



## *The Judiciary, State of Hawai‘i*

Testimony to the Twenty-Ninth State Legislature, 2017 Session

**Senate Committee on Judiciary and Labor**

Senator Gilbert Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

Wednesday, February 8, 2017, 9:00 a.m.

State Capitol, Conference Room 016

by

Rodney A. Maile

Administrative Director of the Courts

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**Bill No. and Title:** Senate Bill 328, 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.

**Purpose:** 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.

**Judiciary’s Position:**

The Judiciary respectfully, but strongly, opposes this bill.

1. This bill would undermine the independence of Hawaii’s judicial system by transforming the process for retention of judges from one based on merit to one that would be politically-based.
2. The current system was adopted at the 1978 Constitutional Convention. It reflects a careful balancing of various interests, which ensures judicial accountability while preserving judicial independence. Judicial independence means that judges have the ability to decide cases by applying the law to the facts of each case, without outside pressure or influence.
3. After nearly 40 years of the current system, the nine members of the Judicial Selection Commission, a majority of whom must be non-lawyers, decide whether

- to retain a judge at the end of their term. The political branches of government already have a significant voice, since the Senate and House leadership appoint a total of four of the members of the Commission, and the Governor appoints two.
4. A political process for judicial retention would not elicit the quality of information available to the Commission, which reviews confidential attorney and juror evaluations of the judges, and conducts confidential interviews with respected resource persons in the community.
  5. The Commission also obtains public input, by publishing newspaper ads seeking comment, as well as posting requests for comment on the Judiciary website.
  6. After nearly 40 years of the current merit-based system, Hawai'i has the most diverse judiciary in the nation. This bill may deter qualified, experienced, and diverse lawyers from seeking judgeships.
  7. The basic structure of the current system—with some amendments over the years—has served Hawai'i well. While we always look for possible improvements to how the system operates, this bill would fundamentally restructure the process. Such radical change would have substantial negative consequences, and would undermine the independence of the Judiciary.

### **This Bill Would Undermine the Independence of the Courts by Politicizing the Process**

The current retention system supports the Judiciary's commitment to the rule of law and the public's trust in that commitment by providing the Judiciary with the independence to make decisions based on the law, free of outside pressure or influence. "Those who undertake to resolve disputes between citizens, corporations, or government . . . cannot allow control, real or imagined, to influence their decisions; cannot allow the public to believe or even perceive that the decision maker owes allegiance to one side or the other."<sup>1</sup> In other words, justice must not only be done according to the law—the parties before the court and the general public must understand that justice is being done.<sup>2</sup>

Vermont's experience highlights how a reconfirmation process similar to that proposed by this bill can impact the justice system. 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 response, some political candidates indicated that they would use

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<sup>1</sup> Penny J. White, *Judicial Courage and Judicial Independence*, 16 J. Nat'l Ass'n Admin. L. Judges 165. (1996) available at <http://digitalcommons.pepperdine.edu/naalj/vol16/iss2/1>.

<sup>2</sup> *Id.* at 166 (quoting Judge John Parker, *The Judicial Officer in the United States*, 20 TENN. L. REV. 703, 705–06 (1949)).

Vermont's judicial retention system as a means of ousting the "three most liberal" justices.<sup>3</sup> There were weekly "highly rancorous protests" during the retention process.<sup>4</sup> Although the justices were ultimately retained, this illustrates how this type of process threatens the independence of the courts and the public's trust and confidence in them.

In Hawai'i, a robust, balanced system enables fair, impartial, transparent, and accountable courts to resolve disputes among citizens, entities, and government.

### **The Framers' Vision: A Merit-Based, Non-Political Process**

The current system of judicial selection and retention was crafted by delegates to the 1978 Constitutional Convention and ratified by the people of the State of Hawai'i at an ensuing election.<sup>5</sup> The convention's judiciary committee stated that a judicial selection commission system, which the Committee referred to as a "merit based system," would provide for a more qualified and independent judiciary.<sup>6</sup> The Committee described the Judicial Selection Commission (Commission) 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."<sup>7</sup> With respect to the retention of judges, it elaborated:

[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 commission, is intended to provide an unbiased and effective method of maintaining the quality of our jurists.<sup>8</sup>

(Emphasis added).

At the convention, a proposed amendment establishing a retention election after appointment was defeated. Delegates expressed concern that the lack of voter knowledge about candidates and the potential for judges to decide cases on the basis of popular appeal,

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<sup>3</sup> David McLean, *Judicial Tenure in Vermont: Does Good Behavior Merit Retention?*, 27 Vt. B.J. 39, 39 (2001).

<sup>4</sup> Bridget Asay, et al., *Justice Johnson and the Clerks*, 37 Vt. B.J. 24, 25 (2011).

<sup>5</sup> 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 344–56 (1980).

<sup>6</sup> Stand. Comm. Rep. No. 52, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 621 (1980).

<sup>7</sup> 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 620 (1980)

<sup>8</sup> 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 623 (1980).

rather than on the law, would be detrimental to the judicial process.<sup>9</sup> Ultimately, the convention adopted the merit-based process for selection and retention. This system reflects the sentiment that a judicial selection commission provides the essential foundation for a qualified and independent judiciary.

### **The Current Retention Process Ensures An Independent And Accountable Judiciary**

The Constitution requires that the Commission operate in a “wholly nonpartisan manner.”<sup>10</sup> Specifically, the Constitution requires that members of the Commission be appointed in staggered six-year terms, prohibits any member from serving more than one term on the Commission, and prohibits members from running for or holding any political office or taking an active part in political management or political campaigns.<sup>11</sup> Members are not eligible for appointment as a judge and for three years thereafter.

The structure of the Commission reflects a balance of the three branches of government and other interests. While the Commission is non-partisan, it nevertheless provides the political branches with a significant voice. Pursuant to article VI, section 4 of the Hawai‘i Constitution, the Commission is composed of nine members, no more than four of whom can be licensed attorneys. Two members are selected by the Governor, two members are selected by the Speaker of the House of Representatives, two by the President of the Senate, one by the Chief Justice of the Supreme Court, and two members are elected by the attorneys of the State.<sup>12</sup> At least one member must be a resident of a county other than the City and County of Honolulu.

The Commission has two functions. First, it identifies the most qualified candidates for vacant judgeships. Second, when judges near the end of their judicial terms<sup>13</sup> and petition to be retained as judges, the Commission conducts thorough evaluations. A judge first submits a petition for retention, which contains detailed information on subjects ranging from the timeliness of case dispositions to the status and outcome of cases on appeal. Notice of the petition for retention is published in newspapers and on the Judiciary website. The Commission invites public comment on whether the judge should be retained, allowing interested parties (including Legislators) to submit confidential written comments. The

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<sup>9</sup> 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 371–72 (1980).

<sup>10</sup> Haw. Const. art. VI, § 4.

<sup>11</sup> *Id.*

<sup>12</sup> In 1994, the Hawai‘i Constitution was amended to change the composition of appointees to the Commission. The amendment reduced the number of the Governor’s appointees from three to two, reduced the Chief Justice’s appointees from two to one, and increased the number of appointees by the Speaker of the House of Representatives and the President of the Senate from one each to two each. S.B. 2515, 16th Leg., Reg. Sess. (HI. 1994). It further required one member of the Commission to be a resident of a county other than the City and County of Honolulu. *Id.*

<sup>13</sup> Currently, district and family court judges serve six-year terms; judges and justices on the circuit, intermediate, and supreme court serve ten-year terms.

Commission also meets with resource people in the community who provide direct, confidential feedback.

Also essential to the Commission's process is its review of 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. All full-time judges are evaluated at approximately three year intervals 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, and are invited to provide written comments. Another important component of the JPP is periodic evaluations of judges by jurors. Surveys are sent to those who have served as jurors, asking them to rate judges.

Results of the questionnaires are shared with each judge. The judge then meets with members of the Judicial Evaluation Review Panel to discuss the results. A Judicial Evaluation Review 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. However, upon request by the Commission, copies of the individual judge's evaluation results 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 results are confidential, the Judiciary provides a yearly summary of the program's activities and results.

The Commission also reviews pertinent information from the Commission on Judicial Conduct, which investigates and conducts hearings concerning allegations of judicial misconduct or disability and makes disciplinary recommendations to the Hawai'i Supreme Court.

The HSBA also conducts confidential attorney evaluations of judges, midway through their terms and when they are in the retention process. Results are shared with each judge, the Chief Justice, the Judicial Evaluation Review Panel, and the Commission upon request.

The retention process culminates with the Commission's in-person interview of the judge. To be retained, at least five members of the Commission must then vote in favor of retention.

The current retention process is thorough. It minimizes the influence of outside pressures on the process. Methods for obtaining input are tailored to maximize the quality and quantity of input, and the current process allows the Commission to place all input into context.

### **The Proposed Senate Reconfirmation Process Would Have Significant Limitations**

Under this bill, the Commission's decision—either affirmative or negative—as to whether a judge should be retained is not dispositive, instead it is considered “notice” subject to the Senate's review, public hearings, and a final decision as to whether the judge will be retained.

Under the proposed reconfirmation process, the Senate will not have access to the same comprehensive information that is available to the Commission, most notably the confidential attorney and juror evaluations of the judges, and the confidential interviews with respected resource persons in the community.

This is particularly problematic because it is that information that allows the Commission to place any concerns raised about a judge's performance in a particular case into a broader context, i.e., the body of the judge's work.

Moreover, judges may not be able to respond to criticisms that are raised in the Senate's hearing process regarding their rulings in specific cases. The Revised Code of Judicial Conduct prohibits judges from discussing or making any statements on pending or impending matters, or making any statement that might substantially interfere with a fair trial or hearing.<sup>14</sup>

Thus, judges who make rulings in controversial cases of high public interest shortly before retention would be unable to respond to the specifics of a pending case; they could effectively have their hands tied. And as noted above, the Senate would not have access to the confidential attorney or juror evaluations or resource person interviews to contextualize those concerns. The Senate would have only part of the picture, and neither the judge nor anyone else would be able to complete the picture.

The confidential evaluations submitted by attorneys are one of the most valued sources of information available to the Commission. The assurance of confidentiality is key to gathering input that is helpful and candid. The numerous resource persons who speak with the Commission on the assurance of confidentiality may not be willing to share the same information publicly.

There are other negative consequences to the proposed re-confirmation process. For example, it will substantially lengthen the time that each judge is subject to the retention process, from six months to between nine to twelve months. The judges would undertake that process while still performing their regular judicial duties. District and family court judges,

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<sup>14</sup> 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.” The “Terminology” section of the Code provides that “[a] matter continues to be pending through any appellate process until final disposition.”

who serve six-year terms, could spend as much as the last year—or one-sixth—of their term in the retention process.

### **The Bill May Deter Qualified, Experienced, And Diverse Lawyers From Seeking Judgeships**

Merit-based systems encourage judicial diversity. A 2009 study by the American Judicature Society concluded that “minorities and women fared very well in states that used merit selection.”<sup>15</sup> After nearly 40 years of a merit-based system, Hawai‘i has the most diverse state judiciary in the nation.<sup>16</sup> This bill, by proposing to significantly alter the nature of a judicial career, may make many highly-qualified attorneys less inclined to seek to become judges.<sup>17</sup> It is critical that our retention process does not create artificial obstacles to maintaining and expanding the diversity of the Judiciary.

### **Conclusion**

In 1979, Chief Justice William S. Richardson succinctly declared: “Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision.”<sup>18</sup> Our current merit-based system serves the public well by ensuring that qualified judges are appointed, and then carefully reviewed during the retention process. The bill’s proposed fundamental shift is unwarranted when the current system is working well, particularly given the concerns discussed above.

For these reasons, the Judiciary respectfully opposes this bill. Hawaii’s current judicial selection and retention procedures were developed to ensure that highly qualified and skilled judges are selected by merit and retained without regard to political considerations. Judges are held accountable when they fall short of expectations for competence, integrity and fairness. Indeed, the present system ensures accountability while safeguarding the public’s interest in an independent judiciary.

While we appreciate, and share, in the Legislature’s desire to seek ways to improve the present retention system for judges, this bill’s approach is not consistent with the goal of improving the quality of judges. Instead, it will lead to the perception of a politicized judiciary. Therefore, retention by Senate reconfirmation will erode the confidence the public has in the non-partisanship of the judicial selection process and will ultimately diminish trust in the judicial system.

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<sup>15</sup> Malia Reddick, et al., *Racial and Gender Diversity on State Courts, an AJS Study*, 48 No. 3 Judges’ J. 28, 30 (2009).

<sup>16</sup> Tracey E. George & Albert E. Yoon, *The Gavel Gap: Who Sits in Judgement on State Courts?*, American Constitution Society (2016), available at <http://gavelgap.org/pdf/gavel-gap-report.pdf>.

<sup>17</sup> See 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 619 (1980) (“The public should not be deprived of having the most qualified candidate for judicial appointment.”).

<sup>18</sup> William S. Richardson, *Judicial Independence in Hawaii*, 1 U. HAW. L. REV. 1, at 4 (1979).

Senate Bill 328, 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.  
Senate Committee on Judiciary and Labor  
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Respectfully, the Judiciary strongly opposes this bill. Thank you for the opportunity to testify.



Testimony of the Judicial Selection Commission  
To the Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2017  
By Jackie Young, PhD., Vice Chair,  
Judicial Selection Commission,  
And Members of the Commission

**S.B. No. 328:**        **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.**

**S.B. No. 673:**        **PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE  
OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND  
JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.**

Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee:

The Judicial Selection Commission (JSC) strongly opposes these proposed amendments for two primary reasons:

**1. POLITICS AND CONFIDENTIALITY.**

Our community places a high value on an independent judiciary, which is the core foundation of a democratic society.

The citizen delegates at the 1978 State Constitutional Convention established the Judicial Selection Commission because they were highly concerned with the potential for political influence and abuse in the judicial selection system. They firmly believed that a judicial selection commission system would provide for a more qualified and independent judiciary.

Further, the delegates were convinced that retention of the judges through review by a non-partisan commission is more desirable. Such a commission would ensure that a process that minimizes partisan political actions would select qualified judges and justices.

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

To ensure a fair and diverse judiciary the Commission members bring a wealth of knowledge and experience and are individually respected for their contributions to Hawaii's community. To remove politics from the decision process JSC members must forego political activity during their term. We can vote, but cannot actively participate in partisan politics – such as attending fundraisers or being a member of a candidate's campaign.

Almost all of what the JSC does requires a strong commitment to confidentiality that would not be possible in a public or legislative forum. The State Constitution mandates that the JSC's deliberations be confidential. We cannot reveal or discuss our interviews with applicants, petitioning justices or judges, or resource people. JSC members cannot reveal or discuss what goes on or is said in our meetings. The JSC code of strict confidentiality encourages the honest discussion of an applicant's character, temperament, integrity, legal and decision-making skills. JSC applicant files contain personal financial records such as credit reports and financial stability, personal health and family issues and confidential letters from the members of the public, including court administrative staff, legal peers, past clients, and representatives

of related state and local organizations. Due to the JSC's adherence to strict validation of information and confidentiality during the vetting process, the JSC rarely receives anonymous calls or letters.

Our workload is intense. In 2016 alone, we received 223 applications for nine vacancies and seven petitions for retention. Each file is handled in the most secure manner and reviewed meticulously, which means careful reading of information from the applicant, recommendations from outside sources and peer reviews. There may be as many as 45 applicants for a single vacancy with some applications running several dozen pages long. After reading the applications, the JSC meets with several resource individuals who express their candid and confidential views of the applicants. Following these resource meetings each applicant is interviewed to assess her/his knowledge of the law and, equally important, his/her character.

The Commission members are dedicated and uncompensated public service volunteers. It has been our collective experience that the current process provides the necessary confidentiality and rigorous vetting of judicial personnel actions, which results in the selection of outstanding justices and judges known for their excellent legal expertise and trustworthy personal qualities. The JSC serves our community well by preserving a strong, diverse and independent judiciary.

## **2. RETENTION: THE IMPACT OF TIMING ON LIMITED RESOURCES.**

Under the existing terms of Article VI, Section 3 of the State Constitution, the time of formal notification of a justice's or judge's petition for retention is at least six months prior to the expiration of the justice's or judge's term of office. Upon receipt of the petition, the JSC has to notify the public, receive comments from the public during a 90-day period, review the petitioner's file and public comments, meet with resource people and stakeholders and interview the petitioner approximately 8-10 weeks prior to the expiration of the justice's or judge's term of office. The foregoing process by the JSC requires and exhausts the full six-month period. Any proposal to add to, or alter, this period would be a disservice to the petitioning justice or judge, the judiciary, and the public.

Further, the proposed amendments in S.B. No. 328 allow a petitioning justice or judge to file a retention petition as late as 9 months prior to expiration of the term. The proposed amendment allows the JSC 6 months to make its decision, and 3 months thereafter for the Senate to approve the JSC's decision to grant the petition. This would exhaust the full 9 month period. What happens to the Judiciary should the Senate decide to reverse the JSC's decision to grant the petition? The Judiciary would then be severely short-handed by a justice or judge because the JSC would have to begin the entire process to select a new justice or judge, leaving the Judiciary in a desperate predicament. We surmise that this would leave the Judiciary in a bind for quite some time, perhaps up to 18 months if the timeline proposed in S. B. No. 328 is allowed.

Thank you for the opportunity to comment on these proposed legislation.

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

February 10, 2016

S.B. No. 328:           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 strongly oppose passage of S.B. No. 328 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 merit-based system of judicial retention is preferable to the procedure proposed by S.B. No. 328. Our current system balances public input regarding the retention of a judge in office with confidential evaluations from the legal community. Confidentiality of feedback from the legal community is essential in protecting attorneys and their clients from potential 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. 328 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 the political arena, judges are more likely to be singled out for their decisions or rulings on controversial cases rather than their records as a whole. Judges, fearful of being criticized in retention hearings, might be inclined to assign heavier sentences in criminal cases or rulings which are deemed "safe" in civil cases rather than rulings based upon the law and the individual 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 if S.B. No. 328 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.



Committee: Committee on Judiciary and Labor  
Hearing Date/Time: Wednesday, February 8, 2017, 9:00 a.m.  
Place: Conference Room 016  
Re: Testimony of the ACLU of Hawaii in **Opposition** to S.B. 328, 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 Rhoads, and Members of the Committee:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in opposition to S.B. 328, which 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 framers of the Hawaii Constitution – like the framers of the United States Constitution – correctly insulated the judiciary from prevailing popular opinion, allowing judges to base their rulings on law and facts rather than on fear of losing their jobs. The integrity of our courts would be greatly compromised if justices and judges could not make unpopular rulings – for example, by protecting the constitutional interests of minority groups – without fear of retribution.

For these reasons, the ACLU of Hawaii urges the Committee to defer S.B. 328.

Thank you for the opportunity to testify.

Sincerely,

Mandy Finlay  
Advocacy Coordinator  
ACLU of Hawaii

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

American Civil Liberties Union of Hawai'i  
P.O. Box 3410  
Honolulu, Hawai'i 96801  
T: 808.522.5900  
F: 808.522.5909  
E: [office@acluhawaii.org](mailto:office@acluhawaii.org)  
[www.acluhawaii.org](http://www.acluhawaii.org)



Lisa Woods Munger  
Chair  
Hawaii State Committee  
lmunger@goodsill.com

[JDL.testimony@capitol.hawaii.gov](mailto:JDL.testimony@capitol.hawaii.gov)

Senator Gilbert S. C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Committee on Judiciary and Labor

SB 328 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

SB 673 Proposing Amendments to the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges are Appointed, Consented to, and Retained

Hearing Date: February 8, 2017 at 9:00 a.m.

**TESTIMONY OF  
THE AMERICAN COLLEGE OF TRIAL LAWYERS  
OPPOSING S.B. NO. 328 AND S.B. NO. 673**

I submit this testimony in opposition to both S.B. No. 328 and S.B. No. 673 in my capacity as the Hawaii State Chair of the American College of Trial Lawyers.

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

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

**REPLY TO:**

Goodsill Anderson Quinn &  
Stifel  
PO Box 3196  
Honolulu, HI 96813-3196  
t: (808) 547-5744  
f: (808) 547-5880

**NATIONAL OFFICE**  
19900 MacArthur Blvd.  
Suite 530  
Irvine, CA 92612  
t: 949-752.1801  
f: 949-752.1674  
www.actl.com





access to justice, and fair and just representation of all parties to legal proceedings. Additional information about the College, as well as a list of the Hawaii Fellows, is available at the College website: <https://www.actl.com/>

S.B. No. 328 states, in part, that “[t]he purpose of this Act is to propose 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 the consent of the senate for a justice or judge to renew a term of office.” Similarly, S.B. No. 673 states, in part, that “[t]he purpose of this Act is to propose amendments to article VI, Section 3, of the Constitution of the State of Hawaii to ...[a]uthorize the senate to approve or reject subsequent terms of office for a justice or judge.”

The American College of Trial Lawyers has steadfastly opposed threats to the independence and impartiality of the judiciary. In October of 2011, the Judiciary Committee of the College issued the *American College of Trial Lawyers White Paper on Judicial Elections*, proposing that the College go on record as opposing contested elections for the selection and retention of judges. This recommendation was subsequently adopted by the Board of Regents.

The College’s *Recommended Principles Regarding Judicial Selection and Retention* are now as follows:

One of the core values of the College is the improvement of the administration of justice. In keeping with that purpose, one of the College's missions is to support, and seek to preserve and protect, the independence of the judiciary as a third branch of government. While our courts must be accountable, the College believes that it is preferable that they be accountable to the Constitution and the rule of law rather than to politicians and special interest groups, and that it is appropriate for the College to lend its support in defense of fair and impartial courts from political pressures. The College respects and defers to the rights of each state to select the manner in which its judges are chosen. It is, however, in keeping with the core values of the College, to have the discretion to assist in the defense of existing judicial selection systems that are based on something other than partisan political elections, whether they be denominated as merit based or nonpartisan, when efforts are made to supplant them with systems that are more partisan and political in nature than the then existing one. It is with this purpose in mind that the College adopts the following statement of principles:

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



2. The preferred method of selecting judges for statewide office, or in large metropolitan areas, is one which, as much as possible, is nonpartisan and based on merit. One such method would be by a judicial nominating commission, composed of lawyers and laypersons with the nominating commission established by statute in such a fashion as to minimize or neutralize the influence of partisan politics and to be broadly reflective of the community (e.g. requiring several appointing authorities and limiting appointments from any one political party). The nominating commissions would select a short list of the best qualified nominees, based on education, experience, temperament, and the ability to be fair and impartial. The governor would then appoint a judge from the panel submitted by the commission. Judges would be accountable to the public and subject to periodic performance evaluations and periodic, non-partisan, retention votes.
3. In order to exercise its oversight function, regardless of the selection/ retention system, the public needs access to meaningful information about the performance of judges. Performance evaluations should be conducted by a body that is independent of the judiciary and statutorily composed in a manner similar to the nominating commission. Evaluations should be based on stated criteria and reported accurately, effectively, and promptly to the public. Survey participants should include lawyers, parties, and jurors who have interacted with the judge.
4. The "appearance of impartiality" is critical to judicial independence. Nothing erodes public confidence in the judiciary more than the belief that justice is "bought and paid for" by particular lawyers, parties, or interest groups. *The College holds in the highest esteem elected judges who perform their duties day in and day out with integrity, courage and conviction, and without permitting the fact of judicial elections to exert any influence over their decisions. The College believes that contested judicial elections, including retention elections, create an unacceptable risk that improper and deleterious influences of money and politics will be brought to bear upon the selection and retention of judges. The College therefore opposes contested elections of judges in all instances. (Italics in original; underlining added for emphasis.)*



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On behalf of the American College of Trial Lawyers, I respectfully oppose S.B. No. 2239 and S.B. No. 2238. As stated above, while courts must be accountable, the College believes that it is preferable that they be accountable to the Constitution and the rule of law rather than to partisan and political pressure. In keeping with its core values, the College defends existing judicial selection systems that are based on something other than partisan political elections, like Hawaii's system, when efforts are made to supplant them with systems that are more partisan and political in nature than the then existing one. Judicial independence is best served if politics are removed, insofar as possible, from the judicial retention process. The framers of our State's Constitution understood this, and designed a retention system accordingly. We urge the Committee to hold both bills.

Thank you.

Lisa Woods Munger  
Hawaii State Chair  
American College of Trial Lawyers



February 7, 2017

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

Re: **SB 328:** *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.*

**SB 673:** *Proposing Amendments to the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges Are Appointed, Consented to, and Retained.*

Hearing Date: February 8, 2017

Hearing Time: 9:00 a.m.

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Dear Senator Keith-Agaran and Senator Rhoads:

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 328 and SB 673, which propose to amend the Hawaii State Constitution to require Senate consent to all petitions for retention of justices and judges.

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<sup>1</sup> 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 are issues that have been of particular concern to AJS in Hawaii.

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<sup>1</sup> 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 a Fair and Impartial Judiciary.*

A fair and impartial judiciary is essential to our democratic form of government. That goal has long been linked to the process of selecting and retaining judges and justices. 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, but the overriding concern was with the potential for political influence in the judicial selection process and its impact on the decision-making of judges selected and retained through that process.<sup>2</sup> 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.”

To address these concerns, the 1978 Constitutional Convention replaced a system in which the governor or chief justice appointed judges, many on the basis of political connections, with a system in which judges and justices must be appointed on the basis of merit. As many know, this merit selection system selects and retains judges by means of the nonpartisan, nine-member Judicial Selection Commission (“*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.<sup>3</sup> Applicants are evaluated on the basis of background, professional skills, character, and other specified criteria relating to merit.<sup>4</sup> 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.<sup>5</sup> The final selection is subject to confirmation by the Senate.

For subsequent terms, judges and justices seeking to renew their terms petition the JSC to be retained in office and are evaluated by the JSC. Petitioners are evaluated on the basis of the same merit-based criteria specified for appointment.<sup>6</sup>

Since its implementation, Hawaii’s merit selection system for justices and judges has been found to be the most important and effective protection for a fair and impartial judiciary. *See* Report of the AJS Hawaii Chapter’s Special Committee on Judicial Independence

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<sup>2</sup> William S. Richardson, *Judicial Independence & the Hawaii Experience*, 2 Univ. of Hawaii L. Rev. 1, 45 (1979).

<sup>3</sup> 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>.

<sup>4</sup> Judicial Selection Commission Rules, Rule 10.

<sup>5</sup> The Chief Justice appoints State of Hawaii District Court judges from the list provided by the JSC.

<sup>6</sup> Judicial Selection Commission Rules, Rule 10.

