The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Wednesday, February 10, 2016, 9:00 am
State Capitol, Conference Room 016

by
Rodney A. Maile
Administrative Director of the Courts

Bill No. and Title: Senate Bill No. 2239, Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges.

Purpose: Proposes a constitutional amendment to require justices and judges to be elected to serve six-year terms and be subject to the consent of the senate for subsequent judicial terms, authorizes the governor and chief justice to make interim appointments for vacancies in the offices of the chief justice, supreme court, intermediate appellate court, and circuit courts, or district courts, respectively, and repeals the judicial selection commission. Ratification upon general election of 2018.

Judiciary's Position:

This bill would result in far-reaching ramifications not only to the judicial branch of this state, but to Hawaii's government as a whole. From the time of Hawaii's Constitution of 1852 through the present day, our judges have never been selected through an electoral process. The current merit-based system, which has been in place since 1978, has served this state well by providing for the selection and retention of qualified judges, while ensuring that judges can exercise independent judgment in deciding cases.

While we should always look for ways to improve the current system, this bill proposes a radical departure from it. Jurisdictions with judicial elections have seen dramatic increases in spending, including an influx of special interest money. Judges in these states must raise money to run for office and often face negative attack ads by their opponents or special interest groups.

Research studies have shown that judicial elections affect judges' decision making, and result in less diverse judiciaries.

Accordingly, the judiciary respectfully opposes this bill. We offer this testimony to provide the historical basis for Hawaii's current merit-based system, to explain briefly how that system operates, and to highlight concerns raised by the experience of jurisdictions with judicial elections.

Hawaii's 150-Year History of an Appointive Judiciary System, and Adoption of a Merit Based Process

Hawai'i has had a long tradition of an appointive judiciary system, dating back to the Constitution of 1852.[1] Upon statehood, our first state constitution provided for gubernatorial appointments with the advice and consent of the Senate.[2]

The 1978 Constitutional Convention again considered how to select and retain judges. The convention's judiciary committee was primarily concerned with the potential for political influence and abuse in the selection system. It was the committee's firm belief that a judicial selection commission system, commonly referred to as a "merit based system," would provide for a more qualified and independent judiciary.[3]

At the convention, amendments providing for the election of judges were proposed and defeated. Delegates indicated that judicial elections suffer from many problems, including being disruptive to judicial proceedings and making judges beholden to campaign contributors.[4] Delegate Adelaide "Frenchy" DeSoto noted that public hearings made clear that the people of Hawai'i did not want an elective judge system.[5] Also defeated was an amendment to provide for a retention election after appointment. Delegates expressed concern regarding the lack of voter knowledge about candidates and the potential for judges to decide cases on the basis of popular appeal, rather than on what is right.[6]

Ultimately, the convention adopted the merit-based process which—with some subsequent amendments—remains in place to this day. This system reflects the sentiment that a

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[1] Craig Kugisaki, *Hawaii Constitutional Convention Studies 1978, Article V: The Judiciary* 29 (Legislative Reference Bureau, May 1978).
[2] *Id.*
[3] Stand. Comm. Rep. No. 52, in *1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 621 (1980).
[4] *2 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 368-69 (1980).
[5] *Id.* at 371.
[6] *Id.* at 371-72.

judicial selection commission provides the essential foundation for a qualified and independent judiciary.

Hawaii's Current Framework of Judicial Appointment

The Judicial Selection Commission (JSC) plays two important roles in the merit-based process. First, it screens and then identifies the most qualified candidates for vacant judicial offices, after which the Governor (for supreme, intermediate, and circuit court positions) or Chief Justice (for district and family court positions) selects a nominee from the list, who is subject to advice and consent by the Senate. Second, when a sitting judge applies to be retained in office, the JSC evaluates and determines whether the judge will be allowed to serve another term.

The structure of the JSC reflects a careful balancing of the various branches of government and other interests. Pursuant to article VI, section 4 of the Hawai'i Constitution, the JSC is composed of nine members, no more than four of whom can be licensed attorneys. Two members are selected by the Governor, two members are selected by the Speaker of the House of Representatives, two are selected by the President of the Senate, one is selected by the Chief Justice of the Supreme Court, and two members are elected by the attorneys of the State.[7] At least one member of the JSC must be a resident of a county other than the City and County of Honolulu.

The JSC's process for identifying candidates for judicial vacancies provides for an extremely thorough review of the applicants. The rules of the JSC allow for public notice to be provided when there is a vacancy. Applicants must submit a detailed application that includes information relating to their background, professional experience, disciplinary record, criminal history, health, and compliance with tax laws. Additionally, the JSC meets with key resource people in the community to obtain their confidential input, and conducts in-person interviews with the applicants.

Concerns with the Election of Judges

This bill would eliminate the JSC and institute an election process to select judges for six-year terms.[8] At the end of their terms, judges would apply to the Senate to be considered for retention for additional six-year terms.

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[7] In 1994, the Hawai'i Constitution was amended to change the composition of appointees to the JSC. The amendment reduced the number of the Governor's appointees from three to two, reduced the Chief Justice's appointees from two to one, and increased the number of appointees by the Speaker of the House of Representatives and the President of the Senate from one each to two each. S.B. 2515, 16th Leg., Reg. Sess. (Hi. 1994).

[8] Currently, district and family court judges serve six-year terms, while judges and justices on the circuit, intermediate, and supreme courts serve ten-year terms.

There are a number of concerns with the judicial election process.[9]

First, judicial elections require candidates for judicial office to raise money for their campaigns, which may undermine the public's perception of the judiciary's fairness, impartiality, and independence and erode its reputation for making decisions that reflect these fundamental qualities. These concerns are particularly relevant in the aftermath of the U.S. Supreme Court's decision in Citizens United v. Federal Election Commission, which allows corporations and unions to make unlimited independent expenditures and electioneering communications in federal and state elections, including judicial elections.[10] Further, many highly qualified lawyers who would be inclined to apply for a judicial position under the current system would likely not be willing to run for office if they were required to raise large amounts of funds to successfully campaign.

The threat to state courts from the influx of campaign money is serious. "Between 2000 and 2009, candidate fundraising more than doubled from the previous decade across more than 20 states with competitive elections for state supreme courts—rising to $206.4 million from $83.3 million between 1990 and 1999."[11] In 2014, 19 states held elections for their highest courts.[12] Spending in these elections exceeded a combined $34.5 million, with much of the money coming from special interests, according to a report by Justice at Stake, the Brennan Center for Justice, and the National Institute on Money in State Politics.[13] This runaway spending in judicial elections poses a substantial threat to fair and independent courts.

Second, escalating spending in judicial elections may have a negative effect on judicial behavior and fosters appearances of partiality by judges. In 2013, the American Constitution

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[9] This bill finds that there has been a trend to eliminate or alter the merit selection of judges. However, in the last decade, the percentage of states with merit-based systems versus states with judicial elections has remained substantially the same. Most efforts to eliminate merit-based systems—such as in Arizona, Florida, and Missouri—have failed due to a lack of popular support. *Judicial Selection in the States*, Ballotpedia, https://ballotpedia.org/Judicial_selection_in_the_states (last visited Feb. 8, 2016).

[10] 558 U.S. 310 (2010).

[11] Adam Skaggs, *Buying Justice: The Impact of* Citizens United *on Judicial Elections* 3 (Brennan Center for Justice, 2010), available at http://www.brennancenter.org/sites/default/files/legacy/publications/BCReportBuyingJustice.pdf. The Center also reported that in one week, special interest groups spent nearly $1 million to air television ads in judicial races in Illinois, Michigan, Montana, North Carolina, and Ohio. *Surge of Last Minute Outside Spending Hits State Supreme Court Races*, Brennan Center for Justice (Oct. 30, 2014), http://www.brennancenter.org/press-release/surge-last-minute-outside-spending-hits-state-supreme-court-races.

[12] Christina A. Cassidy, *Campaign Cash in State Judicial Elections Grows*, Associated Press (Dec. 28, 2015), http://bigstory.ap.org/article/a8b9c2e0085f459d9f743d8bb375f2de/campaign-cash-state-judicial-elections-grows.

[13] Scott Greytak, et al., *Bankrolling the Bench: The New Politics of Judicial Elections 2013-2014* 2 (Brennan Center for Justice, Oct. 2015), available at https://www.brennancenter.org/publication/bankrolling-bench-new-politics-judicial-elections.

Society for Law and Policy found that the more campaign contributions that state supreme court justices receive from business interests, the more likely the courts are to vote for business litigants appearing before them in court.[14] Thus, by seeking votes through campaigning and fundraising, the study concluded, judges invariably lose what is most important for them to retain: their perceived credibility as neutral and unbiased arbiters of cases and controversies.[15]

In West Virginia, a newly elected supreme court justice refused to disqualify himself from hearing the case of a campaign supporter who had spent over $3 million dollars to elect the justice. That justice was the deciding vote in favor of the campaign supporter, reversing a $50 million jury verdict. On appeal, the U.S. Supreme Court reversed the West Virginia court ruling, concluding that the justice's failure to recuse himself constituted a violation of due process.[16] This example, while dramatic, is by no means isolated. Similar situations have occurred in Illinois, Alabama, and Ohio, among other states.[17] These incidents increase the public perception that justice is for sale to the highest bidder.

Moreover, studies have shown that the pressures of both selection and retention elections make judges more punitive in criminal cases. In 2015, the Brennan Center for Justice found that, near election time, judges are less likely to rule in favor of criminal defendants, and more likely to sentence defendants convicted of certain felonies to longer terms.[18] The same study reviewed death sentences over a 15-year period and concluded that appointed supreme court judges reversed death sentences 26 percent of the time, judges facing retention elections reversed 15 percent of the time, and judges facing competitive elections reversed 11 percent of the time.[19]

Third, merit-based systems encourage judicial diversity. A 2009 study by the American Judicature Society concluded that merit-based systems led to a more diverse judiciary than an election-based system.[20] In a diverse and multicultural state like Hawai‘i, it is critical that our judicial selection process does not create artificial obstacles to achieving this goal.

In sum, the available studies and the experience of other states suggest that judicial elections threaten the independence and impartiality of the judiciary. It is precisely these

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[14] Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* (American Constitution Society for Law and Policy, June 2013), available at http://www.acslaw.org/ACS%20Justice%20at%20Risk%20%28FINAL%29%206_10_13.pdf.
[15] *Id.*
[16] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).
[17] David E. Pozen, *The Irony of Judicial Elections*, 108 Colum. L. Rev. 265, 303-04 (2008).
[18] Kate Berry, *How Judicial Elections Impact Criminal Cases* 2 (Brennan Center for Justice 2015), available at https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf.
[19] *Id.*
[20] Malia Reddick, et al., *Racial and Gender Diversity on State Courts, an AJS Study*, 48 No. 3 Judges' J. 28, 30 (2009).

concerns that led Hawai‘i to adopt a merit-based process that has served us well for over 40 years, and which caution against the adoption of the elective system proposed by this bill.

Hawaii's Current Framework of Judicial Retention

This bill also proposes that judges seeking to remain in office apply to the Senate, which in turn must hold a public hearing and then decide whether to consent to the retention. The bill does not state what happens if the Senate fails to act.

Currently, the JSC determines whether judges will be retained in office. To summarize the process briefly, a judge submits a petition for retention, which contains detailed information on subjects ranging from timeliness of case dispositions to the status and outcome of cases on appeal. After the petition is received, notice of the petition for retention is published in newspapers and on the Judiciary website. The JSC invites public comment on whether the judge should be retained, allowing interested parties to submit confidential written comments or fill out an evaluation form.

In addition, the JSC meets personally with key resource people who provide direct, confidential feedback to the commissioners. The JSC also obtains from the Judiciary confidential evaluations of judges that are completed by attorneys and jurors. These evaluations are undertaken pursuant to the Judicial Performance Program established by Rule 19 of the Rules of the Supreme Court of the State of Hawai‘i.[21]

The Hawai‘i State Bar Association (HSBA) also conducts confidential attorney evaluations of judges who are either midway through their term or up for retention. Results of those evaluations are shared with each judge and the Chief Justice, and provided to the JSC upon request for use in the retention process.

The JSC also obtains input from the Commission on Judicial Conduct, which investigates and conducts hearings concerning allegations of judicial misconduct or disability, and has the authority to make disciplinary recommendations to the Hawai‘i Supreme Court.

The retention process culminates with an in-person interview of the judge by the JSC, followed by a vote on whether or not the judge will be retained. At least five members of the commission must vote in favor of retention.

Currently, district and family court judges serve six-year terms, while judges and justices on the circuit, intermediate, and supreme court serve ten-year terms. This bill would provide for

[21] Further details of this process are provided in our testimony on S.B. no. 2420.

six-year terms for all positions. The 1978 Constitutional Convention determined that ten-year terms for circuit, intermediate, and supreme court judges would "give a judge job security and independence from the appointing authority," and that it would allow a new judge enough time to "learn and mature in his role as an arbiter of the law."[22]

Concerns with the Proposed Senate Retention Process

The proposed Senate consent process for sitting judges raises several concerns. Because the Rule 19 and HSBA attorney evaluations, as well as the juror evaluations, are confidential, the Senate would lack the information that these sources provide to the JSC. Moreover, the numerous resource persons who speak with the JSC on the assurance of confidentiality may not be willing to share the same information publicly. Thus, the proposed process will not have the benefit of these significant sources of information, which are available to the JSC.

Further, a judge seeking retention would be ethically precluded from responding to questions before the Senate about pending cases. Hawai'i Revised Code of Judicial Conduct, Rule 2.10, does not allow a judge to make any public statements on pending or impending matters.[23]

Thus, judges who make rulings in controversial cases shortly before retention could effectively have their hands tied—unable to respond to the specifics of a pending case, and unable to have the decision makers refer to the judicial evaluations or resource persons to serve as a counterweight to concerns expressed by disappointed litigants.

Conclusion

In a 1979 University of Hawai'i Law Review article, then-Chief Justice William S. Richardson succinctly explained the significance of judicial independence: "Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision."[24]

Hawai'i has never had judicial elections. Our current merit-based system, which has been in place since 1978, is serving the public well. The present system ensures that qualified judges are appointed and are carefully reviewed when they seek retention of their position.

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[22] *Supra* note 3, at 623.
[23] Rule 2.10(a) states that "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing."
[24] William S. Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. Haw. L. Rev. 1, 4 (1979).

The shift to an election-based system would be an unwarranted change and would raise significant concerns regarding judicial independence and public confidence in the Judiciary. The delegates at the 1978 Hawai‘i Constitutional Convention recognized as much when they rejected judicial elections and endorsed a judicial selection commission and our appointive process.

For these reasons, the Judiciary respectfully opposes this bill.

Thank you for the opportunity to present testimony on this important issue.

Testimony of the Judicial Selection Commission
To the Senate Committee on the Judiciary
Wednesday, February 10, 2016
By Jackie Young, Phd., Vice Chair,
Judicial Selection Commission,
And Members of the Commission

SB No. 2239: Proposing an amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges.

Chair Agaran, Vice Chair Shimabukuro, and Members of the Committee:

SB No 2239 proposes to repeal Article VI, section 4 of the Constitution of the State of Hawai'i, thereby eliminating the judicial merit selection system and replacing it with judicial elections for six-year terms, subject to the consent by the Senate to subsequent terms.

The Judicial Selection Commission (JSC) is opposed to the proposed amendment to our Constitution. It is our belief that the current merit selection model is a balanced and fair process for the following reasons.

First, pursuant to Article VI, section 4 of the Hawai'i Constitution, the JSC is made up of nine members. Seven of the members are appointed. Of those seven, two Commissioners are appointed by the Senate President, two by the House Speaker, two by the Governor, and one by the Chief Justice. The remaining two are elected by the members of the Hawaii State Bar Association. The Commissioners serve staggered six- year terms. Commission members are uncompensated for their time and service. At no one time may there be more than four active licensed attorneys on the Commission. The makeup of the Commission thus affords both houses of the Legislature, the other two branches of government and the Bar a role in the judicial selection process. Limiting the number of active licensed attorneys to four members of the Commission ensures a substantial voice for non-lawyers in the judicial selection process.

Second, Commissioners take an oath of office to follow a strict code of conduct in the administration of their duties. The code of conduct requires that a commissioner not use his or her position to secure privileges or exemptions, solicit gifts or favors or anything of value, either explicit or implicit, that might influence the official actions, decisions, or judgment of any commissioner. The code also requires confidentiality and contains rules regarding conflicts of interest. Further, Commissioners may not take an active part in political management or in political campaigns.

Commissioners must consider each applicant and petitioner for judicial office in an impartial, objective manner. Commissioners are sworn not to discriminate on the

basis of race, religion, sex, national origin, marital status, sexual orientation or political affiliation.

Third, the JSC follows a rigorous procedure to select the most meritorious applicants to be placed on the list sent to the appointing body.

When a judicial vacancy arises, the Commission runs an advertisement in local newspapers and in the Bar Journal that provides notice of the vacancy, and includes instructions regarding how to apply for the vacancy.

The application process is rigorous. It is comprised of a daunting 28- page application that asks applicants to provide information on:

1. Education;
2. Number of years in practice;
3. Awards and Recognitions;
4. Community Service and Volunteer work;
5. Significant jury trials in which they have had an active role, both civil and criminal;
6. Significant appellate cases in which they had an active role, both civil and criminal;
7. Number of cases they have tried to verdict, both civil and criminal;
8. Significant cases where they had an active role in arbitration;
9. A case where the applicant had a significant role, the name and contact information of the Judge who heard the case and the name and contact information of opposing counsel;
10. Financial Responsibility;
11. Mental and Physical health;
12. Character references;
13. And a statement on their qualifications as a candidate for judicial office.

The Commissioners review the applications and the character reference materials prior to the applicant interviews.

Also before the interviews, the Commission meets individually with respected resource members from the legal community. The resource people are provided the confidential names of the applicants and asked for their views on the applicant.

Resource people include but are not limited to[1]:

1. Representative from the Hawai‘i Supreme Court;

[1] Not all resource people are called for each vacancy. For example, a representative from the Attorney General's office would not be consulted for any vacancy for which the Governor is the appointing body, and a representative of the Supreme Court would likewise not be consulted for any District Court or District Family vacancies.

2. Representative from the Hawai'i Intermediate Court of Appeals;
3. Representative from the District Court in the same county as the judicial vacancy;
4. Representative from the Circuit Court, both Civil and Criminal Divisions, in the same county as the Judicial vacancy;
5. Representative from the State Public Defender;
6. Representative from the Prosecutor of the County where the judicial vacancy is located;
7. Representative from the Corporation Counsel or County Attorney where the judicial vacancy is located, and:

Representatives from: The Hawaii State Bar Association (HSBA) including the representative from the island where the Judicial vacancy is located; Young Lawyers Division of the HSBA; Hawaii Women Lawyers; Native Hawaiian Lawyers Association; Hawaii Association of Criminal Defense Attorneys; the Commission on Judicial Conduct; two attorneys who practice at the court level of the vacancy or retention; and Legal Aid Society of Hawai'i.

This is a significant way in which the Commission reaches out to the legal community to obtain input regarding an applicant's fitness for service on the bench.

The Commission interviews each applicant, unless the applicant has been previously and recently interviewed by the commission for another vacancy, and the Commission believes that they have sufficient information on the applicant. In such cases, the applicant still may request an interview.

In evaluating the applicants, the Commissioners consider attributes that include, but are not limited to, the following:

1. Integrity and moral courage
2. Legal ability and experience
3. Intelligence and wisdom
4. Compassion and fairness
5. Diligence and decisiveness
6. Judicial Temperament
7. And such other qualities that the commission deems appropriate.

After completing the interviews, the Commissioners discuss the merits of each applicant and provide a list of no more than six and not less than four nominees to the Governor for Circuit, Intermediate Court of Appeals and Supreme Court vacancies, and not less than six nominees to the Chief Justice of the Supreme Court for District Court vacancies.

The JSC follows a very similar process in considering judicial retentions including a request for the public comment in the advertised Notice of Retention. In addition to the above stated process, the Commission also has the benefit of judicial evaluations, and feedback from resource people. It is important to note that both

individuals, who support the retention of a petitioning judge, and those people opposed, may submit letters to the Commission.

Finally, the JSC deeply believes in the importance of an independent Judiciary. Judicial independence is crucial to maintaining the checks and balances in our government structure as well as in instilling abiding confidence in the fair and just decisions of our judges. Judicial decisions must reflect balanced and careful thought based on the law. A judge ought not be, or appear to be, influenced by donations a litigant or a lawyer may have made to the judge's campaign.

With the broad range of backgrounds of those appointed and elected to the JSC, the strong, ethical mandate of the JSC code of conduct, and the meticulous and thorough vetting that confidentiality will allow, the JSC believes that our current system for judicial selection works well and is, in fact, one of the best that can be found anywhere.

Thank you for the opportunity to comment on this legislation.

**Testimony of the Office of the Public Defender,
State of Hawaii to the Senate Committee on
Judiciary and Labor**

February 10, 2016

S.B. No. 2239: PROPOSING AN AMENDMENT TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII RELATING TO THE SELECTION AND RETENTION OF JUSTICES AND JUDGES

Chair Keith-Agaran and Members of the Committee:

We strongly oppose passage of S.B. No. 2239 which would require that justices and judges of our state courts be elected by voters of the state at a general election. Currently, our state judges are selected through a merit-based selection process. We believe that our current system of judicial selection is a good one and results in a state judiciary which reflects a broad cross-section of our state's citizenry. More importantly, our merit-based selection process ensures a state judiciary which is free from political influences and empowered to make fair and impartial decisions without fear of political retribution.

