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. 2420, Proposing an Amendment to Article VI, Section 3, of the Constitution of the State of Hawai'i 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.

Purpose: Proposes a constitutional amendment to amend article VI, section 3 of the Hawai'i Constitution to amend the timeframe to renew the term of office of a justice or judge, and require consent of the Senate for reappointment of a justice or judge.

Judiciary's Position:

Presently, justices and judges (collectively "judges") petition the Judicial Selection Commission (JSC) for reappointment. The JSC conducts an in-depth evaluation, including a review of confidential performance evaluations completed by attorneys and jurors, written comments from interested persons, and interviews with key resource people. The JSC then decides whether to retain the judge in judicial office.

This system was first developed at the 1978 Constitutional Convention. It reflects a careful balancing of various interests, with the goal of ensuring judicial accountability while preserving judicial independence.

This basic structure—with some amendments over the years—has served Hawai'i well. While we should always look for possible improvements to how the JSC operates, this bill would fundamentally restructure the process and have negative consequences. Accordingly, the

Judiciary respectfully opposes this bill. In this testimony, we set forth the background and operation of the current system and identify some issues that would arise under the proposed amendment.

History of the Judicial Selection Commission and the Current Retention Process

The current process of judicial selection and retention was established pursuant to the electorate's approval of amendments proposed by the 1978 Constitutional Convention. The convention's judiciary committee and delegate debates reflected a strong belief in an independent judiciary free from political influence and abuse.[1]

The 1978 amendments to article VI included the establishment of the JSC. The judiciary committee indicated that the "clear majority" of those testifying strongly supported the concept of a nonpartisan JSC that could screen qualified candidates for judicial appointment.[2] The committee noted that this process would reduce unnecessary political influence while ensuring that the public had the most qualified candidates for judicial appointment.[3] The committee described the proposal for a JSC as "the fairest and best method, one that will provide input from all segments of the public, include a system of checks and balances and be nonpartisan."[4]

Under the 1978 amendments, when a judicial vacancy occurs, the JSC presents to either the Governor or the Chief Justice a list of candidates for the position. The nominee is subject to the consent of the Senate. However, the convention decided to leave the decision of retention exclusively to the JSC. The judiciary committee noted that this process would lessen partisan politics and maintain the high quality of the judiciary:[5]

> [Y]our Committee recommends that any justice or judge petition the judicial selection commission for retention in office, or inform them of his or her intent to retire. Your Committee is of the opinion that retention through review by a nonpartisan commission is more desirable than simple reappointment by either the governor or the chief justice. It is intended that the commission in its review and retention function again perform the same function of excluding or at least lessening partisan political actions and also ensure that capable judges are kept on the bench. This review and retention process, in tandem with the judicial selection

[1] 2 *Proceedings of the Constitutional Convention of Hawaii of 1978*, at 368-69 (1980).
[2] Stand. Comm. Rep. No. 52, in *1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 619 (1980).
[3] *Id.* at 619-20.
[4] *Id.* at 620.
[5] *Id.* at 623.

commission, is intended to provide an unbiased and effective method of maintaining the quality of our jurists.

The JSC is composed of nine members, no more than four of whom can be licensed attorneys. 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. It further required one member of the JSC to be a resident of a county other than the City and County of Honolulu.[6] In short, the amendment diminished the authority of the Governor and Chief Justice in favor of the legislature, and maintained the parity between the House and Senate by providing an equal number of appointees for each.

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.

Currently, the JSC determines whether judges will be retained in office. To summarize the process briefly, the JSC's retention process involves a careful review of information from a number of different sources, including public comments, meetings with key resource people, confidential evaluations of the judge's performance, appellate cases reviewing the judge's decisions, and the judge's retention petition and in-person interview with the JSC.

Initially, 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, the Hawai‘i State Bar Association (HSBA) newsletter, 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 (JPP) established by Rule 19 of the Rules of the Supreme Court of the State of Hawai‘i.

[6] S.B. no. 2515, 16th Leg., Reg. Sess. (Hi. 1994).