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.”). However, by providing that the Senate may consent to or reject a retention petition even if the JSC has evaluated the petitioner and determined that he or she should be retained, the proposed legislation would effectively replace the JSC as the final arbiter for retention petitions.

### *Retention and Judicial Fairness and Impartiality.*

AJS opposes the proposed legislation because it would effectively replace the merit-based retention system with one in which political or non-merit based considerations will be perceived as the overriding factors, and in so doing, undermine the fair and impartial analysis of cases to be decided by retention candidates.

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. Some judges and justices anticipating the proposed retention hearings while handling such cases might be more likely to take into account popular sentiment or other “non-judicial” factors in making their decisions than they would have under the current commission-based retention system, since they may believe such factors would play more of a role in their retention. The proposed legislation could make it less likely that their decisions would be based solely on the case facts and law, thus undermining judicial fairness and impartiality.

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).<sup>7</sup>

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<sup>7</sup> 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 system to select and retain judges, coding decisions that upheld the government’s case as conservative and decisions in favor of the defendant as liberal.

Chairman Sen. Gilbert S.C. Keith-Agaran  
Vice Chairman Sen. Karl Rhoads  
Senate Committee on Judiciary and Labor  
February 7, 2017  
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A more recent empirical study of retention election behavior confirms that a judge's concerns over his or her job security will impact how the judge decides cases, suggesting that an anticipated process of re-confirmation by the legislature could cause judges to decide certain types of cases based on political factors or perceived popular opinion, rather than the law and the facts of the case. See Kate Berry, "How Judicial Elections Impact Criminal Cases," Brennan Center for Justice (December 2, 2015), available at <https://www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases>.

To summarize, nearly 40 years ago, the need to restore fairness and impartiality in the judicial decision-making process led to the creation of our commission-based system for retaining judges and justices. The public expectation of a fair hearing in the courts remains 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 retention election -- studies have shown that some justices and judges will adjust his or her decision-making process in a way to align with the perceived constituency for fear of losing his or her position. The proposed process of Senate reconfirmation, no less than retention elections, could inject such political considerations into the decision-making process of retention candidates, and thereby, undermine judicial impartiality and fairness.

In closing, I humbly submit that the proposed legislation should not be passed.

Thank you for your consideration.

Very truly yours,



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

Telephone No.: (808) 544-3841  
Email: [cmiwa@cades.com](mailto:cmiwa@cades.com)



AMERICANS FOR DEMOCRATIC ACTION

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OFFICERS	DIRECTORS			MAILING ADDRESS
John Bickel, President 23404	Guy Archer	Jan Lubin	Cameron Sato	PO. Box
Alan Burdick, Vice President	Dylan Armstrong	Jenny Nomura	George Simson	Honolulu
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February 3 , 2017

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

RE: SB 328 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.

Opposition for hearing on Feb. 8

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

We oppose SB328 to propose a constitutional amendment to require Senate consent for a justice or judge to renew a term of office as we support the independence of the judiciary and the principle of checks and balances. Judges should rule on what they see as just and legal not what will get them in political trouble with the Senate upon a reconfirmation hearing. U.S. Supreme Court Justice Ruth Bader Ginsburg is making a trip to Hawaii. She is an outstanding Justice, but would a Republican Senate vote to reconfirm her if this law applied at the federal level? Keep judges and justices accountable to the law and the constitution, not politics.

Thank you for your consideration.

Sincerely,

John Bickel  
President





Senate Judiciary and Labor Committee  
Chair Gil Keith-Agaran, Vice Chair Karl Rhoads

02/08/2017 at 9:00 AM in Room 016

SB328 – 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.

TESTIMONY – OPPOSITION

Corie Tanida, Executive Director, Common Cause Hawaii

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

**Common Cause Hawaii opposes SB328** which would require the consent of the Senate for a judge or justice to renew their terms of office and adjusts the timeframe to renew the terms of office accordingly.

Requiring Senate confirmation for the re-retention of judges and justices is not appropriate for the branch of government charged with protecting citizens' rights, regardless of public sentiment. The proposed re-retention process would result in intense political pressure on judges and justices, who would face retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case.

Inviting this type of political influence on our judges and justices undermines the public's trust and confidence in our courts.

**Judges must make fair, impartial decisions based on the law and the merit of a case – not what is popular. We urge the Committee to defer SB328.**

Thank you for the opportunity to offer testimony **opposing SB 328**.

**FAMILY LAW SECTION  
OF THE  
HAWAII STATE BAR ASSOCIATION**

c/o 841 Bishop Street, Ste. 480, Honolulu, Hawaii 96813  
[www.hawaiiifamilylawsection.org](http://www.hawaiiifamilylawsection.org)

February 6, 2017

TO: Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

FROM: LYNNAE LEE, Chair  
TOM TANIMOTO, Vice-Chair  
Family Law Section of the Hawaii State Bar Association

CHAIR  
LYNNAE LEE  
[llee@lla-hawaiiilaw.com](mailto:llee@lla-hawaiiilaw.com)  
VICE-CHAIR / CHAIR-ELECT  
TOM TANIMOTO  
[ttanimoto@coatesandfrev.com](mailto:ttanimoto@coatesandfrev.com)  
SECRETARY  
ANTHONY PERRAULT  
[tony@farrell-hawaii.com](mailto:tony@farrell-hawaii.com)  
TREASURER  
NAOKO MIYAMOTO  
[N.Miyamoto@hifamilaw.com](mailto:N.Miyamoto@hifamilaw.com)

HEARING DATE: February 8, 2017 at 9 a.m.

RE: Testimony in opposition to SB328 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

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Dear Committee Chair Keith-Agaran, Vice Committee Chair Rhoads, and fellow committee members:

It appears these bills seek to amend the current process for the retention of judges by adding the Senate's approval by vote during a public hearing. It's always a slippery slope when politics infects our judicial process. Individuals best able to apply the standards applicable to our judiciary are attorneys who appear before the court regularly. The public is not in the best position to make that determination. The HSBA already regularly surveys its members regarding the judges up for retention.

The Hawaii State Bar Association Family Law Section opposed this measure last year and we oppose this measure again this year. We believe the current process whereby the Judicial Selection Commission handles the retention process for Judges and Justices is satisfactory and needs no further review or amendments.

The Judicial Selection Commission is comprised of members of our community appointed by the Governor; Senate President; House Speaker; Chief Justice; and, the Bar. No more than four of these individuals may be lawyers. The current system provides for non-lawyers to have a voice.

Allowing the change may not be effective in that the legislative process is a public process. Hence, an individual's testimony will become public record. The likely consequence of introducing the legislative process into the retention system is that individuals may not be willing to publicly state an objection out of fear of retaliation. The current retention process works

because all comments made to the Judicial Selection Commission remain confidential. Likewise, the Judicial Selection Commission's deliberations must be kept confidential. Therefore, the Commission can be assured to receive the most complete and candid commentary regarding a Judge or Justice.

Second, the negative effect this may have is upon the public itself whereby Judges and Justices (whether conscious or sub-conscious) may be cautious and hesitant in their rulings. Judges and Justices must be impartial. If the current bill is adopted, it may affect a Judge or Justice's ability to make decisions without cause for concern about a disgruntled or vexatious litigant; a public figure; or, someone with ties to the legislature publicly coming after them for his/her ruling.

Third, the bill as proposed will take time away from the Judiciary. The Judges and Justices already are extremely busy with an overload of cases. The concern as practitioners representing the general public is this time taken to appear at a hearing (or lobby the Senate) may create further backlog in Court.

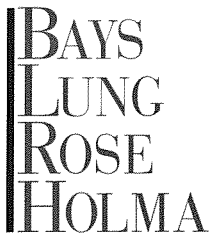
In summary, we believe why fix something when it isn't broken. We are not aware of any significant problems with the current retention process or problems with the Judicial Selection Commission. It allows for the public to comment and provide feedback confidentially. Please remember not all judges are retained. The Judicial Selection Commission does not act as a "rubber stamp" with respect to retention. It takes the process very seriously and garners testimony from the HSBA, amongst other sources, before rendering its decision.

Thank you for the opportunity to testify in opposition to SB328.

Sincerely,

Lynnae Lee, Chair, Family Law Section  
Tom Tanimoto, Vice-Chair, Family Law Section

*NOTE: The comments and recommendations submitted reflect the position/viewpoint of the Family Law Section of the HSBA. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.*



Attorneys at Law

Topa Financial Center  
700 Bishop Street, Suite 900  
Honolulu, Hawai'i 96813

P.O. Box 1760  
Honolulu, Hawai'i 96806

Tel: (808) 523-9000  
Fax: (808) 533-4184  
E-mail: mail@legalhawaii.com  
www.legalhawaii.com

Harvey J. Lung  
Crystal K. Rose  
Karin L. Holma  
Bruce D. Voss  
Craig P. Wagnild  
Ryan H. Engle  
Michael C. Carroll  
Adrian L. Lavarias  
Sarah M. Love  
Bart W. Howk  
Matthew C. Shannon  
Christian D. Chambers  
David R. Major

A Partnership of  
Law Corporations

Sharon E. Har  
Kristin A. Shinkawa  
Jordyn S. Toba  
John D. Ferry III  
Leinaala L. Ley  
Michael R. Kirgan  
Grant F. Allison  
Jason W. Jutz  
James G. Diehl

Of Counsel:  
A. Bernard Bays  
Jean K. Campbell

Jason N. Baba  
(1957-2001)

February 7, 2017

The Honorable Gilbert S. C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice-Chair  
415 S. Beretania Street  
Honolulu, HI 96813

**Re: SB 328 – Senate Reconfirmation of JSC Retention  
SB 673 – Senate Reconfirmation of JSC Retention  
Hearing: Wednesday, February 8, 2017 @ 9:00 a.m.  
State Capitol, Conference Room 016**

Dear Chair Keith-Agaran, Vice Chair Rhoads, and other Members of the State Judiciary and Labor Committee:

Thank you for the opportunity to submit testimony and comments on SB 328 and SB 673. This testimony is submitted on behalf of many of the former presidents of the Hawaii State Bar Association and represents the collective voice of the undersigned in strong opposition to both SB 328 and SB 673.

SB 328 and SB 673 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 petition for retention, the JSC determines whether these individuals will be retained. The JSC has significant input from elected officials. In addition to confirming initial judicial selections, the Legislature has input because four of the nine members of the JSC are selected by the Legislature, and two more are appointed by the Governor.

Numerous safeguards are in place to ensure that both the selection and the retention of judges is protected from outside political and/or financial influence. The constitutional separation of powers doctrine requires that we zealously preserve the independence of our judiciary, for even the fear of reprisals (including a refusal to renew a judge's term) based on the judgments rendered while sitting on the bench carries with it a chilling effect that will extend long beyond the particular judge seeking to be retained.

The Honorable Gilbert S. C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice-Chair  
February 7, 2017  
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Substantively, the JSC is well-positioned under our current system to evaluate the performance of sitting judges seeking retention. 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, if judicial retention were to become a public affair by requiring Senate reconfirmation of judges approved for retention by the JSC, it would be close to impossible to protect the judges from systemic political pressure. Such pressure would be brought, whether intentionally or inadvertently, by groups ranging from disgruntled litigants, to government officials, to the public at large, each of whom have an interest in a particular case and result. By way of example, it is quite likely that disgruntled litigants may come forward to speak during the Senate process against a judge who did not provide the exact relief sought by the litigant. 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.

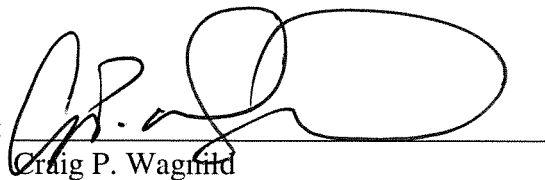
Ultimately, the proposed extra layer of Senate re-confirmation of judicial retentions is unnecessary, would be unfair to judges seeking retention, and poses significant potential adverse consequences to the individual judges being retained, the rule of law, and the separation of powers.

For these reasons, we reiterate our strong opposition of SB 328 and SB 673.

Respectfully,

BAYS LUNG ROSE & HOLMA

By:



Craig P. Wagfield  
Attorney at Law, A Law Corporation  
Its General Partner

CPW:akk

The Honorable Gilbert S. C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice-Chair  
February 7, 2017  
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/s/ Calvin E. Young

Calvin E. Young

/s/ David M. Louie

David M. Louie

/s/ Jeffrey H. K. Sia

Jeffrey H. K. Sia

/s/ Jodi Kimura-Yi

Jodi Kimura-Yi

/s/ Carol K. Muranaka

Carol K. Muranaka

/s/ Randall W. Roth

Randall W. Roth

/s/ Louise K.Y. Ing

Louise K.Y. Ing

/s/ Alan Van Etten

Alan Van Etten

/s/ Hugh R. Jones

Hugh R. Jones

/s/ Ellen Godbey Carson

Ellen Godbey Carson

/s/ Jeffrey S. Portnoy

Jeffrey S. Portnoy

/s/ Sidney K. Ayabe

Sidney K. Ayabe

/s/ Dale W. Lee

Dale W. Lee

/s/ Paul Alston

Paul Alston

/s/ Gregory K. Markham

Gregory K. Markham

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Monday, February 6, 2017 11:44:56 AM

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**SB328**

Submitted on: 2/6/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
victor geminiani	hawaii Appleseed Center fopr Law and Economic Justice	Oppose	No

Comments: Thanks you for an opportunity to testify in strong oppositions to both SB328 and SB673. Both bills breach the critical need to have a judiciary that is free from political pressure. The independence of the courts is a very foundation upon which are unique system of checks and balances between the 3 branches of government is enforced. The system for selection of judges should be through a process that supports merit selection process that is absolutely free from any political influence as possible. Political forces already have enough influence thorough the appointment by the legislature of members top the Judicial Selection Committee and confirmation by the Senate. Changing the State Constitution to authorize the Senate to reconfirm Justices and judges would add a potentially politically influenced process to a currently impartial system that protects judges from external political pressure. Thank you for an opportunity to testify in strong opposition to both SB328 and SB673. Aloha, Victor

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](mailto:webmaster@capitol.hawaii.gov)

**Testimony of Kenneth S. Robbins, on behalf of the  
Hawaii Chapter of the American Board of Trial Advocates (ABOTA)**

Regarding Senate Bill 328

(and separate submission of testimony for Senate Bill 673)

Committee on Judiciary and Labor  
Senator S. C. Keith-Agaran, Chair  
Senator Karl Rhodes, Vice Chair

Wednesday, February 8, 2017, 9:00 a.m.  
Conference Room 016, State Capitol

Dear Senator Keith-Agaran and members of the committee:

The Hawaii Chapter of the American Board of Trial Advocates (ABOTA) has asked that I submit written testimony on behalf of ABOTA in opposition to Senate Bill 328/Senate Bill 673. We are unanimous in our opposition.

Inasmuch as membership in ABOTA is based, in part, upon a minimum number of civil jury trials, which many civil trial attorneys never attain in their entire career, we believe we are uniquely qualified to evaluate and comment on proposed legislation which will impact the independence, quality and integrity of members of the Hawaii Judiciary. Without listing all of the approximately 30 members of ABOTA, alphabetically we include Sid Ayabe, Randall Chung, Tom Cook, Mark Davis, retired Justice James Duffy, David Fairbanks, Rick Fried, Jim Kawashima, Wayne Kekina, Janice Kim, Walter Kirimitsu, Bert Kobayashi, John Komeiji, Hon. Fay Koyanagi, James Levitt, Bill McCorrison, Mel Miyagi, retired Chief Justice Ronald Moon, John Nishimoto, Ken Okamoto, Judith Pavey, Jeff Portnoy, Wayne Sakai, Gerald Sekiya, Richard Sutton, Ray Tam and John Thomas. This is not an entire list, but, hopefully, will give you some idea of those on behalf of whom I have been asked to speak collectively, who, I believe, are held in the highest esteem among trial lawyers in the State of Hawaii.

Our trial lawyer colleagues and judges in other states have expressed time and time again, how they wish the selection process for members of the judiciary was as nonpolitical as what we have in the State of Hawaii, while allowing the input of representatives of each branch of government, the citizenry of our state - through the legislative branch, and the entire body of practicing lawyers in the State via the Hawaii State Bar Association. Of the nine (9) members of the Judicial Selection Commission, the legislative and executive branches of government select more than 50% of that membership. The legislative branch has robust participation in the selection process by its additional opportunity to hold hearings with respect to initial appointments. During that process, candidates are fully vetted and members of the community have the opportunity to weigh in.



Testimony of Kenneth S. Robbins,  
on behalf of the Hawaii Chapter of the  
American Board of Trial Advocates (ABOTA)  
Senate Bill 328  
February 6, 2017  
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ABOTA fully supports the present system and urges as strongly as words allow that we not tinker with the system by including legislative approval of retention of judges. Sometimes the law is not popular. Therefore, there are occasions when judges and justices who apply the law will be unpopular in the perception of many. We can name many cases both nationally and here in Hawaii which have been controversial and, therefore, unpopular with many people - sometimes even the majority of people at the time. As an example, the same sex marriage decision of many years ago in Hawaii was reviled by many, who criticized the decision as being unlawful insofar as it contravened the traditional definition of marriage. Yet today, the philosophy underlying that decision has subsequently been adopted by the United States Supreme Court. It is considered by the vast majority as what the law should be. Would the author of the same sex Hawaii Supreme Court decision been retained, if there had been legislative approval to retain him? Probably not.

To do what is right by the law, judges and justices must have the courage to do what the law requires, and not what the political will demands. Holding legislative retention hearings for sitting judges would, in our strong opinion, apply incalculable pressure on judges to rule in accordance with what is popular and not with what the law requires. On the other hand, legislators are expected and committed to effectuate the will of their constituents, particularly if they wish to be reelected. Therefore, the forces that are applied to legislators must frequently be ignored by members of the judiciary. Indeed, the independence of our judiciary and maintenance of the integrity of our judiciary disallows any current member of the judiciary to speak on their own behalf on occasions, such as this. For those of us who are in court day in and day out, know how critically important it is for our clients to believe in the integrity of the judicial process and never have any perception that a ruling is made for political expediency, rather than what justice requires. Passage of this bill will go a long way toward eroding the confidence our citizenry has in our judiciary.

ABOTA is committed to preserving the jury trial system and the independence of the judiciary. It is for this reason that we are strongly committed to the opposition of Senate Bill 328, and urgently ask and recommend that this bill not proceed beyond this point. Many of our members will appear at the hearing of this bill on February 8. We welcome your questions and those of your committee members.

Respectfully submitted,

Kenneth S. Robbins

Testimony  
Senate Committee on Judiciary and Labor  
Hearing: Wednesday, February 8, 2017 at 9:00 am

To: The Honorable Gilbert S.C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice Chair

From: Sherilyn K. Tavares, Esq.  
Vice-President, Hawai'i County Bar Association

Re: SB 328: Proposing an Amendment to Article IV, Section 3, of the Constitution of the State of Hawaii to Amend the Timeframe to Renew the Term of Office of a Justice and Judge and Require Consent of the Senate for a Justice or Judge to Renew a Term of Office

Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Senate Committee on Judiciary and Labor, thank you for the opportunity to submit testimony on Senate Bill 328. The Hawai'i County Bar Association (HCBA) submits this testimony in opposition to Senate Bill 328.

The HCBA Board voted to oppose Senate Bill 328 and informed its members of its intent to oppose this bill unless "an overwhelming majority of HCBA members voice their disagreement." A message to the HCBA membership was sent on January 30, 2017.

Two HCBA members responded to this message with one opposed and one in support of Senate Bill 328. Accordingly, the HCBA maintains its opposition to Senate Bill 328.

The HCBA Board believes that the current judicial retention process is sufficient and does not need to be replaced. The current process allows attorneys to provide periodic evaluations of sitting judges and affords the public at large an opportunity to provide comments and evaluations to the Judicial Selection Commission as part of a judge's application for retention. Allowing attorneys to provide periodic evaluations and commentary on judges they appear before provides the Judicial Selection Commission with reliable, vital information regarding a judge's strengths and weaknesses. Some attorneys interact with the judges on a regular basis and therefore develop unique insight into the judge's temperament, knowledge of the law, and other critical skills necessary of a jurist. Thus, the current retention process allows the Judicial Selection Commission to focus on the merit, ability, and proper demeanor of a sitting judge and is not a mere rubber stamp for retention.

Integral to our system of government is the need for an independent judiciary. Independence is fostered by allowing the current process to remain unchanged. Although we have full confidence in the Senate's ability to review and confirm judicial nominations, instituting a re-confirmation process has the unnecessary potential of politicizing the judicial system. Judges issue rulings based on the facts and the applicable law without considering potential political

consequences. Any belief that a judge's decision is based on politics or with retention in mind, however unfounded, has the potential to needlessly taint our judicial system.

While the HCBA Board appreciates and commends the Senate's efforts to improve the judicial retention process, it is concerned that altering the current process as proposed would have the unintended consequence of politicizing an otherwise independent, objective process. Judges should make decisions based on the law and facts of each case and not have to worry if their decisions are politically correct or popular.

Thank you for your time and attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sherilyn K. Tavares". The signature is written in a cursive, flowing style.

Sherilyn K. Tavares

# HAWAII FILIPINO LAWYERS ASSOCIATION

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Date: February 7, 2017

To: Sen. Gilbert Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

Re: Testimony on S.B. 328 and S.B.673 – Proposing Constitutional  
Amendments Relating to Judicial Appointments, Consent, and Retention

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The Hawaii Filipino Lawyers Association (HFLA) appreciates the opportunity to submit this testimony in **OPPOSITION** to both **SB328** 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; AND **SB673**, PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

First, in light of the multiple lawsuits that have been filed against President Trump by not only private parties, but also on behalf of various state and municipal governments, **HFLA believes that it is critical - now, more than ever - to support and celebrate the independence of our third branch of American government – the Judiciary.**

Given the gravity of the numerous claims that our current President has egregiously, and unconstitutionally abused his executive power - merely weeks into his administration – we should highlight the non-partisan, non-political process that Hawaii uses to ensure the independence and neutrality of our Judiciary. It would be a step backward to subject this process to the whims of political influence, when Hawaii should be heralded as a nation-wide model for the selection and retention of its judges.

Second, **a robust and comprehensive process already exists** to evaluate judges that seek to retain their position. The Judicial Selection Committee (JSC), currently charged with judicial retention, has the ability to administer oaths; subpoena individuals and relevant documents; and also interview judges seeking retention. The JSC utilizes a confidential comment mechanism that would encourage candid feedback from the legal community, as well as the general public. Moreover, the Judicial Performance Program (JPP) utilizes a highly confidential process performed by a 9-member review panel to promote judicial excellence and competence that each and every judge in Hawaii must

undergo before the question of retention even comes up. Furthermore, the Commission on Judicial Conduct (CJC) has a vigorous process for reviewing and addressing reports of misconduct on behalf of judges, and may recommend a range of disciplinary sanctions, including involuntary retirement.

At best, further adding to these three layers of robust review would be an unnecessary waste of government resources. At worst, the objective and arduous processes of the JSC, JPP, and CJC could be easily and quickly undermined by the political influence of disgruntled legislators and/or the special interest groups or large donors that back them, who may engage in judicial influence or retribution, unhappy with the result of a judge's informed, reasoned analysis and learned interpretations of law - in just one controversial case of the dozens to hundreds a judge may rule on.

Third, given HFLA's mission to: *promote participation in the legal community by Filipino lawyers; to represent and to advocate the interests of Filipino lawyers and their communities; to foster the exchange of ideas and information among and between HFLA members and other members of the legal profession, the Judiciary and the legal community; to encourage and promote the professional growth of the HFLA membership; and to facilitate client referrals and to broaden professional opportunities for Filipino lawyers and law students*, it is necessary for HFLA to express our deep concern that **these measures threaten to erode the diversity of Hawaii's bench.**

If instituted, qualified Filipino attorneys would be discouraged from applying for judgeships, especially 6-year District Court posts (traditionally entry level), knowing they would have to go through a public political process for retention.

Fourth, **public retention hearings at the Capitol would rub against the Judicial Code of Ethics, which prohibits judges from commenting on pending or impending cases.** If the retention process proposed in these bills were instituted, disgruntled litigants would feel emboldened to come forward and question a judge's decision-making. Because judges cannot comment on such cases, they cannot defend themselves in such a forum. Family court judges, in particular, would be especially vulnerable to such public criticism. We want to preserve the current process so judges will not be subject to such public and influential ridicule for merely executing their judicial duties based on objective, measured analysis of the law.

To summarize: as attorneys, officers of the court, and proponents of the balance and separation of powers in our democracy, HFLA believes that our Justices and Judges should have the independence to interpret and apply the law free from political influence. The current process ensures that. We do not want to erode this, nor do we want to discourage a qualified and diverse pool of candidates from answering a call to serve as judges for fear of political retribution. We also do not wish to place our judges in the awkward position of having to pit their need to defend against litigants or special interests against their ethical duties as judges.

Thank you for this opportunity to testify on these measures in opposition.



**HAWAII GOVERNMENT EMPLOYEES ASSOCIATION**  
AFSCME Local 152, AFL-CIO

**RANDY PERREIRA**, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Twenty-Ninth Legislature, State of Hawaii  
The Senate  
Committee on Judiciary and Labor

Testimony by  
Hawaii Government Employees Association

February 8, 2016

**S.B. 328 – 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**

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO strongly opposes the purpose and intent of S.B. 328, which proposes a constitutional amendment to amend the timeframe to renew the term of a justice or judge and require consent of the Senate for a justice or judge to renew a term of office.

It is essential for our judicial system to be composed of justices and judges who have the authority and autonomy to exercise their independent judgement. When justices and judges must return to the Senate for confirmation to renew each term, they are exposed to political influence and their rulings on controversial cases may be swayed to ensure another term. While it can be argued that there could be more transparency in the process, the current composition of and criteria for Hawaii's judicial merit selection system works.

Thank you for the opportunity to testify in strong opposition to S.B. 328. We respectfully request the Committee defer this measure.

Respectfully submitted,

Randy Perreira  
Executive Director



**TESTIMONY**

Senate Committee on Judiciary and Labor  
Hearing: Wednesday, February 8, 2017 (9:00 a.m)

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice Chair

FROM: Nadine Y. Ando  
President, Hawaii State Bar Association

RE: SB 328, 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

SB 673, PROPOSING AMENDMENTS TO THE  
CONSTITUTION OF THE STATE OF HAWAII TO AMEND  
THE MANNER IN WHICH JUSTICES AND JUDGES ARE  
APPOINTED, CONSENTED TO, AND RETAINED

Chair Keith-Agaran, Vice-Chair Rhoads and Members of the Senate Committee on Judiciary and Labor, thank you for the opportunity to submit testimony on Senate Bill 328 and Senate Bill 673. Both bills propose amendments to the Constitution of the State of Hawaii. The Board of the Hawaii State Bar Association (“HSBA”) considered both bills at its regular meeting on January 26, 2017. At the conclusion of the discussion, the Board voted unanimously to oppose both bills, finding that the bills would, in all probability, have an impact on the legal profession and on legal services provided to the public.