We are very fearful of the part that special interests and campaign finances would play in judicial decisions if judges were required to be elected. It is critical to fair and impartial adjudication of cases that judges are independent and free from interests outside of the cases that are before them. In particular, since the U.S. Supreme Court's decision in the Citizen's United case, there has been an explosion of television attack ads in judicial elections in a number of mainland jurisdictions. Citizen's United removed regulatory barriers to corporate electioneering. Special interest groups and political action committees have taken aim to unseat judges who are perceived to not be in line with their political or business interests without regard to the quality of their judicial conduct or legal acumen.

With regard to the criminal justice system, a common method of attacking judicial candidates during elections is that the candidate is "soft on crime." As a result, the bench becomes dominated by those who rule most often against criminal defendants or who are perceived to be the harshest sentencers. Again, the judge's legal ability becomes secondary, or even unimportant, during an election. Prosecutors dominate the bench since those who have fought on behalf of the rights of plaintiffs or the criminally accused are most often viewed in disfavor by the general public influenced by big money advertising.

While our current merit-based system of judicial selection is not perfect and has resulted in the past with the appointment of some sub-par jurists, we feel that this has been the exception rather than the rule and that the Hawaii judiciary is a strong one with a number of very good judges and justices. Our courts have

rendered numerous decisions dealing with such controversial issues as same-sex marriage, the environment and criminal rights. The judges who have ruled on such decisions were able to do so mindful only of the law without fear of retribution or backlash from interest groups.

Thank you for the opportunity to provide testimony in this matter.

HSBA
Hawaii State Bar Association

TESTIMONY
Senate Committee on Judiciary and Labor
Hearing: Wednesday, February 10, 2016 @ 9:00 a.m.

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Maile S.L. Shimabukuro, Vice-Chair

FROM: Jodi Kimura Yi
President, Hawaii State Bar Association

RE: SB 2239 Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justice and Judges

Chair Keith-Agaran, Vice Chair Shimabukuro and Members of Senate Committee on Judiciary and Labor, thank you for the opportunity to submit testimony on Senate Bill 2239, Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justice and Judges. The Hawaii State Bar Association ("HSBA") submits this testimony in opposition to Senate Bill 2239.

Immediately after this measure, Senate Bill 2238 and Senate Bill 2420 were brought to the attention of the Executive Director, and recognizing the importance of these measures to member attorneys, she informed the HSBA Board, and the leaders of HSBA committees, sections, Neighbor Island bar associations, legal entities and service providers, and law firm managing partners of their introduction. After consultation with me and at the request of members, said measures were placed on an addendum agenda for the HSBA's monthly board meeting scheduled for January 28th.

After a review and discussion of said measures, the HSBA Board voted to oppose all three bills finding that they would, in all probability, have an impact on the legal profession and legal services provided to the public. The HSBA Board took an additional (unprecedented) step of informing the entire HSBA membership of its vote to oppose these measures unless an overwhelming majority of members voiced their disagreement with the position to oppose. The message stated:

> The HSBA Board intends to oppose these measures, if they are scheduled for legislative committee hearings, UNLESS an overwhelming majority of HSBA members voice their disagreement with the position to oppose.

138 HSBA members responded to the membership notification message. 130 responses received from HSBA members opposed all three measures, 12 citing personal experiences in jurisdictions with an elected State judiciary and 8 members specifically supported the HSBA's position to oppose judicial elections but were silent on this retention measure. 8 members opposed the HSBA's position to oppose the 3 measures. Of the 8 members in opposition to the HSBA's position to oppose, 3 attorneys reside and practice law in mainland jurisdictions with elected State judges.

The HSBA Submits this Testimony in Opposition to Judicial Elections

Senate Bill 2239 would amend our Constitution to abolish the Judicial Selection Commission (JSC), to select judges initially by election, and to retain all judges by decision of the State Senate. The Hawaii State Bar Association strongly believes that the "appearance of impartiality" is critical to judicial independence. Nothing erodes public confidence in the judiciary more than the belief that justice is "bought and paid for" by particular lawyers, parties or interest groups. The American Bar Association ("ABA") first addressed this issue in 1937, when it adopted a policy of merit selection of judges, a position that has been affirmed by the ABA for decades.[i]

The Impact of *Citizens United* on Judicial Elections

This Committee is well aware of the United States Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)*. There, the Court held that political spending is a form of protected speech under the First Amendment and the government may not keep corporations or unions from spending money to support or denounce individual candidates in elections. This holding applies to judicial elections as well as legislative elections. It is not surprising that political party and special interest group spending on judicial elections skyrocketed following *Citizens United*:

- The Brennan Center for Justice reports that since *Citizens United*, special interest groups and political parties spent an unprecedented $24.1 million in state court races in 2011-12, an increase of over $11 million since 2007-08.[ii]

- The Associated Press reports that in 2014, for just 19 state high court elections, spending exceeded $34.5 million, with much of the money coming from special interests.[iii]

It should be noted that there is no barrier to spending by out of state interest groups in judicial elections. Three Supreme Court justices in Iowa were ousted in 2010 after interest groups, mostly from out of state, spent nearly a million dollars to unseat them owing to the court's unanimous ruling in a 2009 gay marriage case. Also, following a collective bargaining dispute in Wisconsin, both parties tried to pack the state court with candidates favorable to their positions.[iv]

No doubt for these reasons, contrary to the December 2013 article referenced in Section 1 of SB2239, and due to the effect of *Citizens United* on judicial elections, after 2013, states are trending away from judicial elections.[v]

The Impact of Fundraising on the Judiciary

Judges who must run for election must campaign, and to campaign, they must either be wealthy enough to fund their own campaigns or they must engage in fundraising. Fundraising may leave judges feeling indebted to certain parties or interest groups. Studies show that judicial elections result in a judiciary that is

much more supportive of special interests and views, such as longer prison sentences for convicted defendants. [vi] Studies show that judicial elections also result in a judiciary that is less diverse.[vii]

For these reasons, the HSBA does not support joining the minority of states with judicial elections for initial appointment, with no nominating commission.[viii] Nor does the HSBA support Hawaii becoming the only state with retention decided solely by a state Senate.

The HSBA Submits this Testimony in Opposition to Senate Reconfirmation

The Hawaii State Bar Association also opposes Senate Bill 2239 because it would require state Senate reconfirmation of judicial retentions which also undermines the independence of the judiciary.

The Constitutional Framework for Judicial Selection

Under our Constitution, the Senate's role is to advise and consent to a judicial nominee following his or her initial selection by the Governor or the Chief Justice of the Supreme Court. In this process, the Senate generally considers the nominee's experience, qualifications and personal qualities. Our Constitution provides that the JSC alone, not the Governor, the Senate or the Chief Justice, shall consider retention. While elected public officials are meant to be representatives of the views of the voters, judges are not. Judges are meant to respect the rule of law and to impartially apply the rule of law in all cases.

Chief Justice William S. Richardson explained these principles in "Judicial Independence: The Hawaii Experience"[ix]:

- "Only an independent judiciary can resolve disputes impartially and render decisions that will be accepted by rival parties, particularly if one of those parties is another branch of government."

- Judicial independence requires both institutional independence and the independence of individual judges. "Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision."

- "A judge determined by the [judicial selection] commission to be qualified will remain on the bench without going through the entire appointment process. **The convention history indicates that the primary purpose of the new retention process is to exclude or, at least, reduce partisan political action**." (Emphasis added; footnotes omitted.)

We are concerned that a retention re-confirmation by the Senate would politicize the retention process by providing the opportunity for a referendum on how judges have decided cases during their term in office. In contrast to the JSC's confidential evaluation process, in Senate hearings each judge may be called upon to explain his or her decisions to the Senate and to respond publicly to those persons or groups whose special interests may have been affected by his or her decisions. Much like judicial elections, this process diminishes judicial independence and adversely affects the separation of powers as judges would need to be mindful of and deferential to the legislature and popular opinion.

The Judicial Selection Committee Process for Retention

The JSC conducts a very careful review before making decisions on retention petitions. The JSC reviews the confidential comments it receives through the public notice of retention petitions. The JSC reviews numerous periodic judicial evaluations conducted by the Judiciary, which are based on confidential assessments by attorneys who have appeared before the judge. For judges who have presided over jury trials, the JSC also reviews evaluations of jurors who have served in trials over which the judge presided. The JSC reviews appellate decisions reviewing decisions of the judge. The JSC conducts confidential interviews of numerous knowledgeable community resource persons. After receiving all of this input over the course of many months, the JSC interviews the judge in a confidential setting.

If these bills were adopted, the Senate would not have access to this confidential information, nor would the Senate likely have the time or resources to independently gather such confidential information. The evaluations of attorneys, jurors, judges and other sources provided to the JSC must be kept confidential as reviewers would be much less candid if their comments were to be provided to a public body. Similarly, while the judges can respond candidly to evaluations in a confidential interview, it would be very difficult for a judge to respond to comments and questions regarding his or her decisions in a public setting. This is particularly true for family court judges whose proceedings are generally not open to the public.

The Importance of the Separation of Powers

If the Senate's concern is that its views should be reflected in judicial retention decisions, it should be noted that two members of the nine member JSC are already appointed by the Senate President. Under the existing process, when a judge seeks retention, the JSC publishes public notice of retention petitions, inviting confidential input from anyone seeking to comment. The Senate (and an individual Senator) is able to provide input directly and/or through the Senate's designated representative to the JSC.

If the Senate's concern is that judicial retention decisions should reflect accountability to elected representatives of the people, in addition to the two of nine JSC members appointed by the Senate President, two members are appointed by the Speaker of the House, and two members are appointed by the Governor. Thus, six of nine members of the JSC are already designated by elected representatives of the people. (The other three members of the JSC are two attorneys voted in by members of the HSBA, and one member appointed by the Chief Justice.) Requiring Senate approval of JSC-approved retentions would give the Senate veto power over retention decisions that included the retention votes of JSC members designated by the House, the Governor, the HSBA and the Chief Justice.

In conclusion, we urge the Committee to limit, not expand, the role of politics in the selection of state judges. We urge the Committee to recognize that an independent judiciary is essential to the maintenance of public trust and confidence in the court system. Public trust and confidence in the court system would not be furthered by adding a perception that judicial decisions are influenced by the need for Senate approval.

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[i] https://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf

[ii] http://www.brennancenter.org/publication/new-politics-judicial-elections-2011-12

[iii] http://bigstory.ap.org/article/a8b9c2e0085f459d9f743d8bb375f2de/campaign-cash-state-judicial-elections-grows

[iv] https://www.actl.com/library/american-college-trial-lawyers-white-paper-judicial-elections

[v] http://www.brennancenter.org/newsletter/fair-courts-e-lert-il-gov-calls-judicial-selection-changes-candidates-seek-party; http://gavelgrab.org/?p=99592; https://pmconline.org/choosingjudges/meritselection, https://democracychronicles.com/south-carolina-judicial-election/.

[vi] http://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf; http://ivn.us/2015/12/03/new-study-links-campaign-ads-judicial-elections-harsher-sentencing/

[vii] http://www.southernstudies.org/2015/10/big-money-in-judicial-elections-intensifies-racial.html.

[viii] http://justice.uaa.alaska.edu/forum/32/2-3summerfall2015/a_judicial.html.

[ix] William S. Richardson, Judicial Independence: The Hawaii Experience, 2 University of Hawaii Law Review, 1, 4, 47.

February 3, 2016

To Whom It May Concern:

The West Hawai`i Bar Association, its general membership comprised of attorneys from Kohala to Ka`u and its executive committee, by *unanimous* resolution, opposes:

> SB2239/HB2139 [http://www.capitol.hawaii.gov/session2016/bills/SB2239_.htm]
> (Proposes a Constitutional amendment to require that justices and judges be elected to serve 6-year terms and be subject to the consent of the Senate for subsequent judicial terms. Repeals the Judicial Selection Commission)
>
> SB2238/HB2138 [http://www.capitol.hawaii.gov/session2016/bills/SB2238_.htm]
> (Makes conforming amendments to implement Constitutional amendment which establishes judicial elections. Requires the Judiciary, Office of Elections and Campaign Spending Commission to study appropriate methods of implementing a judicial election system in Hawaii, and submit a written report including proposed legislation, to the Legislature 20 days prior to the 2017 legislative session).
>
> SB2420/HB2140 [http://www.capitol.hawaii.gov/session2016/bills/SB2420_.htm]
> (Proposes a Constitutional amendment to amend the timeframe to renew the term of office of a justice or judge, and require the consent of the Senate for a justice or judge to renew a term of office).

The West Hawai`i Bar Association finds that judicial elections, and additional senate confirmation for retention, threaten our right to an impartial judiciary and would transform the bench into another body controlled by large moneyed special interests. Further, judicial elections will have a destabilizing affect upon the predictability of Hawaii's trial and appellate courts—which would be a disservice to everyone.

Very Truly Yours,

Peter S.R. Olson, Esq.
President, West Hawai`i Bar Association

KAUAI BAR ASSOCIATION

TESTIMONY
Senate Committee on Judiciary and Labor
Hearing February 10, 2016 at 9:00 a.m.

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Maile S.L. Shimabukuro, Vice-Chair

FROM: Joe P. Moss
President, Kauai Bar Association

RE: SB 2238, Relating to Judicial Elections
SB 2239, Proposing an Amendment to Article VI, Section 3, of the Constitution of the State of Hawaii
SB 2420, Proposing an Amendment to Article VI, Section 3, of the Constitution of the State of Hawaii to Amend the Timeframe to Renew the Term of Office of a Justice or Judge and Require Consent of the Senate for a Justice or Judge to Renew a Term of Office

Dear Chair Keith-Agaran, Vice Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor:

The general membership of Kauai Bar Association oppose SB 2238, 2239 and 2420.

The Kauai Bar Association finds that judicial elections, and additional senate confirmation for retention, threaten the right to an impartial judiciary and would transform the bench into another body controlled by large moneyed special interests. Elections would undermine public confidence in an impartial judiciary. The public could well have the perception that litigants could use campaign contributions to promote the election of judges favorable to their interests. This could be especially true if a litigant were to have a case before appellate courts and an election of appellate judges was pending. In light of the Citizens United decision and the influence of PAC money in elections, the public needs confidence that the judiciary will be an independent branch of government which will impartially make decisions based on the facts of the case, applying the laws passed by the legislature and interpreting the Constitution of the State of Hawaii. Further, judges from time to time must suppress evidence in order to protect a defendant's rights under the Hawaii Constitution. Such decisions could result in acquittal of a defendant and a resulting nasty attack ad which would not delve into the intricacies of constitutional law. This might result is judges being less vigorous in protecting the constitutional rights of Hawaiian citizens.

It would also divert judge's attention from their judicial duties to focus on campaigns. The current system provides for public and attorney comments in a confidential setting which provides for more candid comments, especially from members of the bar. All KBA members who had been in jurisdictions that implemented judicial elections and voiced an opinion were against judicial elections.

Thank you for your consideration.

Testimony
Senate Committee on Judiciary and Labor
Hearing: Wednesday, February 10, 2016 at 9:00 am

To: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair

From: Jeffrey Ng
President, Hawai'i County Bar Association

Re: SB 2239 Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justice and Judges

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Senate Committee on Judiciary and Labor, thank you for the opportunity to submit testimony on Senate Bill 2239. The Hawai'i County Bar Association (HCBA) submits this testimony in opposition to Senate Bill 2239.

The HCBA Board voted to oppose all three bills (SB 2238, 2239, and 2420) and informed its members of its intent to oppose these bills unless "an overwhelming majority of HCBA members voice their disagreement with the position to oppose." A message to the HCBA membership was sent on February 2, 2016.

Six HCBA members responded to this message with four opposed to all three Senate bills and two in support of the three Senate Bills. As a result, the HCBA continues to oppose Senate Bill 2239 and supports the positions of the Hawai'i State Bar Association and the Hawai'i State Judiciary.

Very truly yours,

Jeffrey Ng

ADA HAWAI'I
AMERICANS FOR DEMOCRATIC ACTION

OFFICERS

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DIRECTORS

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Jan Lubin
Jenny Nomura
Stephen O'Harrow
George Simson
Emmanuel Zibakalam

MAILING ADDRESS

PO. Box 23404
Honolulu
Hawai'i 96823

Feb. 5, 2016

TO: Honorable Chair Keith-Agaran and Members of the Judiciary Committee

RE: SB 2239

PROPOSING AN AMENDMENT TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII RELATING TO THE SELECTION AND RETENTION OF JUSTICES AND JUDGES.

Oppose

Americans for Democratic Action is a national organization founded in the 1950s by leading supporters of the New Deal and led by Patsy Mink in the 1970s. We are devoted to the promotion of progressive public policies.

We oppose SB 2239 as it would propose a constitutional amendment to move our judiciary from appointed to elected. Currently there is a Judicial Selection Commission which proposes names and the Governor appoints with legislative confirmation. This process seems to be a much more logical way to assess the legal skills of a candidate for the judiciary than subjecting the candidate to the campaign and election process. More importantly subjecting judges to election will put in jeopardy our principle that judicial decisions should be made by unbiased reasoned judgment and not whims of public opinion or promises of campaign contributions. Keep the judiciary independent and fair. Don't advance this constitutional amendment.

Thank you for your consideration.

Sincerely,

John Bickel
President

February 9, 2016

Senator Gilbert Keith-Agaran, Chair
Senate Committee on Judiciary and Labor

Re: **S.B. 2239 Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges**

Hearing: **Wednesday, February 10, 2016, 9:00 a.m.**

Dear Chair Keith-Agaran and Members of the Committee on Judiciary and Labor:

Hawaii Women Lawyers submits testimony in **strong opposition** to S.B.2239, which proposes a constitutional amendment to require justices and judges be elected to serve six-year terms and be subject to the consent of the Senate for subsequent judicial terms, authorize the governor and chief justice be authorized to make interim appointments for vacancies in the offices of the chief justice, supreme court, intermediate appellate court, and circuit courts, or district courts, respectively, and repeal the judicial selection commission.

The mission of Hawaii Women Lawyers is to improve the lives and careers of women in all aspects of the legal profession, influence the future of the legal profession, and enhance the status of women and promote equal opportunities for all. Judicial elections are inimical to our mission.

The role of the judiciary is not to make popular decisions, but to make independent decisions based on the rule of law. Judicial elections will erode public confidence in the judiciary, and as a result, in government as a whole.

Serious problems with judicial elections have been reported on extensively throughout the years, and have been reiterated in the recent comprehensive studies undertaken by respected institutions such as the American Bar Association, the American Constitution Society, and the Brennan Center.

The judiciary already has an existing gender imbalance on the bench, and passing this measure will only serve to exacerbate this problem. An American Bar Association Coalition for Justice Report on "Judicial Selection: The Process of Choosing Judges,"[1] notes that states with judicial elections result in significantly less women on the state courts of last resort (supreme) and intermediate appellate courts. According to that study, **while 33.8% of appellate judges were women in merit selection states such as Hawaii, the percentages went down to 25.2% for states with partisan elections and 8.6% for states with non-partisan elections**. Judicial elections have also been shown to intensify racial imbalance on the courts.[2]

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[1] https://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf

[2] http://www.southernstudies.org/2015/10/big-money-in-judicial-elections-intensifies-racial.html, https://www.americanprogress.org/press/advisory/2015/10/21/123713/advisory-discussion-on-judicial-elections-judges-of-color-and-diversity-on-the-bench-will-feature-keynote-by-rep-butterfield/

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Email: hawaiiwomenlawyers@gmail.com

Hawaii will erode judicial independence by allowing judicial elections. Besides gender and racial diversity, recent comprehensive studies conducted by well-respected organizations uniformly and decisively show additional negative effects of judicial elections.[3] These, and other studies and reports, show that judicial elections not only affect diversity on the bench, but result in decisions favoring special interest groups and big businesses. In the last few years, some states with judicial election systems have been proposing a move toward a merit selection system, which Hawaii already has in place.[4]

We also strongly oppose the proposal to have the Senate, rather than the Judicial Selection Commission ("JSC"), decide judicial retentions. We believe the existing system should not be changed and is a fair and balanced process that works. Six of the nine members of the JSC are already designated by elected representatives of the people -- two from the Senate President, two from the Speaker of the House and two from the Governor. The other three members of the JSC are two attorneys voted in by members of the Hawaii State Bar Association ("HSBA"), and one member appointed by the Chief Justice.

Giving the Senate complete power over retentions would greatly reduce input from Hawaii Women Lawyers and the membership of the bar on judicial retention decisions.

Moreover, the existing process is rigorous and allows for public input as well as information from periodic evaluations conducted by both the Judiciary and the HSBA. The JSC spends significant time on retention petitions. It reviews the confidential comments submitted after public notification of retention petitions, as well as numerous periodic judicial evaluations conducted by the Judiciary and the HSBA. These evaluations are based on confidential assessments of attorneys who have actually appeared before the judges. For judges who have presided over jury trials, the HSBA is also provided the evaluations of jurors in their trials. The JSC also reviews appellate opinions concerning decisions made by the judge, and conducts confidential interviews of many community resource persons. Finally, the JSC interviews the judge in a confidential setting, where questions can be asked regarding the judge's past decisions.