The Hawai‘i Information Consortium administers the JPP evaluation process. All full-time judges and a limited number of per diem judges are evaluated by attorneys who have appeared before those judges on substantive matters. Attorneys are asked to respond confidentially to a series of questions covering subjects such as legal ability, judicial management, and comportment, as well as provide any helpful written comments.

The 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.

Another component of the JPP is periodic evaluations of judges by jurors. Surveys are sent to jurors who have served on a case before a trial judge, and are asked to rate the judge's overall performance. In 2013, 1,172 survey forms were distributed for eight judges, with 473 being returned;in 2016, 896 forms were distributed for seven judges.[7]

Results of the questionnaires are shared with each judge. The judge then meets with members of the Judicial Evaluation Review Panel to discuss the report and the ways in which the JPP's goals can be achieved in light of the results. A Judicial Evaluation Panel consists of a senior member of the HSBA, a retired judge, and a respected lay person from the community. The evaluation results are confidential, provided only to the individual judge, the Chief Justice, and members of the review panel who meet with the judge. However, upon request by the JSC, copies of the individual judge's evaluation reports are provided to the commission for its use in reviewing a judge's application for retention or for a new judicial position. Although the individual reports are confidential, the Judiciary does provide a yearly summary report of the program's activities and results. These reports, as well as more information on the JPP, can be found on the Judiciary's website.[8]

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.

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[7] The Judiciary State of Hawai‘i, *Judicial Performance Program 2013 Report* 15 (Nov. 7, 2013), available at http://www.courts.state.hi.us/docs/news_and_reports_docs/JP13REPT.pdf.

[8] *Judicial Performance Review*, Hawai‘i State Judiciary, http://www.courts.state.hi.us/courts/performance_review/judicial_performance_review.html (last visited Feb. 2, 2016).

Concerns with the Proposed Senate Retention Process

There are some significant consequences of the proposal that should be considered.

First, the proposed process would result in approximately doubling the number of judicial confirmation proceedings that the Senate conducts.[9] While some initial confirmation hearings move quickly, others can stretch out over multiple sessions if there are concerns about the nominee. Moreover, because petitions must be acted on before the end of the judge's term, many of these hearings would need to take place during the eight-month period between sessions of the legislature, and would thereby require the Senate to convene in special sessions.

Second, the proposal will substantially lengthen the time that each judge is subject to the retention process, from six months to between 9-12 months. The judges would undertake that process while still performing their regular judicial duties. District and family court judges, who serve six-year terms, could spend as much as the last year—or one-sixth—of their term in the retention process.

Third, a judge seeking retention would be ethically precluded from responding to questions before the Senate about pending cases. Rule 2.10 of the Hawai‘i Revised Code of Judicial Conduct does not allow a judge to make any public statements on pending or impending matters.[10]

Fourth, because the Rule 19 and HSBA attorney evaluations, as well as the juror evaluations, are confidential, the Senate would not have the benefit of 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, 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 decision makers refer to the judicial evaluations or resource persons to counter concerns expressed by disappointed litigants.

Finally, Vermont's experience highlights how a similar legislative retention system can impact judicial independence. In Vermont, judges are evaluated by a judicial selection committee and retained by a majority vote of the general assembly. In 1997, the Vermont Supreme Court declared the state's funding procedure for public schools unconstitutional. In

[9] Since 2011, there have been 27 retention petitions approved by the JSC, and 25 lists of candidates to fill vacant judgeships.

[10] 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."

response, some political candidates indicated that they would use Vermont's judicial retention system as a means of ousting the "three most liberal" justices from the bench.[11] While the justices were ultimately retained, it illustrates the threat to judicial independence that this type of process can create. Indeed, a clerk to the Vermont Supreme Court recalled weekly "highly rancorous protests" outside of the court during the retention process.[12]

Conclusion

The current review and retention process provides a fair and effective method of maintaining the quality and independence of our jurists. The JSC process has served the public well for more than 35 years. The proposal at issue here represents a substantial change and may have consequences that could impair the ability of judges to administer justice in an impartial, efficient, and accessible manner.

For these reasons, the Judiciary respectfully opposes this bill.