**The HSBA Submits this Testimony in Opposition to  
Senate Consent for Retention in Judicial Office**

Senate Bill 328 would amend the Constitution to require the consent of the Senate for a justice or judge to renew a term of office. Senate Bill 673 would amend the Constitution to provide that the Senate would have the power to consent to or reverse the decision of the Judicial Selection Commission (“JSC”) regarding the retention of a justice or judge. The HSBA opposes both bills because they undermine the fairness, impartiality and independence of the judiciary. A decision to change the Constitution and to reject the findings of the 1978 Constitutional Convention should not be taken lightly.

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### **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 and the history of the retention process created by the 1978 Constitutional Convention in "Judicial Independence: The Hawaii Experience"<sup>1</sup>:

- "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.)

With this primary purpose in mind, the membership of the JSC is to be nonpartisan by Constitutional mandate. The JSC has members selected by the Governor, the Senate President, the Speaker of the House, the Chief Justice and the Members of the Bar.<sup>2</sup> The JSC has strict rules regarding abuse of position, conflict of interest, and confidentiality.<sup>3</sup> To limit partisan political influences, Commissioners are prohibited from running for or holding an elected office, and cannot take an active role in political management or political campaigns.<sup>4</sup>

### **The Judicial Selection Commission Process for Retention**

The JSC conducts a careful and confidential review before making decisions on retention petitions. The JSC reviews judicial evaluations conducted by the Judiciary, which are based on confidential assessments from attorneys who have appeared before the judge. Public notifications are placed in a newspaper of general statewide publication of requests for judicial retention which solicits public comment. The JSC then receives confidential evaluations from the public and from jurors. The JSC conducts confidential interviews of knowledgeable community resource persons. After receiving this input over the course of many months, the JSC interviews the justice or judge in a confidential setting.

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<sup>1</sup> William S. Richardson, Judicial Independence: The Hawaii Experience, 2 University of Hawaii Law Review, 1, 4, 47.

<sup>2</sup> Hawai'i Constitution, art. VI, § 4.

<sup>3</sup> Rule 5, Judicial Selection Commission Rules (JSCR).

<sup>4</sup> Hawai'i Constitution, art. VI, § 4.



The HSBA strongly supports the confidentiality of the JSC process. HSBA members must be able to make comments without the fear of retaliation or the expectation of favor. The Board is very concerned that the identity of its members and the substance of their comments may be revealed outside of the JSC process.

A retention re-confirmation by the Senate would politicize the retention process by providing the opportunity for a referendum on how justices and judges have decided cases during their term in office. In contrast to the JSC's confidential evaluation process, in a Senate hearing each justice or judge may be called upon to explain his or her decisions and to respond publicly to those persons or groups whose special interests may have been affected by his or her decisions. However, under the Revised Code of Judicial Conduct, justices and judges may not make statements on pending matters before the court, and so justices and judges would not be able to respond to the specifics of pending cases in a retention hearing. (This is particularly true for family court judges whose proceedings are generally not open to the public.) Justices and judges would not be able to provide a counterweight to anecdotal concerns expressed by disappointed litigants or special interest groups. As a result, judges would need to be mindful of and deferential to the executive branch, the legislature and popular opinion, which at minimum would undermine the public's perception of the judiciary's fairness and impartiality.

This concern is heightened in the aftermath of the U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission*, which allows individuals and groups with special interests to make unlimited expenditures and election communications in federal and state elections. It is not surprising that political party and special interest group spending on judicial elections skyrocketed following *Citizens United*.<sup>5</sup> It should be noted that there is no barrier to spending by out of state interest groups in other state elections.<sup>6</sup> While Hawaii does not have judicial elections, those with special interests may turn their attention to Senate races in response to unpopular decisions of the judiciary.

In conclusion, the HSBA opposes both bills in their entirety. In addition to its opposition to changes in the judicial retention process, the HSBA opposes the proposed amended timeline for judicial selection and retention. The practical effect of these changes is to extend the process for up to 180 days, resulting in long judicial vacancies. Lengthy judicial vacancies adversely impacts attorneys, litigants and the courts. We urge the Committee not to make changes to Article VI of the Constitution.

Thank you for the opportunity to comment.

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<sup>5</sup> The Brennan Center for Justice reports that since *Citizens United*, special interest groups and political parties spent an unprecedented \$24.1 million in state court races in 2011-12, an increase of over \$11 million since 2007-08. The Associated Press reports that in the 2014 election, for just 19 state high court elections, spending exceeded \$34.5 million, with much of the money coming from special interests.

<sup>6</sup> Three Supreme Court justices in Iowa were ousted in 2010 after interest groups, most from out of state, spent nearly a million dollars to unseat them owing to the court's unanimous ruling in a 2009 gay marriage case. Following a collective bargaining dispute in Wisconsin, both parties tried to pack the state court

# Hawai‘i State Trial Judges Association

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**Testimony to the Senate Committee on Judiciary and Labor  
Regarding SB328 and SB673**

Senator Gilbert S.C. Keith-Agaran, Chair

Senator Karl Rhoads, Vice Chair

Hearing on Wednesday, February 8, 2017, 9:00 a.m.

State Capitol, Conference Room 016

By

Board Members on behalf of the Hawai‘i State Trial Judges Association

Hon. Jeannette H. Castagnetti, President

Hon. Melvin H. Fujino, Vice President

Hon. Joseph E. Cardoza, Secretary

Hon. Catherine Remigio, Treasurer

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On behalf of the Hawai‘i State Trial Judges Association (“HSTJA”), thank you for the opportunity to comment on SB328 and SB673 which propose amendments to the Hawaii Constitution concerning the appointment and retention of judges and justices.

The HSTJA was formed in 1990 to gather, study and disseminate information with respect to the trial and the disposition of litigation, the organization of the trial courts, and to promote, encourage, and engage in activities to improve the law, the legal system, and the administration of justice.

Our membership consists of every duly appointed circuit, family and district court judge in the State of Hawai‘i as well as appellate justices and judges.

The HSTJA **strongly opposes** SB328 and SB673. With all due respect to the Hawai‘i legislature, these bills undermine judicial independence and erode the public trust in government. The bills propose to fundamentally change the constitutionally mandated procedure for merit selection and retention of judges in Hawai‘i when our current process was designed to ensure impartiality of the courts and judicial accountability.

The work of the courts would be negatively impacted as there would be delays in judicial decision making. HB 673, for example, proposes to extend the time to appoint and confirm new judges, leaving judicial positions unfilled for an unreasonable amount of time. It is the public and parties involved in court proceedings who are hurt most by judicial positions left vacant for extended and lengthy periods of time.

Lastly, given that judges petition for retention year round and not solely when the legislature is in session, the added cost to taxpayers to hold special sessions for judicial retention hearings

would be significant for the State and unnecessary when the non-partisan judicial selection commission is better suited to retain competent and independent judges to serve the people of Hawai'i. It is also noted that four out of the nine judicial selection commission members are appointed by the legislature (two by the senate president and two by the speaker of the house).

## **1. The bills undermine judicial independence.**

Judicial independence is critical to the integrity of our democracy and essential to the fair administration of justice for our citizens. As Alexander Hamilton argued in *The Federalist Papers*,

“[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments . . . .<sup>1</sup>

Judges must be free to make fair and just decisions based on the constitution, the rule of law and the facts presented by the parties, without fear of reprisal by outside interests, including the other branches of government. Judicial independence is integral to ensuring fair and impartial decision making for all who appear in Hawai'i courts seeking justice. It serves to protect the minority from the majority, the poor from the rich, and in some cases, individuals from government overreaching.

The concept of judicial independence is plainly evident in Article VI, sections 3 and 4 of the Hawai'i Constitution which allows for the nine-member judicial selection commission, who “shall be selected and shall operate in a wholly nonpartisan manner,” to determine whether a judge or justice should be retained for another term. At the 1978 Constitutional Convention, the Judiciary Committee was highly concerned with the potential for political influence and abuse in the existing selection system. It was the Committee's firm belief that a judicial selection commission system, commonly referred to as a “merit based system,” would provide for a more qualified and independent judiciary.<sup>2</sup>

As proposed, SB328 and SB673 authorize the senate, rather than the nonpartisan judicial selection commission, to approve or reject subsequent terms of office for judges and justices. For judges seeking retention, having to appear before the senate for retention hearings is precisely the type of political or partisan pressure that undermines judicial independence and delegitimizes the role of the courts in administering justice.

## **2. SB328 and SB673 erode the public trust in the impartiality of the courts and government as a whole.**

The people of Hawai'i deserve judicial independence in every case decided by the courts. They deserve a judiciary that is free from a selection and retention process that could appear or suggest that judicial decision making is influenced by partisan pressure or special interests. The public

must have confidence in the courts and that judges will decide legal disputes in line with the justice system's traditional notions of fairness and equal treatment under the law.

Respectfully, proposing a bill to amend the constitution to authorize the senate to determine whether a judge or justice is retained, intentional or not, gives the appearance that members of the legislature or other outside interests seek to influence judges' rulings. If the public perceives the legislative branch or special interests are attempting to influence judicial decisions by way of the selection or retention process, the public trust in government and the pillars of our democracy will diminish. Public perception that parties cannot get a fair shake in the courts will, without question, erode the public's trust in the impartiality of the courts and the government as a whole.

In the long run, the public and *all* branches of government, the legislature, the governor, and the courts, benefit from judicial selection and retention that is merit based and free from any process that might tend to indicate imposing pressure on judicial decisions.

### **3. The current selection and retention process for judges is set up to ensure merit selection, judicial impartiality and accountability.**

**Judicial Selection Commission.** Article VI, section 4 of the Constitution requires the judicial selection commission to be nonpartisan. Commission members cannot hold political office and cannot take an active part in political management or political campaigns. Of the nine commission members, the governor appoints two (one of whom must be a non-lawyer), the president of the senate and the speaker of the house of representatives each respectively select two members, the chief justice appoints one, and members of the Hawai'i bar select two of its members by way of election. The commission consists of no more than four licensed attorneys. Commission members do not receive any compensation for their service.

The judicial selection commission reviews applicants for each judicial vacancy. Every applicant must complete a 40 page application detailing, among other things, his or her educational background, professional experience, ethical and/or judicial conduct complaints, if any, criminal record, if applicable, and health and tax information. The commission reviews the applications, references, and interviews applicants for each judicial vacancy. The commission considers not only an applicant's professional background and experience, but also character, integrity, moral courage, wisdom, fairness, compassion, diligence, decisiveness, judicial temperament and other qualities the commission deems appropriate.

**Selection of a nominee and senate confirmation.** Once the commission completes its evaluation of the applicants, the commission selects four to six qualified applicants and provides a list to the appointing authority (the governor for supreme court, intermediate court of appeals and circuit court vacancies; the chief justice for district and family court). The governor or the chief justice then selects a nominee, who is then further vetted and confirmed by the senate.

**Judicial Performance Program.** During the course of a judge's tenure, judges are reviewed under the Judicial Performance Program which was established in 1991 by the Supreme Court to

promote judicial excellence and competence. The goals of the program are to improve each judge's performance and provide the judicial selection commission with a source of information for retention and promotion decisions. Judges are evaluated two or three times during their tenure, depending on the length of the judge's term.

Attorneys who appear before the judges complete questionnaires and rate the judges on specific characteristics -- legal ability, judicial management skills, comportment, and settlement or plea agreement ability. Jurors who sat on cases before a judge also complete questionnaires to evaluate judicial performance.

The identities of attorneys who complete evaluations remain confidential and not disclosed to the judges to protect attorneys' concerns of retaliation by judges or influence on judicial decision making. Confidentiality and anonymity helps the program receive useful and candid evaluation responses. Any breach or alteration of the confidentiality requirement would likely reduce the public trust in the courts because the program would be undermined and there could be a perception that judges will tilt their rulings based on prior evaluation responses or in hopes of favorable future evaluations.

Judicial performance evaluations are used in meaningful ways. The results of the evaluations are reviewed by the Judicial Evaluation Review Panel. At least three of the nine-member panel interview judges to discuss the results of the evaluations to improve judicial performance. The evaluations are also used to develop judicial education programs. Finally, the evaluations are provided to the judicial selection commission for review and consideration in determining whether to retain a judge for another term or if a judge applies for a higher judicial office.

**Commission on Judicial Conduct.** The Commission on Judicial Conduct was established in 1979 by the Supreme Court consistent with Article VI, section 5 of the Hawai'i Constitution. The commission investigates complaints made by members of the general public, court personnel, lawyers and judges concerning allegations of judicial misconduct or disability of judges under the Hawai'i Revised Code of Judicial Conduct. When a complaint is made, the commission determines if a complaint warrants investigation and evaluation, and if so, the commission then conducts a confidential investigation and hearing, and recommends dispositions to the Supreme Court. Upon sufficient cause, the commission recommends disciplinary action and further proceedings before the Supreme Court. Ultimately, the Supreme Court shall enter an order based on the commission's recommendation and may impose sanctions ranging from private reprimand to involuntary retirement.

These processes are well established and in place to ensure nonpartisan merit selection and retention of judges, impartiality of the courts, and judicial accountability.

#### **4. The work of the courts will be negatively impacted.**

SB673 proposes to extend the required timeframe for the governor to select and the senate to confirm judicial nominees. Currently, the governor has thirty days to select a nominee from the

list provided by the judicial selection commission and the senate has thirty days to confirm the nominee. Sixty days total for selection and confirmation of a judicial nominee is reasonable.

The proposed amendments seek to extend the current timeframe to one hundred eighty days total (ninety days for the governor to select a nominee and ninety days for the senate to confirm or reject a nominee). Six months to select and confirm judicial nominees significantly extends the time that judicial positions remain vacant.

It is critical for the public and the legislature to understand and appreciate that extending the deadlines for the governor to select and the senate to confirm judicial nominees by as much as six months will have a significant impact on the work of the courts and will likely result in delays of court proceedings. While some courts are covered by *per diem*, district or family court judges when there is a judicial vacancy, not all courts have judges assigned to temporarily preside over their calendars. In the first circuit, for example, district and family court judges are not temporarily assigned to cover circuit court civil divisions. When judicial vacancies for these calendars are left unfilled for extended periods of time, court proceedings will be postponed and judicial decisions delayed.

Further, should the retention process add another layer for senate consent, it is the public and the litigants who pay dearly as justice delayed is justice denied.

##### **5. Public senate retention hearings would be limited and costly for taxpayers.**

The Revised Code of Judicial Conduct precludes judges from discussing or making any statements on pending or impending matters before the court that may substantially interfere with a fair trial or hearing, and also prohibits judges from making any comments about cases, controversies, or issues that are likely to come before the court that are inconsistent with the impartial performance of the adjudicative duties of judicial office. These restrictions on judges are necessary and essential for the impartiality, independence, and integrity of the courts.

A retention process that involves senate confirmation would likely be substantially limited in light of the ethical responsibilities of judges. Judges are bound by the code of judicial conduct and ethically required to refrain from answering or responding to certain questions or critiques directed at them. Thus, judges who issue controversial decisions that senators or their constituents disagree with prior to their retention hearing would be placed in intolerable positions in that a judge may be asked about their decisions, but could not explain or discuss their decisions that may be legally correct, but unpopular with the public or the legislature.

In all likelihood, this process would be frustrating for all the participants as senators may ask questions that cannot ethically be answered by sitting judges. Further, we note that to the extent the legislature disagrees with rulings by any court, it is within the province of the legislature by way of the separation of powers doctrine to make changes to the law to rectify what the legislature believes may be an erroneous decision by a judge or justices. For a party who disagrees with a judge's decision, the party may, of course, appeal to a higher court.

Additionally, because confidentiality is a necessary tool for the Judicial Performance Program to gather meaningful information to evaluate judges, senators involved in the retention process would lack key information about a judge covering the judge's six or ten year term of office. In its retention process, the judicial selection commission interviews numerous resource persons who speak candidly with the commission about judges on the assurance of confidentiality. These same resource people may be reluctant or unwilling to share the same information publicly before a senate hearing. If, during a senate retention hearing, these confidential resources were provided to senators, they would not be at liberty to make such information public. Thus, no greater transparency would be achieved by a senate retention process with regard to such information.

Finally, judges petition for retention throughout the year and judicial terms of office do not end solely when the legislature is in regular session. A retention process in the senate would necessarily require special sessions for the senate, thus significantly increasing the work of senators and cost to taxpayers for a retention process that would be incomplete and inefficient.

**6. The bills discourage qualified and experienced attorneys from seeking judicial office.**

A partisan retention process for judges will discourage qualified and experienced lawyers from seeking a career as a judge. When an attorney becomes a judge, his or her loyalty is to the constitution and the law. Attorneys who aspire to become judges want to serve the public and do not want to be part of a partisan process as it goes against the core of judicial independence and impartiality.

**7. The Judicial Selection Commission is best suited to determine judicial retentions.**

As the judicial selection commission is constitutionally mandated to operate in a nonpartisan manner, has access to meaningful judicial performance evaluations during the course of a judge's term of office, interviews resource persons who candidly discuss a judge's abilities and conduct in a manner that ensures confidentiality for the resource persons, and gives members of the public the opportunity to comment on judges before decisions are made about a judge's retention, the judicial selection commission is the entity that is best suited to make a final decision on whether a judge should or should not be retained.

For these reasons, the Hawai'i State Trial Judges Association opposes the bills. Thank you for considering our testimony.

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<sup>1</sup> THE FEDERALIST NO. 78 at 227-28 (Alexander Hamilton, 1788) (quoting M. DE SECONDANT, BARON DE MONTESQUIEU, 1 THE SPIRIT OF LAWS 165 (Thomas Nugent trans., Edinburgh 1772)).

<sup>2</sup> Stand. Comm. Rep. No. 52, in *1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 621 (1980).

HAWAIIAN AFFAIRS CAUCUS  
Democratic Party of Hawai‘i  
email: [mkhan@hawaiiantel.net](mailto:mkhan@hawaiiantel.net)

TESTIMONY IN OPPOSITION TO  
SB 328, 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

Hearing: Wednesday, February 8, 2017, 9:00 a.m., Conference Room 016

Senator Gilbert S. C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
and Members of the Committee on Judiciary and Labor

The Hawaiian Affairs Caucus of the Democratic Party of Hawai‘i submits this testimony in strong opposition to SB 328.

We begin our testimony by quoting the highly respected Chief Justice William S. Richardson, a Native Hawaiian, “In resolving disputes, courts interpret and develop law and act as a check on the other branches of government. In order to effectively perform these functions, *the judiciary must be free from external pressures and influences.* (italics added)” 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.”

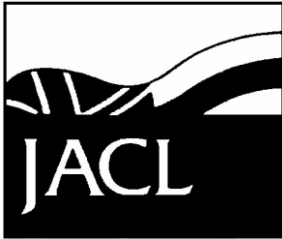
“CJ” got it right! We look to the Judiciary as that arm of government who will impartially listen to and consider the voices of our people, no matter what their stature.

Our judicial system, as it now exists, shields judges from the political process in their reappointment 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 that are legally correct but politically unpopular, especially where the rights of Native Hawaiians and 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.

We are fortunate to have a strong judiciary in Hawai‘i. The existing selection and retention procedures have been successful. There is no need to change the system. To do so would only leave the perception that the change is politically motivated and therefore would result in our loss of confidence in Hawaii’s Judicial system as being fair and impartial. Please do not pass SB 328.

Respectfully,  
Leimomi Khan, Chair





## JAPANESE AMERICAN CITIZENS LEAGUE

HONOLULU CHAPTER

P.O. BOX 1291, HONOLULU, HAWAII 96807

EMAIL: [jaclhon@gmail.com](mailto:jaclhon@gmail.com) WEBSITE: [www.jaclhonolulu.org](http://www.jaclhonolulu.org)

*Working For A Greater America*

### Board Members

February 8, 2017

Alison Kunishige  
President

To: Committee Chair Gilbert Keith-Agaran  
Members of the Senate Committee on Judiciary and Labor

Kent Walther  
1<sup>st</sup> Vice President

From: Alison Kunishige  
President, Japanese American Citizens League – Honolulu Chapter

Jacce Mikulanec  
2<sup>nd</sup> Vice President

Re: OPPOSITION TO S.B. NO. 328 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.

Liann Ebesugawa  
3<sup>rd</sup> Vice President

Geoff Sogi  
Treasurer

Sean Ibara  
Secretary

Chair Keith-Agaran and Members of the Committee:

Susan Arnett

The Japanese American Citizens League (JACL) is the oldest Asian civil rights organization in our country. We seek to protect and defend the rights of all Americans. Over many years, we have supported those who are under-represented in the seats of government or who may take controversial stands in defense of liberty.

Della Au Belatti

Alphonso Braggs

Shawn Benton

Senate Bill No. 328 proposes a constitutional amendment to dramatically alter the process by which Hawaii State District, Circuit and Appellate judges and justices are retained at the conclusion of a term. For the following reasons, the JACL-Honolulu Chapter strongly opposes this bill. Specifically, we oppose the proposed language at page 5, lines 5-16 that would abolish the Judicial Selection Commission's (JSC) decision-making authority in the retention of judges and justices and replace it with a requirement for the state senate to vote on each petition for retention approved by the JSC.

Bernadette Fo

David Forman

Hana Fulghum

AJ Halagao

Trisha Nakamura

Kenyon Tam

As we recognized in testimony submitted on Senate Bill 673, which includes a similar proposal, this does not mandate the election of judges or justices, but it does directly insert political influence in the retention of these jurists. The same problems that accompany elected judges would be present in such a scheme.

Jamie Yamagata

### Legal Counsel

Benjamin Kudo

Jurisdictions with elected judges have far less diverse judiciaries than those where judges are selected by another process, and the cost of mounting an election requires judges to seek endorsements and contributions. Likewise, if a judge was seeking to have our Senate overrule the JSC, it would require an effort by that judge or his or her supporters to persuade constituents of lawmakers to weigh in, which would involve monetary expenditures as well as efforts to satisfy some sort of litmus test to gain the greatest voter support.

### Advisory Council

Allicyn Hikida-Tasaka

Clayton Ikei

William Kaneko

It is naïve to suggest judges would not have to engage in such conduct. If a poor judge, i.e., someone who had demonstrated a significant lack of legal knowledge as shown by repeated appellate reversals, or someone who was known to be unable to manage their caseload by taking unreasonable time periods to decide cases, etc., were to not be retained by JSC, that judge could essentially lobby the Senate, and the voters who support the Senators, to overturn the decision.

Colbert Matsumoto

Alan Murakami

Likewise, a good judge, whose retention was supported by JSC, might find themselves in the position of defending their retention to the Senate when other, better funded parties, were lobbying the Senate to overturn JSC. There is simply no way to apply this change in the retention process without introducing this level of politics and cost.

We think back to controversial decisions made by the judicial branch over our history such as the seminal case integrating our schools, *Brown v. Board of Education*, and the legal cases of Fred Korematsu and Ehren Watada. In the recent history of Hawaii, there was the issue of same sex marriage, which began with a Hawaii Supreme Court decision in *Baehr v. Lewin*, then occasioned a Constitutional Amendment, and over some years of extreme contention led us to the freedom to marry that Hawaii enjoys today.

Looking back on these controversies, what if the judges who had decided these cases as the issues made their way through the court system, over years in some cases, had been subject to a popular vote at the very moment of their controversial decision? We cannot assure that there would not be political influence from the ballot box on our legislators as they struggled with a retention decision. We cannot assure that judges would not be unduly influenced by the likelihood that a controversial decision, albeit following the law, would come back to haunt them when they faced the political process of retention.

Hawaii's current merit-based system of retention is not perfect but it does the best job we have seen of eliminating political influence while keeping a process that widely evaluates the job a judge has been doing. For example, judges with 10-year terms (Circuit and Appellate) are evaluated 3 times during their 10-year term by the attorneys who appear before them. Judges with 6-year terms (District and Family) are evaluated 2 times during their 6 years. All of these evaluations are shared with the JSC when the judge comes up for retention. Additionally, the Hawaii State Bar Association (HSBA) solicits comments from approximately 6,000 attorney members and shares those comments with the JSC. Also, the JSC meets personally with resource people in the community seeking input about a specific judge. While the proceedings before JSC are private in order to give all of the resources the fullest opportunity to give frank, honest input, there is no question there is significant information provided from diverse sources, which cover the years that the judge has been on the bench.

It would seem that proponents of this legislation take issue with certain decisions of our judges and/or justices. In any legal community, anywhere, you will find those who take issue with court decisions on all sides of every question. That simply reflects the adversarial nature of legal practice. As a policy matter, we must consider carefully what it means to amend our state constitution. It would be unfortunate, indeed, if every time an agency (whether public or private), a special interest group, or an individual did not agree with a Hawaii judicial ruling, they could immediately resort to amending the constitution to politicize the retention of judges of the state's courts. We believe that is bad policy. Even if one could point to a specific decision of JSC with which they disagree, this process has served us well for many years. Our judiciary is diverse and independent, and is a contributing branch of our government.

Hawaii is a unique place with a unique history and population. Our courts exemplify the democracy of our state. Circuit and appellate judges are nominated by an elected Governor and approved by elected State Senators. Current judges are appointees of both Democratic and Republican governors. These persons are chosen based on legal experience, scholarship and ability. Decisions regarding retention are based on the same important factors.

We urge our legislators to be vigilant in keeping politics from entering into the judicial retention process.

Thank you for the opportunity to comment on this measure.

KALIHI PALAMA HAWAIIAN CIVIC CLUB

email: [mkhan@hawaiiantel.net](mailto:mkhan@hawaiiantel.net)

TESTIMONY IN OPPOSITION TO

SB 328, 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

Hearing: Wednesday, February 8, 2017, 9:00 a.m., Conference Room 016

Senator Gilbert S. C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
and Members of the Committee on Judiciary and Labor

The Kalihi Palama Hawaiian Civic Club submits its testimony in strong opposition to SB 328. The bill would undermine the integrity of the Judiciary and the Judicial Retention and Selection Process and the impartiality of judges in rendering decisions.