A Senate retention process may not be based on all the information available to the JSC, especially judicial evaluations, and would require significant additional resources of the Senate if the reviews are to be of the same standard implemented by the JSC members. With an average of 10 retention reviews a year, at various times of the year, this would require many special sessions.

This measure also unnecessarily politicizes the retention process. Judges will be limited in the information they can provide in a public hearing. Rule 2.10(a) of the Hawaii Revised Code of Judicial Conduct provides: " A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court[.]"
The JSC's confidential interview format ensures that information regarding the judge's decisions and overall performance can be examined. Thus, even though it would appear to be a more public process for the Senate to conduct retention hearings, the public would not necessarily gain more information. It would be detrimental for the public to perceive that judges make decisions based on a desire for Senate approval - this would undermine public confidence in the Judiciary.

---

[3] *See, e.g.,* https://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/Justice/PublicDocuments/judicial_selection_roadmap.authcheckdam.pdf, http://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf, http://www.brennancenter.org/publication/new-politics-judicial-elections-2011-12.

[4] *See, e.g.*, http://www.brennancenter.org/newsletter/fair-courts-e-lert-il-gov-calls-judicial-selection-changes-candidates-seek-party.

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We respectfully request that the Committee **hold** S.B.2239. Thank you for the opportunity to submit testimony on this measure.

Sincerely,

M. Nalani Fujimori Kaina
Board of Directors

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Email: hawaiiwomenlawyers@gmail.com

Michael K. Livingston
Chair
Hawaii State Committee
mlivingston@davislevin.com

JDL.testimony@capitol.hawaii.gov

Senator Gilbert S. C. Keith-Agaran, Chair
Senator Maile S. L. Shimabukuro, Vice Chair
Committee on Judiciary and Labor

SB 2238 Relating to Judicial Elections

SB 2239 Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges

Hearing Date: February 10, 2016 at 9:00 a.m.
Conference Room 016

TESTIMONY OF MICHAEL K. LIVINGSTON AND THE AMERICAN COLLEGE OF TRIAL LAWYERS OPPOSING S.B. NO. 2238 AND S.B. NO. 2239

I submit this testimony opposing both S.B. No. 2238 and S.B. No. 2239 in my capacity as the Hawaii State Chair of the American College of Trial Lawyers.

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. Fellowship is limited to one percent of the lawyers in any individual State or Province, and the candidate must have practiced for at least 15 years. Fellows are selected from among advocates who represent plaintiffs or defendants in civil proceedings of all types, as well as prosecutors and criminal defense lawyers. There are more than 5,800 Fellows of the College, including Judicial Fellows elected before ascending to the bench, and Honorary Fellows, who have attained eminence in the highest ranks of the judiciary, the legal profession or public service.

The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

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S.B. No. 2239 states, in part, that "[t]he purpose of this Act is to propose an amendment to article VI of the Constitution of the State of Hawaii to reflect the growing trend of eliminating or altering the judicial merit selection system by requiring justices and judges to be elected …." Although this Act views with favor what it characterizes as a "growing trend" towards judicial elections, the American College of Trial Lawyers views such recent trends as a threat to the independence and impartiality of the judiciary. In October of 2011, the Judiciary Committee of the College issued the *American College of Trial Lawyers White Paper on Judicial Elections*, proposing that the College go on record as opposing contested elections for the selection and retention of judges. This recommendation was subsequently adopted by the Board of Regents. **It is therefore the official position of the College to oppose contested elections of judges in all instances**.

For the convenient reference of the Committee, the *White Paper on Judicial Elections* follows:

AMERICAN COLLEGE OF TRAIL LAWYERS
WHITE PAPER ON JUDICIAL ELECTIONS

In April, 2008, the Judiciary Committee proposed a set of Recommended Principles for Judicial Selection and Retention, adopted later that year by the Board of Regents. Of those recommended "Principles," four in number, the first three are unimpeachable, as was the fourth at the time it was adopted and recommended by the Committee. However, events since that time have combined to produce a veritable "Perfect Storm" of adverse consequences attendant upon judicial elections that strongly suggest that the College should reconsider and take a position in opposition to selection and retention of judges by contested elections under any circumstances.

The Committee's "Fourth Principle" as set forth in the 2008 Recommendations, states:

> The "appearance of impartiality" is critical to judicial independence. Nothing erodes public confidence in the judiciary more than the belief that justice is "bought and paid for" by particular lawyers, parties or interest groups. *In states where judges are selected or retained by contested elections, publicly financed elections are preferable*.

What has transpired since that principle was recommended by the Committee and the College to suggest that it is no longer supportable? At least two decisions by the United States Supreme Court which, together with an earlier decision and with two troublesome trends which were apparent even in 2008 but which have only increased since then, have given rise to a situation in which any contested election of judges virtually assures improper and deleterious influence upon the system.

Even before 2008, the College, among many other organizations and individuals, had commented repeatedly on the pernicious influence of money in contested judicial elections, a trend which had been growing for some time and which, in conjunction with the elimination of courses in what used to be called Civics or Problems of Democracy in most public school curricula, had already fed a corrosive attitude that judges were not much if at all different from other "pols." In 2002, the Supreme Court in *Republican Party of Minnesota v. White*, ruled that candidates for judicial vacancies could not be forbidden to take positions on issues that might come before them on the bench. The case involved a First Amendment attack upon a Minnesota Canon of Judicial Conduct, the so-called "announce" clause, prohibiting candidates for judicial office from "announcing [their] views on disputed legal or political issues."

In 1996, Gregory Wersal ran for associate justice of the Minnesota Supreme Court and published literature in support of his candidacy criticizing certain decisions of that court on key issues such as crime, welfare and abortion. A complaint filed against him with the Office of Lawyers Professional Responsibility was later withdrawn by the agency owing to doubts as to the clause's constitutionality, but Mr. Wersal withdrew from the race to avoid further complaints and potential damage to his practice. However, he ran for the same post again several years later and, together with certain others, filed an action against officers of the agency in federal court, seeking, among other things, a declaratory judgment that the clause was unconstitutional. He was unsuccessful in the trial court and on appeal to the Eighth Circuit, but the Supreme Court reversed in an opinion by Justice Scalia in which Justice Sandra Day O'Connor, while concurring in the result, tellingly expressed in a separate opinion the view that "the very practice of electing judges undermines ... the state's compelling governmental interest in an actual and perceived ... impartial judiciary."

Far from being "free from any personal stake in the outcome of the cases to which they are assigned," Justice O'Connor wrote, "if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the

outcome of every publicized case." She went on to decry the fact that "contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds." Moreover, unless the pool of candidates is limited to those wealthy enough to fund their own campaigns independently — "a limitation unrelated to judicial skill" — the cost of campaigning requires them to engage in fundraising which "may leave judges feeling indebted to certain parties or interest groups." She had little sympathy for Minnesota's "claim that it needs to significantly restrict judges' speech in order to protect judicial impartiality."

> If the State has a problem with judicial impartiality, it is largely one that the State brought upon itself by continuing the practice of popularly electing judges.

Literature suggesting the extent to which money has played a disturbing part in contested judicial elections was already plentiful when Justice O'Connor wrote in 2002. Things haven't improved in the interim. In fact, during the decade 2000-2009, "fundraising by high-court candidates surged to $206.9 million, more than double the $83.3 million raised in the 1990s," according to the Brennan Center for Justice. Even more unsettling, in 2010, "heavy spending and angry TV ads spread to several states holding *retention elections*," which as recently as 2009 had accounted for less than 1 per cent of spending in such races. In 2010 alone, high-court retention elections in a handful of states cost more than the $2.2 million raised for all retention elections in the nation during the decade 2000- 2009. Yet those expenses were still far lower than in competitive election states.

The most striking example of just how bad the situation can get is provided by the facts in the notorious case of *Caperton v. A.T. Massey Coal Company*. Petitioner Caperton and others had secured a $50 million verdict against the Massey company. Don Blankenship, Chairman, CEO and President of the company, decided after the verdict but before the appeal to support an attorney, Brent Benjamin, who sought to replace Justice McGraw, then Chief Justice of the Supreme Court of Appeals of West Virginia, who was a candidate for re-election. Blankenship donated $1,000 — the statutory maximum — to Benjamin's campaign, but in addition donated nearly $2.5 *million* to a political organization opposed to McGraw and supporting Benjamin, and another $500,000 in independent expenditures for direct mailings, solicitation letters and TV and newspaper ads to support Benjamin. These expenditures amounted to more than the total amount spent by all other Benjamin supporters and was triple the amounts spent by Benjamin's own committee. Benjamin won.

In October 2006, before Massey filed its appeal, Caperton moved to disqualify Benjamin, citing conflict of interest. The motion came on for hearing before Benjamin himself who denied it, indicating that upon careful consideration he could find no "objective information" to show that he was biased, or that he had prejudged the issues or was "anything but fair and impartial." In December, Massey filed its petition and the Supreme Court granted review.

The following November, the court reversed Caperton's $50 million verdict. While conceding that Massey's conduct had warranted the type of judgment entered against it, the Court reversed on two independent procedural grounds, over the dissents of two justices who stated that the "majority's opinion [was] morally and legally wrong," misapplied the law and introduced sweeping "new law." Caperton sought rehearing and various disqualification motions were filed. Among them were a motion aimed at one of the judges in the majority, Justice Maynard, photos having come to light of the justice vacationing with Blankenship on the French Riviera while the case was pending. He granted Caperton's motion and recused himself.

One of the dissenting judges granted a disqualification motion filed by Massey based on his public criticism of Blankenship's role in the 2004 elections. He also urged Benjamin to recuse himself, describing the presence of Blankenship's money, political tactics and "friendship" as having "created a cancer in the affairs of this Court." Justice Benjamin declined his colleague's suggestion and denied Caperton's recusal motion.

The court granted rehearing, and with Benjamin now in the role of acting chief justice, selected two other justices to replace the two who recused. Again, Benjamin refused to withdraw from the case in the face of yet another disqualification motion and a public opinion poll showing that over 67% of West Virginians doubted he could be fair and impartial. Once more the Court reversed the jury verdict, again by a vote of 3 to 2, both dissenting justices drawing attention to Benjamin's failure to recuse himself. A month after Caperton filed its cert petition with the U.S. Supreme Court, Benjamin filed a concurring opinion containing a spirited defense of the majority opinion and his decision not to recuse.

The majority decision of the Supreme Court, per Justice Kennedy, to reverse the decision of the West Virginia court, was not a foregone conclusion. As a matter of law and policy, very appealing arguments were advanced by the dissent of Chief Justice Roberts in which Justice Scalia joined. But the facts of the case are striking. It may well be that Justice Benjamin could maintain an attitude of perfect objectivity

despite the influences injected by Blankenship's money, tactics and "friendship." But it is difficult to imagine anyone claiming that the facts did not give rise to a "reasonable question" regarding his impartiality. And the results of the public opinion poll seem to bear out the conclusion that the public at large is more than a little disenchanted with the system when it creates such an appearance of impropriety.

The decision of the Court in the *Citizens United* case in 2009 also operates, in practice, to increase the pernicious influence of money and politics in the election of judges. *Republican Party of Minnesota* validates a judge's decision to announce in advance her views about issues and cases that may come before her and, indeed, to lobby parties and groups which might be able to generate votes; Caperton illustrates just how far interested parties may be willing to go if the stakes are high enough and just how responsive to such influence a judge may be — or at least appear to be. Now *Citizens United* confirms the right of large corporations and unions to join the fray. The results in terms of the sheer amounts of money now available to the process have already been confirmed by the spike in spending in 2010, and judges are certain to be held even more accountable to interest groups and political campaigns at the expense of their fealty to the law and the Constitution.

In the wake of these developments, three Supreme Court justices in Iowa were ousted in 2010 after interest groups, most from out of state, spent nearly a million dollars to unseat them owing to the court's unanimous ruling in a 2009 gay marriage case. Other such efforts were mounted but failed. Still, the tendency is clear and is likely only to get worse. The efforts of both parties to the collective bargaining dispute in Wisconsin to pack the state court with candidates favorable to their respective positions is reflective of many such efforts underway at present.

There may have been a time when arguments could be mounted in favor of judicial elections as distinct from other types of political races. That time has now passed, owing to the threats to the independence and impartiality of our judiciary posed by this combination of judicial rulings and political trends — compounded by minimal curricular attention accorded to civics education that, if given, would teach that judges are often charged with protecting the rights of the unpopular and are not simply another sort of elected politicians. Other methods of selection of judges are doubtless far from perfect in many instances, but they are substantially less subject to the corrupting influences of money and partisan politics than any form of contested election of judges.

The Judiciary Committee recommends that the College go on record as opposing contested elections for the selection and retention of judges. The Jury Committee and the Special Problems in the Administration of Justice Committee (U.S.) have participated as partners in this study and analysis and join in this recommendation.

In accordance with this recommendation, the Committees suggest that the Fourth Principle of the Recommended Principles for Judicial Selection and Retention be revised as follows:

> The "appearance of impartiality" is critical to judicial independence. Nothing erodes public confidence in the judiciary more than the belief that justice is "bought and paid for" by particular lawyers, parties or interest groups. *The College holds in the highest esteem elected judges who perform their duties day in and day out with integrity, courage and conviction, and without permitting the fact of judicial elections to exert any influence over their decisions. The College believes that contested judicial elections, including retention elections, create an unacceptable risk that improper and deleterious influences of money and politics will be brought to bear upon the selection and retention of judges. The College therefore opposes contested elections of judges in all instances.*
> **

As noted above, the recommendation set forth in the *White Paper on Judicial Elections* was formally adopted by the College. The College's *Recommended Principles Regarding Judicial Selection and Retention* therefore are now as follows:

AMERICAN COLLEGE OF TRIAL LAWYERS
Recommended Principles Regarding Judicial Selection and Retention

One of the core values of the College is the improvement of the administration of justice. In keeping with that purpose, one of the College's missions is to support, and seek to preserve and protect, the independence of the judiciary as a third branch of government. While our courts must be accountable, the College believes that it is preferable that they be accountable to the Constitution and the rule of law rather than to politicians and special interest groups, and that it is appropriate for the College to lend its support in defense of fair and impartial courts from political pressures. The College respects and defers to the rights of each state to select the manner in which its judges are chosen. It is, however, in keeping with the

core values of the College, to have the discretion to assist in the defense of existing judicial selection systems that are based on something other than partisan political elections, whether they be denominated as merit based or nonpartisan, when efforts are made to supplant them with systems that are more partisan and political in nature than the then existing one. It is with this purpose in mind that the College adopts the following statement of principles:

1. As an ideal, judicial independence is best served if politics are removed, insofar as possible, from the judicial selection and retention process.

2. The preferred method of selecting judges for statewide office, or in large metropolitan areas, is one which, as much as possible, is nonpartisan and based on merit. One such method would be by a judicial nominating commission, composed of lawyers and laypersons with the nominating commission established by statute in such a fashion as to minimize or neutralize the influence of partisan politics and to be broadly reflective of the community (e.g. requiring several appointing authorities and limiting appointments from any one political party). The nominating commissions would select a short list of the best qualified nominees, based on education, experience, temperament, and the ability to be fair and impartial. The governor would then appoint a judge from the panel submitted by the commission. Judges would be accountable to the public and subject to periodic performance evaluations and periodic, non-partisan, retention votes.

3. In order to exercise its oversight function, regardless of the selection/ retention system, the public needs access to meaningful information about the performance of judges. Performance evaluations should be conducted by a body that is independent of the judiciary and statutorily composed in a manner similar to the nominating commission. Evaluations should be based on stated criteria and reported accurately, effectively, and promptly to the public. Survey participants should include lawyers, parties, and jurors who have interacted with the judge.

4. The "appearance of impartiality" is critical to judicial independence. Nothing erodes public confidence in the judiciary more than the belief that justice is "bought and paid for" by

particular lawyers, parties, or interest groups. *The College holds in the highest esteem elected judges who perform their duties day in and day out with integrity, courage and conviction, and without permitting the fact of judicial elections to exert any influence over their decisions. The College believes that contested judicial elections, including retention elections, create an unacceptable risk that improper and deleterious influences of money and politics will be brought to bear upon the selection and retention of judges. The College therefore opposes contested elections of judges in all instances.*

**

On behalf of the American College of Trial Lawyers, and for the reasons set forth above, I respectfully oppose S.B. No. 2239 and S.B. No. 2238.
Thank you.

Michael K. Livingston
Hawaii State Chair
American College of Trial Lawyers

TESTIMONY OF LIZ SEATON, ESQ.
INTERIM EXECUTIVE DIRECTOR
JUSTICE AT STAKE
IN OPPOSITION TO:
SB 2238: RELATING TO JUDICIAL ELECTIONS and
SB 2239: PROPOSING AN AMENDMENT TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII RELATING TO THE SELECTION AND RETENTION OF JUSTICES AND JUDGES.

Submitted February 9, 2016

On behalf of Justice at Stake, a non-partisan organization working to protect our courts from partisan politics and special interests pressure, I testify in opposition to Senate Bills 2238 and 2239. These bills run counter to the growing body of evidence showing that judicial elections hinder the ability of courts to dispense justice fairly and impartially.

All across the country, a new culture of judicial politics has emerged. State courts, the institutions whose legitimacy is most reliant on public confidence, have been undermined by record-shattering contributions to judicial candidates, unprecedented influence from outside organizations such as Super PACs and 501(c)(4) organizations, and alarming instances of political intimidation and politicization from the executive and legislative branches. State courts serve citizens best when judges are accountable to the Constitution, the Bill of Rights, and the law – not to campaign donors or politics. As Chief Justice John Roberts wrote last year in *Williams-Yulee v. The Florida Bar*,[1] judges are not politicians, and they must be insulated from political pressures that reduce their ability to be fair and impartial.

Campaign money should not be a factor in selecting judges, and merit selection systems reduce the influence of this money on the courts. Merit selection systems increase public confidence in the court system, judicial independence, and diversity on the bench.

Public Confidence in the Court System
A merit selection system that reduces the role of politics while promoting transparency and ensuring broad, nonpartisan participation is an established best practice designed to ensure a quality judiciary that enjoys the public's trust and confidence. Past polls conducted by Justice at Stake have shown that 87% of people nationwide think that judges' decisions are affected by campaign contributions. Even more disturbingly, about half of judges agree. A merit selection system would boost the public's confidence in the judiciary, because it would remove the appearance of impropriety inherent in having judges accept campaign funds from the attorneys who argue cases before them.

[1] 575 U.S. ___ (2015).

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Judicial Elections Do Not Increase Accountability

Judicial elections do not provide a meaningful opportunity for the voting public to choose their judges. A large percentage of appellate court judges run unopposed, giving voters no choice and no voice in these "races" and more than 90% of incumbents are re-elected.

Big spenders dominate judicial elections, drowning out the voice of ordinary voters. In 2013-14, a majority of all campaign contributions were at least $1,000 for 15 of the 18 states that saw spending on high court elections. In Michigan in 2014, over 85% of the $5 million that candidates raised came in donations of at least $1,000. In Alabama, it was over 99 percent. These financial incentives may encourage the candidates who benefit from such significant contributions to reflect their donors' interests when they rule from the bench.

The case against merit selection often focuses on a perceived lack of accountability to the voters. Accountability is certainly vital for fair courts. However, this accountability must be to the Constitution, the Bill of Rights, and the law, not to the electorate, elected legislators, or the executive. Judges are not politicians, and they must be insulated from political intimidation that might reduce their ability to be fair and impartial. Courts exist to protect the rights of all Americans and uphold the Constitution. We are particularly troubled by recent studies showing a link between judicial elections – and particularly ads attacking judges as "soft on crime" or lauding them as "tough on crime" – and outcomes in criminal cases. Judges should be able to make unpopular decisions based on the facts and the law, rather than what is politically popular, and they must be able to protect the rights of defendants in their courts without fearing political retribution.

Moreover, a well-designed merit selection system will ensure far more transparency and accountability than an election system. If the legislature has concerns that merit selection "transfers popular politics to behind-the scene political control," the solution is to adopt some of the best practices for increasing the transparency of and public engagement in the judicial nominating commission and judicial performance evaluation processes being used in merit selection systems across the country, not in scrapping these practices that provide members of the public a real voice in ensuring their judges are competent, professional, and unbiased.

Diversity on the Bench Is a Key Value

Justice at Stake supports diversity on the bench as a key value in our work. Indeed, we have run pilot projects in three states – Arizona, Maryland and Washington – to increase diversity on the state court benches through pipeline building and other efforts. Judicial elections disproportionately disadvantage judicial candidates of color. A 2015 study by the Center for American Progress revealed that, since 2000, white incumbents had 90 percent re-election rate, compared with 80 percent for black justices and 66 percent for Latino justices.

Diversity on the bench supports equal access to justice, enhances and enriches judicial decision-making, and builds confidence in our court systems. Effective use of merit selection and nominating committees can lead to increased diversity. Some states using merit selection effectively have included laws that require that the people who serve on the nominating commission be reflective of a state's racial, gender, and geographic diversity. Other states effectively using merit selection require that the commission consider the racial, gender, and

geographic diversity of the community when choosing the applicants they will send on to the governor.