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

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[11] David McLean, *Judicial Tenure in Vermont: Does Good Behavior Merit Retention?*, 27 Vt. B.J. 39, 39 (2001).
[12] Bridget Asay, et al., *Justice Johnson and the Clerks*, 37 Vt. B.J. 24, 25 (2011).

**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. 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

Chair Keith-Agaran and Members of the Committee:

We oppose passage of S.B. No. 2420 which would require the Senate to hold public hearings and approve of each petition to retain a justice or judge in office following an approval by the Judicial Selection Commission. We believe that our current system of judicial retention is a good one which balances public input regarding the retention of a judge in office with the need for confidentiality of sources of information which is essential in protecting attorneys and their clients from possible retaliation.

Currently, a judge must notify the Judicial Selection Commission [JSC] of his/her intention to seek retention in office when his/her term is approaching expiration. The JSC then seeks public comment as well as input from confidential source persons from within the bar and the justice system regarding the judge's application. This merit-based retention system is designed to decrease political and special interest influences on the issue of judicial retention.

S.B. No. 2420 seeks to add another layer of approval to judicial retention by having the Senate advise and consent on all retentions which have been approved by the JSC. We are concerned that the procedure proposed by this bill would inject politics and special interests into the retention process. In public hearings, judges could be singled out for certain cases or rulings rather than their records as a whole. Judges, fearful of being criticized in public hearings, might be inclined to assign heavier sentences in criminal cases or rulings which are deemed "safe" in civil cases rather than rulings based on the merits of a case.

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. The U.S. Supreme Court's decision in the Citizen's United case 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. These outside interests would be free to hire lobbyists to take aim at judges here if S.B. No. 2420 would to be instituted.

Our current system of judicial retention, while not perfect, is preferable to that envisioned by this measure. It is critical to a fair and impartial judiciary that our judges maintain independence free from the influence of special interests.

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

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 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.

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 2420. The Hawaii State Bar Association ("HSBA") submits this testimony in opposition to Senate Bill 2420.

Immediately after this measure, Senate Bill 2238 and Senate Bill 2239 were brought to the attention of the Executive Director, and recognizing the importance of these measures to member attorneys, she informed the HSBA Board, 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 on 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 the 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 voiced their disagreement with the position to oppose.

Hawaii's Lawyers Serving Hawaii's People

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 Senate Reconfirmation

Senate Bill 2420 would amend our Constitution to provide that judges approved for retention by the Judicial Selection Commission ("JSC") would also need to be reconfirmed by the State Senate. (We note that a similar provision is found in Senate Bill 2239 which would amend our Constitution to abolish the JSC, to select judges initially by election, and to retain all judges by decision of the state Senate.)

The Hawaii State Bar Association opposes Senate Bill 2420, and the corresponding section in Senate Bill 2239, because they undermine 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"[i]:

- "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 terms 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** included in the Star-Advertiser and other publications. 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.

[i] 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 2420 Proposing an Amendment to Article VI, Section 3, of the Constitution of the State of Hawaii Relating 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.

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 2420. The Hawai'i County Bar Association (HCBA) submits this testimony in opposition to Senate Bill 2420.

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 2420 and supports the positions of the Hawai'i State Bar Association and the Hawai'i State Judiciary.

Very truly yours,

Jeffrey Ng

February 9, 2016

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

Re: **S.B. 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 Justice or Judge and Require Consent of the Senate For a Justice or Judge to Renew A Term of Office**

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.2420, which proposes a constitutional amendment 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. This proposal would amend the Constitution to allow the Senate to conduct a public hearing and vote on any judge whose retention has already been approved by the Judicial Selection Commission ("JSC").

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.

We strongly oppose the proposal to have the Senate, rather than the 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 other members 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

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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.

We respectfully request that the Committee **hold** S.B.2420. Thank you for the opportunity to submit testimony on this measure.

Sincerely,

M. Nalani Fujimori Kaina
Board of Directors

P.O. Box 2072 • Honolulu, Hawaii 96805
Email: hawaiiwomenlawyers@gmail.com

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 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.***
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 2420, which proposes to amend the Hawaii State Constitution to require retention of all justices and judges to be confirmed by the Senate.