There has been a longstanding clear separation of powers among the three branches of government nationally and locally. For the State of Hawai'i, at the 1978 Constitutional Convention, the issue was thoroughly debated and the people and delegates intentionally crafted a model for an independent judiciary in Hawai'i. We believed they did so to maintain the integrity of the judicial system. Requiring consent of the Senate for a justice or judge to renew a term of office would be a fundamental change that would invite political influence on the Judiciary, thereby undermining public confidence and trust in the fairness and impartiality of the courts.

As you are well aware, sometimes the Native Hawaiian community is at odds with laws made at the legislature. We need an impartial judicial system not subjected to political influence or threat to someone's career to assure fair consideration of our views, as well as yours. Our community expects no less from the judiciary system or from the legislature. Please do not pass SB 328.

Me kealoha pumehana

(on-line testimony)

LEIMOMI KHAN  
Chair

# ***KAUAI BAR ASSOCIATION***

## TESTIMONY

Senate Committee on Judiciary and Labor

Hearing: February 8, 2017

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice-Chair

FROM: Mauna Kea Trask  
President, Kaua'i Bar Association

RE: SB 328 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.

Aloha Chair Keith-Agaran, Vice Chair Rhoads and Members of the House Committee on Judiciary, mahalo nui loa for the opportunity to submit testimony on Senate Bill 328 ("SB 328"). After careful review and consultation with my distinguished colleagues on the island of Kaua'i the Kauai Bar Association ("KBA") respectfully submits this testimony in opposition to SB 328.

*\*Pursuant to the Board adopted Guidelines for Legislative Testimony of the Sections Committee (4/15/88) this written position represents the views of the Kauai Bar Association (a committee, section, division or related entity of the Hawaii State Bar Association, and does not necessarily reflect the views of the Hawaii State Bar Association as a whole.*

### **The KBA Submits this Testimony in Opposition to Senate Reconfirmation**

SB 328 proposes amendments 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.

To date, there have been a total of three bills introduced in the 2017 Legislative Session that propose a constitutional amendment for Senate reconfirmation of judges and justices at the end of their terms. As you are aware, there were numerous bills during the 2016 Legislative Session which collectively appeared to challenge the impartiality and independence of courts. The 2016 bills proposed constitutional amendments to establish judicial elections and reconfirmation by the Senate at the end of judges' terms, and statutory reduction of judges' retirement benefits.

The three 2017 bills to date again propose a Senate reconfirmation process. They would fundamentally change the current judicial retention process, under which the Judicial Selection Commission ("JSC") thoroughly reviews voluminous materials, and obtains confidential input from numerous resource persons and determines whether to retain a judge in office at the end of his or her term. In contrast, under the bills, the JSC would make a "recommendation" or "notice," which would then be subject to review and approval by the Senate. During the Senate's review, it may hold hearings.

Two of these bills are very similar (HB1 and SB 673). HB1 was introduced by the honorable Representatives Souki, Luke, Nishimoto, and Saiki. SB 673 was introduced by the honorable Senators Keith-Agaran and Tokuda. These bills provide authority to the Senate to reconfirm or reject judges or justices at the end of their terms.

The third Senate reconfirmation bill is formulated somewhat differently (SB328). It was introduced by the honorable Senators Keith-Agaran, Dela Cruz, Inouye, and Kim.

Although HB1 and SB673 differ from SB 328, and there are some other proposed changes in HB1 and SB673, the primary thrust of the bills is a constitutional amendment to establish Senate reconfirmation of judges and justices. Accordingly, the same concerns with Senate reconfirmation apply to all.

The Kauai Bars Association specifically opposes SB 328 because it would undermine the independence of the Judiciary as a co-equal branch of government.

### **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 Judicial Selection Commission ("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":

- "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 popular 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.

## Conclusion

In conclusion, we urge the Committee to maintain, 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. Currently our society is perched upon a precipice regarding its democratic values. Although a strong democracy is founded upon a strong and active citizenry this foundation can only be maintained if the three branches of government are able to function independently and co-equally. We must at all costs maintain order by the rule of law and acknowledge and prevent the tyranny of the majority from infringing upon the rights of those with minority views and opinions. This can only be done by an independent judiciary. The Hawaii State Supreme Court recently ruled that only the legislature can judge the qualifications of its own members and I believe that was a correct decision in order to maintain the independence and integrity of the legislative branch. The political question doctrine is also frequently invoked in the courts so as to limit its own influence and power into what is clearly your kuleana. Today I am simply asking that you do the same in the spirit of our democracy.

Aloha,

*Mauna Kea Trask*

Kauai Bar Association President  
maunakeatrask@icloud.com

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<sup>1</sup> William S. Richardson, Judicial Independence: The Hawaii Experience, 2 University of Hawaii Law Review, 1, 4, 47.



## Ke One O Kākuhihewa

O'ahu Council of the Association of Hawaiian Civic Clubs  
P.O. Box 37874  
HONOLULU, HAWAII 96837-1122

TESTIMONY IN OPPOSITION TO  
SB 328, 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

February 7, 2017

Senator Gilbert S. C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
and Members of the Committee on Judiciary and Labor

Ke One O Kakuhihewa, O'ahu Council of the Association of Hawaiian Civic Clubs, with 25 clubs and over 1,000 members on the Island of O'ahu, submits its testimony in strong opposition to SB 328. The bill would undermine the integrity of the Judiciary and the Judicial Retention and Selection Process and the impartiality of judges in rendering decisions.

There has been a longstanding clear separation of powers among the three branches of government nationally and locally. For the State of Hawai'i, at the 1978 Constitutional Convention, the issue was thoroughly debated and the people and delegates intentionally crafted a model for an independent judiciary in Hawai'i. We believed they did so to maintain the integrity of the judicial system. Requiring consent of the Senate for a justice or judge to renew a term of office would be a fundamental change that would invite political influence on the Judiciary, thereby undermining public confidence and trust in the fairness and impartiality of the courts.

As you are well aware, sometimes the Native Hawaiian community is at odds with laws made at the legislature. We need an impartial judicial system not subjected to political influence or threat to someone's career to assure fair consideration of our views, as well as yours. Our community expects no less from the judiciary system or from the legislature. Please do not pass SB 328.

Mahalo piha,

*Roth K. Puahala*

Roth K. Puahala, Pelekikena  
Ke One O Kākuhihewa, O'ahu Council of the Association of Hawaiian Civic Clubs





49 South Hotel Street, Room 314 | Honolulu, HI 96813  
www.lwv-hawaii.com | 808.531.7448 | voters@lwv-hawaii.com

**Senate Committee on Judiciary and Labor  
February 8, 2017, 9:00 AM, Conference Room 016**

**SB328 and SB673 Proposing Amendments to the Constitution of the State of Hawaii to  
Amend the Manner in Which Justices and Judges are Appointed, Consented to, and  
Retained**

**TESTIMONY IN OPPOSITION**

**Joan Platz, Legislative Committee, League of Women Voters of Hawaii**

Chair Keith-Agaran, Vice-Chair Rhoads, and Committee Members:

**The League of Women Voters of Hawaii strongly opposes** specific provisions included in SB328 and SB673 to amend Article VI Section 3 of the Constitution of the State of Hawaii to authorize the Senate to approve or reject the retention of justices and judges for a subsequent term.

The role of the Judicial Selection Commission (JSC) would also change if the voters approve either one of these amendments. The JSC would be required to send a "written notice" to the Senate when it recommended the reappointment of a justice or a judge. The recommendation would then be subject to the review and approval of the Senate. Currently the JSC has the sole authority to recommend or reject justices and judges who seek reappointment.

The amendment is premised on the argument that the legislative branch of government should have the authority to reconfirm justices and judges. The Senate already has confirmation authority of justices and judges.

The League of Women Voters of Hawaii supports "...a merit system of judges through a process that is as free of political influence as possible," and "judicial independence as necessary for the Hawaii State Judiciary to operate as a co-equal third branch of government..."<sup>1</sup>

All judges should be held accountable, but unlike elected officials, who are ultimately

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<sup>1</sup> League of Women Voters Hawaii, Positions on Merit Selection of Judges and Justices and an Independent Judiciary. Adopted November 15, 2003, available at <http://www.lwv-hawaii.com/position.htm>



49 South Hotel Street, Room 314 | Honolulu, HI 96813  
[www.lwv-hawaii.com](http://www.lwv-hawaii.com) | 808.531.7448 | [voters@lwv-hawaii.com](mailto:voters@lwv-hawaii.com)

accountable to voters, judges should be accountable for adhering to the law.<sup>2</sup>

The judicial reconfirmation process already includes the perspective of the legislative branch of government through the JSC, which includes two members appointed by the President of the Senate and two members appointed by the Speaker of the House. The JSC includes a total of 9 members, and so almost half of its members are appointed by the legislative branch.

Holding judges accountable for adhering to the law is accomplished through the JSC, which conducts thorough reviews, and solicits confidential feedback and comments from a variety of sources to reapprove a justice or judge at the end of his or her term.

The role of an independent judiciary in a democratic society is to protect and advance the rule of law. The judiciary acts as a check on the executive and legislative branches of government, preserving the balance, and ultimately protecting the rights and liberties of the people.

The selection of judges is an important factor in establishing the trustworthiness and independence of the judiciary in a democratic society. The Brennan Center for Justice at New York University defines judicial independence as “the freedom we give judges to act as principled decision-makers. The independence is intended to allow judges to consider the facts and the law of each case with an open mind and unbiased judgment. When truly independent, judges are not influenced by personal interest or relationships, the identity or status of the parties to a case, or external economic or political pressures.”<sup>3</sup>

Changing the State Constitution to authorize the Senate to reconfirm justices and judges would add a potentially politically influenced process to a currently impartial system that protects

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<sup>2</sup> American Bar Association Coalition for Justice, Updated by the American Judicature Society, Malia Reddick, Ph.D., *Road Maps, Judicial Selection: The Process of Choosing Judges*, page 8, June 2008, available at [https://www.americanbar.org/groups/judicial/conferences/lawyers\\_conference/committees/coalition\\_for\\_justice.html](https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/coalition_for_justice.html)

<sup>3</sup> League of Women Voters: Creating A Just Society: Judicial Independence Study, available at <http://www.lwv.org/join/judicial/> 2001.



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justices and judges from external political pressures.

In fact the American Bar Association Commission on the 21st Century Judiciary in 2003 found that “...the worst selection-related judicial independence problems arise in the context of judicial reselection. It is then that judges who have declared popular laws unconstitutional, rejected constitutional challenges to unpopular laws, upheld the claims of unpopular litigants, or rejected the claims of popular litigants are subject to loss of tenure as a consequence.”<sup>4</sup>

If these bills are passed and the constitution is changed, some justices and judges might be discouraged from seeking reconfirmation if forced to confront dissenters and defend every decision that they have made in their ten-year term in order to be reconfirmed.

And, public confidence in the independence of the judiciary would suffer as a result of a Senate reconfirmation process that exposes justices and judges to perceived or real pressures from special interests.

Hawaii’s current judicial selection and retention system closely follows the commission based appointive judicial system recommended by the American Bar Association, because it “encourages community involvement in judicial selections, limits the role of political favoritism, and ensures that judges are well qualified to occupy positions of public trust.”<sup>5</sup>

We urge members of the Committee on Judiciary and Labor to oppose the Senate reconfirmation provisions in SB328 and SB673, and preserve an independent judiciary reappointment process in Hawaii.

Thank you for this opportunity to testify.

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<sup>4</sup> John F. Kowal, *Judicial Selection for the 21st Century*, Brennan Center for Justice Twenty Years, New York University School of Law, page 18, June 6, 2016 available at <https://www.brennancenter.org/publication/judicial-selection-21st-century>

<sup>5</sup> American Bar Association, page 7, available at [https://www.americanbar.org/groups/judicial/conferences/lawyers\\_conference/committees/coalition\\_for\\_justice.html](https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/coalition_for_justice.html)



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# Maui County Bar Association

P. O. Box 1595  
Wailuku, Maui, Hawaii 96793

## TESTIMONY

Senate Committee on Judiciary and Labor  
Hearing: February 8, 2017

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**TO:** The Honorable Gilbert S.C. Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice-Chair

**FROM:** Brandon Segal  
President, Maui County Bar Association

**RE:** S.B. 328, 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

## I. INTRODUCTION

The Maui County Bar Association ("MCBA") respectfully submits this testimony in opposition to S.B. 328, one of three bills proposing a constitutional amendment to the process of appointment and retention of judges. There are three reasons for our opposition: First, the proposed amendment would unwisely politicize the decision of whether or not to retain judges. Second, in an attempt to bring further transparency to the process of evaluating judges for retention, the amendment would actually have the undesirable effect of limiting and skewing the information available to the body that makes the ultimate decision. Third, the amendment would unnecessarily prolong the judicial appointment and retention process, which would particularly hurt the administration of justice on the neighbor islands.

## II. POLITICIZATION OF THE RETENTION DECISION

The MCBA joins the Hawaii State Bar Association, as well as the other respective neighbor island bar associations, in their concerns that this bill would undermine the integrity of the judicial retention process. Our current process, through the Judicial Selection Commission ("Commission"), is the best procedure to ensure judicial fairness, impartiality, and accountability. We strongly agree with the other bar associations that Senate control over retention would be a fundamental change that would invite political influence on the Judiciary, and in turn would undermine public confidence and trust in the fairness and impartiality of the courts. The independence of the Judiciary is paramount in our constitutional framework.

## III. RETENTION DECISIONS WOULD BE BASED ON INCOMPLETE AND SKEWED INFORMATION

The amendment is apparently designed to "promote transparency" in the decision to renew or not renew a judge's term of office. But in shifting the ultimate decision-making power to the Senate, and thereby conducting the information-gathering process on the public record, this bill would have the undesirable effect of limiting the information on which the retention decision is based, and discouraging members of the bar from coming forward with information about the judge.

During the retention process, the Commission does a careful and thorough job of gathering information about the judge's performance, including confidential interviews

with practicing attorneys. The Commission gathers information from the Board of Directors of our bar association, the heads of government legal offices, and others with relevant knowledge of the judge and experience practicing before the judge. This is all done with the assurance that the information revealed to the Commission will be held in complete confidence. The Commission's guarantee of confidentiality frees attorneys to speak frankly and share important information that the Commission needs in making its decision. These persons may not be willing to share the same information publicly.

#### **IV. EXTENDED TIME FRAMES IN THE BILL WILL DELAY APPOINTMENT AND/OR RETENTION OF JUDGES, DISRUPT THE COURT SYSTEM, AND NEGATIVELY AFFECT THE ADMINISTRATION OF JUSTICE**

The proposed procedures for the appointment of judges would likely prolong judicial selection procedures by many months. The proposed amendment increases time frames by extending the deadlines for action by either the governor, chief justice, and/or legislature at the respective stages of the judicial appointment, approval, and retention process for circuit and district court judges. In each case the time periods may be tripled, from thirty to ninety days.<sup>1</sup>

For the efficient and consistent administration of justice, it is important to replace and/or retain judges with no more delay than necessary, and to have open judicial positions filled promptly. This is especially true on the neighbor islands, where there are fewer judges to handle the court's case load. In the past, when there have been periods of several months with a vacancy in one of Maui's four circuit courtrooms, district court judges have been rotated into the position temporarily, sometimes taking turns with a calendar, and then an ever-changing roster of per diem judges have sat in on the district court calendars. Such substitutions are not conducive to the orderly and consistent operation of the court system, and where possible they should be avoided. Retaining the tighter time lines for each stage of the appointment and retention process, as now contained in our Constitution, would help avoid such problems.

#### **V. SUMMARY AND CONCLUSION**

This bill does not represent good public policy. It would unwisely politicize the judicial retention process in two separate ways: First, it would enable the senate to overrule the commission and refuse to reappoint a judge, simply because the judge issued a ruling that although legally correct, was politically unpopular. And second, in the public hearings on the reappointment of a judge, there may be political influence and less transparency. The senators may not receive honest input from those who could provide reasons to retain or not retain the judge. Finally, the lengthening of various deadlines contained in the bill would unduly delay the appointment and/or retention of judges, which would undermine the orderly and efficient administration of justice, especially on the neighbor islands.

For all of the above reasons, the MCBA opposes S.B. 328. Thank you for the opportunity to submit this testimony.

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<sup>1</sup> H.B. 1, S.B. 328, and S.B. 673 differ somewhat in the way they amend the appointment / retention process, but all three bills appear to increase the length of time for the appointment / retention process in some material respect. In the case of S.B. 328, the bill provides for a ninety-day deadline for the Senate to have a public hearing on re-confirmation, and the timeframe for renewal of the terms of office is extended from at least six months to between nine and twelve months prior to the expiration of a term. The time that a judge would be focusing on petitions, hearings and meetings with Senators, is time the judge cannot be in court, which adversely affects the judicial system.



**Prince Kuhio  
Hawaiian Civic Club**

Luna O Na Papa Alaka'i

*Pelekikena  
A. Makana Paris*

*Hope Pelekikena 'Ekahi  
Randi Fernandez*

*Hope Pelekikena 'Elua  
Matthew Gumapac*

*Pu'uku  
Denise Kekuna*

*Kakau'olelo Ho'opa'a  
Kanani Youart*

*Kakau'olelo Ho'oholo  
Palapala  
Kainoa Kaumeheiwa-Rego*

*Pelekikena Hala Koke  
Yvonne PeeWee Ryan*

Papa Luna Alaka'i  
*Kuni Agard  
Puamana Crabbe  
Kanani Pali  
Jennifer Smythe  
Marlene Sai  
Bruce Wong*

*Mailing Address:  
P.O. Box 4728  
Honolulu ~ Hawaii  
96812*

*Email: pkhcc64@gmail.com*

**Founded 1964  
by Lili'uokalani  
Kawanana'aoa Morris**

February 8, 2017

Senator Gilbert S.C. Keith-Agaran, Chair  
Judiciary and Labor  
Senate, State Capitol  
Honolulu, HI 96813

Dear Chair Keith-Agaran and Honorable Members:

The Prince Kūhiō Hawaiian Civic Club does **NOT SUPPORT** the passage of **SB328** and **SB673**.

The Club supports an independent judiciary. An independent judiciary is key to: a truly democratic system with safeguards against despotism; protecting the rights of the minority; maintaining a balance of powers between our branches of government; maintaining public trust in our government; and providing predictability in rulings that spurs economic activity. Moreover, an independent judiciary is critical to the enforcement of the Hawai'i State Constitution, including its unique provisions protecting the Environment and recognizing the traditional and customary rights of Native Hawaiians.

The founding fathers of the United States of America understood that a judiciary must be able to apply the law freely and fairly for a free society to prosper. The people of Hawai'i similarly expressed their will in the 1978 Hawai'i State Constitutional Convention – where the delegates enshrined judicial independence in Article VI, Section 3. After great deliberation, the delegates specifically intended to insulate the judiciary from political pressures by establishing a new judicial selection committee and empowering it, in its sole discretion, to renew the terms of judges and justices.

Subjecting judges and justices to multiple confirmations before the Senate eviscerates that intent and jeopardizes the judiciary's ability to make decisions based solely on the letter of the law without the influence of popular politics or fear of retaliation.

Meanwhile, the judicial selection committee has proven effective in fostering both judicial independence and public confidence in judicial rulings in Hawai'i. The committee limits the influence of the Executive, Legislative, and Judicial branches, as well as allows for measured public input from the legal community and beyond. In so doing, the committee limits the amount of influence that any one branch has over the renewal of judges and justices.

The judiciary does not require further checks on its power, for it is sufficiently balanced with the other branches of government, given both mandatory term limits for judges and justices and the control of its funding by the Executive and Legislative branches. Mahalo for fostering a strong, free, and democratic society by guaranteeing the independence of the judiciary.

Me ka 'oia'i'o,

A. Makana Paris  
President



The Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2017  
9:00 am, Room 016

**RE: SB 328 Proposing an Amendment to Article VI, Section 3, of the Constitution 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.**

Attention: Chair Gilbert Keith-Agaran, Vice Chair Karl Rhoads and  
Members of the Committee

The University of Hawaii Professional Assembly **opposes SB 328** as an overreach on judicial review by the Senate. The reappointment of a justice or judge is best effectuated through the judicial selection commission established to assess the performance and fitness to maintain office free from legislative influence and pressures that could be brought to bear on an independent judiciary.

UHPA respectfully requests that the Committee **oppose SB 328**.

Respectfully Submitted,

Kristeen Hanselman  
Executive Director

**University of Hawaii  
Professional Assembly**





February 5, 2017

To Whom It May Concern:

The West Hawaii Bar Association, its general membership and its executive committee, by unanimous resolution, respectfully opposes:

**SB673/HB1:** PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

[http://www.capitol.hawaii.gov/session2017/bills/SB673\\_.pdf](http://www.capitol.hawaii.gov/session2017/bills/SB673_.pdf)  
[http://www.capitol.hawaii.gov/session2017/bills/HB1\\_.pdf](http://www.capitol.hawaii.gov/session2017/bills/HB1_.pdf)

**SB 328:** 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.

[http://www.capitol.hawaii.gov/session2017/bills/SB328\\_.pdf](http://www.capitol.hawaii.gov/session2017/bills/SB328_.pdf).

The West Hawaii Bar Association finds the above-proposed legislation intrudes upon the independence of the Judiciary and most fundamental principles of separation of powers contemplated and preserved in the State of Hawaii since its Constitutional Convention in 1978. This Bar maintains it is inappropriate and unnecessary for any Justice or Judge to be subjected to or concerned with matters of politics or political influence in the administration of their duties.

We respectfully urge efforts in support of opposition to and ultimate rejection of these proposals and join in that opposition with the other various bar associations, independent legal professionals and other organizations opposing this legislation. This Association thanks you for your time, attention, and consideration of this most important matter.

Very Truly Yours,

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Michael H. Schlueter  
President, West Hawaii Bar Association  
(808) 987-7275

February 7, 2017

To: Senator Gilbert S.C. Keith-Ageran  
Chairperson, Senate JDL

Re: SB 328 and SB 673 Testimonies for 2/8/17 Hearing

Aloha Chair Ageran and members of the committee,  
I oppose both SB 328 and SB 673. Mahalo for the opportunity  
to submit testimonies for both Bills.

*A. Lloyd Geiser*

A. Lloyd Geiser

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Friday, February 3, 2017 9:28:52 AM

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**SB328**

Submitted on: 2/3/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Alan Young	Individual	Oppose	No

Comments: Dear Senators: I feel separation of powers is important in our democracy and so I oppose passage of SB328. Passage of SB328 could likely lead to undue influence on the Judiciary. Political pressures could be brought to bear that interfere with the impartiality of our Judiciary. Thank you for considering this oppositional viewpoint. Aloha, Alan Young

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:** [Arianna Feinberg](#)  
**To:** [JDL Testimony](#)  
**Subject:** SB 328 and SB673 - OPPOSE  
**Date:** Monday, February 6, 2017 9:50:05 PM

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Aloha Chair Keith-Agaran, Vice Chair Rhoads and Members of the Senate Judiciary and Labor Committee,

I strongly encourage you to oppose SB 328 and SB 673. As lifelong Maui resident, small business owner, and active Democrat I am deeply concerned by the implications of SB329 and SB673 to our courts. It is essential that we have a separation of power and that the judicial branch is separate from the politics of the two other branches. No offense to current Senate members, but I fear that a future Senate could be politically influenced by special interests to not approve judges re-retention if they made a decisions that went against specific business interests. With our current separation of powers, we have trust and confidence in the impartiality and fairness of the courts.

Please oppose SB329 and SB673 to retain our politically impartial courts.

Thanks,  
Arianna Feinberg

**COMMITTEE ON JUDICIARY AND LABOR**  
**ATTN: CHAIR GILBERT S.C. KEITH-AGARAN, VICE-CHAIR KARL RHOADS**

**February 8, 2017, 9:00 a.m.**  
**Conference Room 016**

Aloha Chair Keith-Agaran, Vice-Chair Rhoads, 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 13+ 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, 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. It is my strong view that the proposed retention system in SB 328 and SB 673, and HB 1 and HB 1186 has the potential to do great harm. An enhanced role for the Senate in the renewal of Justices and Judges, as proposed by these measures, 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" has been proven to be 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.*

If there were a need to underscore the importance of an independent judiciary, President Donald Trump's *ad hominem* Twitter attack early last Saturday morning on Federal District Judge James Robart, whom he called a "so-called judge," hardly could be a better example. The President labeled Judge Robart's opinion—which temporarily enjoined an Executive Order, titled "Protecting The Nation From Foreign Terrorist Entry Into The United States"—as "ridiculous."

Once confirmed, all Article III Federal Judges fortunately have the security of lifetime appointments, subject only to good behavior, as well as salaries that cannot be

reduced. Thus Judge Roberts—appointed by President George W. Bush in 2004—could apply the law independently as he saw fit, despite the strong wishes of the President. The late Chief Justice William Rehnquist once compared the role of a judge “to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it.” Quoted by Justice Ruth Bader Ginsburg in her *Remarks on Judicial Independence*, American Judges Association Annual Meeting, September 27, 2007.

Such judicial independence is deeply important to the Rule of Law, but it is also easily undermined. If Hawai'i judges were concerned that they would not be retained by a majority vote of the Hawai'i Senate, some of them might pull their punches in making legal decisions that are likely to be controversial. Such a chilling effect might well not be the intended purpose of SB 328 and SB 673, and HB 1 and HB 1186. Nonetheless, the mere public perception of a possible legislative rejection hanging over a judge's good faith decision would do damage to the public's faith in judicial decisions, even if such enhanced skepticism is an unintended consequence.

This direct recent presidential attack on a judge strongly suggests that if there ever were a time to be sensitive to and protective of the independence of the judiciary in our country, that time is now. It also illustrates how appealing it can be for an elected official, displeased by a particular judge or a specific ruling, to take out that displeasure against a particular judge directly. In an article in 2007, Justice Ruth Bader Ginsburg recounted numerous examples of direct assaults launched by members of the Executive and Legislative branches against judicial independence. In concluding her *Remarks on Judicial Independence*, Justice Ginsburg quoted what James Madison said as he introduced what was to become the Bill of Rights. Madison said: “[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of th[e]se rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights”.

In Hawai'i, we are lucky to have avoided the bitter imbroglios that many other states have experienced in the context of judicial retention decisions. Chief Justice Richardson put the point succinctly in his 1979 article: “A judge determined by the [judicial selection] commission to be qualified will remain on the bench without going through the entire appointment process. The [1978 Constitutional] Convention history indicates that the primary purpose of the new retention process is to exclude or, as least, reduce partisan political action.”

The Rule of Law remains an essential component of our heritage, yet we tend to take it for granted. And the Rule of Law 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 were certainly 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 future service of the Justices depended on the vote of a political body.

