employers from the burdens of litigation. A jurisdictional understanding will enable a judge to determine numerosity — and, thus, whether Title VII applies at all — at the very outset of a case. By contrast, petitioner's position, under which the numerosity issue would routinely be pushed deep into a case and tried to a jury alongside ordinary merits questions, actually invites protracted litigation.

If the numerosity requirement was part of the claim, rather than a jurisdictional issue, the defendant had to raise it as a defense or else it was waived. The

Supreme Court held, without dissent, that the threshold number of employees for application of Title VII was an element of the claim, not a jurisdictional issue.

## X. CRIMINAL JUSTICE

As attorney general, Bennett opined repeatedly on criminal justice issues.

Bennett has [criticized](#) the Hawaii Supreme Court for being too pro defendant claiming that “[t]he basic purpose of the criminal justice system should be to punish the guilty and free the innocent. Justice is not furthered, however, when common sense is abandoned and the rights of defendants are elevated to such a degree that the rights of victims of crime and society as a whole are forgotten.” In the same article, Bennett argued that “[t]he Hawaii Supreme Court’s approach to criminal law has done little to promote confidence in the administration of justice in Hawaii. The court seems at times to go out of its way to reverse serious criminal convictions in circumstances in which such reversals are not required by any rule of law or by any rational concept of justice.”

- In a 2007 interview, Bennett [stated](#) that “I personally believe that sentences meted out in state court are often too lenient.”
- In 2006, as attorney general, Bennett [campaigned](#) for the state’s three-strikes law, which mandates a sentence of at least 30 years to life for a third

conviction for a violent offense. Bennett [criticized](#) a watered-down version of the bill that would “allow judges the discretion to decide whether or not they will impose the Three Violent Strikes law.” Bennett argued that “[t]here is no reason to provide judges discretion to impose less than the required sentence for habitual, dangerous, recidivist, violent felons[.]” Governor Linda Lingle [signed](#) the bill into law in 2006.

- Bennett [criticized](#) the state’s wiretapping laws, arguing that Hawaii’s “wiretap laws have so many hurdles that they are rarely used.”
- Bennett [supported](#) reviving “Walk and Talk” programs at airports, which permitted officers to “question and possibly search suspicious-looking passengers with their consent[.]” a practice that was declared unconstitutional by the Hawaii Supreme Court in 1992.
- Bennett supported a bill that would eliminate the legal requirement that police knock and announce themselves before breaking down a door. Bennett [argued](#) that the bill would “keep important evidence admissible.” The bill would also eliminate the requirement that police make a “reasonable effort” to help people who are under arrest contact a lawyer or family members. The bill was opposed by the ACLU of Hawaii.

- In 2003, Bennett [supported](#) a proposal that would allow “information charging” of Class B and Class C felony suspects, also known as [direct filing](#). This [proposal](#) would speed up the charging and trying of felony suspects, by allowing prosecutors to “submit written evidence directly to a judge who determines whether the suspect probably committed the crime and send the case to trial[.]” thereby “bypass[ing] the current requirement for victims, witnesses and police officers to appear at a preliminary court hearing or before a grand jury.” Voters [approved](#) the proposal in November 2004.
- According to the Honolulu Advertiser, in 2006, Bennett [presented](#) a proposal to lawmakers that would “enable prosecution of someone who kills or injures a viable fetus[.]” He argued that the bill was “not a veiled attempt to categorize fetuses as people.” The proposal did not [become law](#).
- In 2005, Bennett [encouraged](#) lawmakers to “require more convicted felons to give DNA samples so the state can expand a database police could use to catch or free suspects.” At the time, Hawaii only required felons convicted of murder, attempted murder, and sex crimes to provide DNA samples. However, Bennett suggested the lawmakers “include

all convicted felons and all those arrested for felonies, including juveniles, in the database[.]” The bill was [adopted](#) in June 2005.

In contrast with the above, after the Supreme Court ruled in [Gonzales v. Raich, 545 U.S. 1 \(2005\)](#), that the federal government may criminally prosecute individuals for the possession, distribution, or use of marijuana, even if a state law legalizes such possession, distribution, or use of marijuana for medical purposes, Bennett [issued](#) a statement saying that those who use medical marijuana in Hawaii would not be prosecuted under state law.

## CONCLUSION

The Senate Judiciary Committee should carefully examine Mark Bennett’s record before putting him in a lifetime seat on the U.S. Court of Appeals for the Ninth Circuit.