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, all judges seeking to renew their terms petition the JSC and are evaluated for retention by the JSC. The proposed legislation would additionally require that the Senate consent to any retention petition approved 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.

Retention and Judicial Independence.

AJS opposes the proposed legislation because it would 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.[5]

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[5] In addition to these studies 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 introduce Senate confirmation to the retention process and thereby undermine 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

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 those states in which a justice or judge must respond to his or her perceived constituency -- *e.g.* through the process of a Senate confirmation -- studies have shown that the justice or judge will adjust their judicial decisions in a way to curry favor with the perceived constituency for fear of losing their seat. Senate reconfirmation, no less than retention elections, would compromise judicial independence.

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:3371759.4

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.

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

AYABE, CHONG, NISHIMOTO, SIA & NAKAMURA

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SIDNEY K. AYABE*
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RODNEY S. NISHIDA
(1949 – 2004)

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 2420 - Senate Confirmation after JSC Retention
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 2420.

The undersigned, all former Presidents of the Hawaii State Bar Association, strongly oppose SB 2420.

SB 2420 would keep our current appointment system for justices and judges, but would require consent of the Senate for a justice or judge retained by the Judicial Selection Commission (JSC) to renew a term of office.

Our current merit-based system for judicial selection is a sound and stable one with built-in checks and balances throughout the process from application through retention. Currently, the JSC screens applicants for vacant judgeships and makes recommendations to the appointing authority (either the Governor or the Chief Justice). The nominee selected is then subject to Senate confirmation. When sitting judges come up for retention, the JSC determines whether these individuals will be retained.

The JSC has access to a wide variety of sources to help the Commission Members make their retention decisions, including confidential evaluations made

by attorneys and jurors who have been in court with the judge, and confidential comments from key resource people. In addition, the JSC publishes public notices in the Star-Advertiser and other local media which provides Hawaii residents the chance to comment on the jurist. The JSC is bound by confidentiality which encourages individuals to come forward and candidly express their views.

In contrast, it is quite likely that disgruntled litigants may come forward to speak against a judge who did not provide the exact relief sought by the litigant during the Senate process. If the case is still pending, or if the issue raised is likely to come before the court again, then the judge, under applicable rules of judicial conduct, will not be able to respond. In addition, the Senate will not have access to the confidential resource materials which are available to the JSC. We believe Senate confirmation hearings are not the forum for disgruntled litigants.

Ultimately, this extra layer of Senate re-confirmation is unnecessary and would be unfair to judges seeking retention.

We reiterate our strong opposition to SB 2420.

Respectfully,

/s/ Calvin E. Young
Calvin E. Young

/s/ Craig P. Wagnild	*/s/ David M. Louie*
Craig P. Wagnild	David M. Louie
/s/ Carol K. Muranaka	*/s/ Randall W. Roth*
Carol K. Muranaka	Randall W. Roth
/s/ Louise K.Y. Ing	*/s/ Alan Van Etten*
Louise K.Y. Ing	Alan Van Etten
/s/ Hugh R. Jones	*/s/ Ellen Godbey Carson*
Hugh R. Jones	Ellen Godbey Carson
/s/ Jeffrey S. Portnoy	*/s/ Sidney K. Ayabe*
Jeffrey S. Portnoy	Sidney K. Ayabe

/s/ Dale W. Lee
Dale W. Lee

/s/ Paul Alston
Paul Alston

/s/ Gregory K.Markham
Gregory K. Markham

/s/ Jeffrey H.K. Sia
Jeffrey H. K. Sia

16ct0204B

Testimony of Carroll S. Taylor, Esq.
in Opposition to S.B. No. 2420
Senate Committee on Judiciary and Labor
February 10, 2016, 9:00 a.m.
Room 016, State Capitol

Senators,

I am an attorney licensed to practice in Hawaii since 1969.

Thank you for the opportunity to speak against the enactment of S.B. 2420 as presently worded.

When discussing our judicial selection process with mainland lawyers, the common response is along the lines of "You're lucky! How did you ever get such a plan in place?"