As I stated initially, I testify only for myself. Our Law School is blessed to have many diverse opinions among its faculty members, staff, and students. But the Hawai'i judiciary has earned our respect, even if at times some or even many might begrudge particular decisions. We are proud of the justices and judges who are independent enough to protect the rights of minorities, though sometimes that may mean standing up to the majority. This independence remains a crucial element of the Rule of Law. I respectfully urge rejection of SB 328 and 673, and HB 1 and HB 1186.

Mahalo and aloha,

A handwritten signature in black ink, appearing to read 'Aviam Soifer', with a long horizontal flourish extending to the right.

Aviam Soifer  
Dean and Professor

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Sunday, February 5, 2017 1:26:38 AM

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**SB328**

Submitted on: 2/5/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Barbara L. George	Individual	Oppose	No

Comments: OPPOSE. Re-retention by the Senate subverts the important balance of powers. This would influence our judges and justices, blurring the separation of powers among the 3 branches. It would invite political influence on the Judiciary and would encourage self-censorship of judges; it would undermine public confidence and trust in the fairness and impartiality of the courts to make rulings that are based in law and NOT political pressure. When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure on judges during the re-retention process and influence their decisions.

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**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Monday, February 6, 2017 7:32:51 PM

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**SB328**

Submitted on: 2/6/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Barbara Polk	Individual	Oppose	No

Comments: I oppose this proposed constitutional amendment because it violates the separation of powers between the legislature and the judiciary. While it is appropriate for the state senate to have a role in the appointment of judges, once they are appointed, they must be able to make decisions without regard to what the state senate may or may not like. Politicizing the judiciary is detrimental to democracy.

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**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Monday, February 6, 2017 11:15:45 PM  
**Attachments:** [Testimony - SB 328, 673, 249 - Brandon Marc Higa.pdf](#)

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**SB328**

Submitted on: 2/6/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Brandon Marc Higa	Individual	Comments Only	No

Comments: My name is Brandon Marc Higa, I am a second year law student at Richardson and I wish to provide comments to Senate Bills 328, 673, and 249. While I support the intent of these bills in promoting accountability and transparency in the Judiciary Branch, I urge the committee to consider the risks of inviting undue influence from external parties who seek to push a private agenda in judicial adjudication in our courts. Hawaii's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in keeping the courts free from direct political interference. The measures proposed under these three bills could potentially be perceived as politicizing the courts, which might achieve the opposite of what these bills intend to accomplish. The strength of our democracy depends on an independent judiciary. We need our judges to make decisions based on the facts and laws relevant to the cases before them. If these bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators, I respectfully feel that is a step in the wrong direction.

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**From:** [Carla Pew](#)  
**To:** [JDLTestimony](#)  
**Subject:** Committee Hearing Wednesday, February 8 - Bills SB328 & SB673  
**Date:** Friday, February 3, 2017 9:04:53 AM

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Aloha,

I am writing concerning:  
Bills [SB328](#) and [SB673](#)  
, 2017

I live in Kihei, Hawaii, and am writing to urge you to oppose these two bills that, if approved, would require the state Senate to approve judges or justices when they renew their terms.

Please take into consideration:

- Separation of powers. The Judiciary is 1 of 3 branches of government that, through our system of checks and balances, helps to ensure no one branch wields excessive influence. Re-retention by the Senate would influence our judges and justices, blurring the separation of powers among the 3 branches.
- This proposal would invite political influence on the Judiciary undermining public confidence and trust in the fairness and impartiality of the courts.
- When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process.

Again, please stop these bills NOW.

Mahalo for your time and attention to my concerns.

Carla Pew

February 7, 2017

Senate Committee on Judiciary and Labor

Wednesday, February 8, 2016, 9:00 a.m.

**RE: Opposition to SB328, SB673, and SB249**

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

Thank you for the opportunity to submit testimony on this important issue. My name is Charlotte Mukai. I am a 3<sup>rd</sup> year law student at Richardson and I testify against Senate Bills 328, 673, and 249. These bills taken together represent an unfair and unnecessary involvement by the senate in judicial affairs.

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

Hawaii's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in keeping the courts free from direct political interference. The measures proposed in these three bills would undermine that effectiveness by allowing politics to seep into the judiciary.

The strength of our democracy depends on an independent judiciary as we have seen in the current headlines. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills set the stage to create a judicial climate where judges fear political backlash if their rulings do not line up with certain senators. That is a step in the wrong direction.

The people of Hawai'i deserve an independent judiciary. These bills represent an attempt to undermine that system.

I urge you to oppose Senate Bills 328, 673, and 249.

*/s/ Charlotte Mukai*

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<sup>i</sup> Judicial Selection Commission Rules ([http://www.courts.state.hi.us/docs/court\\_rules/rules/jsr.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf)).

February 6, 2017  
Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2017, 9:00 a.m.  
**RE: Opposition to SB673, SB328, SB249**

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

Thank you for the opportunity to submit testimony on this important issue. My name is Chase Livingston I am a 1<sup>st</sup> year law student at Richardson and I testify **against** Senate Bills 673. 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. The current political climate in Washington should be all the evidence necessary to show how fundamentally necessary strong separations between the three branches of government are for the welfare of our country.

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 673, 328, and 249.

Chase Livingston

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** \*Submitted testimony for SB328 on Feb 8, 2017 09:00AM\*  
**Date:** Monday, February 6, 2017 10:10:07 PM

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**SB328**

Submitted on: 2/6/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Chris Mentzel	Individual	Oppose	No

Comments:

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February 6, 2017  
Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2016, 9:00 a.m.  
**RE: Opposition to SB328, SB673, and SB249**

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

Thank you for the opportunity to submit testimony on this important issue. My name is Christina Yee and I am a 2nd year law student at Richardson and I oppose Senate Bills 328, 673, and 249. These bills taken together represent an unfair and unnecessary involvement by the senate in judicial affairs and risk improper influence that the commission was created to avoid.

Currently Hawaii has a robust and fair judicial selection process which includes a nine-member judicial selection committee and senate confirmation for all judges and justices.<sup>1</sup> Appointees are vetted and a selection decision is made based upon merits, not political connections. Once appointed, judges are subject to disciplinary action if they are deemed unfit to sit on the bench.

Hawaii's existing judicial selection process is what other states should strive for in its effectiveness in keeping the courts free from direct political interference. The measures proposed under these three bills would undermine that effectiveness by allowing politics to seep into the judiciary.

The strength of our democracy depends on an independent judiciary. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. This is a step in the wrong direction.

The people of Hawai'i deserve the independent judiciary which they have under the current system. These bills represent attempts to undermine that system and threaten political influence.

For these reasons I urge you to oppose Senate Bills 328, 673, and 249.

Sincerely,

*Christina Yee*

Christina Yee

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<sup>1</sup> Judicial Selection Commission Rules ([http://www.courts.state.hi.us/docs/court\\_rules/rules/jscr.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf)).

February 6, 2017  
Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2016, 9:00 a.m.  
**RE: Opposition to SB328, SB673, and SB249**

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

Thank you for the opportunity to submit testimony on this important issue. My name is Ciara Kahahane. I am a 1st year law student at Richardson and I testify in strong opposition to Senate Bills 328, 673, and 249. These bills taken together represent an unfair and unnecessary involvement by the senate in judicial affairs. They are a solution to a problem that does not exist.

Hawai'i 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.<sup>i</sup> In fact, four of the nine committee members are already approved by legislative leaders. 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.

Hawai'i's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in keeping the courts free from direct political interference. It ensures a fair and unbiased assessment of judges, which means a healthy judiciary free from looming political pressures. The measures proposed under these three bills would undermine that effectiveness by allowing politics to seep into the judiciary.

It is absolutely vital to the interest of justice that the Hawai'i judiciary remains independent from the influence of our state's legislature. The strength of our democracy depends on an independent judiciary. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. That is a step in the wrong direction.

The people of Hawai'i deserve an independent judiciary and under the current system, they have that. These bills represent attempts to undermine that system.

This is why I urge you to oppose Senate Bills 328, 673, and 249.

Ciara Kahahane, 1L

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<sup>i</sup> Judicial Selection Commission Rules ([http://www.courts.state.hi.us/docs/court\\_rules/rules/jsr.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf)).



**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Monday, February 6, 2017 12:19:00 PM

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**SB328**

Submitted on: 2/6/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Corlis J. Chang	Individual	Oppose	No

Comments: I object to the proposed amendments in SB 328, particularly at page 5, lines 11-12, "the senate shall hold a public hearing and vote on each petition approved by the judicial selection commission." The amendments threaten the independence of the Judiciary. SB 328 will compel me to advise my clients that there may be concerns that the judge hearing his/her case might be worried about the Senate's next hearing if he/she wants to be reappointed. I can see no benefit from having to caution my clients about that all-too-human response to SB 328, and this will cast doubt upon the independence of the judiciary.

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## OPPOSING SB 328

Please consider my opposition to SB-328 which would mandate the judicial selection commission (JSC) to only make a recommendation of a judge's retention to the Senate. Which would in turn conduct public hearings before renewing a judge's term.

Since 1978 all judges were appointed via the JSC, a process that has proven very effective in the selection, retention and rejection of judges. Having Senate consent on retention reduces the efficiency and is unnecessary. Well to note the current retention process with the JSC is detailed. The vetting is exceedingly thorough and public input is encouraged. The JSC has historically denied retention for many marginal judges for nearly 40 years. It is a system that has not failed.

I do not recommend the Senate embark on public hearings. Many high volume calendar judges will hear hundreds of cases per week, Family judges hear hundreds of contentious divorce and custody trials. Many litigants feel justice is only served when they prevail. Many are only too willing to testify how "unfairly" they have been treated simply because they did not win. Such public hearings involving losing litigants before the Senate may well be protracted.

More over hearing losing litigants carp about how their case was handle does not give a full picture of the entire case without the prevailing party also testifying. But to have both will essentially have the case reheard before the Senate.

I strongly recommend that this measure be rejected.

Judge Darryl Y. C. Choy (ret.)

Family district judge  
1982 to 2016

**From:** [Dave Kisor](#)  
**To:** [JDLTestimony](#)  
**Subject:** SB328 & SB673  
**Date:** Friday, February 3, 2017 3:49:57 PM

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Aloha Senate

The notion that the court can be influenced by big money interests brings to mind Act 97, which was done solely for the benefit of the geothermal industry to squash any dissent by those the industry affected. Justice is supposed to be blind and not have peep holes for those with influence. There is a saying, there is no justice unless you can pay for it.

Aloha,  
Dave Kisor,  
Puna Makai resident

||||| >^.^< |||||

Cats & computers. Bring them into your home and your life is no longer your own. Don't get upset when things don't work, but rather be amazed when they do! (The way things work lately, I haven't spent much time being amazed, especially when it comes to government operations.)

Testimony in opposition to SB 328 - 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

SENATE COMMITTEE ON JUDICIARY AND LABOR HEARING FEBRUARY 8, 2017

Chair Keith-Agaran and members of the Senate Committee on Judiciary and Labor,

My name is Dave Raney. I am opposed to SB 328 and similar bills which would require the consent of the Senate to renew the term of office of a justice or judge.

Recent events at the national level have confirmed the importance of maintaining the independence of the executive, legislative, and judicial branches of government. The judiciary plays a crucial role in keeping the other two branches in check. Judges and justices should be free to carry out this role without fear of retribution when they apply for renewal of their terms of office.

The state constitution currently provides that an independent body, the Judicial Selection Commission, conduct a review of the performance of justices and judges applying to renew their terms. SB 328 calls for an amendment to the constitution which would require Senate concurrence with the commission's recommendations. Under this provision, judges or justices rendering opinions challenging actions by the Senate would be placing their requests for renewal of terms of office in jeopardy. This is wrong.

I respectfully request that SB 328 not be passed out of your committee.

Mahalo.

February 6, 2017  
Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2016, 9:00 a.m.  
**RE: Opposition to SB328, SB673, and SB249**

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

Thank you for the opportunity to submit testimony on this important issue. My name is David Lau, I am a 2<sup>nd</sup> year law student at Richardson and I testify against Senate Bills 328, 673, and 249. These bills taken together represent an unfair and unnecessary involvement by the senate in judicial affairs. They are a solution to a problem that does not exist.

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.<sup>1</sup> In fact, four of the nine committee members are already approved by legislative leaders. 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.

Hawaii's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in keeping the courts free from direct political interference. The measures proposed under these three bills would undermine that effectiveness by allowing politics to seep into the judiciary.

The strength of our democracy depends on an independent judiciary. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. That is a step in the wrong direction.

The people of Hawai'i deserve an independent judiciary and under the current system, they have that. These bills represent attempts to undermine that system.

This is why I urge you to oppose Senate Bills 328, 673, and 249.

Sincerely,

David R. Lau

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<sup>1</sup> Judicial Selection Commission Rules ([http://www.courts.state.hi.us/docs/court\\_rules/rules/jscr.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf)).

**From:** [Devra Dynes](#)  
**To:** [JDLTestimony](#)  
**Subject:** SB 328 & SB 673  
**Date:** Monday, February 6, 2017 1:03:13 PM

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I oppose both of these measures as it adds political pressure into the Judiciary which should be a SEPARATE balanced arm of the democracy. Please vote NO to these measures.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Friday, February 3, 2017 9:06:47 PM

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**SB328**

Submitted on: 2/3/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Diana Shaw	Individual	Oppose	No

Comments: I am writing in opposition to this bill for the following reasons: • Separation of powers. The Judiciary is 1 of 3 branches of government that, through our system of checks and balances, helps to ensure no one branch wields excessive influence. Re-retention by the Senate would influence our judges and justices, blurring the separation of powers among the 3 branches. • This proposal would invite political influence on the Judiciary undermining public confidence and trust in the fairness and impartiality of the courts. • When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process. Mahalo, I appreciate the opportunity to provide testimony on 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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**DIANA L. VAN DE CAR**  
ATTORNEY AT LAW

P. O. BOX 385, VOLCANO, HAWAII 96785  
TELEPHONE (808) 896-3538

Testimony to the Senate Committee of Judiciary and Labor  
Senator Gilbert Keith-Agaran, Chair  
Senator Karl Rhoads, Vice-Chair

Wednesday, February 8, 2017, at 9:00 a.m.

Dear Senators:

I read with great unhappiness Senate Bill 328 and the proposal to require retention of judges to be confirmed by the Senate. I speak as a private citizen who is a lawyer and current member of the bar with almost 40 years of experience in litigation in our judicial system. I have worked closely with lawyers and judges for all of these years. I have also watched our judicial selection system in action, as a citizen, as an applicant for judicial office myself and, interestingly enough, as the wife of a judge serving in the courts who went through both the initial selection and confirmation process and the retention process.

I can tell you that the both processes are extremely rigorous. The Judicial Selection Commission does utterly exhaustive investigations of the applicants, both for initial appointment and for retention. The process allows the Commission to gain a great deal of knowledge about the applicants and too perform a thorough vetting of the applicants. The Commission does an excellent job of selecting and retaining good judges.

Sometimes, the decisions made by the Commission when judges have not been retained have been very unpopular and have received much publicity. I submit to you that this is a price to be paid in order to have an independent judiciary.

Judges must be able to make their decisions based on the law. Judges have to carefully look at the law and apply the law to the facts before them in a case. They must be able to ignore outside influences in order to assure that their decisions are indeed grounded in the law. Sometimes, judges find themselves making decisions in very difficult circumstances and under the glare of heavy publicity and public protest. Here in the Third Circuit, we have seen hotly contested proceedings where our residents are bitterly divided. We have seen courtrooms thronged with the press and the public, with protest demonstrations taking place outside simultaneously with the court proceedings inside. The judges handling these cases must ignore all of this and make decisions based solely on the proper application of the law to the facts in these case. Judges can effectively do this only where they are assured independence in the ability to make those decisions.

Every judge takes an oath to uphold the law. When disputes come to court, lawyers and



parties are advocating different interpretations of what the law requires. They are in court because they differ on what the law requires. The judge has to carefully review the matter and then exercise the best judgment possible on what the law requires. Inevitably, someone will be unhappy with the result because there cannot be two victors. Every decision is going to be unpopular to some portion of the public. There is always be a risk of push back to a judge in every decision he or she makes. In short, a certain amount of pressure is always being exerted on a judge. Judges already have to ignore this to make good decisions.

If we make the retention of our judges subject to Senate confirmation, then we add a risk of possible future political pressure and we connect that risk of possible future political pressure with the judge's personal livelihood. Every judge faced with a controversial case would then have to make decisions knowing not only that one side is going to be unhappy, but that there would always be the possibility that an unpopular decision might adversely affect the judge's chances for retention. That is not conducive to good decision-making. The best decisions are always made when people can act freely and independently.

Our current system of judicial selection and retention has worked very well for 40 years. Please recognize its strengths and do not change this.

I cannot attend the hearing to testify in person but I would be happy to answer any questions you may have. Thank you for this opportunity to provide input.

Yours truly,

DIANA L. VAN DE CAR

**From:** [Diane Herrle](#)  
**To:** [JDLTestimony](#)  
**Subject:** Reasons why the Senate should not vote to appoint judges.  
**Date:** Friday, February 3, 2017 9:47:13 AM

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- Separation of power is very important to insure fairness in our judiciary system. Judiciary is 1 of 3 branches of government that, through our system of checks and balances, helps to ensure no one branch wields excessive influence. Re- retention by the Senate would influence our judges and justices, blurring the separation of powers among the 3 branches.
- This proposal would invite political influence on the Judiciary undermining public confidence and trust in the fairness and impartiality of the courts.
- When a judge faces re- retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process.

[1] The bills are [SB328](#) and [SB673](#)

Sent from my iPhone

**DOUGLAS S. MCNISH**  
Judge, Second Circuit Hawaii Family Court (Ret.)

2101 Piihola Rd., Makawao, HI. 96768

February 4, 2017

WRITTEN TESTIMONY IN OPPOSITION TO  
SB 328

This Bill proposes a constitutional amendment to (1) change the time frame for applicants to apply for renewal of a judicial appointment, and (2) require Senate approval of renewal appointments.

This testimony is not in opposition to the proposed change in the time frame for judicial officers to apply for renewal appointments. It is in opposition to the proposal to require Senate approval of such appointments.

The undisputed desire is to have judicial officers that are both **competent** (knowledge of the law, the ability to apply the law to the facts of the case, and the ability to manage the courtroom and workload efficiently) and **unbiased** (make decisions that are not influenced by personal preferences or needs, popularity, or deference to individuals or groups advocating for a result inconsistent with an application of the law to the facts of the case).

Hawaii, like the federal government, eschews election of judges by popular vote in recognition of the fact that judges are human and it would be very difficult not to be influenced against making unpopular decisions if their jobs were at risk. Judges do not choose the cases or issues that come to them for decision. It is inevitable that some legal

disputes about legislative actions will come before judges. If the Senate has the power to deny retention applications approved by the Judicial Selection Commission, then the unlucky judge will, of course, be aware that how he or she rules may have an impact on her or his retention, especially if his or her retention date is in the near future.

This Bill implies that the Judicial Selection Commission is not doing its job in approving retention only for **competent** judges and that Senate approval, perhaps using public hearings, is a necessary addition. I strongly believe that any gain on the **competent** element would be offset by a much larger loss in the **unbiased** element, especially if the Senate process includes a public hearing component.

If the concern addressed by this Bill is a belief that the Judicial Selection Commission is not doing its job to eliminate judges who are not **competent** when applications for renewal appointments are made, then it would be better to articulate the deficiencies of the Judicial Selection Commission process and consider remedies to that process that would not compromise the need for having **unbiased** judges.

February 7, 2017

Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice-Chair  
Senate Committee Judiciary And Labor  
Hawaii State Legislature

RE: Opposition to SB 328 & 673

Dear Chair Keith-Agaran & Vice-Chair Rhoads:

I am a licensed attorney primarily practicing in the area of Family Law. I am writing to express strong opposition to SB 328 and SB 673.

Both bills propose significantly altering the retention process of all judges by having them face Senate confirmation all over again. I just completed my term as Chair of the Family Law Section (FLS) of the Hawaii State Bar Association's Family Law Section. I recall last legislative session there were similar bills proposed and there was strong opposition from many groups, including FLS, most of which were comprised of licensed attorneys here in the State of Hawaii.

I now speak for myself and my law partner, Alethea Rebman, in stating that we are extremely concerned about the possible demise of judicial independence if either of these current bills pass. It is important to have clear separation of powers among the three branches of government, here and nationwide.

Confidentiality is key to ensure that the process remains focused on the merits and qualifications of the Judges. This is the main reason why the current system with the Judicial Selection Commission (JSC) responsible for handling the retention process works just fine.

Confidentiality ensures that people will come forward honestly and openly to the JSC because they know the Judge(s) will never know they provided commentary. The JSC is thorough by seeking commentary from both individuals and groups- those who have regular interaction and exposure to the Judges. The Judges have no idea who provides input or commentary, thus ensuring that the Judges are not influenced in any way that may affect their present and/or future rulings. Having the process become "public" also has the reverse effect- the public may not want to come forward for fear of a Judge retaliating for receiving negative commentary.

As a licensed practitioner attending court proceedings on a weekly basis, I am also concerned about the time this will take away from the Judiciary. The Judges and Justices already are extremely busy with an overload of cases. My clients' cases do not need to be further backlogged because a Judge is lobbying the Senate for support.

Lastly, I am certain that there are many Judges now that may refrain from seeking retention if this process changes. This is extremely concerning because we currently have a shortage now of full-time Judges due to many of them recently retiring. Many people are already reluctant to apply for full-time Judge positions. We do not need another reason for attorneys not to apply for full-time Judge positions.

Thank you for the opportunity to testify in opposition to SB 328 and SB 2673.

Eden Elizabeth Hifo

February 2, 2017

The Honorable Senator Keith-Agaran  
& Judiciary Committee Members

Re: Testimony Opposing S.B.328 and SB. 673

Dear Judiciary Chair and Committee:

Please accept this testimony in opposition to Senate Bills 328 and 673 which are similar versions of proposed Hawaii State Constitutional amendments to give the Hawaii State Senate power to reverse the Judicial Selection Commission (JSC) decisions on retention of all judges. One bill would establish Senate re-confirmation hearings for JSC retained judges; the other gives the Senate power to override JSC decisions on all petitions for retention including those the JSC denies. The expressed need for this power shift and interjection of senate political action on retention decisions is for greater “transparency.” This purported goal need not involve the Senate but rather could fully and completely be obtained by requiring the current JSC process on retentions be made public. Thus, the JSC’s interviews with petitioning judges and “source people” and all those who comment in person or by letter, whether from the public or within the bar and the judiciary itself including staff, could be made public just as senate hearings on bills are public and just as the current confirmation process of judicial appointments are public. Of course, the JSC retention procedures/hearings/deliberations are not and never were intended to be public for obvious and good reasons that ensure such important decisions can be made on candid, useful, confidential comments, data and evaluations gathered over a six or ten year period of time on the bench. The reasons our JSC retention process is confidential strongly argue against repeating the process in a public political forum of senate retention hearings.

The current Hawaii Constitutional provision was adopted to reduce the political influence in selecting and retaining our judges. It is designed to allow the appointing authorities to choose from a list of names that the JSC creates on the basis of merit selection. Likewise, the JSC retention process is a judgement of the actual conduct of a sitting judge based upon multi-factor data and evaluations that are merit based and include any history of complaints/comments from counsel, sitting jurors, and the public. As has been noted in other testimony opposing these bills, there is nothing to prohibit legislators from making retention concerns about any particular judge known to the JSC, four of whose nine members are legislative appointees. Indeed, the State Senate’s confirmation power obtains for all newly appointed judges of district court through appellate judges and equally so when any sitting judge faces Senate confirmation for a new term to a “higher” level judgeship.

As a former Honolulu district court judge and later as a first circuit court judge, I had occasion to file a petition for retention in each of those positions. The documentation required by the JSC was specific including how many appeals had been taken and whether the outcome was affirmance or reversal. I know the staff at both levels were consulted, the Judicial Discipline Commission also, the jury and attorney evaluations at circuit court, and the comments if any by the public as well as select “source

people” who were not known to me for my own retention decisions but I know are chosen and invited by the JSC to provide candid opinions. All of these serious endeavors by the JSC are part of a retention process that has appeared to work without controversy or rancor and which deserves praise not replacement for the dignity and deliberation it offers to those who have undergone the process. All judges know there is no promise of retention; all benefit from the not always complimentary comments in judiciary generated evaluations that are made known during their tenure so they can make adjustments to improve. In the end, the JSC retention process offers a rigorous self-evaluation that I think strengthens the positive aspects of any judge who is retained.

For the above reasons I respectfully urge you to hold and not pass Senate Bills 328 and/or 673. I also agree with the more comprehensive testimony of the Hawaii State Trial Judges Association in opposition to these bills.

Thank you for your consideration.

Sincerely,

Eden Elizabeth Hifo



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EDWARD R. LEBB, ESQ.  
PAULA S. NAKATA, ESQ.

PACIFIC GUARDIAN CENTER, MAKAI TOWER  
733 BISHOP STREET, SUITE 1478  
HONOLULU, HAWAII 96813

TELEPHONE: (808) 524-9000  
FACSIMILE: (808) 524-9900

February 7, 2017

**Via E-Mail**

Senator Gilbert S.C. Keith-Agaran, Chair  
Committee on Judiciary and Labor  
Hawai'i State Senate  
State Capitol  
415 South Beretania Street  
Honolulu, Hawai'i 96813

Re: S.B. No. 328 and 673 – Amending Timeframe to Renew Term of  
Justice or Judge and Require Consent of the Senate for Renewed Term

Dear Chair Keith-Agaran and members of the Committee:

I am pleased to provide my comments regarding S.B. No. 328 and S.B. 673 which would amend the timeframe to renew the term of office of a Justice or Judge of our courts and require consent of the Senate to renew a term of office. In particular, I wish to address the retention process proposed in the bills. I am an attorney who has been licensed to practice in Hawai'i since 1970. I am an active member of the Family Law Section of the Hawai'i State Bar Association, and a past chair of the section. I am particularly familiar with the Senior Judges and District Court Judges of the Family Court, their selection and retention.

Over the years, I have observed the outcome of the Judicial Selection Commission decisions on retention for the Family Court. In my estimation, their decisions in this regard have been appropriate and consistent with my experience and my colleagues' assessment of the judge's performance. On several occasions, I have been called upon to provide information in the Commission's retention review process. I am impressed by the efforts to obtain current and extensive information respecting the retention petitioner and the Commission's review of the same in reaching its decision. To require a further legislative (Senate) approval of the applicant who initially received such investigation and confirmation is both unnecessary and unwise. Once the judge has initially passed the appropriate scrutiny of the Senate, retention should be left to the Commission consistent with the process envisioned in our system of appointment and approval. To require further Senate approval tends to politicize judges and their continued service; a process our state sought to avoid to its credit.