Judicial Elections Impact Judicial Decisionmaking

Research has shown that both money and the current political climate of the electorate can influence judicial outcomes. The political rhetoric and campaigning involved in judicial elections often fixates on criminal justice issues, in turn elevating the importance of a judicial candidate's positions or decisions in criminal matters. The fallout from this norm is startling: Recent research has demonstrated that the more TV ads run during an election cycle, the more likely judges will rule against criminal defendants. This is especially concerning because the proportion of TV ads explicitly discussing criminal justice issues are on the rise: in 2013-14, a record 56 percent of TV ads in judicial races discussed criminal justice issues.

Research has found that as Election Day draws near, judges issue increasingly punitive sentences for serious crimes. In fact, from the start of a judge's term until the day of his or her next election, the average sentence length increases as much as 10 percent. Other research has shown that incarceration rates rise by 2.2 to 2.6 percentage points in election years for black criminal defendants; this constitutes a 10 percent increase in the likelihood of black defendants being incarcerated during election years.

Voters Support Merit Selection (The Legislative Finding Stating Otherwise Is Inaccurate)

The legislative findings associated with these bills state that "there has been a trend in the last decade to eliminate the merit selection of judges or alter its components." This trend simply does not exist. In 2012, voters in Missouri, Arizona and Florida overwhelmingly rejected efforts to alter their merit selection systems. In 2014, voters in Tennessee amended their constitution to remove the requirement for judges to be elected following assurances from the governor that he would create a nominating commission by executive order, ensuring that the core elements of that state's merit selection system would remain in place and not be subject to continued court challenges. In the past three years, polls across the country have shown that majorities of voters – across party lines, in states with both merit selection and judicial elections – prefer merit selection as a means to ensure that their courts remain fair and impartial. In fact, the only move away from merit selection occurred in Kansas, where the legislature could change the selection method for the court of appeals with a simple majority vote (not subject to voter approval) and did so in a political move that ignored the fact that a strong majority of Kansans opposed the change.

A judiciary free from political restraints is crucial to ensuring public confidence in the court system, judicial independence, and diversity on the bench. Thank you for the opportunity to offer this testimony, and I urge you to oppose Senate Bills 2238 and 2239.

Contact:
Liz Seaton, Esq., Interim Executive Director, Justice at Stake
lseaton@justiceatstake.org, (202) 588-9700

AMERICAN JUDICATURE SOCIETY

ADVOCATING INTEGRITY IN AMERICAN JUSTICE

February 9, 2016

Chairman Sen. Gilbert S.C. Keith-Agaran
Vice Chairman Sen. Maile S.L. Shimabukuro
Senate Committee on Judiciary and Labor
Hawaii State Capitol
415 S. Beretania Street
Honolulu, HI 96813

Re: **SB 2238:** ***Relating to Judicial Elections***

SB 2239: ***Proposing an Amendment to Art. VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges***
Hearing Date: February 10, 2016
Hearing Time: 9:00 a.m.

Dear Senator Keith-Agaran and Senator Shimabukuro:

Please allow this letter to serve as my testimony on behalf of the American Judicature Society ("***AJS***"), of which I am a board member, and as a practicing attorney in private practice in Hawaii since 1982. AJS opposes SB 2239, which proposes to amend the Hawaii State Constitution to require all justices and judges to be elected and their retention to be confirmed by the Senate. AJS also opposes SB 2238, which proposes conforming and related amendments.

Founded in 1913, the national AJS organization has worked as an independent, non-partisan, organization dedicated to protect the integrity of the American justice system. Here, the Hawaii Chapter of AJS and its successor entity[1] have continued to pursue the national organization's mission, working closely with justice system stakeholders and the broader public to study and promote a range of improvements to judicial selection, retention, and accountability, judicial ethics, access to the courts, and the criminal justice system in the State of Hawaii. Judicial selection, retention and accountability, including the operation and improvement of Hawaii's Judicial Selection Commission ("***JSC***"), has been a particular focus and concern of AJS in Hawaii and its Standing Committee on Judicial Selection, Retention and Accountability, of which I am currently a committee co-chairperson (the "***Committee***").

[1] In 2014, the (former) Hawaii State Chapter of AJS, established in 1998, established a separate non-profit organization, which continues under the name of the national organization.

Merit-Based Selection and an Independent Judiciary.

An independent judiciary has long been deemed essential to our democratic form of government. As noted by William S. Richardson, former Chief Justice of the Hawaii Supreme Court, the method of selecting judges was a controversial issue in the constitutional conventions of 1950, 1968, and 1978 (which resulted in the creation of the JSC), but the overriding concern was with the potential for political influence in the judicial selection process and abuse.[2] As Chief Justice Richardson observed:

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

Since its implementation, Hawaii's merit selection system for justices and judges has been found to be the most important and effective protection for judicial independence in Hawaii. *See* Report of the AJS Hawaii Chapter's Special Committee on Judicial Independence and Accountability, at 5 (March 2008), available at http://www.ajshawaii.org/resources.html ("[The merit selection system's] balance of political influences, the mix of legal professionals and lay people, and the inherent procedural protections provide the best means to ensure judicial independence.").

As many know, this merit selection system generally chooses judges by means of the nonpartisan, nine-member JSC, comprised of non-lawyers and no more than four lawyers, including members appointed by the Governor, the Senate President, the House Speaker, and the Chief Justice of the Supreme Court of the State of Hawaii, and elected by the Hawaii State Bar Association. The JSC is charged to locate, recruit, investigate, and evaluate applicants for judgeships.[3] The names of the most highly qualified applicants for the Hawaii District, Circuit, and Appellate Courts are submitted to the Chief Justice or the Governor, who must make the final selection from the list.[4] The final selection is subject to confirmation by the Senate. For subsequent terms, judges are evaluated for retention by the JSC.

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[2] William S. Richardson, *Judicial Independence & the Hawaii Experience*, 2 Univ. of Hawaii L. Rev. 1, 45 (1979).

[3] Report of The Judicial Selection, Retention and Accounting Standing Committee of the American Judicature Society - Hawaii Chapter, at 2 (2010), available at http://www.ajshawaii.org/resources.html.

[4] The Chief Justice appoints State of Hawaii District Court judges from the list provided by the JSC.

Problems with Judicial Elections.

AJS opposes the proposed legislation because it would abolish Hawaii's merit-based selection system for nomination and retention of judges and justices. Although this system is not perfect, the proposed system of judicial elections gives rise to even more problems.

Public expectation of getting a fair hearing in the courts is a cornerstone of the judicial system, so it is essential that judges be impartial and free of economic and political pressure. But in many states a candidate has to campaign -- first to get nominated and then to get elected. This can compromise a future judge's independence. For instance:

- **Getting nominated**

In partisan election states, political credentials come first. Campaign work in previous party primaries and elections, support of party functions, fundraising, and precinct work may have more to do with who the party slates for a judgeship than how good a judge the candidate will be. A Pennsylvania judge, who ran (and won) in a partisan election, said this about party-controlled selection of judges:

> "Since a judicial candidate brings little strength to the ticket but is likely to rise or fall with the fortunes of the other candidates, it is natural for a party leader to conclude that it doesn't much matter who the candidate (for judge) is, so long as he or she will not HURT the ticket. From this conclusion it is a short step to awarding the nomination as a political favor, with little reference to qualifications."

In many states that is precisely what judgeships are: political favors. An elected judge can carry to the bench a load of obligations to those who helped him or her get there. At the same time, many well-qualified attorneys without the proper political credentials never get to the bench. Merit selection increases the pool from which the nominating commission can choose.

- **Getting money**

Because most candidates can't afford to personally finance their election campaigns, they have to raise the money they need. Much of this money comes from attorneys, and some of them will be appearing in front of those judges. This relationship can raise questions about the judge's impartiality.

- **Getting elected**

In many urban areas there are so many candidates on the ballot that no voter can be informed enough to make intelligent choices. Many rural areas are controlled by one party or

the local bar association, and the person they put on the ballot is assured of election; in this case the voters have virtually no choice. And, judicial campaigns don't help the voters choose either. Ethical rules say judges and judicial candidates can't make traditional campaign promises -- like promising to decide certain cases a certain way. It would undermine our belief in the judicial system if we had judges making rulings based on campaign promises, not facts and the law. Since candidates can make only general statements like, "I believe in law and order," judicial campaigns are usually meaningless and uninformative.

Elected Judges and Disciplinary Actions.

Although merit selection does not entirely eliminate politics from the selection process, supporters argue that it minimizes the rule of political and special interests while emphasizing qualifications and experience, thereby yielding fewer unfit judges than in judicial election systems. One indicator of the fitness of judges is judicial disciplinary actions. Although states differ in terms of judicial disciplinary processes -- *e.g.* options for private sanctions, burden of proof required -- studies of disciplinary rates for merit-selected and elected judges indicate that merit-selected judges are disciplined less often than are elected judges.[5]

In addition to this study and the AJS March 2008 Report referenced above, numerous other assessments, analyses and reports have informed AJS's strong opposition to the proposed legislation, which would abolish Hawaii's merit selection system and compromise the independence of the judiciary, including: (1) the League of Women Voters' July 2003 report entitled "*Judicial Independence in Hawai'i*;" (2) the July 2003 study conducted by Ward Research, for the Judiciary, entitled "*Openness in the Courts: A Final Report of Responses of Focus Groups from Members of the Bench, Bar, Media and General Public*;" (3) the January 2000 Report of the AJS Hawaii Chapter's Special Committee on Judicial Evaluations; (4) the November 2005 Report of the AJS Hawaii Chapter's Special Committee on the Judicial Selection System; (5) former Chief Justice Ronald Moon's December 2004 Remarks and other materials from the November 2004 Judicial Independence Conference sponsored by the League of Women Voters; (6) the AJS (national) study entitled "*Racial and Gender Diversity in State Courts*," which was published in the Judges' Journal, Vol. 48, No. 3, Summer 2009, by the American Bar Association; (7) the Brennan Center for Justice study, authored by Kate Berry and entitled "*How Judicial Elections Impact Criminal Cases*," published in 2015 by the Brennan Center for Justice at the New York University School of Law; (8) various publications that can be found at the website for the National Center for State Courts; and many other resources strongly supporting merit selection and documenting the improper and negative effects of contested judicial elections.

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[5] Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline,* available at http://www.judicialselection.us/judicial_selection_materials/records.cfm?categoryID=11

Retention and Judicial Independence.

The proposal contained in SB 2239, requiring that approvals of judges for retention be subject to confirmation by the Senate, would further compromise the independence of judges and justices.

Senate hearings on judicial retentions would involve public review of the cases decided by the judges during their prior terms. Although not all of those decisions would be subjected to in-depth review, it is likely that controversial decisions or those that involved highly public figures or issues would become a focus of Senate review. Judges anticipating retention but handling such cases would be more likely to take into account political factors in making their decisions than they might be under the current system, since they may be required to explain their decisions at the retention hearing stage. The threat of this kind of review would discourage an impartial analysis of the facts and law of the case and thereby undermine judicial independence.

Although judicial retention elections more directly inject political factors into the process than Senate confirmation hearings, studies of retention elections suggest that Senate retention confirmation would impact the decision-making behavior of judges nearing the end of their terms. A survey-based study of retention elections published in the AJS publication, *Judicature*, found that retention elections strongly influence judicial behavior. Current and former appellate and major trial court judges who stood for retention election were surveyed. Of the 645 judges surveyed, 60.5% indicated that retention elections affected their judicial behavior. *See* Larry T. Aspin & William K. Hall, "*Retention Elections and Judicial Behavior*," 77 Judicature 306, 312 (1994).

Similarly, a 2007 study found, for instance, that judges' decisions in conservative states became more conservative at retention while judges' decisions in liberal states became more liberal at retention. *See* Elisha Carl Savchak & A.J. Barghothi, "*The Influence of Appointment and Retention Constituencies: Testing Strategies of Judicial Decision-Making*," 7 State Politics & Policy Q. 394, 395 (2007). Hypothesizing that judges become more inclined to cast votes in line with their retention constituency for fear of losing their posts, Savchak and Barghothi analyzed judges' votes in 1,912 criminal cases in fifteen states that use a merit selection systems to select and retain judges, coding decisions that upheld the government's case as conservative and decisions in favor of the defendant as liberal. Scores developed from CBS/New York Times public opinion surveys from 1997 to 1999 were used as indicators of state-level citizen ideology.

In closing, I humbly submit that the proposed legislation would do more harm than good, and that it should not be passed. To the extent that there are particular problems or issues with the existing process, AJS is prepared to examine and investigate those issues and propose appropriate reforms.

Thank you for your consideration.

Very truly yours,

Colin O. Miwa,
individually and on behalf of the
American Judicature Society

ImanageDB:3367789.6

LEAGUE OF WOMEN VOTERS®

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SENATE COMMITTEE ON JUDICIARY AND LABOR

Wednesday, February 10, 2016, Conference Room 016, 9:00 a.m.

SB 2239: Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges

SB 2238: Relating to Judicial Elections

TESTIMONY (STRONGLY OPPOSE)

Chairs Keith-Agaran, Vice Chair Shimabukuro and Committee Members:

The League of Women Voters of Hawaii strongly opposes SB 2239, and SB 2238, which would radically alter the current process of judicial selection and replace it with an election process with far-reaching negative consequences, undermining public confidence in our judicial system.

SB 2329 proposes an amendment to Article VI of the Constitution of the State of Hawaii that would eliminate the judicial merit based selection system and require that justices and judges be elected to serve six year terms, thereafter subject to consent of senate for subsequent terms. SB 2328 makes conforming changes for this purpose. Both measures propose a State Constitutional amendment to elect justices and judges in Hawaii, and would eliminate the judicial merit selection process. This jeopardizes judicial independence, a core democratic principle. Judicial independence is necessary for the Hawaii State Judiciary to operate as a co-equal third branch of government, including preservation of individual constitutional rights, fair and impartial adjudication of legal disputes, and fair and timely criminal prosecutions.

The right to a fair trial is a founding principle of our democracy, and public confidence depends upon the belief in a neutral, impartial judiciary. New research, however, has demonstrated the influence that campaigns and campaign contributions have had on judicial decision-making. The revolution in financing political campaigns, especially since the 2010 Citizens United case, (which struck down federal limits on corporate and political spending) has allowed Political Action Committees (PAC's) and Super PAC's to advertise heavily in Mainland states where judges are elected. Last November spending in a seven-way race for seats on the Pennsylvania Supreme Court surpassed $15.8 million, with the top three candidates who collected the most money winning the seats.i

SB 2238 and SB 2239 are undesirable for many reasons, but most especially because they would make it possible to leverage "dark" campaign money from obscure sources. Large expenditures on judicial elections and large out of state contributions have the potential to sway elections locally in ways that favor special interests. Opening the door to the influence of big money in local contests for judgeships is deeply problematic.

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Every litigant in a civil case or a defendant in a criminal case needs to know that his or her case will be heard by a judge whose loyalty is to the law, and whose integrity will not be compromised by campaign finance or political pressures. We must ensure that our judges are free from inappropriate political pressure and able to act with integrity in their role as arbiters of the law.

Ample evidence exists to demonstrate the dangers of an election- based system of judicial selection. Hawaii does not need a politicized judiciary. In this land of aloha, it is equity, fairness, and impartiality that should be the rule of the day. We urge the committee to oppose these measures.

Thank you for the opportunity to submit testimony.

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[i] Winners were Christine Donohue ($1.9 million), Kevin Doughty ($3.9 million, and David Wicht ($2.9 million). https://blogs.wsj.com/law/2015/11/03/race- for-pennsylvania-supreme-court-breaks-spending-record.

Committee:	Committee on Judiciary and Labor
Hearing Date/Time:	Wednesday, February 10, 2016, 9:00 a.m.
Place:	Room 016
Re:	*Testimony of the ACLU of Hawaii in Opposition to S.B. 2239, Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges*

Dear Chair Keith-Agaran and Members of the Committee on Judiciary and Labor:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to S.B. 2239, which seeks to amend article VI of the Constitution of the State of Hawaii to require justices and judges to be elected at a general election.

The framers of the Hawaii Constitution – like the framers of the United States Constitution – correctly insulated the judiciary from prevailing popular opinion, allowing judges to base their rulings on law and facts rather than on fear of losing their jobs. The integrity of our courts would be greatly compromised if justices and judges could not make unpopular rulings – for example, by protecting the constitutional interests of minority groups – without fear of retribution from the electorate.

After the Iowa Supreme Court unanimously ruled in favor of marriage equality, three of the justices were removed in a retention election in retaliation for their ruling in the case. In Pennsylvania, a study of judicial decisions revealed that – in election years – judges increased the length of the sentences they imposed, resulting in an additional 2,700 years of prison time imposed over a ten-year period. *See* Adam Liptak, *Rendering Justice, With One Eye On Re-Election*, NY TIMES (May 25, 2008).

Judicial elections, as required by S.B. 2239, would undermine the impartiality of our courts. We respectfully request that you defer this measure.

Thank you for this opportunity to testify.

Sincerely,

Mandy Finlay
Advocacy Coordinator
ACLU of Hawaii

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years

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COMMITTEE ON JUDICIARY AND LABOR
ATTN: CHAIR GILBERT S.C. KEITH-AGARAN, VICE-CHAIR MAILE S.L. SHIMABUKURO

February 10, 2016, 9:00 a.m.
Conference Room 016

Aloha Chair Keith-Agaran, Vice-Chair Shimabukuro, and Committee Members:

I submit this testimony only for myself, as someone who has taught Constitutional Law and related courses for over 40 years. I now have the great honor of being a Professor of Law and the Dean at the William S. Richardson School of Law, as I have been for over the past 12+ years. From what I have seen, studied, and taught about judges and about how they are selected and retained across the United States and in other countries as well, Hawai‘i has many reasons to be unusually proud of our merit selection system and of our judges. It remains extremely important that judges continue to be above the political fray. In my view, the proposed election system in SB 2238 and SB 2239 has the potential to do great harm. Similarly, an enhanced role for the Senate in the renewal of Justices and Judges as proposed by these measures as well as SB 2420 directly threatens judicial independence.

We are fortunate to have a strong judiciary in Hawai‘i and our existing selection and retention procedures have a great deal to do with this tradition. It is hardly an accident that our Law School’s namesake, Chief Justice William S. Richardson, became a leader in the Conference of the Chief Justices of all the states as well as being honored—some would say revered--for his ability as a judge to remain open-minded, fair, and empathetic, including for legal claims made on behalf of those who lacked power, money, and influence.

In an article that is directly relevant to the current proposals, “Judicial Independence: The Hawai‘i Experience,” which appeared in the second volume of the Law Review of the still-new Law School, C.J. Richardson wrote: “[I]n 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.* (italics added)” 2 U. Hawai‘i Law Review 1, 4 (1979). And “CJ” proved himself prescient as he continued, “Only an independent judiciary can resolve disputes impartially and render decisions which will be accepted by rival parties, particularly by those parties in another branch of government.” Id.

Recent controversies that erupted over the appointment and retention of judges in states as diverse as Alabama, Iowa, Texas, Virginia, and Wisconsin suggest how problematic it can be when those with the ability to spend strive to influence how judges will decide. (These contributions now have been held to be protected by the First Amendment to the Federal Constitution.) In Hawai‘i, we are lucky to have avoided such bitter imbroglios. The Rule of Law remains an essential component of our heritage. We

tend to take it for granted. Yet the Rule of Law is actually quite fragile, and it depends directly on public acceptance of even unpopular decisions.

Many of us were appalled, for example, by the decision of the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000). Yet, though the stakes certainly were high, that controversial judgment was accepted and a new president was inaugurated peacefully. It is worth imagining how different the scenario might have been if the Justices had been elected, based on popular expectations about their decisions, or if their future service as justices depended on a vote of a political body.

As I said initially, I testify only for myself. Our Law School is blessed to have many diverse opinions among its faculty, staff, and students. But I believe that the Hawai‘i judiciary has earned our general respect, even if grudging at times about particular decisions. We are proud of the justices and judges who are independent enough to protect the rights of minorities, even if it sometimes means standing up to the majority. This independence remains a crucial element of the Rule of Law. Therefore, I respectfully urge rejection of SB 2238, SB 2239, and SB 2240.

Mahalo nui,

Aviam Soifer
Dean and Professor

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2239 on Feb 10, 2016 09:00AM
Date: Monday, February 08, 2016 5:47:13 PM

SB2239
Submitted on: 2/8/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara Polk	Individual	Oppose	No

Comments: Chair Keith-Agaran and Vice-Chair Shimabukuro: I strongly oppose SB2239 that provides for the election of judges. It is important for judges to be fully separate from the pressures of politics that may skew their judicial opinions. I do not want to see judges spending their time raising money for their next election, nor do I want to see independent ads funded by special interests supporting or opposing a judicial candidate. Our current system of selection of judges provides for vetting the qualifications of prospective judges, as well as requiring support by the legislature. I believe that provides adequate public representation, without the negatives of running campaigns for office. I urge you to hold SB 2239.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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February 8, 2016

The Honorable Gilbert S. C. Keith-Agaran, Chair
The Honorable Maile S. L. Shimabukuro, Vice-Chair
Senate Committee on Judiciary and Labor
415 S. Beretania Street
Honolulu, Hawaii 96813

Re: SB 2238 and SB 2239 - Judicial Elections in Hawaii
Hearing: Wednesday February 10, 2016 @ 9 a.m.
Conference Room 016
State Capitol

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Senate Judiciary and Labor Committee,

Thank you for the opportunity to submit comments on SB 2238 and SB 2239. The undersigned, all former Presidents of the Hawaii State Bar Association, respectfully submit this testimony in strong opposition to SB 2238 and SB 2239.