What drives that response? Many things, including:

- avoiding the unseemliness of judges out campaigning for votes (e.g., "I sent more criminal defendants to death row than my bleeding heart opponent!");
- avoiding being hit up by judges' campaign committees for contributions;
- not worrying during argument to a judge that opposing counsel may be favored because of his campaign contributions;
- having judges with the freedom to apply the law without worrying about how the decision appears to the public;
- minimizing the role of politics in the selection and retention of judges.

With a system that works and is admired, I see no need to tinker with it by having the Senate second guessing the Judicial Selection Commission's ("JSC") decision to renew the term of a sitting judge. That person passed through the JSC, the Governor and the Senate when first appointed and was deemed qualified, personally and professionally. At the time for reappointment, then, the only issues likely to arise are those emanating from decisions that he or she made during the first term. Having the Senate confirm reappointment, then, undermines the judge's independence: as the first term nears its end, the judge can't help but be aware that near-term job security depends upon satisfying the public and the Senate. The judge should be able to concentrate on resolving the pending matters in the courtroom without fear of public consequences.

That said, I think that the Senate may wish to consider playing a role in review of the JSC's decision to deny a judge's retention request. Permit me to explain my reasoning.

I served on the Hawaii Supreme Court's Disciplinary Board for 12 years, three as Chair and three as Vice-Chair. It is the duty of the Board to discipline attorneys who breach our ethical rules.

Complaints about such breaches come from clients, opposing counsel, witnesses, and judges. It is a fact that, when a judge complains about an attorney, the matter is deemed a priority because the judge has no ax to grind in the underlying dispute and generally knows from experience what is and is not ethical conduct.

But we had very few complaints from judges. That is, those with the most opportunity to observe and recognize unethical conduct were least likely to complain about it. I asked some judges about their reluctance to complain. I was surprised to hear that they had a concern that, if they complained about attorney X to the Office of Disciplinary Counsel, when it came time for them to apply for retention, attorney X's friends would confidentially complain about the judge to the JSC and seek to block his or her retention. This would require the judge to try to rally support from attorneys and other judges, oftentimes without knowing who was saying what bad things about him or her. Bottom line: "don't make waves;" better to leave it up to the Office of Disciplinary Counsel to get their complaints from other sources.

So that suggests to me that a judge who seeks retention and is denied by the JSC should have the right to "appeal" to the Senate to take another look and possibly override the JSC's denial. The decision to not retain a judge would not automatically be reviewed by the Senate, but would be reviewed if requested by the judge. That sort of Senate review would inspire the JSC to thoroughly and well document all of its non-retention decisions, and would free up judges to more readily report unethical attorneys.

Thank you for considering my thoughts.

Carroll S. Taylor, Esq.
737 Bishop St., Ste. 2060
Honolulu, Hi 96813
(808) 528-2222
ctaylor@hawaii.rr.com

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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Jason N. Baba
(1957-2001)

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 2420 - 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 the proposal to include senate consent for the retention of sitting judges. The present system helps preserve confidentiality, judicial independence and impartiality by utilizing the Judicial Selection Committee, a body that includes representatives from political as well as non-political backgrounds. As a practical matter, sitting judges up for retention will not be in a position to comment on the reasons given for certain decisions or how they would decide particular cases. Placing them in a public forum to "answer for their record on the bench" is counterproductive to a impartial judiciary and interjects political influence precisely where it is not needed or desired. I appreciate that there is difficulty in rejecting a proposal that would likely have the affect of increasing the power, control and influence of your committee. That is, in my mind, why it is so important for you to do so. This is your opportunity to demonstrate the importance of preserving the integrity and independence of the judiciary and supporting the systems in place to ensure that our third branch of government can be entrusted to protect our freedoms and fairness for everyone under the law. I hope that you will look at what is best for our judiciary and the judges that serve in it, and what is best for the people of our state who place their trust in those judges, and vote no on SB 2420.