Senator Gilbert S.C. Keith-Agaran, Chair  
Committee on Judiciary and Labor  
Page 2  
February 7, 2017

Similarly, I believe that the present, initial process for approval and confirmation of a new judge is efficient and adequate. The expanded time period provided in S.B. No. 673 is not helpful to the filling of vacancies or determination of qualification after the Commission's vetting. Further, requiring the sitting judge to petition for retention earlier than the existing six month prior to term expiration is unrealistic, both for the applicant and the Commission.

Respectively, I would recommend that your Committee disapprove both bills.

While I will be unable to attend the hearing, should you have any questions or wish further comment, please do not hesitate to contact me.

Sincerely,

Edward R. Lebb

ERL:ek

Testimony on SB 328  
Requiring Consent of the Senate to Renew a Judge's Term of Office

Eileen Tamura  
Feb. 6, 2017

To Chair Keith-Agaran and members of the Senate Committee on Judiciary and Labor

As a citizen and resident of the State of Hawai'i, I oppose SB 328, 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.

My testimony is short because my major concern is the requirement that the Senate consent to the renewal of the term of office of a justice or judge.

As I am sure the Committee is aware of what is happening nationally, I urge you to honor the independence of the judiciary. As it is important on the national level, it is also important at our state level that the executive, legislative, and judicial branches of government remain independent of each other. This means that judges should not be at the mercy of the Senate, which they would be if the Senate decides on the renewal of judges' terms of office.

The current practice of having the Judicial Selection Commission review judges' performance and make the decision of renewal is correct and should be kept. We do not need the added step of having the Senate agreeing with the commission's decision. We need an independent judiciary.

Please stop SB 328.

Thank you.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Thursday, February 2, 2017 5:35:34 PM

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**SB328**

Submitted on: 2/2/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Elizabeth Kent	Individual	Oppose	No

Comments: Aloha, I write in opposition to the portion of the bill that would require consent of the Senate for a justice or judge to renew a term of office. In my opinion, judicial independence is one of the cornerstones of our society and Senate consent for renewal would undermine that independence. Of lesser concern, the proposed amendment is a compound question and I prefer to have single questions on the ballot. Sometimes I support part of an amendment but not all of it and it's difficult to know how to vote. Finally, as an aside, how about requiring Senate confirmation for the JSC members after they are appointed? That makes sense to me. Thank you for considering my testimony on this important issue. Sincerely, Elizabeth Kent

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From: [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
To: [JDLTestimony](#)  
Cc:  
Subject: Submitted testimony for SB673 on Feb 8, 2017 09:00AM  
Date: Tuesday, February 7, 2017 12:02:41 PM

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**SB673**

Submitted on: 2/7/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Emily White	Individual	Comments Only	No

Comments: Aloha. Because you know the importance of an independent and impartial judiciary to fulfilling our Constitutional promise, I trust you will oppose SB 328 and SB673. These bills create constitution amendments to require the state Senate to approve judges or justices when they renew their terms. Please oppose so that our courts remain impartial and non-political! Here are some reasons to oppose SB328: Separation of powers. The Judiciary is 1 of 3 branches of government that, through our system of checks and balances, helps to ensure no one branch wields excessive influence. Re-retention by the Senate would influence our judges and justices, blurring the separation of powers among the 3 branches. This proposal would invite political influence on the Judiciary undermining public confidence and trust in the fairness and impartiality of the courts. When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process. Many legislators are lawyers and are keenly aware of the importance of an independent judiciary. Please protect our independent judiciary to maintain a fair state. We do not want to become a banana republic like the way some states are going. Fair states earn more investors and have higher success and health rates for their citizens. Mahalo piha, Emily H. White, JD, MA

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**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Tuesday, February 7, 2017 11:54:29 AM

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**SB328**

Submitted on: 2/7/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Emily White	Individual	Oppose	No

Comments: Aloha. Because you know the importance of an independent and impartial judiciary to fulfilling our Constitutional promise, I trust you will oppose SB 328 and SB673. These bills create constitution amendments to require the state Senate to approve judges or justices when they renew their terms. Please oppose so that our courts remain impartial and non-political! Here are some reasons to oppose SB328: Separation of powers. The Judiciary is 1 of 3 branches of government that, through our system of checks and balances, helps to ensure no one branch wields excessive influence. Re-retention by the Senate would influence our judges and justices, blurring the separation of powers among the 3 branches. This proposal would invite political influence on the Judiciary undermining public confidence and trust in the fairness and impartiality of the courts. When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process. Many legislators are lawyers and are keenly aware of the importance of an independent judiciary. Please protect our independent judiciary to maintain a fair state. We do not want to become a banana republic like the way some states are going. Fair states earn more investors and have higher success and health rates for their citizens. Mahalo piha, Emily H. White, JD, MA 67 Meheu Circle Kahului, HI 96732

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February 6, 2017

Senate Committee on Judiciary and Labor

Wednesday, February 8, 2016, 9:00 a.m.

**RE: Opposition to SB328, SB673, and SB249**

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

Thank you for the opportunity to submit testimony on this important issue. My name is Erik Meade, I am a 1st year law student at Richardson and I testify against Senate Bills 328, 673, and 249. These bills taken together represent an unfair and unnecessary involvement by the senate in judicial affairs. They are a solution to a problem that does not exist.

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.<sup>1</sup> In fact, four of the nine committee members are already approved by legislative leaders. 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.

Hawaii's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in keeping the courts free from direct political interference. The measures proposed under these three bills would undermine that effectiveness by allowing politics to seep into the judiciary.

The strength of our democracy depends on an independent judiciary. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. That is a step in the wrong direction.

The people of Hawai'i deserve an independent judiciary and under the current system, they have that. These bills represent attempts to undermine that system.

This is why I urge you to oppose Senate Bills 328, 673, and 249.

Erik G. H. Meade

<sup>1</sup> Judicial Selection Commission Rules ([http://www.courts.state.hi.us/docs/court\\_rules/rules/jscr.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf)).

TESTIMONY OF ESTHER KIA'AINA  
IN OPPOSITION TO  
SB328 AND SB673 BEFORE THE  
SENATE COMMITTEE ON JUDICIARY AND LABOR

Wednesday, February 8, 2017, 9 a.m., Room 016

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

My name is Esther Kia'aina of Nanakuli, Oahu. I am testifying in opposition to the passage of SB328 and SB673.

There is no doubt in my mind that Hawaii's aloha spirit, unique land tenure system, complicated political and cultural history, recognition of Native Hawaiian rights, vibrant diversity of cultures, limited and fragile land and natural resources, and progressive leadership among all branches of government makes the State of Hawaii unparalleled among all states in the nation for our strides in social, cultural, environmental, and economic justice.

While imperfect, we here in Hawaii do our best to create a society which values and respects all that we hold dear, including the independent roles of our three branches of government. That is why anyone who calls Hawaii home is still here. Through our democratic election of leaders for our legislative and executive branches of government, we have confidence that when you nominate, appoint, or confirm specified judges and select the majority members of the Judicial Selection Committee, that you are looking after our interests. The system is working.

I respectfully urge that committee members value the checks and balances and independence of our judicial branch of government and oppose SB328 and SB673.

SB328 and SB673 send the wrong message to the people of Hawaii and to those in our judiciary. Both have the potential of politicizing the retention process, intimidation, suppression of sound judicial decisions, and undermining public confidence in our judicial system. It is important that we safeguard the independence of our judicial system.

Respectfully,

Esther Kia'aina  
[estherkiaaina@aol.com](mailto:estherkiaaina@aol.com)



**From:** [Greg Puppione](#)  
**To:** [JDLTestimony](#)  
**Subject:** concerns about bills SB328 and SB673  
**Date:** Monday, February 6, 2017 1:31:39 PM

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Hi,

I am writing to you because I am concerned about two bills which are currently before the State Senate. They are bills SB328 and SB673.

My concerns are these:

- Separation of powers. The Judiciary is 1 of 3 branches of government that, through our system of checks and balances, helps to ensure no one branch wields excessive influence. Re-retention by the Senate would influence our judges and justices, blurring the separation of powers among the 3 branches.
- This proposal would invite political influence on the Judiciary undermining public confidence and trust in the fairness and impartiality of the courts.
- When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process.

I would prefer that judicial nominees be allowed to adjudicate free from partisan biases, and while that ideal may be impossible to achieve, it feels like these two bills are a step in the wrong direction. Thank you for your time and service to our community.

Aloha,

Greg Puppione

Honolulu, HI

## TESTIMONY OF J. ALBERTO MONTALBANO

**RE: SB 328 – 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.**

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

Wednesday, February 8, 2017, 9:00 a.m.  
Conference Room 016, State Capitol

### **Senator Keith-Agaran and Members of the Committee on Judiciary and Labor:**

I write in opposition to Senate Bill 328 (SB 328).

The attendant result of this bill, if it becomes law, is to bestow upon the legislative branch the power to retain members of the judiciary. The notion that one branch of government would control another branch of government violates the basic fundamental checks and balances instituted in our constitution.

The United States Constitution as well as our own Constitution of the State of Hawai'i are both founded in part on the political doctrine known as "separation of powers". The drafters of these documents relied heavily upon the philosophy of Charles Secondat, Baron De Montesquieu who argued – ***the best way to secure liberty and prevent a government from becoming too corrupt was to divide the powers of government among different actors who would check each other.*** Montesquieu warned, "***were the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become so despotic; for as it might arrogate to itself what authority it pleased and soon destroy all the other powers that be.***" Montesquieu, *On the Spirit of Laws* (1748).

Here, giving the legislative branch the ultimate power to decide who should be retained as a judge will violate the doctrine of separation powers by essentially putting one branch in control of another. A review of our local history suggests that this matter was already considered during the 1978 Constitutional Convention when the people

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\*Certified by the National Board of Trial Advocacy. The Supreme Court of Hawaii grants Hawaii certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association.

Testimony of J. Alberto Montalbano  
SB 328  
February 8, 2017  
page 2

ratified an amendment to the Constitution of the State of Hawai'i thereby creating the Judicial Selection Commission (JSC).

While the JSC is not perfect by any means, it does guarantee the selection and retention of judges based on a merit-based system rather than a politically-favored based system. The decisions as to retention are made by a panel consisting of representatives from all three branches of government as well as from commentary and evaluations from and by practitioners in the legal community.

Senate Bill 328 seeks to strip the appointed JSC panel members of their decision making power, and grant the Senatorial body the power to review and render a final decision as to whether a judge will be retained. The obvious problem with SB 328 is that it infringes on the independence of the judiciary when ruling on matters of public interest, especially when one of the parties to a case is another branch of government. See Richard Nelson III, et al vs. Hawaiian Homes Commission, et al; CIV No. 07-1-1663-08(JHC).

I fail to see how SB 328 is a better option than the current system. The only way that SB 328 could be considered superior was if it were acceptable to have one branch of government control another branch of government. Such a set up would offend the required checks and balances of the three branch government system, and as noted by Montesquieu lend to a despotic and corrupt form of government.

Based on the most basic fundamental constitutional theories which include the doctrine of "separation of powers", **I strongly oppose SB 328.**

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Friday, February 3, 2017 9:30:07 AM

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**SB328**

Submitted on: 2/3/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Jake Jacobs	Individual	Oppose	No

Comments: My name is Jake Jacobs. I've lived in Kona since 1976. I am testifying in opposition to SB328. SB328 would undermine the separation of powers and the vital checks and balances provided by an independent judiciary. It would place judges in a position of being beholden to legislators who are too often beholden to special interests, namely the rich and powerful. This is a fundamental problem facing the entire country. At the national level, one party has aggressively taken over all branches of government. They intend to subvert the Constitution and Bill of Rights by packing the Supreme Court with authoritarian minded judges. It is vital that Hawaii keep our judiciary independent of politics and not join in this self destruction of our democracy. Therefore I urge you to vote against SB328 and any similar legislation. Mahalo.

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**LEAVITT, YAMANE & SOLDNER**

JAMES T. LEAVITT, JR.  
JOHN D. YAMANE  
WOODRUFF K. SOLDNER  
MICHAEL R. CRUISE

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NICOLE KALAKAU  
SHARON PARIS

PACIFIC GUARDIAN CENTER – MAUKA TOWER  
737 BISHOP STREET, SUITE 1740  
HONOLULU, HAWAII 96813

*Of Counsel:*  
R. AARON CREPS

TELEPHONE: (808) 521-7474  
FACSIMILE: (808) 521-7749

February 7, 2017

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

RE: Testimony Against S.B. No. 328

Dear Chairperson Keith-Agaran and Senate Judiciary Committee Members:

My name is Jim Leavitt and I am the founding partner of Leavitt, Yamane & Soldner.

I offer this testimony against Senate Bill No. 328.

If one goes to Kansas or Texas during election season, one can see many ads by judges asking the electorate for their votes. In jurisdictions like these, judgeships can become highly politicized.

Thankfully, Hawaii currently has a “Merit” system, which, as much as possible, attempts to keep politics out of the justice system. An independent judiciary is tremendously important in a democracy. Almost as important is the perception of the public that the system is fair, that the judges are not beholden to anyone, and that justice cannot be “bought”.

The proposed legislation, of course, is not to establish anything so extreme as the direct election of judges, but requiring the consent of the senate for the renewal of a judgeship is nevertheless a step in the direction away from the very good system that Hawaii now has in place.

Any step away from the current system will certainly give rise to the perception—and possibly the actuality—that justice in the State of Hawaii can be manipulated.

Moreover, this legislation cannot fail to be in the minds of judges who are sometimes asked to make difficult decisions involving the State. I believe it is important to shield judges from having to think about their employment while deciding such cases.

**LEAVITT, YAMANE & SOLDNER**

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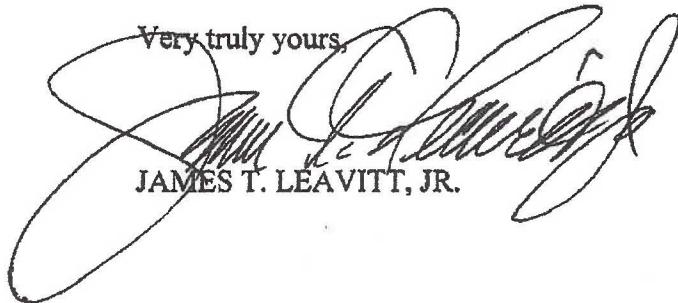
*Senator Gilbert S.C. Keith-Agaran, Chair  
Committee on Judiciary and Labor*

*Page 2*

*February 7, 2017*

Thank you for your consideration in this matter.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'James T. Leavitt, Jr.', is written over the typed name below.

JAMES T. LEAVITT, JR.

JTL/rwf

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Saturday, February 4, 2017 1:12:13 PM

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**SB328**

Submitted on: 2/4/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
JEFFREY HAWK	Individual	Oppose	No

Comments: I strongly oppose this bill. It will unnecessarily subject the judicial retention process to political pressure. The judiciary should be free from the influence of politics.

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COMMITTEE ON JUDICIARY AND LABOR  
Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair

SENATE BILL #328

HEARING

February 8, 2017

9:00 am  
Conference Room 016  
State Capitol  
415 South Beretania Street

**INTRODUCTION**

- (1) My name is Jeffrey S. Portnoy. I am a former Hawaii State Bar Association President, a former member of the Judicial Selection Committee, and a practicing attorney in Hawaii for the past 44 years, specializing in Civil Trial practice
- (2) I write regarding Senate Bill #328.
- (3) I write in opposition to Senate Bill #328.

**CONTENT**

Senate Bill #328 attempts to propose an amendment to Article VI, Section 3, of the Constitution of the State of Hawaii to require consent of the Senate for a Justice or Judge to renew a term of office.

Although not stated in the proposed Bill, it is clear that the intention of this proposed legislature is to insert politics into the Judicial Selection process. This is a very bad idea as it directly impacts the independence of the Judiciary and could subject sitting judges seeking retention to political considerations.

The executive and legislative branches already have the ability to review and influence the decision of the Judicial Selection Commission in its deliberations and decision making regarding the retention of Judges.

Of the 9 members of the Commission, 2 are selected by the Senate Majority Leader, 2 by the House Speaker and 2 by the Governor.

Hawaii's present system of selecting and retaining Judges has been praised by national organizations for its policies and procedures to minimize politics in the selection of an independent judiciary.



## CLOSING

(1) It is understandable that these are and will be decisions by Judges and Courts that both the legislature and the public may not understand or approve, but the separation of powers is a cornerstone of a true democracy. Judges are to decide matters based upon the Constitution, Statutes and precedent and must not be influenced by public pressure or politics.

(2) I urge the Commission and the Senate to reject any attempt to alter the retention of Judges. Thank you for your consideration.

Jeffrey S. Portnoy  
(808) 521-9221

A handwritten signature in black ink, consisting of a stylized 'J' and 'P' followed by a long horizontal stroke.

**From:** [Jenifer Jenkins](#)  
**To:** [JDLTestimony](#)  
**Subject:** Protecting the integrity of our Judicial System  
**Date:** Monday, February 6, 2017 4:19:54 PM

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Aloha,

My name is Jenifer Jenkins and I am currently a student at William S. Richard School of Law. I am concerned about new legislation being considered specifically, House Bill 1 and Senate Bills 328 and 673. These bills, if passed, would likely have devastating effect on the independence of Hawaii's Judiciary, but even more importantly Hawaii's people. I implore you to keep Hawaii's Judiciary independent. Thank you for your time on this matter.

Mahalo,

--

Jenifer Jenkins

J.D. Candidate, Entering Class of 2016  
William S. Richardson School of Law

TO: Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

HEARING DATE: February 8, 2017

RE: Testimony in Opposition to SB328

Good day Senator Keith-Agaran, Senator Rhoads, and members of the Committee. My name is Jessi Hall. I am an attorney licensed to practice law in Hawaii. I am here today to testify against SB328.

I am writing in opposition to SB328. I do not understand the necessity of this Bill, especially in consideration of the many other issues that are of much more importance to our community at this time.

First of all, to expand the time period for confirmation from 30 days to 90 days will come at great expense and efficiency for the public. For instance, look at the current situation where there are several vacancies in the Judiciary. To expand the time limit from thirty days to ninety days for each decision will essentially push the final decision out to six months. Such a delay can cause inconsistency in Court decision, because per diem judges will be necessary.

Currently we are seeing our District/Family Court Judges having to rotate to cover the vacancies in Circuit Court. This in turn leads to per diem judges covering District and Family Court. In all levels of the judicial system it is essential to have continuity not only for decision making, but also for expediency of decisions and public perception. The longer it takes to fill these positions the more the public is being neglected.

Second, the Judicial Selection Commission is made of two appointees by the House Speaker, two appointees by the Senate President, two appointees by the Governor, one appointee by the Chief Justice, and two appointees by the Bar. If the Senate feels they need to confirm the retention after the Judicial Selection Commission has made their decision, that leads to a public perception that you do not have confidence in the people you appoint to the Commission, but I cannot believe that to be the case. Assuming that is not the case, then this bill leads to an unnecessary redundancy in the process and further delay for the public in reaching final outcomes in their Court proceedings.

Thank you for the opportunity to testify in opposition to SB328.

**LEAVITT, YAMANE & SOLDNER**

JAMES T. LEAVITT, JR.  
JOHN D. YAMANE  
WOODRUFF K. SOLDNER  
MICHAEL R. CRUISE

ATTORNEYS AT LAW  
A LAW CORPORATION

NICOLE KALAKAU  
SHARON PARIS

PACIFIC GUARDIAN CENTER – MAUKA TOWER  
737 BISHOP STREET, SUITE 1740  
HONOLULU, HAWAII 96813

*Of Counsel:*  
R. AARON CREPS

TELEPHONE: (808) 521-7474  
FACSIMILE: (808) 521-7749

February 7, 2017

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

RE: Testimony Against S.B. No. 328

Dear Chairperson Keith-Agaran and Senate Judiciary Committee Members:

My name is Jim Leavitt and I am the founding partner of Leavitt, Yamane & Soldner.

I offer this testimony against Senate Bill No. 328.

If one goes to Kansas or Texas during election season, one can see many ads by judges asking the electorate for their votes. In jurisdictions like these, judgeships can become highly politicized.

Thankfully, Hawaii currently has a “Merit” system, which, as much as possible, attempts to keep politics out of the justice system. An independent judiciary is tremendously important in a democracy. Almost as important is the perception of the public that the system is fair, that the judges are not beholden to anyone, and that justice cannot be “bought”.

The proposed legislation, of course, is not to establish anything so extreme as the direct election of judges, but requiring the consent of the senate for the renewal of a judgeship is nevertheless a step in the direction away from the very good system that Hawaii now has in place.

Any step away from the current system will certainly give rise to the perception—and possibly the actuality—that justice in the State of Hawaii can be manipulated.

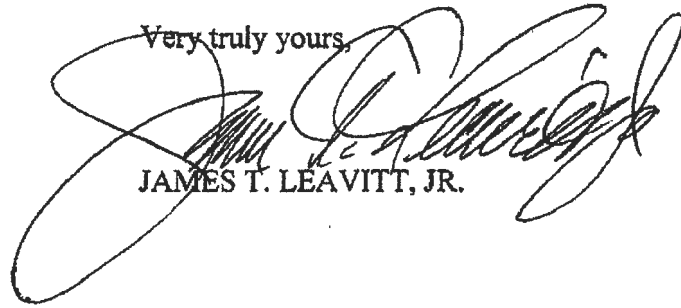
Moreover, this legislation cannot fail to be in the minds of judges who are sometimes asked to make difficult decisions involving the State. I believe it is important to shield judges from having to think about their employment while deciding such cases.

**LEAVITT, YAMANE & SOLDNER**  
ATTORNEYS AT LAW  
A LAW CORPORATION

*Senator Gilbert S.C. Keith-Agaran, Chair  
Committee on Judiciary and Labor  
Page 2  
February 7, 2017*

Thank you for your consideration in this matter.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'James T. Leavitt, Jr.', is written over the typed name. The signature is highly cursive and loops around the text.

JAMES T. LEAVITT, JR.

JTL/rwf

Testimony to the Senate Committee on Judiciary and Labor  
Regarding SB 328 and SB 673  
Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhodes, Vice Chair  
Wednesday, February 8, 2017, 9:00 a.m.  
State Capitol, Conference Room 016  
Respectfully Submitted By Richard K. Perkins, Circuit Judge (Retired)

Thank you for the opportunity to comment on SB Nos. 328 and 673, each proposing a constitutional amendment that would, among other things, shift final authority to determine whether a sitting judge should be retained in office for an additional term from the Judicial Selection Commission to the Senate.

This written testimony is submitted in opposition to both SB 328 and SB 673.

My name is Richard K. Perkins. I was appointed to the circuit court bench in 1994 and thereafter twice retained in office pursuant to constitutional provisions on judicial retention that have been operating as intended and effectively for nearly forty years and are now potentially subject to radical change pursuant to SB Nos. 328 and 673. I retired from the bench on July 1, 2016.

I believe that final authority over judicial retention determinations should remain with the Judicial Selection Commission because I see no convincing reason to transfer that power to a legislative body and compelling reasons not to do so. As to the latter, I agree with the positions taken by the Judiciary and the Hawaii State Trial Judges Association in their respective testimonial submissions on these bills and with the editorial entitled "Protect Integrity of Judicial Selection" appearing in the Honolulu Star Advertiser on February 4, 2017. Beyond this, the only thing I can think of that might be relevant to the Committee's deliberations on these bills is my sincere belief, based on personal experience, that the Judicial Selection Commission is doing a commendable job deciding retention issues.

I applied for retention prior to the expiration of my terms of office in 2004 and in 2014. Each time, I was required to fill out a petition for retention — essentially a questionnaire that in 2014 was eighteen pages long — covering virtually every aspect of my professional life during the last ten-year term, including the types of legal matters I had handled; the most important, challenging, complex, difficult, or novel legal issues I had decided; my publications; legal education courses I had taught or attended; professional and community activities; compliance with the code of judicial conduct; compliance with the law; and a listing of all cases in which a decision of mine had been appealed and not affirmed. In 2014, the completed petition, including attachments, was more than 50 pages long. At my appearances before the Judicial Selection Commission, I was questioned about items in my petition as well as information received by the Commission in confidence from its chosen sources and others who had communicated with it concerning my judicial performance. I am convinced that, both times, the Commission had thoroughly reviewed and considered the material before it and resolved, through its questioning (and presumably subsequent deliberations at which I was not present), any concerns it had about my retention. I am also convinced that it did so in compliance with its constitutional obligation to "operate in a wholly nonpartisan manner."

I did not enjoy the retention process. It is by nature grueling and stressful which, I think, reflects the seriousness and care with which the Judicial Selection Commission approaches each retention determination. Indeed, SB Nos. 328 and 673 do not appear to be motivated by

any concern over the Commission's competence or effectiveness in the handling of these determinations. While transparency is mentioned in SB 673 as the rationale for transferring ultimate authority over retention decisions from the Judicial Selection Commission to the Senate, as argued in the Star Advertiser editorial referenced above, transparency may be achieved by other means. Therefore, I respectfully suggest that, absent some other, and demonstrably cogent, rationale for what amounts to a sweeping change in policy and process, SB Nos. 328 and 673 be rejected for the reasons given in the testimony of the Judiciary and the Hawaii State Trial Judges Association.

Senator Gilbert S. C. Keith-Agaran, Chair

Senator Karl Rhoads, Vice-Chair

Testimony to the Senate Committee on Judiciary and Labor

Regarding SB 328

Wednesday, February 8, 2017, 9:00 a.m.  
State Capitol, Room 016

Chair Keith-Agaran, Vice-Chair Rhoads, and Members of the Committee, thank you for the opportunity to comment on SB 328 which proposes amending the Hawaii Constitution regarding the retention of judges and justices.

My name is Steven Alm and I am a recently retired (8/31/16) First Circuit Court Judge. I am writing in opposition to SB 328. Simply put: if it ain't broken, don't fix it.

Hawaii's current process of judicial appointment and retention involves the Judicial Selection Commission, the appointing authority (Governor or Chief Justice) and the Senate, in its advice and consent function, for the initial selection of judges and justices and a review and decision making by the Judicial Selection Commission for the retention of judges and justices. This has resulted in a process that is robust, merit-based, and to a remarkable degree, removed from politics. Our system, while not perfect, and naturally subject to criticism of individual judges' decisions on particular cases, is not often criticized for being influenced by politics.

The entities involved, the Judicial Selection Commission and the Senate, have taken their duties seriously over the years and have rejected numerous judicial nominees, both at the front end and at the time of retention.