SB 2239 proposes a Constitutional Amendment to abolish the Judicial Selection Commission (JSC) and provides for judicial elections in Hawaii. SB 2238 would implement that Amendment, if adopted by the electorate, and immediately requires the Judiciary, the Office of Elections, and the Campaign Spending Commission to study appropriate methods of implementing a judicial election system and submit a written report, including proposed legislation, to the Legislature.

Judicial elections threaten the balance of power between our three branches of government. The Executive and Legislative branches are designed by their very nature as elected branches to receive public input and respond in most instances in a way that reflects voter sentiment. This is true of the Governor, who is chosen by the voters of the entire State, and our State Legislators, whose primary duty is to represent and advocate for their respective constituents.

In contrast, the Judiciary is not a vehicle for public input, and justices and judges should not take public opinion into account when making decisions. A judge's primary duty is to be a neutral arbiter of justice, and to apply the law in a way that is correct and fair for all parties. If judges take public sentiment into account when they make decisions and issue rulings, there may be dangerous pressure placed upon judges for them to rule in a manner that might be politically beneficial or popular, but not legally correct.

We do not believe it is necessary to conduct a study on a potential switch to a judicial election system in Hawaii. Prior studies and the experience of other states illustrate that judicial elections are not in the best interests of our Aloha state. In 2013, a study by the American Constitution Society found that judges and justices who receive more campaign contributions from business interests are more likely to rule for business litigants appearing before them. In 2015, The Brennan Center concluded that judges are less likely to rule in favor of criminal defendants near election cycles, and that trial judges in Pennsylvania and Washington who were close to re-election were sentencing defendants convicted of felonies to longer sentences.

These concerns are particularly relevant in the aftermath of the U.S. Supreme Court's decision in *Citizens United*, 558 U.S. 310 (2010), which allows corporations and unions to make essentially unlimited political expenditures. In 2014, a total of $34.5 million was spent on only 19 state supreme court races--mostly by special interest groups. This runaway spending in judicial elections poses a substantial threat to fair and independent courts. These kinds of examples, which are likely to become more common after *Citizens United*, increase the public perception that justice is available to the highest bidder.

It for these reasons and others that we reiterate our strong opposition to these measures.

Respectfully,

/s/ Calvin E. Young

Calvin E. Young

/s/ Craig P. Wagnild
Craig P. Wagnild

/s/ David M. Louie
David M. Louie

/s/ Carol K. Muranaka
Carol K. Muranaka

/s/ Randall W. Roth
Randall W. Roth

/s/ Louise K.Y. Ing
Louise K.Y. Ing

/s/ Alan Van Etten
Alan Van Etten

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/s/ Ellen Godbey Carson
Ellen Godbey Carson

/s/ Jeffrey S. Portnoy
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/s/ Dale W. Lee
Dale W. Lee

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/s/ Gregory K. Markham
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/s/ Jeffrey H.K. Sia
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From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2238 on Feb 10, 2016 09:00AM
Date: Friday, February 05, 2016 2:16:53 PM

SB2238
Submitted on: 2/5/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Carroll Taylor	Individual	Oppose	Yes

Comments: My testimony previously submitted opposing SB 2239 is equally applicable to SB 2238 which I also oppose.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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February 9, 2016
Senate Committee on Judiciary and Labor
Wednesday, February 10, 2016, 9:00 a.m.
RE: Opposition to SB2238, SB2239, and SB2420

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

Thank you for the opportunity to submit testimony on this important issue. My name is Chantrelle Waiʻalae, I am a 3rd year law student at Richardson and I am against Senate Bills 2238, 2238, and 2420. These bills would move the Hawaiʻi state courts to popular election, which would mean the end of selecting judges based on merit. Popular election of judges increases the role of politics and money on the bench while deteriorating the public's confidence in the judiciary.

I believe Hawaiʻi currently has a robust and fair judicial selection process. It includes a nine-member judicial selection committee and senate confirmation for all judges and justices. Appointees are vetted and a decision is made on the merits, not political connections. Once appointed, judges are subject to disciplinary action if they are deemed unfit to sit on the bench.

I am concerned that the judicial election system proposed by these bills would endanger the fairness and impartiality of Hawaii judges. Forcing judges to raise money for their campaigns threatens to tilt the scales of justice as various interest groups may use the opportunity to shape the judiciary.

According to the non-partisan group, **Justice at Stake**, 87% of Americans believe that campaign contributions affect courtroom decisions. Courts need to stay fair and independent -- and private money involvement should be minimized. Instead of boosting public confidence in our court system, the involvement of campaign money through an election process will do just the opposite.

Judges are not politicians; they should be selected based on merit, not based on successful campaigning. Moreover, judges need to be able to protect the rule of law without fear of the political consequences.

This is why I urge you to oppose Senate Bills 2238, 2239, and 2420.

Thank you,

Chantrelle Waiʻalae

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February 8, 2016

The Honorable Gilbert S. C. Keith-Agaran, Chair
The Honorable Maile S. L. Shimabukuro, Vice-Chair
Senate Committee on Judiciary and Labor
415 S. Beretania Street
Honolulu, HI 96813

Re: SB 2238 and SB 2239 - Judicial Elections in Hawaii
Hearing: Wednesday, February 10, 2016 @ 9:00 a.m.
Conference Room 016
State Capitol

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Senate Judiciary and Labor Committee:

I am writing in strong opposition to any form of election of judges as proposed by SB 2238 and SB 2239. A judicial election system inevitably causes implicit bias, subjects judges to financial and political pressure, and prevents many of the strongest judicial candidates from seeking office, which is why the United States stands noticeably alone in holding judicial elections (also only in some states). Okay, I guess Bolivia also elects judges, but Bolivia is hardly considered a thriving democracy, or the hallmark of an uncorrupted, impartial government. With respect to those who may have had good intentions in sponsoring these bills, I don't think you can fully appreciate the absurdity of subjecting those holding the important position of judge in our third branch of government to a mass election without looking at the mockery that it has created in other states. Consider the following:

1. Campaigning. Every few years, judges are forced to campaign to the masses for their jobs. Whether through television, radio, newspaper ads, or as is particularly prevalent here in Hawaii, sign-waving on the street corners, judges will be forced to try to make themselves appealing to the general public. At its most concerning, that could affect how judges rule on cases before them – wishing to seem tough on crime, or champions of the environment, or supporters of big business, etc. The campaigning process is, as all of you know all too well, grueling, frustrating, and at times cruel and unfair. The mud-slinging and political backstabbing would undermine the public's confidence in the people we trust to serve in our judiciary.

2. Improper Influence. From political action committees, to unions, to big business, to environmental lobby groups…and the list goes on, the potential for outside influence to affect future judicial outcome is tremendous. And that should worry all of us. To campaign and win a judicial seat, judges will need money and those who give, as well as those who don't, have a very real and legitimate fear that supporting a judge or his opponent could affect the "justice" dispensed once the election is over. Even if judges are extremely careful not to allow campaign support and donations to affect their decision-making in the courtroom, the appearance of impropriety can never be fully avoided. No decision will be free from scrutiny that questions, rightly or wrongly, whether a judge was improperly influenced to render a particular judgment or hand down a particular sentence. It is that widespread belief that judges may be improperly influenced through political or financial pressure that damages judicial independence and faith in our judicial system.

3. Loss of Judicial Talent. If forced to endure a campaign and election system, I highly expect that many of our most talented, experienced, and highly qualified judges will not run for office. The uncertainty of an election, and the time, expense, and mockery of participating in the elections process will weed out many of the best candidates. Judicial candidates may be marked as too conservative, too liberal, too easy on crime, too hard on offenders, as siding with big business, or as bending to a particular lobby or group based on particular decisions that were rendered in complex cases based on a unique set of facts. What this ignores is that dispensing justice is difficult and complicated. Making the right decision in a case is neither easy nor, at times popular, but we expect a judge to make the right decision and not to be swayed by improper incentives or alliances. That isn't something that can be explained easily on a sign or in a 30-second ad. So, I expect that in many cases, judges will not even try – they simply won't run for office. Empirically this has been proven. In many states that have judicial elections, most of the judges run unopposed each year.

I appreciate that there may be a strong sentiment that "we have to put up with elections, so judges should too," and your feeling on this are not misplaced. It is a brutally arbitrary and cut-throat way to decide who should represent us. But the difference here is that judges are not representing us. They are protecting the rule of law and that job requires you to protect them from not only political pressure and influence, but also from the appearance of such improper influences. I urge you to consider the importance of that responsibility, and vote against SB 2238 and SB 2239.

I am happy to meet to discuss this further or to appear and give further testimony if that would be helpful. Aloha and mahalo for your service.

Sincerely,

By: _____
Craig P. Wagnild
2013 HSBA President
Partner, Bays Lung Rose & Holma

CPW:akk

TESTIMONY OF DAVID L. FAIRBANKS IN
OPPOSITION TO S.B. NO. 2239

Wednesday, February 10, 2016
9:00 a.m.
Conf. Rm 016

THIS **OPPOSITION** IS FOCUSED ON THE PROVISIONS OF THIS BILL THAT: (1) ELIMINATE THE HAWAII JUDICIAL SELECTION COMMISSION; (2) REQUIRE THE INITIAL ELECTION OF STATE JUDGES AND JUSTICES; (3) REDUCE THE TERMS FOR CIRCUIT COURT JUDGES, APPELLATE JUDGES AND JUSTICES OF THE HAWAII SUPREME COURT TO SIX (6) YEARS (FROM (10) YEARS); AND (4) REQUIRE CONSENT OF THE SENATE AFTER A PUBLIC HEARING FOR THE RETENTION OF ALL STATE JUDGES AND JUSTICES.

As a practicing trial lawyer (admitted 1968) and former member of the Hawaii Judicial Selection Commission (elected by the members of the Hawaii State Bar Association, 1995 – 2001, (Chair 2000)), I oppose the passage of S.B. 2239. Without adequate bases, explanation, study, rationale, justification or support the bill seeks to amend the Hawaii Constitution by: (1) eliminating the Judicial Selection Commission; (2) requiring the initial election of all judges and justices of the state courts; (3) reducing the term of Circuit Court judges, appellate judges, and justices of the Hawaii Supreme Court to 6 years (from the present 10 year term); and (4) requiring consent of the Senate, after a public hearing, for renewal of the term for all state judges and justices. These drastic changes to the existing law, at best, blur the separation of powers which is a fundamental and essential corner stone of our system of government, and at worst, improperly infringe upon that cornerstone. Similarly, these changes, at best, threaten the fundamental and essential principle of an independent judiciary, also a basic, cornerstone of our system of government, and at worst, constitute a violation of that fundamental and essential principle. Such drastic changes without a finding that

existing law and procedures do not work, and without appropriate and adequate study, justification and rationale borders on the irresponsible.

There is no basis or justification for eliminating the Judicial Selection Commission. I can say without reservation that my experience on the Commission demonstrates that it does work. Each Commissioner, no matter whether appointed or elected, had the same overriding duty, mission and goal: nominate the best, most qualified applicants. Each Commissioner was faithful to that mission and discharged that duty. Quite frankly, it is a system that is envied by other jurisdictions and organizations. While it does not totally eliminate outside or political influence (no system does or can), it minimizes that influence and helps protect and preserve an independent judiciary. At the very least, there need to be studies to clearly demonstrate that the present process does not work before taking such a drastic step.

S.B. No. 2239 requires the initial election of judges and justices and the renewal of terms by consent of the Senate after a public hearing. Again there is no finding that the current law and process does not work or is significantly failing, and no study has been performed or rationale provided for the radical changes requiring the initial election of judges. The bill merely cites various so-called "trends", a number of which are admittedly contradictory to each other, and then requires the initial election of all judges. Indeed, the bill cites to the so-called "quasi federal system" of initial appointment of judges by the executive branch and subsequent election but then proposes just the opposite process. Interestingly, the measure virtually eliminates the Executive Branch from the process, except for interim appointments. Rather than attempting to protect and preserve judicial independence and reducing outside or political influence, S.B No.

2239 appears to materially interfere with and erode judicial independence, increase outside and political influence in judicial selection and retention and blur the essential separation of powers between the Legislative and Judicial Branches of Government.

The reduction of the terms of Circuit Court judges, appellate judges and justices of the Hawaii Supreme Court to six (6) years is completely devoid of any rationale, justification or basis. Indeed, most scholars and experts on the subject maintain that it is essential that the term of office be long enough to protect the principle of judicial independence and allow judges to make decisions objectively and fairly without fear of reprisal, even if some decisions are unpopular. To arbitrarily reduce the term for our Circuit Court judges, appellate judges, and justices of the Supreme Court by almost fifty percent suggests an almost deliberate assault on the principle of judicial independence and a desire by the Legislative Branch of Government to exercise control over the Judicial Branch. That is contrary to the basic framework of our system of government. Again there is no study, data, or rationale presented to support the proposed reduction.

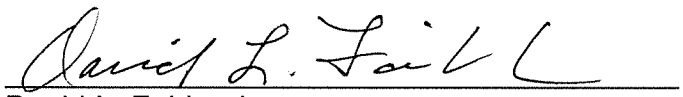
As with the other major provisions in the measure, S.B. No. 2239 provides no study, rationale or basis for requiring Senate consent after a public hearing for the renewal of terms for all judges and justices. There is no finding that the present system is inadequate, is fundamentally unsound, has failed, or needs changing, or that Senate consent is the most appropriate and best means of correcting a failed or failing system. Similarly, this process threatens, if not directly interferes with, the principle of an independent judiciary and appears designed to encourage or ensure the potential for outside or political influence in the retention process.

For all these reasons, I respectfully urge that S.B. No. 2239 not be passed.

For all these reasons, I respectfully urge that S.B. No. 2239 not be passed.

Thank you for considering my testimony.

In the event testimony is submitted on behalf of a group of former Judicial Selection Commission members, I fully support that testimony.



David L. Fairbanks

From:	Tmhifo
To:	JDLTestimony
Subject:	Testimony for Wed. Feb. 10, 2016, 9am hearing in Senate JDL Committe on SB 2239, SB 2248, SB 2420 and SB 2244 IN OPPOSITION TO ELECTIVE JUDICIARY AND RELATED FOUR BILLS
Date:	Friday, February 05, 2016 5:30:06 PM

February 5, 2016

To: The Honorable Gilbert Keith-Agaran, Chair of Senate JDL Committee and Members

From: Eden Elizabeth Hifo (retired first circuit court judge)

Re: Opposition to Senate Bills 2238 (Study on elective judiciary proposed constitutional amendment)
2239 (Proposing State Constitutional Amendment of Article VI to establish an Elective Judiciary and Abolish Merit Selection)
2420 (Proposing State Constitutional Amendment to Article VI, Section 3 to require State Senate confirmation of any JSC decision to retain a judge)
2244 (Reducing judges' retirement benefits)

Please accept this testimony in strong opposition to the above referenced bills, particularly S.B. 2239, which proposes to eliminate the merit selection of judges in our State and replace it with an elected judiciary. There are a myriad of reasons for keeping the merit selection process. It refines the list of applicants who meet adopted standards for competent judges, yet confines the Governor's selection of all jury trial and appellate judges to that vetted list while the Chief Justice is similarly empowered to appoint the district judges, all subject to senate confirmation. The proposal to elect our judges would inevitably create conflicts arising from the need for candidates to solicit and receive campaign contributions which would be made by the general public or superpacs or special interest groups, who may become parties in litigation, but most assuredly by attorneys who later appear on their clients' behalf before the judge(s) to whom the attorney contributed. These are not proceedings that are subject to legislative consensus thereby diminishing the effect of lobbyist or contributors' direct contact contemplated by the election process. These are bench and jury trials where the rulings and judgments must not be subject to actual bias or the appearance of impropriety. In contrast, the current system is based on the JSC checking on the competence and reputation of applicants through the applications, references and interviews plus individual inquiries of those in the legal community and on the bench to learn the merits of the applicant. In short, I urge you to ensure election politics are not infused into the judiciary branch of Hawaii.

An elected judiciary would upset the balance of power, diminishing the Governor's power of appointment (and those of the CJ as well). The CJ 's appointing powers make good sense for lower court judges because the applicants presumably will have established a reputation while practicing law that the bench and bar can provide as to who would be most qualified by temperament, candor, legal knowledge, reliability; those skills most in need and part of the JSC list of criteria for making its list that the general public is not likely to know or be able to learn absent isolated contact through their own cases or news reports of decisions. I submit that the years of the Hawaii judiciary's history sustain the wisdom of the current constitutional framework and respectfully urge that an elective judiciary not be established and that precious monetary resources not be spent to study a system that would not inure to the benefit of our citizens.

Finally, the basis for requiring senate confirmation upon a JSC decision to retain a judge would seem to interject a different level of scrutiny as seen in many judiciary committee confirmation hearings of current and past gubernatorial or CJ appointments. This does not seem necessary especially because all judge's

retention applications are publicized, the public may submit written testimony (as in Senate hearings) or appear before the JSC confidentially. Representatives of both chambers of the Legislature (4 our of the 9 members on the JSC) along with the other JSC members are available to receive, albeit confidentially, all manner of information from judiciary committee members and/or other senators. The entire JSC is charged with scrutinizing retention applications and that process does not preclude anyone who might otherwise have provided info to state senators. Absent a specific concern about any recent retention decisions, the additional layer of scrutiny does not appear warranted. Indeed, it would seem that the confidential process of the JSC would provide more protection to negative commentators than the public hearing process.

Thank you for the opportunity to comment. For the above reasons and with great deference to those who at constitutional conventions and threreafter formed and adopted the current structure of our State Constitution, with its valuable checks and balances, I respectfully urge your rejection of an elected judiciary and specifically urge your taking no further action on the above referenced bills, thereby not sending them to the Senate floor for a vote.

Aloha,

/signature/

_____

Eden Elizabeth Hifo

Edward H. Schulman

Attorney at Law

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Of Counsel: Mark Alan Hart, Esq.

February 4, 2016

Hawaii State Senator Gilbert S.C. Keith-Agaran
Chairman, Senate Committee on Judiciary and Labor
Hawaii State Capitol, Room 215
415 S. Beretania Street
Honolulu, Hawaii 96813

RE: Testimonial Letter of Opposition to Judicial Elections
(See SB#s 2238, 2239 and 2420)

Dear Senator Keith-Agarn:

Converting Hawaii's current judicial appointment/retention system to a "general election process" viz constitutional and statutory changes (see proposed SB 2238, SB 2239 and 2420), will, in my opinion, further politicize the judiciary and undermine its independence. One can only imagine the consequences of such a process given the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). Political opportunism will rule the day as political action committees (PACs) whose funding sources may remain anonymous attempt to 'pack' our courts.

Having practiced law for almost 45 years (admitted in California 1972 and Hawaii 1991), I can bear witness to the implications of political process on the judiciary. In California, the Governor nominates to the Courts of Appeal (CA) and Supreme Court. After a thorough vetting process the nomination is considered at a public hearing by a three-person panel consisting of the Chief Justice, the most senior presiding justice of the CA and the State Attorney General. Two aye votes are required for confirmation. The state legislature has no say. The terms for justices on the CA and Supreme Court are 12 years, subject to retention viz the general election process.[1]

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[1] Former California Supreme Court Chief Justice Rose Bird, along with then Associate Justices Cruz Reynoso and Joseph Grodin were voted out during a retention election in 1986 because of their opinions in cases involving capital punishment. Chief

Although California trial court vacancies are filled by the Governor with no need for either legislative or commission approval, when lower court terms expire vacancies are filled through the general election process. Those elections can and do become quite contentious, often pitting poorly qualified candidates with substantial financial resources against well experienced and thoughtful judges who have focused their time and energy on the extraordinary demands of being a judicial officer rather than on 'fund raising' to advance a particular political agenda. While judicial ethics preclude a sitting justice or judge from commenting on issues currently before the court or upon those likely to come before the court, opposition candidates seeking to unseat a current jurist are not similarly constrained.

Proposed changes to Hawaii's judicial appointment/retention system should be opposed by all concerned citizens who support an independent judiciary.

/S/ Edward H. Schulman
_____
Edward H. Schulman

Justice Bird, who has served for 10 years as the 25th Chief Justice of California, was the Court's first female justice and first female chief justice. She has been the only Chief Justice in California history to be removed from office by the voters.

Cruz Reynoso was a civil rights lawyer, a professor emeritus of law, and the first Chicano Associate Justice of the California Supreme Court (1982–87). He also served on the California Third District Court of Appeal. He served as vice-chairman of the U.S. Commission on Civil Rights from 1993 to 2004. In 2000, Reynoso received the Presidential Medal of Freedom, the United States' highest civilian honor, for his efforts to address social inequities and his public service.