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. 2420

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

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

THIS **OPPOSITION** IS FOCUSED ON THE PROPOSED REQUIREMENT FOR CONSENT OF THE SENATE FOR THE RENEWAL OF THE TERMS OF OFFICE FOR STATE JUDGES AND JUSTICES

As a practicing trial lawyer (admitted 1968) and former member of the Judicial Selection Commission of the State of Hawaii (1995-2001) (elected by the Hawaii State Bar Association, 1995 - 2001, Chair, 2000), I oppose the passage of S.B. No. 2420. The bill essentially: (1) lengthens the time (to nine (9) to twelve (12) months) for a justice or judge to petition the judicial selection commission to be retained or give notice of intent to retire; and (2) requires the consent of the Senate to renew the term of a justice or judge following approval by the Judicial Selection Commission ("Commission").

I do not necessarily oppose the provision in the bill lengthening the time to petition the Commission for retention or give notice of intent to retire, but do oppose the process requiring consent of the Senate for renewal of the term following approval by the Commission (SECTION 2). Requiring Senate consent to renewal of judicial terms: (1) adds an additional, unnecessary step in the renewal process; (2) increases direct oversight of the Judicial Branch of government by the Legislative Branch; (3) increases or creates a perception of increased political influence exerted upon the judiciary and

individual judicial decisions; and (4) threatens, or creates the appearance of threatening, the established and important principle of an independent judiciary, one of the cornerstones of our system of government.

From my experience on the Commission, I can say without reservation that each Commissioner, regardless of whether elected or by whomever appointed had but one single duty and mission: the selection and retention of the most qualified applicants and petitioners. Each Commissioner was extremely serious and diligent in discharging that duty and accomplishing that mission.

The Senate already provides consent to the initial appointment of a judge or justice. Further oversight and Senate consent (with a public hearing) to renewal of terms is not necessary.

Indeed, the proposal raises serious questions of the potential for the exercise of direct political influence upon the judiciary and individual judicial decisions by the Legislative Branch of government. That in itself could result in a violation of the Separation of Powers one of the underpinnings of the U.S. Constitution.

Similarly, it threatens the long established principle of the necessity for an independent judiciary, free from undue outside, influence by individuals, groups or other political influence. Judges need to be as free from outside influence as possible in order to make objective and fair decisions, even if unpopular. Aspects of this bill threaten that independence.

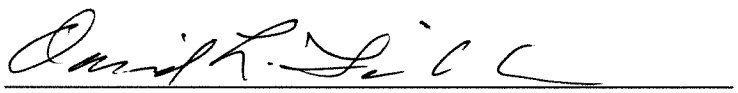
There has been no study or data presented that states or supports a finding or proposition that the present retention process does not work and should be changed. In

addition, there is no study or data or rationale presented to support the proposed amendment to the Hawaii Constitution as being the most appropriate retention process.

I respectfully submit that S.B. No. 2420 not be passed.

Thank you for considering my testimony.

In the event that testimony is submitted by or 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]

---

[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 SB2420 on Feb 10, 2016 09:00AM
Date: Saturday, February 06, 2016 7:43:07 PM

SB2420
Submitted on: 2/6/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Elizabeth Kent	Individual	Oppose	No

Comments: I believe the current system of review by the Judicial Selction Commission is effective and works well.

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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From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2420 on Feb 10, 2016 09:00AM
Date: Sunday, February 07, 2016 3:53:00 PM

SB2420
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 any measure which would diminish the independence of our judiciary, including this measure to require senate reconfirmation of sitting judges whose reconfirmation has already been approved by the Judicial Selection Committee. Our constitutional system is set up so that judges are shielded from the political process so that they have the freedom to apply the laws impartially without political pressure. This is particularly important where judges are in the position to make decisions which are legally correct but politically unpopular, especially where the rights of minorities are concerned. This would be threatened if every judge knew that he or she faced a senate hearing where their decisions would have to be justified on the basis of politics rather than law. Moreover, the quality of the bench in the Hawaii State Judiciary is high. We do not have a problem with unqualified judges being retained after their term is up. This measure is unnecessary and would only harm the independence of our judiciary.

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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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 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

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 SB 2420, which seeks to amend Article VI, Section 3 of the Constitution of the State of Hawaii regarding "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."