As I have traveled across the country over the years, meeting with judges, legislators, non-profits, court administrators, prosecutors, defense counsel, and the public, I have heard many compliments about our merit-based system of selecting and retaining judges and justices. Amending our State Constitution to have the Senate be the ultimate authority to approve or deny retention of judges and justices would be a needless step backwards for our merit-based system.

At a time in history where the nation's courts are playing a critical role with their check and balance function, a measure like SB 328 would negatively impact both judicial independence itself, and the public's confidence in the independence and impartiality of the courts. All of our judges and justices, and the public, need to be confident that all court rulings are based on the facts of the individual case, precedent, and the State and Federal Constitutions, without concern that any ruling may offend, or be influenced by, other entities or individuals.

Currently, the non-partisan Judicial Selection Commission (of whom four of nine members are appointed by the Legislature) does a thorough, merit-based review of any judge or justice seeking another term in office. The Commission looks at judicial evaluations, any reports from the Commission on Judicial Conduct, and all comments, positive or negative, that it re-



ceives about the applicant. As noted, the Judicial Selection Commission has been diligent and proactive in its duties, rejecting a number of applicants over the years for retention in office.

Requiring judges and justices to also be approved by the Senate, may give the impression, whether justified or not, that political considerations may play a role in retention decisions.

Based on these considerations, I write in opposition to SB 328. Thank you for the opportunity to be heard.

Steven S. Alm

February 7, 2017  
Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2016, 9:00 a.m.

**RE: Opposition to SB328**

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

Thank you for the opportunity to submit testimony on this important issue. My name is Kaily Wakefield, and I am a 3rd year law student at Richardson and I OPPOSE Senate Bill 328. This bill represents an unfair and unnecessary involvement by the senate in judicial affairs.

This proposal would invite political influence on the Judiciary, undermining public confidence and trust in the fairness and impartiality of the courts. There is an important need to maintain separation of powers. Re-retention by the Senate would influence our judges and justices, clouding the separation of powers among the 3 branches.

When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process. Judges may feel they need to rule on cases according to public pressure or favor at the time, rather than by the rule of law. The strength of our democracy depends on an independent judiciary. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. That is a step in the wrong direction.

I believe Hawaii's judicial selection system is already fair and effective. Hawaii's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in keeping the courts free from direct political interference. The measures proposed under this bill would undermine that effectiveness by allowing politics to seep into the judiciary.

For these reasons and others not mentioned, I strongly urge you to OPPOSE SB328.

Sincerely,  
Kaily Wakefield

February 6, 2017  
Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2016, 9:00 a.m.

**RE: Opposition to SB328, SB673, and SB249**

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

My name is Kay Lorraine Bate, I am a 3<sup>rd</sup> year law student at William S. Richardson School of Law. I would like to submit testimony in strong opposition of Senate Bills 328, 673, and 249. These bills taken together represent an unfair and unnecessary involvement by the senate in judicial affairs. They are a solution to a problem that does not exist.

I have lived in states where judges were elected in general elections, and I have lived in a state where judges were selected by the state's general assembly. I have seen for myself how people try to influence the court's decision-making when they control who sits on the bench. Hawaii currently has the best and least political judicial selection process that I have seen.

Keeping the courts free from direct political interference is extremely important. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. That is a step in the wrong direction. Hawai'i deserves an independent judiciary and under the current system, they have that.

Believe me, you do not want judges out glad-handing the legislature in an attempt to get elected to the bench. That would undermine the neutrality of the court, but it would also be absolutely inevitable if the Senate takes over the process, eliminating the current independent Judicial Selection Commission. The Senate has enough to do without getting itself involved in shaping judicial decision-making. And, of course, that is exactly what these bills are all about.

I urge you to please oppose Senate Bills 328, 673, and 249.

Warmest aloha,

Kay Lorraine Bate  
7098 Hawaii Kai Drive #32  
Honolulu, HI 96825

1003 Bishop Street, Suite 2300

Honolulu, HI 96813

Phone 808.524.5644

Fax 808.599.1881

info@bfrhawaii.com

*A Law Corporation*

**Bronster Fujichaku Robbins**

ATTORNEYS AT LAW

**Testimony of Kenneth S. Robbins**

Regarding Senate Bill 328

Committee on Judiciary and Labor

Senator S. C. Keith-Agaran, Chair

Senator Karl Rhodes, Vice Chair

Wednesday, February 8, 2017, 9:00 a.m.

Conference Room 016, State Capitol

Dear Senator Keith-Agaran and members of the committee:

I am Kenneth Robbins. I have practice law in Hawaii for 47 years, principally as a civil trial attorney. I have tried more than 150 trials to a jury verdict. I believe I am qualified to testify regarding the impact of Senate Bill 328 on the independence and integrity of our judiciary.

We have a selection process for judges and justices which is the envy of almost all of the attorneys and judges with whom I have discussed the subject who practice and preside in other states. Adding legislative approval of the retention of judges will have a chilling effect on the independence and integrity of our judiciary. Judges will be less inclined to issue decisions which are correct, but which may not be popular. Judges who have been recommended for retention know they will have to "face the music" if they had the courage to make a decision which is unpopular, but is in accordance with what the law dictates. Requiring legislative approval for retention will politicize the process immeasurably.

If a second round of legislative hearings is held for approval to retain a judge, many top-tier candidates for judicial office will not apply. Senate approval for an initial judicial appointment is reasonable and fair. To undergo another Senate approval process for retention could well politicize decisions made before retention hearings are conducted and certainly may politicize decisions thereafter. I believe, and hope, that this proposed bill has not been introduced to divest the judiciary of some of its independence, but that is what the bill will do if enacted. When the separation of powers among the three (3) branches of government is jeopardized by legislation such as this bill, democracy as we know it is in jeopardy. With the constituency of the judicial commission exceeding 50% of its membership, as appointed by the executive and legislative branches, there is ample opportunity for the other two (2) branches of government to have their opinions expressed when retentions are under consideration.

Testimony of Kenneth S. Robbins  
Senate Bill 328  
February 6, 2017  
Page 2

For these reasons, I oppose Senate Bill 328.

Respectfully submitted,

Kenneth Robbins

February 8, 2017

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

**Re: SB 328 and SB 673, bills relating to the Judiciary**

Hearing Date: February 8, 2017

Hearing time: 9:00 am

Dear Senator Keith-Agaran, Senator Rhoads, and members of the Committee:

I respectfully oppose both SB 328 and SB 673.

As a former law clerk for Chief Judge Craig Nakamura and a former extern for Chief Justice Mark Recktenwald, as well as a former staffer for former-U.S. Senator Daniel K. Akaka, I understand the importance of an independent judiciary in our government. While the job of the Legislature and the Executive Branches are to make and administer laws, respectfully, it is up to the Judiciary to interpret those laws and to safeguard the Constitution and the rights it provides.

It has been a cornerstone of our society, since *Marbury v. Madison*, that the Judiciary serve as the final interpreter of our laws. Historically, the judiciary has been the final haven through which the rights of the minority have been upheld and honored, at times in the face of strong popular politics. U.S. Supreme Court decisions like *Brown v. Board*, *Roe v. Wade*, and *Obergefell v. Hodges*, as well as critical Hawai'i Supreme Court decisions like *Kalipi v. Hawaiian Trust Co.*, *Public Access Shoreline Hawai'i v. Hawaii County*, and *Baehr v. Lewin*, may not have been possible had the Justices on those courts found themselves, and their careers as jurists, the target of the popular politics of the day.

Although we have two branches directly accountable to our voters, we – as a country and as a state – have decided to specifically insulate the Judiciary from politics and public opinion as much as possible. We did this because we understood the importance of upholding our society's core values, enshrined in our Constitution. In 1978, Delegates discussed a great many possibilities for selecting the Judiciary, including judicial elections, and ultimately, they chose the system we have now. I dare say that this system has worked to achieve the precise result they desired – a co-equal branch of government, which has sufficient authority and autonomy to carry out its mission: to administer justice in an impartial, efficient and accessible manner in accordance with the law.

Mahalo for your time and consideration of this important matter.

Respectfully,

Keone J. Nakoa, Esq.

February 6, 2017  
Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2016, 9:00 a.m.  
**RE: Opposition to SB328, SB673, and SB249**

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

Thank you for the opportunity to submit testimony on this important issue. My name is Kevin Morris, I am a 1st year law student at Richardson and I testify against Senate Bills 328, 673, and 249. These bills taken together represent an unfair and unnecessary involvement by the senate in judicial affairs. They are a solution to a problem that does not exist.

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.<sup>1</sup> In fact, four of the nine committee members are already approved by legislative leaders. 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.

Hawaii's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in keeping the courts free from direct political interference. The measures proposed under these three bills would undermine that effectiveness by allowing politics to seep into the judiciary.

The strength of our democracy depends on an independent judiciary. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. That is a step in the wrong direction.

The people of Hawai'i deserve an independent judiciary and under the current system, they have that. These bills represent attempts to undermine that system.

This is why I urge you to oppose Senate Bills 328, 673, and 249.

Kevin A. Morris

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<sup>1</sup> Judicial Selection Commission Rules ([http://www.courts.state.hi.us/docs/court\\_rules/rules/jsr.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf)).

**Testimony to the Senate Committee on Judiciary and Labor**

Senator, Gilbert Keith-Agaran, Chair

Senator, Karl Rhoads, Vice Chair

Wednesday, February 8, 2017 9:00 a.m.

State Capitol, Conference Room 016

Re: SB328, 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.

Aloha Chair Keith-Agaran, Vice Chair Rhoads, and members of the committee:

My name is Kylie Wager, and I am a practicing attorney and member of the Hawai'i bar. I am submitting this testimony in my individual capacity to strongly oppose SB328.

Our democracy is rooted in and depends upon a separation of powers between the three branches of government. All citizens should be able to rely on the courts to fairly and impartially resolve disputes and uphold the rule of law. SB328 would severely undermine these democratic principles by allowing politics to improperly influence the judicial process.

For these reasons, I strongly oppose SB328.



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

Senate Bill 328  
Hearing: February 8, 2017, 0900, Room 016

RE: Testimony in Opposition to SB 328

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

I am a resident of Senate District 13, and am strongly opposed to SB 328. The reasons mirror my testimony on SB 673. The proposed constitutional amendment to require Senate reconfirmation for judicial retention would significantly politicize the judicial decision making process, severely weaken judicial independence, and bind the hands of the justice or judge before the Senate. At a time when our legal system will certainly be challenged to uphold the rule of law, now is not the time to erode an essential pillar of our government.

Requiring Senate reconfirmation for judicial retention undermines judicial independence and politicizes judicial decisions. Hawaii's method of selecting and retaining justices and judges via the Judicial Selection Commission has been praised by the American Judicature Society. A judge must decide a case by applying facts to law, not whether the decision will be popular. If a judge has to think about whether a decision will be politically unpopular, the objectivity required of an independent judiciary and public confidence in the process is destroyed. This is to say nothing of the fact that litigants or other parties would then be able to affect judicial retention through political donations, political action committees, and other special interest groups.

Requiring Senate reconfirmation also unfairly binds the hands of the justices or judges appearing before it. The Judicial Selection Commission, comprised of a majority of non-lawyers, is an independent body that is constitutionally mandated to maintain confidentiality to promote open and honest discussions about judicial evaluations and any issues that may affect the decision to retain or dismiss a justice or judge. If these discussions were to be held in public view a judge would be ethically precluded from discussing any matters that may be pending or that could interfere with a trial, hearing, or appeal. If a case has been controversial, then a justice or judge would be unable to provide insight or rebuttals to the questions of the Senate. All input that is provided to the JSC and the Hawaii State Bar Association are held in the strictest of confidence to promote open and honest evaluations of justices and judges. If such information were to be made public through a Senate hearing, the chilling effect would negate the value of such evaluations.

Now, more than ever, public confidence in the judiciary's independence is needed. Judicial independence, free from political influence, ensures that when a person gets their day in court, the decision will be based on the law, and not popular opinion. Now, more than ever, public confidence in the judiciary's independence is needed, and I strongly urge you to oppose SB 328.

Levi K. Hookano  
PO Box 2687  
Honolulu, HI 96803

1003 Bishop Street, Suite 2300

Honolulu, HI 96813

Phone 808.524.5644

Fax 808.599.1881

info@bfrhawaii.com

*A Law Corporation*

# Bronster Fujichaku Robbins

ATTORNEYS AT LAW

## **TESTIMONY OF MARGERY S. BRONSTER**

Regarding Senate Bill 328, 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 Judge or Require Consent of the Senate for a Justice or Judge to Renew a Term of Office

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

Wednesday, February 8, 2017, 9:00 a.m.  
Conference Room 016, State Capitol

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

I strongly oppose Senate Bill 328, which is part of a package of bills aimed at diminishing the independence and integrity of the judiciary. Senate Bill 328, if passed into law, would compromise the independence of our state's judicial branch, and it should, therefore, be rejected.

An independent judiciary is a cornerstone of American democracy. Both the United States and Hawai'i Constitutions establish three co-equal but fully independent branches of government to insure the checks and balances necessary to preserve our democratic form of government. Above all, these checks and balances insure a nation bound by the rule of law and not the preferences of powerful individuals. Just as the legislative branch must be allowed to independently write the laws and the executive branch to independently implement them, so too must the judicial branch be allowed to independently interpret them.

The history of both the United States and Hawai'i has been marked by attacks upon the independence of the judiciary as a co-equal branch of government, but, on balance, the judiciary has withstood these attacks and remained independent. This has served our nation and the State of Hawai'i well because we have remained a nation and State governed by laws rather than individuals. This not only maintains justice for individuals but is also

Committee on Judiciary and Labor  
Senate Bill 328  
Wednesday, February 8, 2017, 9:00 a.m.

necessary to ensure a climate that is favorable for business by insuring the predictable application of law to court cases regardless of the particular parties before the court.

An independent judiciary requires two elements. First, judges must be free to interpret the law without fear of political interference or influence. And, second, judges must be compensated in a manner that makes them secure from monetary influence.

Senate Bill 328 proposes that Judges and Justices of the Hawai'i Supreme Court obtain Senate approval before renewal of their ten-year terms of office. This proposal, if enacted, would create a political test for renewal that would haunt all sitting judges by creating the appearance of political influences on their interpretation of the law and treatment of the parties who appear before them. The drafters of our Constitution created the Judicial Selection Commission for the purpose of selecting and retaining judges. The drafters considered and specifically rejected having the Senate play a role in retention precisely to safeguard the independence of the judicial branch.

Judges are supposed to apply and interpret the law impartially without considering the political power and influence of the particular parties who appear before them. Senate Bill 328 is a direct attack on this impartiality. By subjecting Judges to renewal by the Senate, the Bill will at minimum create the impression that parties who are positioned to have more influence on the Senate can likewise enjoy more favorable treatment in our courts. While it is entirely appropriate for a legislative body like the Senate to be influenced by the democratic processes of lobbying and campaigning, this type of influence has no place in sound judicial decision-making which relies for its credibility on the impartial application of the law to the facts of any particular case.

Under current law, the Senate correctly exercises the power of advice and consent upon the initial appointment of every Judge. This allows the Senate to pass on the qualification of every judge for office with no danger that this process will influence the outcome of any particular case. In contrast, extending this power to renewals will necessarily create the appearance that judicial decision-making is subject to post hoc legislative oversight and review. This fundamental difference makes the proposal in Senate Bill 328 inimical to judicial independence and contrary to the soundly balanced constitutional structure of our government. The Committee should, therefore, reject senate Bill 328.

February 4, 2017

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

From: Marie N. Milks, Judge (retired)

Re: SB 328 - Hearing scheduled for February 8, 2017 at 9:00 a.m., Room 016

My name is Marie N. Milks, and I am providing this written statement, in **strong opposition** to SB 328.

Regrettably, I am providing *pro bono* services in a matter which is set at the same time as the hearing in this matter and therefore cannot attend the hearing in person. I am retired, but consider myself an active member of the bar and continue to have a deep and abiding interest in a strong and independent judiciary.

**I ask that my voice be heard and that I be counted among those who are against the proposed legislation.**

You have been briefed by others who have provided reasons why this measure is unnecessary. We have judges who swear their allegiance to the rule of law and both the Hawaii and United States Constitutions. When they first apply, they are subject to close scrutiny by the Judicial Selection Commission and the Hawaii Senate for confirmation. Thereafter, during the retention process, the public is included in the review of judicial performance.

During a judicial term, ongoing periodic reviews - rigorous and robust - are conducted. Moreover, decisions are reviewed through an appellate process. No decision is made without transparency and an opportunity for thorough consideration.

We all need to have sustained and renewed trust in a judiciary and a process which is designed to insure that judges serve with respect for others, with integrity and courage. All interested parties are able to provide any and all information necessary to the Judicial Selection Commission to do its job, with the reassuring knowledge that all matters, warts and all, can be brought to the Commission in strict confidence.

I urge you and the Committee to carefully consider this measure. **Again, please know that I stand in strong opposition to it.**

Thank you. I will be out of country from February 9 through the 19th, but can be contacted at 808 - 226-5633.

Senator Gilbert S. C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Committee on Judiciary and Labor

SB 328        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 8, 2017 at 9:00 a.m.  
Conference Room 016

**TESTIMONY OF MARK S. DAVIS IN OPPOSITION OF SB 328**

My name is Mark Davis. I am a partner in the law firm of Davis Levin Livingston. I have been a practicing attorney for 43 years in Hawai`i and I have had a long-term personal and professional commitment to the changes made in the 1978 Constitutional Convention that resulted in the model for achieving an independent judiciary in Hawai`i. I have personally served as a chair of the National Committee for Independence of the Judiciary of The American Association of Justice, which was composed of Chief Justices from all over the country. The model provided by the retention system in Hawai`i has always been viewed as a model of fairness and the gold standard for the support of an independent judiciary.

The pending Bill involving retention by the Senate would be a fundamental change, which exposes the Judiciary to political influence. With the current presidential administration and its criticism of the Federal Judiciary, it is obvious that intense political pressure can often be utilized to affect the impartiality of the Judiciary. In my opinion and I believe in the opinion of most fair-minded attorneys who desire to see a free, fair, and independent judiciary, our system immunizes the judges and decision making from the impact of political influence.

Often judges must decide cases based on the Hawai`i Constitution and the laws that exist in Hawai`i. When a judge would face a retention process as proposed in this Bill, there are inevitable political forces by the public, political action committees, and special interests that would affect the interests that usually protect justice and judicial decision-making. The courts must be protected from this politicization.

Judges are ethically precluded from discussing topics in pending matters. The retention process that has been proposed will cause multiple questions and compromises of the Court's decision-making impartiality. In addition, unfair political process to which judges may be exposed in this new system may inhibit qualified and experienced lawyers from seeking judgeships.

This legislature should rely on the highest standards of ethics for the judges and the administration of justice and to make sure to avoid the politics that requires a judge to have certain political instincts and savvy. Politics needs to stay out of the Judiciary and I strongly recommend that you reject this bill.

Respectfully submitted,

Mark S. Davis

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Monday, February 6, 2017 11:55:04 AM

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**SB328**

Submitted on: 2/6/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mei Nakamoto	Individual	Oppose	No

Comments: I object to the proposed amendments in SB 328, particularly at page 5, lines 11-12, "the senate shall hold a public hearing and vote on each petition approved by the judicial selection commission." The amendments threaten the independence of the Judiciary. When I advise my clients about what to expect from a judge, I want to continue to do so with confidence that even an adverse decision will have been the result of consideration of the merits and the law. SB 328 will compel me to include concerns that the judge might be worried about the Senate's next hearing if he/she wants to be reappointed. I can see no good outcome from having to caution my clients about that all-too-human response to SB 328. The benefits of senate confirmation for reappointment will be outweighed by the harm.

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](mailto:webmaster@capitol.hawaii.gov)

ATTORNEYS

400 DAVIS LEVIN LIVINGSTON PLACE  
851 Fort Street, Honolulu, Hawai'i 96813-  
4317

www.DavisLevin.com

TELEPHONE: (808) 524-7500

Fax: (808) 356-0418

MICHAEL K. LIVINGSTON  
mlivingston@DavisLevin.com

NEIGHBOR ISLANDS  
Maui: 877-7500  
Hawai'i: 326-3200  
Kaua'i: 245-6100

February 7, 2017

[JDL.testimony@capitol.hawaii.gov](mailto:JDL.testimony@capitol.hawaii.gov)

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

- SB 328: 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 a judge and require consent of the Senate for a justice or a judge to renew a term of office.
- SB 673: Proposing an Amendment to the Constitution of the State of Hawaii to amend the manner in which justices and judges are appointed, consented to, and retained, including authorizing the Senate to approve or reject subsequent terms of office for justices and judges.

Hearing Date: February 8, 2017 at 9:00 a.m.  
Conference Room 016

**TESTIMONY OF MICHAEL K. LIVINGSTON  
OPPOSING S.B. NO. 328 AND S.B. NO. 673**

I submit this testimony strongly opposing both S.B. No. 328 and S.B. No. 673 (re Senate Reconfirmation of Judges and Justices).

The proposed legislation is offered as an effort “to promote transparency in the judicial retention process.” In truth, the legislation unquestionably would have the effect – whether intended or unintended – of exerting pressure on sitting judges to make decisions in cases before them based on whether the decision will please the majority of the legislators who will decide on whether to retain the judge. This undeniable effect of the proposed legislation should be a primary focus of the debate over the wisdom of the pending bills.

Senator Gilbert S. C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor  
February 7, 2017  
Page 2


I respectfully submit that: (1) Hawaii's present system of judicial selection and retention effectively preserves and protects the judicial independence that is essential in protecting the rights and interests of minorities; and (2) the existing checks and balances built into our democratic system provide adequate legislative remedies when the legislative branch disagrees with a particular judicial decision.

As the immediate past Hawaii Chair of the American College of Trial Lawyers, I am aware that substantive testimony will be provided from this organization elaborating on both of these points, so I will not repeat that testimony here. I will simply add my voice to the many Hawaii attorneys who strongly oppose this proposed legislation as an ill-conceived challenge to judicial independence and impartiality.

Thank you for your consideration.

Sincerely,

**DAVIS LEVIN LIVINGSTON**

  
MICHAEL K. LIVINGSTON



February 7, 2017

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

Re: SB 328                      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.

SB 673:                      Proposing Amendments to the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges Are Appointed, Consented to, and Retained.

Hearing Date: February 8, 2017  
Hearing time: 9:00 am

Dear Senator Keith-Agaran, Senator Rhoads, and members of the Committee:

**I oppose SB 328 and SB 673.**

My name is Momi Cazimero—a **concerned citizen**. After establishing my business in 1972, I began serving on community boards, including the Judicial Selection Commission. I also served on both the national and Hawaii boards of the American Judicature Society (AJS) and now serve on the Judicial Performance Evaluations panel under Rule 19. Through these roles and encounters, I've observed and learned of the Hawaii and national court systems that affirm my support for an independent judiciary.

Hawaii is the envy of many mainland judges who embrace the value of a merit-based system. Why is it called merit selection? It is called merit selection because the Judicial Selection Commission chooses applicants on the basis of their qualifications, and not on the basis of political or social connections, or adherence.

Hawaii's merit-based system of judicial selection and retention was instituted after thorough consideration and debate at the 1978 Constitutional Convention. They created an independent judiciary for Hawaii's citizens. Among the major reasons for establishing the Judicial Selection Commission, the Committee on the Judiciary explained the need to —“remove the selection of judges from the political consideration of one person and place it in the hands of a nonpartisan board of citizens; —that the choice of nominee be made without consideration or influence of partisan politics; and —that an independent panel of commissioners would have the sole and exclusive function of seeking out, encourage and screen all candidates for judicial appointment and to determine a judge's application for retention.” (1) *Proceedings of the Constitutional Convention of Hawaii of 1978*, at 620 (1980)

The Constitution provides that the Judicial Selection Commission alone, not the Governor, the Senate or the Chief Justice, determines whether justices or judges will be retained following completion of their terms.

Since the establishment of the Judicial Selection Commission, a number of pathways for judicial accountability have been put in place to safeguard an independent judiciary with fair and impartial courts. Among the multiple pathways for judicial accountability are the Commission on Judicial Conduct, Judicial Performance Evaluations under Rule 19, HSBA's Judicial Evaluations, the appellate process, and AJS's review of practices and processes. These vital measurements, along with personal interviews, provide the thorough vetting in evaluating the conduct and performance of judges seeking retention.

In contrast to the JSC's confidential evaluation process, in a senate retention hearing each judge may be called upon to explain his or her decisions and to respond publicly to those persons or groups whose special interests may have been affected by his or her decisions. However, under the Revised Code of Judicial Conduct, judges may not make statements on pending or impending matters, and so judges would not be able to respond to the specifics of a pending case in a retention hearing.

Chief Justice William S. Richardson explained the following principles in "Judicial Independence: The Hawaii Experience" 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. Further, he wrote:

- "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" (2) William S. Richardson, Judicial Independence: The Hawaii Experience, 2 University of Hawaii Law Review, 1, 4, 47

William S. Richardson, for whom the University of Hawaii Law School is named, is singled out in my testimony for his scholarly principles. On the other hand, the 1978 Constitutional Convention speaks with a collective view of citizens who aspired to a standard for the judiciary where they would be treated fairly and equally. Both speak to the same issue: Keep politics out of the judiciary.

The *kuleana* we expect, and deserve as a community, is a fair and impartial court whose ability to apply the law will not be intimidated by political intervention. I am not a lawyer, nor am I a judge, but I am a **concerned citizen**, and old enough to speak to you as a *kupuna*.

Do not pass SB 328 or SB 673.

It is NOT *pono*.

Mahalo.

Momi Cazimero

# Coates & Frey

P. Gregory Frey  
Managing Attorney

Of Counsel  
Bradley A. Coates\*  
A Law Corporation  
Senior Counsel  
Paul W. Soenksen

ATTORNEYS AT LAW • L.L.C.

February 7, 2017

Noah H. Gibson  
John D. Hughes  
Ann S. Isobe 磯部 末 アン  
Scott M.Y. LaFontaine  
Jo-Ann K. Takara 高良 薫 ジョアン  
Tom S. Tanimoto 谷本 定男 トム・タニモト  
David A. Weick  
Robert S.N. Young 羅伯特 新年 楊

Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Senator Committee on Judiciary and Labor

RE: Testimony in Opposition to SB328 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 Chairman Keith-Agaran, Vice Chairman Rhoads and committee members:

My name is **P. Gregory Frey** (HSBA #4386) and I am the managing attorney of Coates & Frey, AAL, L.L.C., Hawaii's Largest Family Law Firm, and a former Chair of the Hawaii State Bar's Family Law Section. I note with great interest and concern the introduction of **SB328** which seeks to alter the long-standing and time-tested process by which Hawaii State Judges and Justices are retained. Currently, justices and judges are retained, if they are, by the Judicial Selection Commission ("JSC"). However, the Senate is proposing to interpose a legislative component to the process whereby the Senate will have the power to be the final arbiter of the matter.