Joseph Grodin, a graduate of Yale Law School and a recognized expert in labor law, practiced and taught labor law as well as served on the California Agriculture Labor Relations Board before his appointment to the California Supreme Court.

judges.4

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2239 on Feb 10, 2016 09:00AM
Date: Sunday, February 07, 2016 3:45:53 PM

SB2239
Submitted on: 2/7/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Ilana Waxman	Individual	Oppose	No

Comments: I am strongly opposed to this measure to amend the constitution to allow for the election of judges. Although in theory electing judges sounds more democratic than judicial appointments, in reality judicial elections simply open up the judicial process to an influx of special interest money. Indeed, Justice Don Willett of the Texas Supreme Court, who is himself an elected judge, described judicial elections as "a flawed system" and stated in an article in Atlantic Monthly that "[c]alling this system 'imperfect' is a G-rated description." A study by the American Constitution Society for Law and Policy found that campaign contributions have a measurable impact on the decisions made by elected judges, finding "a significant relationship between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters. The more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants appearing before them in court. Notably, the analysis reveals that a justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time." As a practicing attorney who represents injured workers against large corporations and insurance companies, I am deeply concerned about the possibility of opening up our state judicial system to the corrosive power of big money. I am also deeply concerned about the threat to minority rights, civil liberties, and the rights of criminal defendants presented by allowing judicial elections. Our constitutional system is set up so that judges are independent from the electorate and have the freedom to take positions in defense of the right of minorities even if they might be unpopular with the majority. This is fundamental to our system of civil liberties.

STARN • O'TOOLE • MARCUS & FISHER

A LAW CORPORATION

February 9, 2016

VIA E-MAIL: *JDLTestimony@Capitol.hawaii.gov*

Chairman Sen. Gilbert S.C. Keith-Agaran
Vice Chairman Sen. Maile S.L. Shimabukuro
Senate Committee on Judiciary and Labor
Hawaii State Capitol
415 S. Beretania Street
Honolulu, Hawaii 96813

Re: SB 2238: Relating to Judicial Elections

SB 2239: Proposing an Amendment to Art. VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges

Hearing Date: February 10, 2016
Hearing Time: 9:00 a.m.

Dear Senator Keith-Agaran and Senator Shimabukuro:

I am the Vice Chair of the American Judicature Society (**"AJS"**), and an attorney in private practice in Hawaii since 1971. I also served as a board member of "national" AJS before it terminated its operations in 2015. I submit this testimony in opposition to (1) SB 2239, which seeks to amend the Constitution of the State of Hawaii to require all justices and judges to be elected to serve six-year terms and that their retention to be confirmed by the Senate and (2) SB 2238 which seeks to make conforming amendments.

Although AJS "national" closed its doors in 2015, its mission to preserve the fairness, impartiality and effectiveness of our justice system is being continued through its successor entity and the AJS Hawaii Chapter. The AJS Hawaii Chapter continues to focus its efforts on improving the process of judicial selection, retention and accountability in the State of Hawaii.

Hawaii's system for its selection of justices and judges is merit based. Judges are chosen by a nonpartisan, nine-member Judicial Selection Commission, comprised of non-lawyers and no more than four lawyers, including members appointed by the Governor, the Senate President, the House Speaker, the Chief Justice of the Supreme Court of the State of Hawaii and the Hawaii State Bar Association. After recruiting and evaluating applicants for judgeships, the Judicial Selection Commission

submits the list of qualified applicants for Hawaii Circuit and Appellate Courts to the Governor, who, in turn, makes the final selection from the list provided by the Judicial Selection Commission. Those applicants who are selected for judgeships by the Governor must then undergo confirmation by the Senate. When their terms expire, those judges who seek to renew their terms must petition the Judicial Selection Commission and be evaluated by the Judicial Selection Commission.

AJS opposes both SB 2239 and SB 2238 because it would eliminate Hawaii's merit-based selection system for the nomination and retention of judges and justices and repeal the Judicial Selection Commission and instead move to an election system of justices and judges to six-year terms, with the consent of the Senate to subsequent judicial terms.

Because public expectation of receiving a fair hearing in the courts is core to the judicial system, it is crucial that judges be impartial and free of economic and political pressure. A judge's independence may be compromised if a judge must campaign to be nominated and elected. An elected judge may be weighed down with obligations to the people who helped the judge get elected and those attorneys who are qualified but who lack the proper political credentials may not make it to the bench. Selection of judges based on merit creates a larger pool from which the Judicial Selection Commission can choose.

As most candidates cannot afford to finance an election campaign on their own, they will need to raise the funds for their campaign, which they may derive from other attorneys, some of whom may appear before the judge. Therefore, this may raise questions about a judge's impartiality.

In urban areas, the number of candidates on the ballot may be so numerous that a voter may not be informed enough to make an intelligent decision. It would be detrimental to our judicial system if judges made rulings based on campaign promises and not the facts and the law.

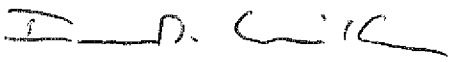
Even though merit selection does not eliminate politics from the selection process, it reduces the rule of political and special interests, emphasizing qualifications and experience, therefore, resulting in fewer unfit judges and lower disciplinary rates for merit-based judges than judicial elected judges.

Under the amendments proposed in SB 2239 and SB 2238, judges seeking judicial retention would be subject to a Senate hearing and therefore, public review of the cases decided by those judges during their prior terms. Controversial decisions involving high profile public figures or issues may be brought to light at a Senate retention / reconfirmation hearing, thereby negatively impacting judges seeking retention and compromise judicial independence. Additionally, Senate retention / reconfirmation

hearings may inject political factors into the process, thus impacting the decision-making behavior of judges who are nearing the end of their terms in that judges may be inclined to make decisions or adjust their judicial decisions in line with their retention constituency for fear of losing their judgeships.

For the reasons stated above, I oppose the amendments proposed in SB 2239 and SB 2238.

Very truly yours,



Ivan M. Lui-Kwan,
Individually as a board member of the
American Judicature Society

JAMES KAWASHIMA, ALC
700 Bishop Street, Suite 1700
Honolulu, Hawaii 96813
Phone: (808) 275-0300
Facsimile: (808) 275-0399

Facsimile Transmittal Cover Sheet

DATE: **February 9, 2016**

FROM: **James Kawashima**

PLEASE DELIVER TO:

NAME	COMPANY	FACSIMILE NO.
	Committee on Judiciary and Labor	**586-7348**

Total Pages: 4 (including this page)
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CLIENT/CASE#:

****

Remarks: **Re: Bill Nos.: SB 2238, SB 2239 and SB 2420**

Hearing Date: Wednesday, February 10, 2016
Time: 9:00 a.m.
Place: Conference Room 016
State Capitol
415 South Beretania Street

JAMES KAWASHIMA ALC

Sender's Information:
Direct: (808) 275-0304
E-mail: jk@ikalc.com

Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Members, Senate Committee on Judiciary and Labor

Re: Bill Nos.: SB 2238, SB 2239 and SB 2420

Hearing Date: Wednesday, February 10, 2016
Time: 9:00 a.m.
Place: Conference Room 016
State Capitol
415 South Beretania Street

Dear Senator Keith–Agaran, Senator Shimabukuro and Members of the Senate Committee on Judiciary and Labor:

This testimony is being submitted by a group of attorneys, all of whom are former members of the Judicial Selection Commission. They constitute the most experienced and well-respected members of the Hawaii State Bar and represent hundreds of years of experience in the practice of law in Hawaii. They bring to the table a wealth of knowledge and experience, unequaled among groups of this nature.

Information for this testimony was obtained through several research papers, including the following:

1. Judicial Independence: A Cornerstone of Democracy Which Must be Defended (American College of Trial Lawyers, September, 2006)

2. American College of Trial Lawyers White Paper on Judicial Elections (October, 2011)

3. Judicial Independence in Hawaii (League of Women Voters of Hawaii, July, 2003)

As the basis for the position that judicial independence requires that our judiciary be independent of any and all influences that may affect a judge's ability to be fair and impartial, I provide the following citation from the American College of Trial Lawyer's article on Judicial Independence:

> *"There is no liberty, if the power of judging be not separated from the legislative and executive powers."*
>
> – Montesquieu, Spirit of Laws (1752)
>
> A Frenchman thus concisely expressed what we Americans know: the best possible form of government is one built upon a foundation of separation of the legislative, executive and judicial functions. Judicial independence is a core value of such a system, our system, one that ensures our liberty.
>
> "Judicial independence" is an oft misunderstood phrase. Justice Randall Shepard, Chief Justice of the Indiana Supreme Court and President of the Conference of Chief Justices, puts it simply: "Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law."
>
> Chief Justice Michael Wolff of Missouri, in his 2006 State of the Judiciary address, elaborated eloquently:
>
> > "Independence," quite frankly, is both overused and misunderstood. It should not be interpreted, either by the public or by any judge, to mean that a judge is free to do as he or she sees fit. Such behavior runs counter to our oaths to uphold the law, and any attempt to put personal beliefs ahead of the law undercuts the effectiveness of the Judiciary as a whole. Better stated, "independence" refers to the need for courts that are fair and impartial when reviewing cases and rendering decisions. By necessity, it also requires freedom from outside influence or political intimidation, both in considering cases and in seeking the office of judge. Courts are not established to follow opinion polls or to try to discern the will of the people at any given time but rather are to uphold the law. The people rely on courts to protect their access to justice and to protect their legal rights. For the sake of the people, then, judicial independence must always be coupled with the second stated measure - accountability.

The foregoing represents the position of the members of this group of attorneys regarding the proposed legislation, SB 2238, SB 2239 and SB 2420. Essentially, having an elected judiciary runs counter to all of the principles stated above and would eliminate a system of judicial selection and retention that has proved to work well and without interference from outside influences.

Hereby submitted is testimony from members Raymond J. Tam and James Kawashima, members of the International Academy of Trial Lawyers (IATL), a respected trial honorary that has been responsible for the bringing of ten government attorneys from China to Hawaii and the rest of the United States, for the past over 21 years. This highly selective group of lawyers from China are exposed to our American legal system, including all aspects of civil and criminal law and especially relating to the selection of judges.

During the period that these attorneys from China visited us in Hawaii, Mr. Tam and Mr. Kawashima were responsible for lectures for these lawyers on our judicial selection system. In attendance at those lectures were prominent trial attorneys from other states, including Florida, Texas and California.

After explaining in detail how our judges are selected, appointed and retained, to a person, the attorneys from China were very impressed and offered that our system of judicial selection and retention was the best that they had learned about in their travels and education. Also to a person, the attorneys from the other states that were in attendance at these lectures similarly acknowledged our system as being far superior than the system in their states, all of which had elected judges. The weaknesses of an elected judge system were related, especially with regard to judges having to raise money and run for popular elections, all of which made it difficult, if not impossible, to exercise total judicial independence.

More testimony will be provided at the hearing on February 10, 2016.

/s/ Sidney K. Ayabe Sidney K. Ayabe	/s/ James J. Bickerton James J. Bickerton	/s/ John S. Edmunds John S. Edmunds
/s/ David L. Fairbanks David L. Fairbanks	/s/ Rosemary T. Fazio Rosemary T. Fazio	/s/ William A. Harrison William A. Harrison
/s/ Susan Ichinose Susan Ichinose	/s/ Shelton G.W. Jim On Shelton G.W. Jim On	/s/ James Kawashima James Kawashima
/s/ Walter S. Kirimitsu Walter S. Kirimitsu	/s/ Bert T. Kobayashi, Jr. Bert T. Kobayashi, Jr.	/s/ James E.T. Koshiba James E.T. Koshiba
/s/ Lawrence S. Okinaga Lawrence S. Okinaga	/s/ Arthur Y. Park Arthur Y. Park	/s/ Warren Price, III Warren Price, III
/s/ Jeffrey S. Portnoy Jeffrey S. Portnoy	/s/ Raymond J. Tam Raymond J. Tam	/s/ Thomas R. Waters Thomas R. Waters

/s/ Raymond J. Tam
RAYMOND J. TAM
Chair
Dated: February 9, 2016

From: Kevin
To: JDLTestimony
Subject: Testimony Re: SB 2238, SB 2239, SB 2420
Date: Monday, February 08, 2016 8:46:26 AM

I am in strong opposition of SB2238, SB2239 and SB2420, which in my humble opinion erodes the separation of powers which our government is based upon and is an essential part of checks and balances of our government system.

As a litigation attorney, it very important to our clients that judicial decisions made in cases are made by qualified and impartial judges that are free from political influence. Judges need to be able to make their decisions based upon the law and the facts presented and should not be afraid of political backlash when making a difficult and sometimes unpopular decision.

All three bills have a negative impact on this vital part of the judiciary's role in our system of government. Thank you for your attention and consideration.

Kevin T. Morikone, Esq.
Hosoda & Morikone, LLC
500 Ala Moana Blvd., Ste. 3-499
Honolulu, Hawaii 96813

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2239 on Feb 10, 2016 09:00AM
Date: Sunday, February 07, 2016 4:17:38 PM

SB2239
Submitted on: 2/7/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Madelyn Denbeau	Individual	Oppose	No

Comments: Judicial elections have not worked well in other states. I oppose creating a system for judicial elections in Hawaii.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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February 9, 2016
Senate Committee on Judiciary and Labor
Wednesday, February 10, 2016, 9:00 a.m.
RE: Oppose SB2238, SB2239, and SB2420

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

Thank you for the opportunity to submit testimony on this important issue. My name is Mahesh Cleveland. I am a first-year law student at the William S. Richardson School of Law and I am writing to testify **STRONGLY AGAINST** Senate Bills 2238, 2238, and 2420. These bills would move the Hawaii state courts to popular election, which would mean the end of selecting judges based on merit. Popular election of judges increases the role of politics and money on the bench while deteriorating the public's confidence in the judiciary.

I believe Hawaii currently has a robust and fair judicial selection process. It includes a nine-member judicial selection committee and senate confirmation for all judges and justices. Appointees are vetted and a decision is made on the merits, not political connections. Once appointed, judges are subject to disciplinary action if they are deemed unfit to sit on the bench.

I am concerned that the judicial election system proposed by these bills would endanger the fairness and impartiality of Hawaii judges. Forcing judges to raise money for their campaigns threatens to tilt the scales of justice as various interest groups may use the opportunity to shape the judiciary.

According to the non-partisan group, **Justice at Stake**, 87% of Americans believe that campaign contributions affect courtroom decisions. Courts need to stay fair and independent -- and private money involvement should be minimized. Instead of boosting public confidence in our court system, the involvement of campaign money through an election process will do just the opposite.

Judges are not politicians; they should be selected based on merit, not based on successful campaigning. Moreover, judges need to be able to protect the rule of law without fear of the political consequences.

This is why I urge you to oppose Senate Bills 2238, 2239, and 2420.

Sincerely,

Mahesh Cleveland
1503 Liholiho St. Apt. 504
Honolulu, HI 96822
clevelan@hawaii.edu
(808) 226-7657

February 8, 2016

To: The Honorable Gilbert Keith-Agaran, Chair
Senate Judiciary and Labor Committee

From: Marie N. Milks, Judge (retired)

Re: SB2239 and SB 2420

I have been retired from the Hawaii State Judiciary since 2004 and although the proposed legislation has no impact upon me, I am a member of the Hawaii State Bar Association and have a deep and abiding interest in a strong and independent judiciary.

For several years, I attended the National Judicial College as student and faculty. I have been most proud of the respect and admiration that other jurists have had for our system of judicial selection. We have been the role model for a non-elective process.

While I agree that a judge should be mindful of the public's interest in a fair and just legal process, it is important for a judge to adhere to the rule of law and both the Hawaii and United States Constitutions. And, with as many controversial measures that confront a judge in matters, big and small, no judge should have to be faced with the subtle influence that election of judges intimates.

We do not have a perfect process. But we have a process that allows judges the independence that has been contemplated and fostered since the birth of our nation.

I strongly urge you and the Committee to carefully consider the negative impact that the election of judges poses, in any form - whether initially or by public ballot after an initial appointment.

Thank you for allowing my position to be stated.

February 7, 2016

Senate Committee on Judiciary and Labor
Wednesday, February 10, 2016, 9:00 a.m.

RE: Opposition to SB2238, SB2239, and SB2420

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

Thank you for your service to our community. I am a third-year student at the William S. Richardson School of Law, and I write in opposition to SB2238, SB2239, and SB2420. These proposals would result in an infusion of politics into judicial selection and retention processes.

SB2238 and SB2239 would undermine the judiciary's independence and harm the community. An ethical framework for judicial elections would be difficult for our state to police and increase the likelihood of judicial misconduct.[1] It is important to consider that elected judges are disciplined at higher rates and for more serious crimes than appointed judges,[2] and elected judges are substantially harsher on parties in criminal matters.[3] Campaign financing would also lead many in the community to question the judiciary's independence and leave judges subject to attacks from those with deep pockets and political agendas.[4]

SB2420 would undermine the ability of the Judicial Selection Committee ("JSC") to make well-informed judicial retention decisions. The JSC reviews confidential comments from the community, bar members, and other judges that would not be available to the Senate during its proposed review. Judges are able to respond to JSC retention proceedings because they are confidential; however, a judge would not be able to respond publicly before the Senate. Politics will also be further infused into retention decisions if consent power is consolidated in the Senate, for retention decisions are reached with input from members designated by the other legislative body, the executive branch, the judicial branch, and the state's bar.

I write in oppossition to SB2238, SB2239, and SB2420 for the aforementioned reasons.

Sincerely,

Matthew Weyer

---

[1] *See Williams-Yulee v. The Florida Bar*, 135 S.Ct. 1656 (2015).
[2] Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline*, *available at* http://www.judicialselection.us/uploads/documents/Judging_the_Quality_of_Judicial_Sel_8EF0DC3806ED8.pdf.
[3] Erik Opsal, *New Analysis: Judicial Re-Election Pressures Tied to Harsher Criminal Sentencing*, COMMON DREAMS (Dec. 2, 2015, 11:30 a.m.), http://www.commondreams.org/newswire/2015/12/02/new-analysis-judicial-re-election-pressures-tied-harsher-criminal-sentencing.
[4] *Koch Brothers Set Sights on Florida Supreme Court Justices*, FLORIDA CENTER FOR INVESTIGATIVE REPORTING (Oct. 1, 2012), http://fcir.org/2012/10/01/koch-brothers-set-sights-on-florida-supreme-court-justices/.

February 8, 2016
Senate Committee on Judiciary and Labor
Wednesday, February 10, 2016, 9:00 a.m.
RE: Opposition to SB2238, SB2239, and SB2420

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

Thank you for the opportunity to submit testimony on this important issue. My name is Mirjam Supponen I am a 2nd year law student at Richardson and I testify against Senate Bills 2238, 2238, and 2420. These bills would move the Hawaii state courts to popular election, which would mean the end of selecting judges based on merit. Popular election of judges increases the role of politics and money on the bench while deteriorating the public's confidence in the judiciary.

I believe Hawaii currently has a robust and fair judicial selection process. It includes a nine-member judicial selection committee and senate confirmation for all judges and justices. Appointees are vetted and a decision is made on the merits, not political connections. Once appointed, judges are subject to disciplinary action if they are deemed unfit to sit on the bench.

I am concerned that the judicial election system proposed by these bills would endanger the fairness and impartiality of Hawaii judges. Forcing judges to raise money for their campaigns threatens to tilt the scales of justice as various interest groups may use the opportunity to shape the judiciary.

According to the non-partisan group, **Justice at Stake**, 87% of Americans believe that campaign contributions affect courtroom decisions. Courts need to stay fair and independent -- and private money involvement should be minimized. Instead of boosting public confidence in our court system, the involvement of campaign money through an election process will do just the opposite.

Judges are not politicians; they should be selected based on merit, not based on successful campaigning. Moreover, judges need to be able to protect the rule of law without fear of the political consequences.

This is why I urge you to oppose Senate Bills 2238, 2239, and 2420.

nTestimony to the Senate Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

Wednesday, February 10 2016, 9:00 am
State Capitol, Conference Room 016

By
Momi Cazimero

Senate Bills No. 2238 and 2239

MY NAME is Momi Cazimero. I am here to speak against Senate Bill No. 2238 and 2239.

I AM a businesswoman and community advocate. I established my graphic design company in 1972, and after "graduating" from PTA, I served on the UH Board of Regents, Queen's Medical Center, and many other private and government boards.

I also committed 33 years to the judiciary, albeit, as a citizen. I served on the State Judicial Selection Commission (1983-1989); American Judicature Society Hawaii Chapter (1997-2008); and have served on the Judicial Evaluation Review Panel since 2000. At the National level, I served on the American Judicature Society (AJS) Board of Directors (2003-2009); and the AJS National Advisory Board (2009-2014).

I SPEAK in opposition to the election of judges. Elections are political. Elections are a "group" phenomenon that is dependent on acceptance—as it should be—in a democracy of representation. On the other hand, the most critical concept for the court is INDEPENDENCE. Decisions of the court must be based on facts, on fairness, and on legal merits and precedence. Decisions of the court should not be driven by fear of losing votes when judgments are considered "unpopular".

The Judicial Selection Commission (JSC) was created to replace a political process in favor of a merit-based process of selecting judges. To ensure an independent court, the JSC merit selection rules guide the screening process in distinguishing and identifying the most qualified applicants. The commission is granted unique and privileged access to personal and professional information. No other government official is held to the same scrutiny that judges must face in order to qualify for appointments. Further, the Governor or the Chief Justice has the authority to select the individual whom they feel will best contribute to the court. This comprehensive process in the investigation and analysis of judges could never be applied in an election.