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 its 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.

SB 2420 proposes to amend Article VI, Section 3 of the Constitution of the State of Hawaii to require Senate consent to any retention petition approved by the Judicial Selection Commission. I oppose this amendment to Article VI, Section 3 of the State Constitution. Under this amendment, 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 proposed amendment to Article VI, Section 3 of the State Constitution requiring Senate consent to retention petitions approved by the Judicial Selection Commission.

Very truly yours,

Ivan M. Lui-Kwan,
Individually and 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)
If you do not receive all pages, please call: **Cheryl @ (808) 275-0350**

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: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB2420 on Feb 10, 2016 09:00AM*
Date: Thursday, February 04, 2016 10:42:38 AM

SB2420
Submitted on: 2/4/2016
Testimony for JDL on Feb 10, 2016 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Support	No

Comments:

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

HEARING DATE: February 10, 2016

RE: Testimony in Opposition to SB2420

Good day Senator Keith-Agaran, Senator Shimabukuro, and members of the Committee. My name is Jessi Hall. I am an attorney whose practice concentrates in Family Law. I am also a past Chair of the Family Law Section of the Hawaii State Bar Association. I am here today to testify against SB2420.

SB2420 makes it sound like the members of the legislature has not say when it comes to the retention of Judges, but that is just not true. The House Speaker and Senate President each select two of the nine members of the Judicial Selection Commission, that is nearly half of the say coming from legislative representatives. By saying that the Senate needs to consent to a reappointment or renewal is essentially saying that you do not trust the people that were selected to represent your interest. If that is the case, then the issue should not be the need for the Senate to confirm the renewal, but instead to look at who is being selected and how they are chosen.

Further, there needs to be a clear separation of powers to avoid the allusion that the Legislature is influencing the decisions of the Court. Giving the Senate the authority to essentially confirm or reject a reappointment/renewal can be seen as a form of influence on a Judge's decision making. Without the separation of powers between the branches there will never be an appropriate check and balance system.

Thank you for the opportunity to testify in opposition to SB2420.

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 SB2420 on Feb 10, 2016 09:00AM
Date: Sunday, February 07, 2016 4:14:06 PM

SB2420
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: I oppose amending the state constitution to require the Senate to approve reconfirmation of state judges.

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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.

TURBIN • CHU • HEIDT
ATTORNEYS AT LAW

A LAW CORPORATION

RICHARD TURBIN
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737 Bishop Street
Honolulu, Hawaii 96813

Phone: (808) 528-4000
Fax: (808) 599-1984

February 4, 2016

Judiciary Committee
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: SB 2420

Dear Judiciary Committee,

I oppose the method of retention of judges to be with the consent of the Senate. There is no showing that the Judicial Selection Commission "JSC" cannot do the job, under the existing provisions of the Hawaii Constitution. The JSC has in general declined to retain a few each year or so for publicly unknown reasons. Obviously the JSC listened to individuals who had issues or negative feedback. Many Judges in that situation was given the chance to withdraw from their application to renew their term or retire. This allows the Judge a degree of dignity, thus preserving confidence in the judicial system.

Applying to the legislature does not accomplish preserving quality judges. To renew a term of office with the Senate is needless public drama, which can be done more painlessly by the JSC. Any such "public drama" only diminishes the public perception and respect of the judicial system. We have the best system in the world that works. Why tinker with success?

Thank you for allowing me to comment.

Sincerely yours,

Rai Saint Chu

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2420 on Feb 10, 2016 09:00AM
Date: Tuesday, February 09, 2016 11:32:32 AM

SB2420
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

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB2420 on Feb 10, 2016 09:00AM*
Date: Tuesday, February 09, 2016 12:06:56 AM

SB2420
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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

TESTIMONY

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

Bill: SB2420 - Requiring Senate approval of judicial continuations for all Hawaii judges

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: SB2420 - Requiring Senate approval of judicial continuations for all Hawaii judges

Position: I oppose SB2420 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.