TO CORROBORATE my position I want to quote from a paper delivered by Professor Erwin Chemerinsky, Dean of the University of California, Irvine School of Law. He delivered his paper to the Roscoe Pound Foundation Forum for State Court Judges in Washington, D.C. (Trial, July 1998)

"Increasingly, state court judges are being targeted for particular rulings and are being ousted from office for their decisions. Throughout the country, the costs of judicial elections are skyrocketing, requiring judicial candidates to raise growing amounts of money, especially from

attorneys who may represent clients with cases that will come before the successful candidates, as well as from potential litigants themselves." (Unquote)

I attended many national meetings while serving on the AJS Boards. Over time I witnessed the transition from principled concepts such as, "Wrongful Convictions", to the reality of facing elections. I was always proud to have these national members refer to the wisdom of Hawaii's merit selection process with envy.

WHILE I AM against election of judges, I believe in vigilance and making improvements. Steps have been taken to improve our courts.

I have served on the Judicial Evaluation Review Panel since September 2000. The panels review judges every 2 years. "Sanitized" surveys of the bar are the basis of the review for the purpose of improving the performance of judges. On a broader scale, deliberations of the American Judicature Society task forces and Citizen Conferences have led to improvements over the past 36 years.

THERE IS A PROVEN history for why we have three branches of government. It is democratic and balanced. Where the Executive and Legislative branches are elected to remain relevant through changing times, the Judiciary is a branch that remains constant from one person to the next; and faithful to the principles we uphold as a society. Please—DO NOT pass this bill.

THANK YOU.

Momi Cazimero 222 Kawaikui Place Honolulu, HI 96821 <Cazimero.momi@gmail.com>

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB2239 on Feb 10, 2016 09:00AM*
Date: Tuesday, February 09, 2016 12:37:20 PM

SB2239
Submitted on: 2/9/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Nancy Davlantes	Individual	Oppose	No

Comments:

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From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2239 on Feb 10, 2016 09:00AM
Date: Tuesday, February 09, 2016 11:31:24 AM

SB2239
Submitted on: 2/9/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Rebecca Copeland	Individual	Oppose	No

Comments: Strong opposition to this Bill.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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TESTIMONY IN OPPOSITION TO:

SB 2239 PROPOSING AN AMENDMENT TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII RELATING TO THE SELECTION AND RETENTION OF JUSTICES AND JUDGES.

SB 2238 RELATING TO JUDICIAL ELECTIONS.

SB 2420 PROPOSING AN AMENDMENT TO ARTICLE VI, SECTION 3, OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE TIMEFRAME TO RENEW THE TERM OF OFFICE OF A JUSTICE OR JUDGE AND REQUIRE CONSENT OF THE SENATE FOR A JUSTICE OR JUDGE TO RENEW A TERM OF OFFICE.

Committee on Judiciary and Labor - Wednesday, February 10, 2016 · 9:00 noon · Rm 016 · State Capitol

Dear Chair Keith-Agaran and Ladies and Gentlemen of the Senate Judiciary and Labor Committee:

I am Riki May Amano, former circuit court judge of the Third Judicial Circuit, State of Hawai'i. Please accept this writing as my testimony in **strong opposition** to SB 2238, 2239 and 2420; to wit, bills relating to: judicial elections; selection and retention of justices and judges; and adding senate confirmation for retention of judges and justices; respectively.

Changing our current selection of judges and justices from merit selection to elections would be a giant step backward in the progression and growth of justice in America. The American Judicature Society ("AJS"), an independent nonpartisan organization of judges, lawyers, and interested members of the public, has a lot of material on this issue. Since 1913, the AJS has sought to improve the American justice system and they continue to actively study and make recommendations "secure and promote an independent and qualified judiciary and fair system of justice." Attached to this testimony is a copy of the chronology of merit selection progression in America. http://www.judicialselection.us/uploads/documents/Merit_Selection_Progression_PDF_1F7A8597AE14E.pdf

Hawai`i is one of the most progressive states in the country when it comes to judicial models. I believe our utilization of the merit selection process is largely responsible for our status. Attached is another AJS article on why merit selection produces the best judges, "Merit Selection: Best Way to Choose Best Judges." http://www.judicialselection.us/uploads/documents/ms_descrip_1185462202120.pdf

Hence, changing Hawai`i's selection of judges from merit to election is inconsistent with best practices. With its history of noble and fair sovereign governance,

keeping merit selection of judges and justices is essential to maintaining an impartial, exemplary judiciary.

On the issue of senate confirmation of judicial retention, I oppose this measure because it creates an unnecessary and inappropriate level of review. Being a judge is an honor and a privilege; it is also an extremely difficult undertaking. No one goes to the bench completely prepared for the challenges. Frankly, it takes several years to really get a handle on all of the aspects of the job. I agree that retention review is an important aspect of accountability and best practices. The criteria for retention review should be consistent, expertly created and as neutral as possible. Senate confirmation of judicial retention would not be a good forum for that important function.

I respectfully request that you vote against these proposals.

DATED: February 9, 2016.

Sincerely,

Judge Riki May Amano (ret.)

Chronology of Successful and Unsuccessful
Merit Selection Ballot Measures

(NOTE: Unsuccessful efforts are in italics. Chronology does not include constitutional amendments authorizing merit selection for filling only interim vacancies, and only statewide efforts are included.)

1940 (Missouri)
The Nonpartisan Selection of Judges Court Plan was approved by the voters. The measure had been placed on the ballot through an initiative petition. The plan called for judges of the supreme court, courts of appeals, and circuit and probate courts in the city of St. Louis and in Jackson County (Kansas City) to be nominated by the governor from a list of three persons submitted by a judicial nominating commission. Judges would stand for retention in the first general election after twelve months in office.

1958 (Kansas)
Constitutional amendment provides for merit selection of supreme court justices. Candidates are initially screened by the supreme court nominating commission, which recommends three candidates to the governor. Justices stand for retention every six years.

1959 (Alaska)
Merit selection was provided for in the original constitution.

1962 (Iowa)
Merit plan established for selection of all judges.

1962 (Nebraska)
Merit selection is adopted by constitutional amendment for judges of the supreme court and district court. Judges stand for retention in the next general election held more than three years after their appointment and every six years thereafter.

1966 (Colorado)
Voters approved a constitutional amendment adopting merit selection of Colorado judges. Judges are appointed by the governor from a list of nominees submitted by a judicial

nominating commission, and they stand for retention at the next general election after two years in office. Upon retention, judges of the supreme court, district courts, and county courts serve ten, six, and four-year terms, respectively.

1967 (Oklahoma)
Following scandals involving three supreme court justices, voters approved two constitutional amendments that would insulate judicial selection from direct partisan politics. These amendments changed elections for district court judges from partisan to nonpartisan and established merit selection for the supreme court and court of criminal appeals. Interim vacancies on the district court would also be filled through merit selection.

1969 (Pennsylvania)
Following the constitutional convention of 1968, the merit selection question was submitted to the voters in the 1969 primary election. The proposal failed by a narrow margin due to the opposition of powerful party leaders.

1970 (Illinois)
A constitutional convention was convened in 1969 to draft a new constitution. The question of judicial selection was submitted to voters as a separate proposition. Voters were given the choice between Proposition 2A, calling for the partisan election of judges, or Proposition 2B, calling for judicial merit selection. Although Proposition 2B carried in several counties, including Cook County, it was defeated statewide by 146,000 votes.

1970 (Indiana)
The judicial article was amended to establish three constitutional courts: the supreme court, the court of appeals, and the circuit court. Appellate court judges would be appointed by the governor from a list of candidates submitted by a judicial nominating commission and would retain their seats in retention elections. Appellate court judges would serve ten-year terms. Circuit court judges would be chosen in partisan elections and would serve six-year terms.

1972 (Kansas)
Constitutional amendment provides the option of merit selection of district court judges. District court judges chosen through merit selection stand for retention at the next general election after at least one year in office. Upon retention, they serve four-year terms.

1972 (Nevada)
Voters rejected a proposed constitutional amendment calling for merit selection and retention of judges.

1972 (Wyoming)
Voters approved a constitutional amendment creating the judicial supervisory commission (now known as commission on judicial conduct and ethics) and the judicial nominating commission. Judges of the supreme court and district court would now be appointed by the governor from a list of candidates submitted by the judicial nominating commission. Judges

would run in a retention election after at least one year in office, with supreme court justices subsequently serving eight-year terms and district court judges serving six-year terms. The amendment also established a mandatory retirement age of 70.

1974 (Arizona)
Through Proposition 108, merit selection was established for the supreme court, court of appeals, and superior court in counties with 150,000 or more people.

1974 (Vermont)
Voters approved a constitutional amendment creating a merit selection system for Vermont judges. The judicial nominating board submits the names of qualified candidates for appointment to the governor, whose selection must be confirmed by the senate. Judges serve six-year terms, after which they must be retained by a majority vote of the general assembly.

1976 (Florida)
Voters approved a constitutional amendment calling for merit selection and retention of appellate judges. The reform effort was spearheaded by Governor Askew, Chief Justice Overton, and State Representative D'Alemberte.

1976 (North Dakota)
Voters approved a constitutional amendment establishing a judicial nominating committee to recommend candidates to fill interim vacancies. The legislature did not create the judicial nominating commission until 1981. Voters had rejected similar amendments in 1966 and 1968.

1977 (New York)
Voters approved a constitutional amendment calling for merit selection of judges of the court of appeals.

1977 (Tennessee)
Voters rejected by a margin of 55% to 45% a proposal to include the Tennessee Plan in the state constitution.

1978 (Florida)
Voters rejected a constitutional amendment that would have extended merit selection and retention to trial court judges.

1978 (Hawaii)
Judicial selection commission created. (Already had gubernatorial appointment.)

1978 (Oregon)
Voters rejected a proposed constitutional amendment calling for merit selection of judges.

1980 (Arkansas)
Constitutional convention held to draft new constitution, including improved judicial article that

provided for nonpartisan elections with option for merit selection. New constitution was rejected by voters.

1980 (South Dakota)
Constitutional amendment established a merit selection process to fill all vacancies on the supreme court and to fill interim vacancies on the circuit court. Prior to the passage of the amendment, a working relationship had developed between the judicial qualifications commission and the governor's office whereby most of the governor's judicial appointees were selected from lists submitted by the commission.

1985 (Utah)
Voters approved a new judicial article, which established merit selection as the exclusive method of choosing judges of courts of record. Judges would be nominated by the commission, appointed by the governor, confirmed by the senate, and retained through unopposed (retention) elections.

1986 (Connecticut)
Judicial selection commission created by constitutional amendment. (Already had gubernatorial appointment system.)

1987 (Ohio)
Issue 3, a ballot initiative to adopt merit selection for appellate judges, was defeated by voters by a 2 to 1 margin.

1988 (Nevada)
Voters rejected a proposed constitutional amendment calling for merit selection and retention of judges.

1988 (New Mexico)
New Mexico voters approved Amendment 6, which established a hybrid system of judicial selection. Vacancies would be filled by the governor from a nominating commission list. Appointees would run in contestable partisan elections in the next general election and in retention elections thereafter.

1989 (Louisiana)
Governor Roemer appointed a task force on judicial selection to consider judicially mandated remedies to violations of the Voting Rights Act in several judicial circuits and districts. The task force recommended three alternatives: an elective plan with modifications in the problem circuits and districts, a merit selection plan, and a hybrid appointive/elective plan. The legislature also created ad hoc nominating commissions to recommend candidates for interim vacancies to the governor for appointment. The governor would select commission members from lists of names submitted by legislators in districts where the vacancies occurred. However, these proposed amendments were soundly defeated in an October referendum election.

1994 (Rhode Island)
In June 1994, the legislature approved a merit selection system for lower court judges. A constitutional amendment providing for merit selection of supreme court justices was approved by the electorate by well over a two-to-one margin in November 1994.

2000 (Florida)
According to a 1998 constitutional amendment, the option of merit selection and retention of trial judges was submitted to voters in each county, but it was overwhelmingly rejected in every jurisdiction. The average affirmative vote was 32%.

2004 (South Dakota)
Voters rejected by a 62-38 margin a proposed constitutional amendment calling for merit selection of circuit court judges.

2010 (Nevada)
Voters rejected by 58-42 margin a proposed constitutional amendment calling for merit selection, retention elections (with 55% voter approval required), and judicial performance evaluation.

Merit Selection: The Best Way to Choose the Best Judges

What is "merit selection" of judges?
Merit selection is a way of choosing judges that uses a nonpartisan commission of lawyers and non-lawyers to locate, recruit, investigate, and evaluate applicants for judgeships. The commission then submits the names of the most highly qualified applicants (usually three) to the appointing authority (usually the governor), who must make a final selection from the list. For subsequent terms of office, judges are evaluated for retention either by a commission or by the voters in an uncontested election.

What "merit selection" isn't.
Merit selection is not a system that grants lifetime judgeships, like the federal system. While details differ from state to state, most merit selection systems have a provision for appointed judges to face the voters after they have established a judicial record.

Merit selection is not a system that ensures the total elimination of politics from judicial selection. But merit selection does minimize political influence by eliminating the need for candidates to raise funds, advertise, and make campaign promises, all of which can compromise judicial independence.

Why is it called "merit selection"?
It is called "merit selection" because the judicial nominating commission chooses applicants on the basis of their qualifications, not on the basis of political and social connections.

Who picks the commissioners?
Commissioners are usually chosen by panels of public officials, attorneys, and private citizens. The panels may include the governor, the attorney general, judges of the state's highest court, bar association officers, private citizens, and in some instances, members of the state legislature.

What's wrong with electing judges? Isn't that the democratic way?
What's democratic about having to choose from more than 100 candidates to fill 40-odd judicial seats, as voters in one urban area did recently? Democracy requires an informed choice, and with the large number of candidates in some areas, it is impossible for even the best-intentioned voter to be well informed. At the same time, in many jurisdictions, candidates run unopposed and the voter has no choice at all.

Other problems arise in judicial elections. Public expectation of getting a fair hearing in the courts is a cornerstone of the judicial system, so it is essential that judges be impartial and free of economic and political pressure. But in many states a candidate has to campaign first to get nominated and then to get elected. This can compromise a future judge's independence. Some problem areas are:

Getting nominated
In partisan election states, political credentials come first. Campaign work in previous party primaries and elections, support of party functions, fundraising, and precinct work may have more

to do with who the party slates for a judgeship than how good a judge the candidate will be. A Pennsylvania judge, who ran (and won) in a partisan election, said this about party-controlled selection of judges:

> "Since a judicial candidate brings little strength to the ticket but is likely to rise or fall with the fortunes of the other candidates, it is natural for a party leader to conclude that it doesn't much matter who the candidate (for judge) is, so long as he or she will not HURT the ticket. From this conclusion it is a short step to awarding the nomination as a political favor, with little reference to qualifications."

In many states that is precisely what judgeships are: political favors. An elected judge can carry to the bench a load of obligations to those who helped him or her get there. At the same time, many well-qualified attorneys without the proper political credentials never get to the bench. Merit selection increases the pool from which the nominating commission can choose.

Getting money

Because most candidates can't afford to personally finance their election campaigns, they have to raise the money they need. Much of this money comes from attorneys, and some of them will be appearing in front of those judges. This relationship can raise questions about the judge's impartiality. How would you like it if your opponent in a lawsuit were represented by someone who gave $500 to help the judge get elected?

Getting elected

In many urban areas there are so many candidates on the ballot that no voter can be informed enough to make intelligent choices. Many rural areas are controlled by one party or the local bar association, and the person they put on the ballot is assured of election; in this case the voters have virtually no choice. And, judicial campaigns don't help the voters choose either. Ethical rules say judges and judicial candidates can't make traditional campaign promises—like promising to decide certain cases a certain way. It would undermine our belief in the judicial system if we had judges making rulings based on campaign promises, not facts and the law. Since candidates can make only general statements like, "I believe in law and order," judicial campaigns are usually meaningless and uninformative.

In states with truly nonpartisan elections, candidates don't have to rely on political credentials or the support of a political party. All they have to do is file to get on the ballot (in some cases they must present a petition with a minimum number of signatures); yet, there is no guarantee of even minimum competence. They still must raise money to finance their campaigns, and participate in the campaign process. And in some states nonpartisan candidates are tacitly, if not openly, endorsed by political parties.

So, in practice, the elective system, whether partisan or nonpartisan, is not more democratic. Traditional campaign rhetoric and promises have no role in judicial elections, so voters have little or no information on which to base their choices. A process that often requires proven party loyalty to get slated, forces candidates to be fundraisers, and makes them run in campaigns where no issues can be raised is not the best way to choose our judges.

Why is merit selection any better?

- Merit selection not only sifts out unqualified applicants, it searches out the most qualified.
- Judicial candidates are spared the potentially compromising process of party slating, raising money, and campaigning.
- Professional qualifications are emphasized and political credentials are de-emphasized.

- Judges chosen through merit selection don't find themselves trying cases brought by attorneys who gave them campaign contributions.
- Highly qualified applicants will be more willing to be selected and to serve under merit selection because they will not have to compromise themselves to get elected.

How will women and minorities fare under a merit selection system?
Women and minorities do as well under merit selection as they do under other selection systems. A recent study showed that women and minorities were just as likely to become appellate judges through merit selection as they were through other processes.

How are merit selection judges held accountable?
After an initial term of office, judges are evaluated on the basis of their performance on the bench by a retention commission or by the voters in an uncontested retention election. Judicial performance is similarly re-evaluated for each subsequent term. This provides an opportunity to remove from office those who do not fulfill their judicial responsibilities.

Where is merit selection operating now?
Two thirds of the states and the District of Columbia select some or all of their judges under the merit system.

THE SENATE
THE TWENTY-EIGHTH LEGISLATURE
REGULAR SESSION OF 2016

COMMITTEE ON JUDICIARY AND LABOR
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

BILL NO. SB2238, relating to judicial elections

BILL NO. SB2239, proposing an amendment to Article VI of the Constitution of the State of Hawaii relating to the selection and retention of justice and judges; and

BILL NO. 2420, proposing an amendment to Article VI, Section 3, of the Constitution of the State of Hawaii to amend the timeframe to renew the term of office for a justice or judge and require consent of the Senate for a justice or judge to renew a term of office.

Date: Wednesday, February 10, 2016
Time: 9:00 a.m.
Place: Conference Room 016
State Capitol
415 South Beretania Street

Testimony of Rosemary T. Fazio In Opposition To SB2238, SB2239 and SB2420

Dear Chair, Vice Chair and members of the Senate Committee on Judiciary and Labor:

Thank you for the opportunity to submit testimony in opposition to Senate Bills 2238, 2239 and 2420.

I was privileged to serve on the JSC from 2003 – 2009 and served as Chairperson during the last two years of my term. That experience left me with great respect for the process.

This testimony supplements opposition testimony to be submitted by me and other attorneys who previously served on the JSC.

The proposed legislation would unfortunately erode public confidence in the Judiciary. Furthermore, open debate in the Legislature regarding retention of a particular judge is not the proper forum for reviewing judicial performance. JSC's decisions regarding retention are based upon numerous confidential evaluations and recommendations. If the retention process were to become public, that would have a chilling effect on the willingness of resource people to participate in the retention process, and have a chilling effect upon the willingness of highly qualified persons to become judges.

Thank you for the opportunity to present testimony on this important issue.

February 9, 2016
Senate Committee on Judiciary and Labor
Wednesday, February 10, 2016, 9:00 a.m.
RE: Opposition to SB2238, SB2239, and SB2420

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and Esteemed Committee Members:

Thank you for the opportunity to submit testimony on this important issue. My name is Ross Uehara-Tilton. I am a Second year law student at Richardson and I testify **AGAINST** Senate Bills 2238, 2238, and 2420. These bills would move the Hawaii state courts to popular election, which would mean the end of selecting judges based on merit. Popular election of judges increases the role of politics and money on the bench while deteriorating the public's confidence in the judiciary.

I believe Hawaii currently has a robust and fair judicial selection process. It includes a nine-member judicial selection committee and senate confirmation for all judges and justices. Appointees are vetted and a decision is made on the merits, not political connections. Once appointed, judges are subject to disciplinary action if they are deemed unfit to sit on the bench.

I am concerned that the judicial election system proposed by these bills would endanger the fairness and impartiality of Hawaii judges. Forcing judges to raise money for their campaigns threatens to tilt the scales of justice as various interest groups may use the opportunity to shape the judiciary.

According to the non-partisan group, **Justice at Stake**, 87% of Americans believe that campaign contributions affect courtroom decisions. Courts need to stay fair and independent -- and private money involvement should be minimized. Instead of boosting public confidence in our court system, the involvement of campaign money through an election process will do just the opposite.

Judges are not politicians; they should be selected based on merit, not based on successful campaigning. Moreover, judges need to be able to protect the rule of law without fear of the political consequences.

This is why I urge you to oppose Senate Bills 2238, 2239, and 2420.

ROSS UEHARA-TILTON
rossut@hawaii.edu

February 8, 2016

The Honorable Gilbert S. C. Keith-Agaran, Chair
The Honorable Maile S. L. Shimabukuro, Vice-Chair
Senate Committee on Judiciary and Labor
415 S. Beretania Street
Honolulu, HI 96813

Re: SB 2238 and SB 2239 – Judicial Elections in Hawaii
Hearing: Wednesday, February 10, 2016 at 9:00 a.m.
Conference Room 016
Hawaii State Capitol

Dear Chair Keith-Agaran, Vice Chair Shimabukuro, and members of the Judiciary and Labor Committee:

Thank you for the opportunity to testify in strong opposition to SB 2238 Relating to Judicial Elections and SB 2239 Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges. My name is Sara Hayden and I am a law student at the William S. Richardson School of Law at the University of Hawaii at Manoa.