Currently 46 District Court/Family Court Judges serve 6 year terms of office. All other judges (34) serve 10 year terms. There are proposals before the Legislature now to decrease these 34 other Judges and Justices to 6 year terms, though a rational for this proposal has not been made apparent. If the rationale is uniformity, I recommend that all judges serve a 10 year term for the reasons set for this testimony and that offered in opposition to the related SB2238 and SB2239.

Almost doubling the number of our judges who must apply for continuation every 6 years, should that occur, as well as requiring Senate confirmation for *all* judicial continuations, whatever their duration, will substantially increase the tempo and number of judicial continuations and increase the burden upon the Senate (especially if our Judicial Selection Commission (JSC) is abolished as requested in SB2239). This will be an unnecessary increase in burdens on judges during the pendency of the continuation applications before the Senate and result in the deferring justice for the public. All of our judges have very demanding daily calendars. Time away from court for a Judge or Justice translates into justice deferred for the public. There is an old saying that unfortunately rings true, "justice delayed is justice denied". This will occur even if the JSC is retained if judges must seek redundant Senate confirmation of judicial continuation applications that have

been are already approved by the JSC. No rationale has been stated for the proposal in SB2420 requiring Senate confirmation proceedings for all judicial continuations.

The process of applying for continuation for a Judge or Justice for an additional term of office is arduous and takes a substantial amount of extra time, effort and resources. It is a very important, career critical evolution. Depending upon which court he or she serves in, a successful continuation can make the difference between qualifying for retirement benefits or not for the applicant and their family. If confirmation by the Senate is added, a Judge or Justice will be compelled, as a practical matter, 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 Judges and Justices cannot rely upon having met the Senators during their initial application process or take the chance that the Senators will not be familiar with the Judge or Justice and his or her work and contributions. From personal experience, this is an expensive and time-consuming ordeal, especially for a neighbor island Judge. For a Judge or Justice seeking continuation this is time taken away from the Court where their service to the public takes place. When a Judge is away, unfortunately the delivery of justice comes to a halt. Under current law, there are no Per Diem judges who can "substitute" for (except in District and Family Court) Judges and Justices who must be preoccupied and away from court. While it may appear superficially that requiring Senate confirmation of judicial continuations serves principles of democracy and transparency, in reality it simply imposes an extra layer of unnecessary bureaucracy which will result in short-falls in meeting the justice needs of the public, and is unwarranted.

Hawaii has a proven high quality, professional Judicial Selection Commission which has successfully processed judicial continuations without Senate confirmation for many years, with a minimum of interference with the service of our Judges and Justices provide to the people of Hawaii.

Our JSC is highly competent and has only one mission; the Senate has many duties and responsibilities. Our JSC is structured to be highly representative of our community as a whole, staffed by representatives whose specific purpose and expertise is to vet, help select and continue our judges. I have had many opportunities to meet and work with our Judicial Selection Commission. Just as all Judges and Justices, 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, while serving 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 time consuming outreach to gather information about the performance of our judges in order to thoroughly vet their performance and fitness to continue in judicial office. 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.

The Judicial Selection Commission generally comes to each island to conduct investigations, meet with the Judge, conduct the continuation hearing and vote on retention. This practice is highly efficient and allows the Commission to gather information, 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.

It should be remembered in considering SB2420, Judges and Justices seeking continuation are not "unknown quantities" regarding their suitability for continuing in judicial office and continued performance of their judicial duties. The JSC has available to it a wealth of information about the actual service of all Hawaii Judges and Justices, their performance and contributions during their previous judicial term of office. In addition, the JSC has available to it judicial performance evaluations which are conducted periodically for the purpose of performance review and judicial counseling for every Hawaii Judge and Justice. Generally, these performance evaluations occur every two years and when a Judge or Justice is facing retention. Public input is also solicited about their performance.

Closing:
To require the addition of Senate confirmation proceedings for judicial continuations may appear to enhance democratic virtues, but it does not add sufficient value to the existing process to justify the negative impact it will certainly have upon the delivery of justice services to the public. Our JSC has competently processed continuations for years and there is no need for this to change. For the reasons stated above, I oppose SB2420.

Thank you for this opportunity to present testimony.

Shackley F. Raffetto
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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.