The statute currently provides a judicial merit selection system in which judicial candidates are screened by a nominating commission; candidates are submitted to the appointing authority that selects a single candidate; and sitting justices and judges petition the judicial selection commission to be retained in office. SB 2238 and SB 2239 propose an amendment to the Hawaii State Constitution to eliminate the judicial merit selection system and require all justices and judges to be elected to serve six-year terms and be subject to reelection for subsequent judicial terms. I do not support these amendments because a judicial election system would create an imbalance to the separation of powers within our state government; would foster judicial bias; and would create a focus on appeasing the general public instead of upholding the law.

The separation of powers among the three branches of government is what makes the American governmental structure unique. The purpose of the separation of powers is to maintain checks and balances between the Legislative Branch, the Executive Branch, and the Judicial Branch. This bill intends to use judicial elections to create a checks and balances system for the Judicial Branch by allowing the "public [to] have the opportunity to select judicial candidates in open, contested elections as the public selects other government officials,"[1] similar to elections for the members of the Executive and Legislative branches. However, a judicial election system would have the opposite effect, instead creating a judicial system focused on winning the favor of the general public for job security rather than providing impartial interpretations of the law. The role of the Judicial Branch is to interpret the law and to provide neutral judicial opinions and interpretations that uphold the meaning of the law and of the Constitution. Instead of creating a checks and balances system that would keep the Judiciary from overstepping its boundaries and authority, instead it would create a checks and balances system that draws the Judiciary from its

[1] S.B. 2238, 2016 Leg., 28th Leg. (Haw. 2016).

primary focus and role in the Government, thus preventing it from performing the function that it is required to perform.

Judicial elections also create strong potential for judicial bias in the courtroom and in the judicial system. S.B. 2238 states "proponents argue that merit selection does not eliminate politics from the selection process, but instead transfers popular politics to behind-the-scene political control."[2] However, a judicial election system for Hawaii would have the opposite effect. A judicial election system would instead thrust the Judiciary into a system of political campaigns and re-elections, creating a system of politics in an environment where politics should not interfere. A prospective judicial candidate, or a sitting justice or judge, should be focused on the cases at the bench and not be distracted by the pressures of campaign strategy and fundraising. A successful election campaign is often the result of successful fundraising campaigns. If a judicial candidate is faced with the costs of running a successful campaign and thus succumbs to the pressures of seeking funds from donors, then that further draws a judge from the purpose of sitting at the bench. Creating an environment where a judge would need to generate funds to establish job security invites the potential for biased judicial rulings and court decisions to appease fundraisers and voters. This would go against the purpose of the judiciary, which is to uphold the law and ensure impartiality and fairness to all parties.[3]

Similar to a legislative election, judicial elections would require a prospective judge or justice to run for election in her district and win the favor and votes of the general public. The common saying in Hawaii, "Wow, small island," refers to the fact that our state/island is so small that "everybody knows everybody" and that you are connected to others through who you know, where you grew up, where you live, where you went to school, etc. Public figures, especially those who run for election, are often recognized and become known by their constituency and by state citizens. A judicial election runs the risk of a justice or judge securing or retaining her position by becoming a recognized public figure to those around the state, and would create potential conflicts in the courtroom. Prospective jurors may not want to sit on juries because they voted for another candidate or did not like how a judge handled her campaign. A judge may feel the need to give particular rulings based on whether or not she is up for re-election. Judges need to conduct their rulings without any prejudice or undue influence; judicial elections would create quite the opposite.

It is for these reasons that I oppose S.B. 2238 and S.B. 2239. Thank you again for the opportunity to present testimony.

Respectfully,

/s/ Sara Hayden

Sara Hayden
J.D. Candidate
William S. Richardson School of Law
University of Hawaii at Manoa

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[2] S.B. 2238, 2016 Leg., 28th Leg. (Haw. 2016).
[3] Hawaii Revised Code of Judicial Conduct Rule 2.2

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB2239 on Feb 10, 2016 09:00AM*
Date: Tuesday, February 09, 2016 12:05:54 AM

SB2239
Submitted on: 2/9/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Sarah Nishioka	Individual	Oppose	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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TESTIMONY

Chair of Senate: Senator Gilbert Keith-Agaran, Vice-Chair Senator Maile Shimabukuro.

Bill: SB2239 Constitutional Amendment – Six year judicial terms, confirmation by Senate for continuation in judicial office and Judicial Selection Commission abolished

Date of Hearing: February 10, 2016

Time and Place of Hearing: 9:00 AM, CR016

Name of Person Testifying: Shackley F. Raffetto, Chief Judge (Ret.), Second Circuit Court, State of Hawaii

Testifying about: SB2239 - Constitutional Amendment – Six year judicial terms, confirmation by Senate for continuation in judicial office and Judicial Selection Commission abolition

Position: I oppose SB2239 in its entirety

Testimony:

There are currently 21 District Court Judges, 15 Family Court Judges, 33 Circuit Court Judges, 6 Intermediate Court Judges and 5 Supreme Court Justices in Hawaii; totaling 80 judicial officers.

This means that 46 District Court/Family Court Judges serve 6 year terms of office. All other judges (34) serve 10 year terms. A rationale for the proposed reduction of the term served by judges with 10 year terms to 6 year terms is not apparent from SB2238. If the rationale is uniformity, I recommend that all judges serve a 10 year terms of service, for the reasons set for this in this testimony.

Almost doubling the number of our judges who must apply for continuation every 6 years and placing the entire burden of this upon the Senate (with the abolition of the Judicial Selection Commission), in addition to initial applications, will substantially increase the work of the Senate. Shorting judicial tenure by thirty percent for almost one-half of our judges will substantially increase the tempo and number of judicial continuation applications. Unfortunately, this will translate into significant disruptions of the service these judges can provide to the public during their judicial continuation application evolutions. All of our judges have very demanding daily calendars. Time away from the courtroom for a judge translates into justice deferred for the public.

The process of applying for continuation for a Circuit Court Judge for an additional term is an arduous process that takes a substantial amount of extra time, effort and resources. For the judge it is a very important, career critical evolution. Confirmation appearances before the Senate as a practical matter will compel the judge, in addition to hours of preparation for and attendance at hearings, to make an effort to meet/introduce himself or herself to each member of the Senate. The membership of the Senate changes regularly and a judge cannot rely upon having met the Senators during the judge's initial application process or that the Senators will be familiar with the judge and his or her work and contributions. From personal experience this is an expensive and time-consuming ordeal, especially for a neighbor island judge.

Under current practice, judicial continuations are processed by the Judicial Selection Commission who generally come to each island to conduct investigations, meet with the judge; and, conduct the continuation hearing and vote on retention. This practice allows the Commission to gather information and interview persons knowledgeable about the performance of the judge locally and also promotes the minimum disruption of the court calendar of the judge and the business and justice needs of the public.

Hawaii has a highly competent Judicial Selection Commission. The Senate has many other duties. What will it benefit the public to dissolve our experienced and successful Commission, whose specific purpose and expertise is to vet, help select and continue our judges, and replace it with an exclusive Senate operated confirmation process? This is bound to be less effective and will likely be more burdensome and probably provide less benefit to the public. I have had many opportunities to meet and work with our Judicial Selection Commission. I applied to and appeared before our Commission for initial judicial selection and for continuation for a second 10 year term of office. In addition, as Chief Judge of the Second Circuit, the Commission often solicited my opinion about judicial applicants and continuations. In my experience the Commission members perform a great deal of outreach to gather information about the performance of our judges. I have always been impressed with the serious and professional manner in which the members of our Judicial Selection Commission (composed of distinguished, highly experienced lawyers and distinguished lay-members) carry out their duties and responsibilities. The membership of the Commission changes from time to time, but it was always highly competent and professional.

Reducing the judicial terms to six years will also create a serious deterrent to our senior, most highly experienced and qualified lawyers from seeking judicial office. Legal experience is a very important quality that we should desire in our applicants for judicial office. The top men and woman lawyers who have this level of experience in our communities will make outstanding judicial officers who's service will ensure the greatest possibility for justice for the people of Hawaii. Experience as a lawyer is very important qualification to be a Judge or Justice. This is the reason that our current law requires that a lawyer applying to serve as a judge must

have first been licensed to practice law for a minimum of five years for District Court and ten years for all other Courts

Currently, in Hawaii, two factors deter many of the most highly qualified of our lawyers from seeking judicial office: the six year limit on judicial terms in the District/Family Courts and mandatory retirement at age seventy years. Enacting a six year judicial term limitation for all of our Judges and Justices will exacerbate this situation, to the detriment of the quality of justice in Hawaii.

In addition, under current law, a Judge or Justice vests under the Hawaii State retirement system after ten years of service. An applicant to a position other than our District/Family Courts (who serve for six years) knows that if they give up their law practice or prior career employment, to which they have likely devoted many years, in order to commit their lives to public service, he or she will have at least the opportunity to earn a pension should they only serve one term of office. Once one becomes a judge, one's prior career is in most cases over and one's future is entirely dependent upon creating a successful new career serving as a Judge or Justice. Most judges re-apply for additional terms of service. In order to earn something close to a full pension a judge must serve about 18 or so years under the current system, and more years probably if pending proposals to reduce judicial retirement benefits are enacted. Accordingly, if judicial terms are reduced to 6 years, a judge must earn continuation in office at least 2 times in order to hope to earn a full pension, and at least one time in order to qualify for vesting of basic retirement benefits. This presents a lawyer-applicant, when considering the opportunity to serve as a judge, with a necessary cost-benefit analysis. Financial considerations such as these are very practical and very important considerations. Unlike Per Diem District/Family court Judges, fulltime judges are prohibited from engaging in outside gainful professional or active business activities. This is not about a windfall, but a realistic understanding of how best to build and maintain the best judiciary we can for the people of Hawaii. Our selection/continuation process should encourage our best and most experienced legal professionals to leave their current careers and devote their futures to public service in our Judiciary.

<u>Closing</u>:
Neither the proposed reduction the duration of judicial office to six years nor the substitution of Senate confirmation of judicial appointment and continuation for the current practice managed by the Hawaii Judicial Selection Commission should become law in Hawaii. For the reasons stated above, I oppose SB2239.

Thank you for this opportunity to present testimony.

Shackley F. Raffetto
Chief Judge (Ret.), Second Circuit,
State of Hawaii
215 Alanuilili Place
Kula, Hawaii 96790

(808) 878-3112
jsraffetto@aol.com

SENATE COMMITTEE ON JUDICIARY AND LABOR
9:00 a.m., February 10, 2016, Conference Room 16

Testimony of Steven H. Levinson relating to SB 2239 Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges

Chair Keith-Agaran, Vice Chair Shimabukuro, and distinguished committee members, my name is Steven H. Levinson, Associate Justice (Retired), Hawaii Supreme Court. I testify in strong opposition to SB 2239 (and its companion bill, SB 2238), which proposes an amendment to Article VI of the Hawaii Constitution relating to the selection and retention of Justices and Judges. Passage of this bill would be a tragedy and would inflict irreparable injury on the Hawaii Judiciary. Among the myriad reasons for rejecting SB 2239, I offer five:

First, the judicial function of resolving legal disputes through the application of the law – constitutional, statutory, and common – is by its very nature randomly related to the popularity of judicial outcomes with the electorate. What judges do is therefore anathema to electioneering appeals to the perceived popular will.

Second, the substantial dependence of candidates for judicial office on the financial assistance of campaign contributors – many of whom donate precisely because they, or their clients, will be appearing before the judge if elected – inevitably, consciously or unconsciously, predisposes the judge to rule in favor of the economic interests of their constituency, thereby corrupting the justice system.

Third, selection of judges by popular election, whether on a partisan or nonpartisan basis, potentially discourages the most qualified and capable judicial aspirants from seeking judicial office, thereby mediocritizing the judicial branch of government.

Fourth, reposing the decision to retain judges in the state Senate would force judges to consider the political ramifications of the proper performance of their judicial duties on their opportunity to continue on their career paths. As is the case regarding the initial selection process by popular election, arriving at proper judicial outcomes should be randomly

related to legislative approval. The tendency to sculpt one's judicial behavior to achieve legislative approval is intrinsically corrupting.

Fifth, judges are frequently required to consider state and federal constitutional imperatives in their decision-making. Notable among these imperatives are the civil liberties enshrined in the Bills of Rights of the United States and Hawaii Constitutions. Civil liberties contained in the first, fourth, fifth, sixth, and eighth amendments, among others, of the federal constitution and their counterparts in the Hawaii Constitution are designed to be counter-majoritarian. In other words, they are intended to protect the individual from the tyranny of the majority, whether the majority likes it or not. For a judge to be beholden to the state Senate, part of whose mandate is to be responsive to the popular will, is inherently undermining and corrosive of civil liberties.

Thank you for the opportunity to testify.

Steven H. Levinson

Testimony Presented Before the
Senate Committee on Judiciary and Labor
By
Dr. Sylvia Yuen

Opposing SB 2239, Proposing an Amendment to Article VI of the Constitution of the State of Hawaii Relating to the Selection and Retention of Justices and Judges

Chair Keith-Agaran, Vice Chair Shimabukuro, and members of the Senate Committee on Judiciary and Labor: Thank you for the opportunity to present my testimony in opposition to SB 2239.

It is imperative that Hawaii's citizens have trust in the judiciary and confidence that judges render decisions that are fair and impartial. SB 2239 undermines that trust and will create situations—actual or perceived—in which the public believes that judicial decisions can be "bought and paid for". We have already seen the corrosive effects when judicial candidates have had to fundraise for campaigns and when individuals and organizations with special interests have made large donations to certain candidates. Lessons from states with elected justices have taught us that the judiciary must be insulated from the external pressures of money and politics. This position has been adopted, after careful review, by the American Judicature Society, American College of Trial Lawyers, and others. The concluding statement from the American College of Trial Lawyers White Paper on Judicial Elections, approved by the Board of Regents on October 2011, reads in part:

> *The College believes that contested judicial elections, including retention elections, create an unacceptable risk that improper and deleterious influences of money and politics will be brought to bear upon the selection and retention of judges. The College therefore opposes contested elections of judges in all instances.*

I urge the Senate Committee on Judiciary and Labor to protect the independence of Hawaii's judiciary and to oppose SB 2239.

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB2239 on Feb 10, 2016 09:00AM*
Date: Monday, February 08, 2016 4:27:19 PM

SB2239
Submitted on: 2/8/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Teri Heede	Individual	Oppose	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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TESTIMONY OF THOMAS D. FARRELL
Regarding Senate Bills 2238, 2239 and 2420

Senate Committee on Judiciary and Labor
Senator Gilbert S. C. Keith-Agaran, Chair

Wednesday, February 10, 2016 9:00 a.m.
Conference Room 016, State Capitol

Good morning Senator Keith-Agaran and Members of the Committee:

It has been my privilege to practice law in Hawaii for over thirty-five years. To say that I am "strongly opposed" to these bills hardly suffices to express my outrage that these bills were even introduced, let alone the fact that they are actually receiving a hearing.

I can think of nothing more corrosive or corrupting to the impartial administration of justice than to subject the judges of this state to popular election or to repeated retention approval by the state Senate. Collectively, these bills are the greatest threat to liberty and justice that I have ever witnessed.

Let's talk about judicial elections, first.

Everyone sitting at this table knows that election campaigns cost money. So if these bills pass, prospective judges will go hat-in-hand seeking campaign contributions to fund their campaigns. Now, frankly, I don't know too many reputable lawyers who would be willing to seek a judicial office under these circumstances, so if this bill does nothing else, it will eliminate most of the current crop and debase the future talent pool. And where will those campaign contributions come from? Primarily they will come from law firms and litigants who expect to appear before those judges. That's what happens in states where judges are elected, and that is exactly what will happen here: justice will go to the highest bidder.

This nation was founded on respect for individual rights. Time and again, the judicial branch has been the last bastion of liberty, the protector of the individual against the mob. An unpopular decision is the hallmark of an honest judge and a fair court. Yet, if judges become subject to popular election and periodic review by the Senate, they won't be making decisions based on the law and the facts; they'll be making decisions based on opinion polls. You might as well just burn the Constitution now, and get it over with.

To be a judge involves a specialized skill set. The general public is no more qualified to assess the performance of a judge than they are to assess the performance of a surgeon. Mostly, they don't know, and they don't care to know. About half of our fellow citizens who could register to vote don't bother, and of those who do, about half don't bother to show up on election day and actually vote. I'll bet I could walk through any of your districts, stop ten people at random, and perhaps one or two at most could tell me your name as their state senator, let alone tell me your position on any significant issue. I can't say I'm happy with an uninformed, uninterested and detached citizenry, but it is what it is. The decision on who should be a judge, is a task for which the man on the street is ill-equipped, nor is he clamoring for that responsibility. And if I read SB 2239 correctly, its sponsors aren't too sure that the general public should be entrusted with the entire responsibility of selecting judges, because this bill would allow the Senate to overturn the results of a judicial election by refusing to confirm the electee.

I'm also not in favor of having our state judges come back in front of you every six years to beg to keep their jobs. Remember Margery Bronster? She had to come back in front of the Senate to keep her job when Ben Cayetano appointed her for a second term as Attorney General. She didn't make it because she had the temerity to take on the Bishop Estate. That's exactly what we can expect from this body if we put judicial retention in your hands. No thanks. You get to advise and consent; you don't get a money-back guarantee. Moreover, the existing retention process through the Judicial Selection Commission works quite well. I know, because I have seen it used to end the career of a judge whose career needed ending.

It isn't enough to hold these bills in committee, although that is certainly what this committee should do. If they have any shame at all, every member of this body whose signature appears on these bills as a sponsor should apologize to the public and to their constituents for having done so.

I trust I've made it clear where I stand.

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB2239 on Feb 10, 2016 09:00AM*
Date: Tuesday, February 09, 2016 4:03:50 PM

SB2239
Submitted on: 2/9/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Troy Abraham	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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February 8, 2016

Via: Web: www.capitol.hawaii.gov/submittestimony.aspx

COMMITTEE ON THE JUDICIARY & LABOR
Chair: Sen. Gilbert S.C. Keith-Agaran
Vice Chair: Sen. Maile S.L. Shimabukuro

DATE: Wednesday, February 10, 2016
TIME: 9:00 AM
PLACE: Conference Room 016
State Capitol
415 Beretania Street
Honolulu, Hawai'i 96813

BILL NO.: **OPPOSE SB 2239**

Honorable Senators: Gilbert S.C. Keith-Agaran, Maile S.L. Shimabukuro and members of the Committee on the Judiciary and Labor.

Thank you for providing me this opportunity to offer testimony **in strident opposition to Senate Bill 2239.**

As background to this opposition, I am a criminal defense attorney who has practiced in all of our courts for over 34 years. I am also a former Chair of the Judicial Selection Commission ["JSC"], having served my term on the Commission from 1991 -1997.

I strongly support the merit selection system, and **oppose** an election process believing that it lessons political influence in judicial appointments while providing for accountability to the public. In a merit selection system, a commission screens potential appointees and presents a list of qualified candidates to the appointing authority. The governor appoints one person from the list of Circuit Court and Appellate Court candidates. The Chief Justice appoints from a list of District Court candidates. Once appointed, judges are vetted by the Legislature and the public. That vetting process removes any concerns the public and the legislature has with an appointee. Merit selection reduces the role of special interests and money in the selection process, and increases the quality of state judges, thereby increasing the public's trust and confidence in a fair and independent judiciary. There have been a plethora of horror stories in other States that have an election process, whereby special interests control certain judges.

Judicial nominating commissions represent the interests of the community and guarantee legal expertise in a nonpolitical screening process. Unlike contested elections, merit selection systems guarantee input from the public and the specialized knowledge of lawyers in choosing judges. An American Judicature Society ["AJS"] survey of nominating commissioners found that lawyers value the role of non-lawyers in the process and non-lawyers likewise value the input of lawyers. The typical composition of nominating commissions ensures a balance between professional assessment of an applicant's legal ability and the voice of citizens. Only 1% of commissioners reported that political considerations were regularly included in commission deliberations.

Merit selection advances diversity on the bench. Recent AJS research indicates that merit selection is the most effective way to advance diversity on state high courts. Even after controlling for a wide range of factors that may influence diversity on the bench, merit selection significantly increases the likelihood that minorities will be chosen to serve on Hawai'i's courts. Ongoing research has consistently found that merit selection is as effective as other methods of selection for promoting women and minorities to the state bench. Indeed during my tenure on the JSC, our Commission added much need diversity to our courts.

Merit selection produces ethical judges. An AJS study of six states finds that elected judges are more frequently disciplined for ethical violations than are judges chosen through merit selection. When disciplined, the harshest punishments were generally

given to elected judges, indicating that elected judges are more frequently engaged in more egregious ethical violations than are merit-selected judges.

Election of judges would create a weakened, self-interested judiciary. In short an elected judiciary, is not good for Hawai'i and the people you represent!

Sincerely,

William A. Harrison