**I respectfully oppose the bill.** Although the bill specifically notes that it is premised upon the need to have an open-door policy re: the process by which judicial officers are retained, I submit that such is ultimately unworkable. Judicial *independence* must be sacrosanct and remain just that; independent and not beholden to pressure(s) from any other branch of government.

It appears quite clear that the Hawaii State Senate has an on-going quarrel with the Hawaii State Bar Association re: the internal and non-public vetting process by which the Bar issues a finding of whether a judicial nominee is qualified or non-qualified to serve as a judge. Notwithstanding this dispute, it appears clear that altering the retention process is not a solution. Regardless of the Bar Association's vetting process, the Senate has a full opportunity, in an open forum where public comments are invited, to determine for itself whether a nominee is qualified to serve as a judge. To do the same in the retention process fails to consider that a judge in such a situation is no longer a nominee, but now a sitting judge who has likely presided and rendered decisions in many, many cases.

Divorce • Paternity • Custody • Abuse/TRO • Mediation • All Family Law

\*Mr. Coates, the firm's founder, remains an active and vital part of the office in an "Of Counsel" capacity, but no longer maintains an ownership interest in the firm.

Chairman Keith-Agaran  
Vice Chairman Rhoads  
Page 2

The process proposed by **SB328** invites disgruntled litigants who wish to complain due to the result(s) of a case, rather than the fairness and/or imparity of the decision-making process. Additionally, there likely will be a chilling effect as pertains to members of the Bar who are perhaps best suited to providing comments and who wish to offer critical, yet constructive, testimony, but will not, due to a fear of retaliation. The JSC's current retention process effectively dispenses with both of these unwanted possibilities. Furthermore, it goes without saying that Hawaii's judges handle enormous caseloads, have little to no spare time and should not have to go through yet another round in the retention process. Do we really want judges constantly biting their finger nails for additional months because of yet another barrier (and a very public one at that) to their retention? I think not.

Accordingly, and for the reasons cited, **I must and do respectfully oppose SB328.**

~~Very truly yours,~~

COATES & FREY  
ATTORNEYS AT LAW, LLLC

  
P. GREGORY FREY

**From:** [Pamela B Elders](#)  
**To:** [JDLTestimony](#)  
**Subject:** SB 328 and SB 673  
**Date:** Friday, February 3, 2017 9:49:09 AM

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**To:** Senator Keith-Agaran, Chair of Senate Judiciary and Labor Committee  
Senator Tokuda, Chair of Senate Ways and Means Committee  
**RE:** SBs 673 and 328

I am writing to express my opposition to Senate Bills 673 and 328 which would amend the Hawaii State Constitution in regard to the appointment and retention of justices and judges.

I believe retention by the Senate would blur the separation of powers between the three branches of government. The Senate already has the power to confirm initial 10 year appointments proposed by the Governor as well as appointment authority for two members of the Judicial Selection Commission. I see no legitimate reason to change this process.

Inserting the Senate in the retention process would invite undue political influence on decisions. Retention rightfully rests with the Judicial Selection Commission. Politicizing the retention process will erode trust in the impartiality and integrity of our legal system.

In the proposed process, judges would be subjected to a “public trial” in the Senate with their past decisions open to political interpretation and scrutiny by special interest groups. I have observed this trend on the national level due in part to our contentious party system and believe these bills would in the long-run undermine the impartiality of justices and judges.

I encourage you to make no changes in the current retention system.

Thank you,

Pamela B. Elders

**From:** [Paul](#)  
**To:** [JDLTestimony](#)  
**Subject:** Opposition to SB328 and SB673  
**Date:** Friday, February 3, 2017 8:36:00 AM

---

I believe senate re-retention blurs the separation of judicial and legislative branches. I support separation of powers and oppose SB328 and SB673

**From:** [R. Elton Johnson, III](#)  
**To:** [JDLTestimony](#)  
**Subject:** Testimony in opposition to SB 328 and SB 673  
**Date:** Monday, February 6, 2017 1:11:20 PM

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Thank you for the opportunity to testify.

I strongly oppose SB 328 and SB 673, which clearly present a gratuitous threat to the independence of the Judiciary, and are inconsistent with the intent of Article VI of the *Constitution of the State of Hawai'i*.

Please reject SB 328 and SB 673.

Thank you,

R. Elton Johnson, III

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Tuesday, February 7, 2017 9:08:48 AM

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**SB328**

Submitted on: 2/7/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Rachel L. Kailianu	Individual	Oppose	Yes

Comments: There is a separation of powers for a reason. No one body can become a sovereign over all the people.

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:** [Bob Nelson](#)  
**To:** [JDLTestimony](#)  
**Subject:** SB328 & SB673  
**Date:** Friday, February 3, 2017 9:08:23 AM

---

Chairs, House and Senate Judiciary Committees,

I urge you to reject SB328 and SB673 when you meet on February 8th. These bills would lessen the basic separation of powers and responsibilities built into our government, allowing the possibility of political influence and lessening the independence of the judicial system in the State of Hawai'i.

Respectfully,

Rev. Dr. Robert W. Nelson

**Testimony to the Senate Committee on Judiciary and Labor**  
Senator, Gilbert Keith-Agaran, Chair  
Senator, Karl Rhoads, Vice Chair

Wednesday, February 8, 2017 9:00 AM  
State Capitol, Conference Room 016

SB 328 and SB 673

I am Ronald T.Y. Moon, former Chief Justice of The Supreme Court of Hawai'i (1993–2010). I strongly oppose SB 673 and SB328.

My experience of serving as a judge and justice for approximately 30 years convinces me that the public Senate retention proposed would potentially cause judges to violate their Code of Conduct. The Code bars judges from being involved in political matters. Judges are prohibited from supporting political candidates, attending political-related functions and speaking out on political issues. Violation of the Code may arise when judges are asked to respond to questions regarding the judge's basis or philosophy of decisions.

The 1978 Constitutional Convention, in establishing the Judicial Selection Commission (JSC) was intent on promoting the concept of Judicial Independence by minimizing politics in the selection and retention processes. In regard to the retention process, it was delegated to the JSC requiring confidentiality. In the ensuing years following the Electoral approval of the 1978 Constitutional Convention Amendments, the retention process has been enhanced. Confidential information is received by the JSC regarding a judge's performance in judging and his/her behavior in and out of the courtroom. Sources of this information are fellow judges, judiciary co-employees, lawyers and the public (jurors). All these resources base their evaluations upon their actual observations and interactions with the judge. I submit the confidential nature of this information fosters candor, as opposed to a public hearing.

My experience of being vetted by the JSC during my retention of the Chief Justice's position for a second term was exceedingly thorough. The amount of information collected by the JSC on my performance and demeanor as Chief Justice was considerable.

When the Judiciary or a particular judge is involved in a controversial issue or decision, the public's reaction including members of the Legislature may be perceived as politicizing the matter or causing the Judiciary/judge, under future similar circumstances, to consider a different outcome. A typical example, is the public's outcry or severe criticism of a judge's sentence in a criminal case, without knowledge of the details of matters the judge considered including that in the defendant's pre-sentence report, which is confidential.

Further, subsequent to Hawaii's *Baehr v. Lewin*, 1993 (same sex marriage), judges did not receive a raise for 8 years (1990–1999). In approximately 1994 I visited with several legislators, requesting that judges receive raises, as the longest period between raises in the 1980s was three years. The response I received from several was that the *Baehr* decision was contrary to their and the public's thinking and would cause much work for the Legislature to amend the Constitution. Several judges opted for early retirement due to the length of time without a raise.

I further submit that an untenable negative effect of a public retention hearing would be on the occasion when the judge is publicly rejected. This result would ruin the judge's opportunity to work as an attorney. In the eyes of the public, many would likely not select the ex-judge as his/her lawyer. The JSC is sensitive to this result, thus giving the judge an opportunity to withdraw in lieu of rejecting his/her petition for retention, understanding that good lawyers and judges possess different qualities.

It is well understood that judges must adhere to the Doctrine of Judicial Independence, only deciding cases/issues on the facts admitted in court and applying the relevant law. Without this most important concept there would be chaos, and Constitutional checks and balances would be inconsequential and meaningless.

Thank you for the opportunity to submit testimony in opposition to SB 673 and SB 328.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** \*Submitted testimony for SB328 on Feb 8, 2017 09:00AM\*  
**Date:** Friday, February 3, 2017 5:45:00 PM

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**SB328**

Submitted on: 2/3/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Sam Suen	Individual	Oppose	No

Comments:

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February 6, 2017  
Senate Committee on Judiciary and Labor  
Wednesday, February 8, 2016, 9:00 a.m.  
**RE: Opposition to SB328, SB673, and SB249**

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

Thank you for the opportunity to submit testimony on this important issue. My name is Sean Aronson, I am a 3rd year law student at Richardson and I testify AGAINST Senate Bills 328, 673, and 249. These bills taken together represent an unfair and unnecessary involvement by the senate in judicial affairs. They are a solution to a problem that does not exist.

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.<sup>i</sup> In fact, four of the nine committee members are already approved by legislative leaders. 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.

Hawaii's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in keeping the courts free from direct political interference. The measures proposed under these three bills would undermine that effectiveness by allowing politics to seep into the judiciary.

The strength of our democracy depends on an independent judiciary. We need our judges to make decisions based on the facts and laws relevant to the cases before them. These bills would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. That is a step in the wrong direction.

The people of Hawai'i deserve an independent judiciary and under the current system, they have that. These bills represent attempts to undermine that system. Last year's attempts to politicize the judiciary were overwhelmingly opposed and that should have signaled to the Senate that the public does not share in their zeal for reform. Don't fix what isn't broke.

This is why I urge you to oppose Senate Bills 328, 673, and 249.

Sincerely,

Sean Aronson

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<sup>i</sup> Judicial Selection Commission Rules ([http://www.courts.state.hi.us/docs/court\\_rules/rules/jsr.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/jsr.pdf)).

TESTIMONY

Chair of Senate: Chair Senator Gilbert Keith-Agaran, Vice-Chair Senator Carl Rhoads

Bill: SB328 - Senate approval of judicial continuations for all Hawaii judges and changing the time periods for consideration and action on judicial continuation petitions

Date of Hearing: February 8, 2017

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: SB328 - Requiring Senate approval and altering time periods for action on judicial continuations for all Hawaii judges

Position: I oppose SB328 in its entirety

## Testimony:

Good Morning. I have been privileged to be a lawyer in Hawaii for about 46 years. I engaged in private practice providing business law and litigation services in my community until 1994 when I became a full-time Circuit Court Judge. I served 24 years as a trial judge in Hawaii (7 years as a per diem judge in District & Family Courts), including 18 years as a Second Circuit Court Judge and 12 years as Chief Judge of Second Circuit. I also served 23 years in the US Navy Reserve Jag Corps., 5 years of which was service as a Military trial judge. After mandatory age retirement from the Judiciary in 2012 (only judges face mandatory retirement at age 70 years) I have continued to serve our Judiciary as a member of the Judicial Counsel and as a member of the Judicial Review Panel, the latter of which reviews the performance of our judges.

Based upon my experience as both a Hawaii lawyer and upon my service as a Hawaii judge, I

believe that the current system for selection and retention of our Hawaii judges is excellent; and, unless there is some very good reason to change our current system, we should not do so.

I carefully reviewed the proposed bills put before our legislature last year and the bills currently pending that propose changes to our Judiciary. After carefully reviewing these bills and considering the changes they would require, I do not believe that the changes to our Judiciary that would be caused by the pending bills, including SB328, would improve our judiciary or enhance judicial selection or retention or, services for the people of Hawaii.

SB328 requires an amendment to our Hawaii Constitution.

SB328 would require a serving judge in any Hawaii Court to petition for either retention *or* retirement during the period beginning 12 to 9 months before their extant term expires, a 3-



month window. Currently, a petition is required at least 6 months before expiration of a judge's term. No reason is given for changing the time period required to give notice for retirement vs. retention.

Under SB328, if a judge petitions for retention, then our Hawaii Judicial Selection Commission (JSC) will carry out its usual investigation and, then, if it decides the judge should be retained, it "...shall *immediately* [*emphasis supplied*] provide written notice to the senate for the senate to consider consent to renew..." There is no definition of "immediately" or of what happens if there a failure to give or untimely notice. It would probably be better to provide for a discrete time period for the notice. Likewise, no mention is made of any procedure in the Senate should the JSC decides *against* retention. The Senate may only vote *for* retention. In any case, the Senate may only vote within 90 days of receipt of the notice. It "...shall then hold a public hearing and vote on each petition...". SB328 then provides that if

“...the senate fails to do so...”, the JSC is shall renew the judge for another term. There is no requirement stated as to whether the senate vote should be by majority or otherwise. And, it seems that in the event that any of the stated conditions, e.g., 90 days, hearing, vote, are not met, the JSC must retain a judge.

SB 328 lacks sufficient clarity; and, in my opinion, will substantially, and unnecessarily, increase the bureaucratic burden upon judges seeking additional terms of service, without providing a demonstrable benefit to our society. SB328 does not state what, if any, benefit will be derived from altering our Hawaii Constitution and, as a lawyer, I urge our Legislators to not amend our Constitution unless there is a clear, demonstrable benefit for the people of Hawaii.

There are currently approximately 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. I understand that the Judiciary is seeking additional judicial positions for Family Courts in First, Second and Fifth Circuits.

Currently 46 District Court/Family Court Judges serve 6 year terms of office. All other judges (34) serve 10 year terms. Most judges seek an additional term of office in addition to their initial term of office. Our District and Family Court Judges cannot qualify for a retirement benefit after serving only one term (6 years). Under additional proposed legislation, our other Judges will be unable to qualify for a pension after serving only one term of office as well. Therefore, it can be expected that most of our 80 plus Judges will likely seek additional terms of office and as a result and will require Senate confirmation to continue in office under SB 328. It appears, then, that SB328 would create a huge increase in work-load for our Senate, and a corresponding burden on our judges, many of whom will probably be seeking retention at any given time.

Requiring Senate confirmation for *all* judicial continuations, whatever their duration, will substantially increase the tempo and number of judicial continuations; and, it will increase the burden upon the Senate. It will also result in an unnecessary increase in burdens on judges during the pendency of their continuation petitions.

SB328 will result in the deferring of justice for the public. All Hawaii 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”. Redundant Senate confirmation of judicial continuation petitions that have already been approved by the JSC will undoubtedly result in court calendar delays. No rationale has been stated for the proposal contained in SB328 requiring Senate confirmation proceedings for all judicial continuations and none comes to mind, except

to increase the authority of the Senate over our Judges.

I can tell you from personal experience that the process of applying for continuation for a judge for an additional term of office is very arduous and takes a substantial amount of extra time, effort and resources. I petitioned for retention and was fortunate to be able to serve an additional judicial term. Accordingly, I have personal experience of the process. The retention process is a very important, career critical evolution for a judge.

Depending upon in which court he or she serves in, a successful continuation can make the difference between qualifying for retirement benefits or not for the judge and his or her family. If confirmation by the Senate is added to the process, a judge 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. This

standard practice for all who are appointed to judicial office. The membership of the Senate changes regularly. A judge petitioning for retention cannot rely upon having met all of the Senators during their initial application process or take the chance that the Senators will not be familiar with the judge during their term of office and his or her work and other contributions. From personal experience, this is an expensive and time-consuming process, especially for a neighbor island judge. Senators are very busy and are not always available. For a judge 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 judges (except in District and Family Court) to provide help judges 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. And, this extra layer will result in short-falls in meeting the justice needs of the public. The additional burdens that SB328 would place upon the public and the deferral of justice that will certainly occur are unwarranted and are not justified in any way in the Bill itself.

There has been no indication that the current process utilizing the JSC for judicial retentions is in any way inadequate or incomplete. Hawaii has a proven high quality, professional Judicial Selection Commission that has successfully processed judicial continuations, without additional senate confirmation, for many years. There has been a minimum of delay or interference with the services of our judges 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 and has

proven to be highly representative of our Island communities as a whole, staffed by persons whose specific purpose and expertise is to vet, help select; and, if warranted, continue our judges and justices for an additional term in office.

I had many opportunities to meet and work with our Judicial Selection Commission during my service as Chief Judge of Second Circuit. Just as all judges, I applied to and appeared before our Commission for initial judicial selection and for continuation to a second 10-year term of office. In addition, while serving as Chief Judge, the Commission often solicited my opinion about judicial applicants and continuations. In my experience the Commission members spend a great deal of time-consuming outreach to gather information about the performance of our judges and justices 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 our



JSC members carry out their duties and responsibilities. The membership of the Commission changes from time to time, of course, but it has always been composed of distinguished, highly experienced lawyers and distinguished lay-members who are highly competent and professional.

The JSC generally comes to each island to conduct investigations, meet with the judge applying for retention, conduct the continuation hearing on-site and vote on retention. This practice is highly efficient and allows the JSC to gather information and interview persons knowledgeable about the performance of the judge locally. Very importantly, this promotes the minimum disruption of the judge's court calendar, the regular business of the court and the justice needs of the public. The presence of the JSC onsite is especially important for neighbor-Island judges and is a confidence-builder for the community.

It should be remembered in considering SB328, judges 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, and their performance and contributions during their previous judicial term of office. In addition, the JSC has available to it all of a Judge’s “judicial performance evaluations” which are conducted periodically for the purpose of performance review; and, also, for judicial counseling for every Hawaii judge and justice. Generally, these performance evaluations occur every two or three years and, in addition, when a judge is approaching retention. Public input is also solicited about a judge’s performance during this process. Thus, the members of the JSC are very knowledgeable about the service of the applicant-judge at the point in time during which their continuation in office is under consideration.

### Closing:

To require the addition of Senate confirmation proceedings for judicial continuations may appear to enhance democratic virtues, but in actual fact, it does not. SB 328 will not add any value over the existing process that might justify the negative impact it will certainly have upon the delivery of justice services to the public. There is no evidence that our current process for judicial continuation is in any way inadequate. Our JSC has competently processed judicial continuation applications for many years and there is no need for our current procedure to change. The only effect of this SF328 would be to unnecessarily, redundantly increase the legal authority of our legislative branch of government over our judicial branch of government. For the reasons stated above, I oppose SB328.

Thank you for this opportunity to present testimony.

Shackley F. Raffetto  
Chief Judge (Ret.), Second Circuit,  
State of Hawaii

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** Submitted testimony for SB328 on Feb 8, 2017 09:00AM  
**Date:** Sunday, February 5, 2017 11:37:31 AM

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**SB328**

Submitted on: 2/5/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Shay Chan Hodges	Individual	Oppose	No

Comments: Separation of powers. The Judiciary is 1 of 3 branches of government that, through our system of checks and balances, helps to ensure no one branch wields excessive influence. Re-retention by the Senate would influence our judges and justices, blurring the separation of powers among the 3 branches. This proposal would invite political influence on the Judiciary undermining public confidence and trust in the fairness and impartiality of the courts. When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process.

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**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** \*Submitted testimony for SB328 on Feb 8, 2017 09:00AM\*  
**Date:** Tuesday, February 7, 2017 8:59:14 AM

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**SB328**

Submitted on: 2/7/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Shelby Ferrer	Individual	Oppose	No

Comments:

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**SIDNEY K. AYABE**

ATTORNEY AT LAW  
A LAW CORPORATION

February 6, 2017

Chair, Senator Gilbert S. C. Keith-Agaran  
Senate Judiciary and Labor Committee  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Re: S.B. No. 328  
Wednesday, February 8, 2017  
Room 016

Dear Chair Keith-Agaran and committee members:

I am an attorney licensed in Hawaii since 1970. I was elected by members of the Hawaii State Bar Association to be the HSBA's representative on the Hawaii State Judicial Selection Commission. I, also, served as chairperson for two of my six years on the Commission.

This letter is submitted in opposition to S.B. No. 328.

The Hawaii State Judicial Selection Commission was created by the 1978 Constitutional Convention. The purpose was to provide a model for an independent judiciary in Hawaii. The objective was to avoid politicizing the appointment and retention of judicial positions.

I have reviewed S.B. No. 328. The bill would defeat the very purpose intended by the 1978 Constitutional Convention in its creation of the Commission. Confidentiality is a critical factor in the selection and retention process. The Commission interviews members from the legal community as well as the public sector. Many of those who appear and provide input about judicial candidates do so because of the assurance of confidentiality. The Commission also reviews surveys, evaluations, judge's records, public comments and other sources. The interview of the judicial applicant is another important factor in the evaluation of a judicial applicant's request for retention which is done in private and not at a public forum.

S.B.No. 328 provides that if the Commission approves the petition for retention of a judicial applicant, then written notice must be given to the Senate to consider consent to the petition approved by the Commission. The Senate would hold a public hearing. The process of having a hearing would undermine the integrity of the judicial retention and selection process. The Senate would lack the information provided to the Commission. Because the hearing is public, many source persons would not testify.

If there is an ongoing controversial ruling by a judge seeking retention, that judge would not be able to respond to questions presented at the hearing. Judges should decide cases based on the Hawaii State Constitution and the laws and not have political pressure placed on them.

Having served on the Commission, I know that the selection and retention process works well. Many organizations have applauded our judicial selection process. Let's continue to maintain that process as well as continue judicial independence.

Finally, the issue of promoting transparency has been raised as a reason for S.B. No. 328. This committee must understand that the very nature of confidentiality dictates that not all information can be made public. For that reason, the Commission is able to obtain much more information when evaluating a judicial applicant. On the retention issue, that process can be addressed to provide more information to the public.

In closing, I echo the remarks set forth in the editorial by the Honolulu Star Advertiser on February 4, 2017: "The integrity of Hawaii's Judiciary comes from decisions by judges and justices that are based on the law, not political pressure. This independence should be guarded, jealously." Thank you for allowing me to submit this testimony.

Very truly yours,



Sidney K. Ayabe



**SENATE COMMITTEE ON JUDICIARY AND LABOR**  
**Wednesday, February 8, 2017, 9:00 a.m, Conference Room 16**

**Testimony of Steven H. Levinson relating to SB 328 Proposing an  
Amendment to Article VI, Section 3 of the Hawaii Constitution  
Requiring Consent of the Senate for a Justice or Judge to Renew a  
Term of Office**

Chair Keith-Agaran, Vice Chair Rhoads, and distinguished committee members, my name is Steven H. Levinson, Associate Justice (Retired), Hawaii Supreme Court. I testify in strong opposition to SB 328, which proposes an amendment to Article VI, section 3 of the Hawaii constitution relating to the selection and retention of Justices and Judges. In particular, SB 328 would require the consent of the Senate for a Justice or Judge to renew a term of office. Passage of this bill would politicize the retention process and inflict irreparable injury on the Hawaii Judiciary.

Reposing the ultimate decision to retain Justices and Judges in the state Senate would inappropriately force Justices and Judges to consider the political ramifications of the performance of their judicial duties on their opportunity to continue their chosen careers. As is the case regarding the initial selection process of Justices and Judges, arriving at proper judicial outcomes should be randomly related to the moment's legislative approbation. The tendency to sculpt one's judicial behavior to achieve such legislative approbation is intrinsically corrupting.

Justices and Judges are frequently required to consider state and federal constitutional imperatives in their decision-making. Notable among these imperatives are the civil liberties enshrined in the Bills of Rights of the United States and Hawaii Constitutions. Civil liberties contained in the first, fourth, fifth, sixth, eighth, and fourteenth amendments, among others, of the federal constitution and their counterparts in the Hawaii Constitution are designed, by their very nature, to be counter-majoritarian. In other words, they are intended to protect individuals and groups from the tyranny of the majority, whether the majority likes it or not. For a Justice or Judge to be dependent upon the state Senate, part of whose mandate is to be responsive to the popular will, for his or her retention is as inherently undermining and corrosive of civil liberties.

On February 4, 2017, Dan Rather posted comments on Facebook that were prompted by the latest assault by President Trump on the integrity of the Federal Judiciary. By analogy, his comments resonate when considering the legislative assault reflected in SB 328:

Donald Trump attacks a federal judge. Again.

When James Robart, who was appointed by George W. Bush and approved for the bench by a 99-0 vote in the Senate, had the audacity to rule against the Trump Administration's immigration ban, you knew that a tweet was coming.

And the President lived up (or down) to expectations:  
"The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!"

This reminded me of another statement from a former president who was previously considered our most autocratic and controversial, and who also swept to office on a populist wave – Andrew Jackson. When Chief Justice John Marshall ruled against him in a case involving Native American rights, President Jackson was quoted as quipping – "John Marshall has made his decision; now let him enforce it!" You can only imagine what Jackson would do on Twitter.

The reality is of course that our courts do not possess an army or law enforcement organization. They gain their power through our legal and democratic traditions. These are under attack. And this is deeply worrisome. Are we going to allow the very basis for our democracy to be threatened in this manner? Every one of us, regardless of political persuasion, must think hard on the answer to that question. Either we step up to defend our judges and courts from this type of intimidation or we do not. . . . This is not a matter of policy but the future of our Constitutional form of government.

We have separation of powers for a reason. It is the bedrock of our nation. These attacks are unconscionable, intolerable, and we as a people are in the process of deciding whether or not they will be normalized.

I urge the Senate Committee on Judiciary and Labor to kill SB 328 and all measures like it.

Thank you for the opportunity to testify.

Steven H. Levinson

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [JDLTestimony](#)  
**Cc:**  
**Subject:** \*Submitted testimony for SB328 on Feb 8, 2017 09:00AM\*  
**Date:** Monday, February 6, 2017 5:22:00 PM

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**SB328**

Submitted on: 2/6/2017

Testimony for JDL on Feb 8, 2017 09:00AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Tamara Paltin	Individual	Oppose	No

Comments:

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

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**TESTIMONY OF THOMAS D. FARRELL**

Regarding Senate Bill 328,

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  
Senator Gilbert S. C. Keith-Agaran, Chair

Wednesday, February 8, 2017, 9:00 a.m.  
Conference Room 016, State Capitol

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

To say that I strongly oppose Senate Bill 328, hardly suffices to express my disgust.

Bill Richardson is turning over in his grave. Our beloved late Chief Justice, once wrote the following, which I commend to your study:

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.

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 [again]. The [constitutional] convention history indicates that the primary purpose of the new retention process is to exclude or, at least, reduce partisan political action.

Back in November of 2015, Judge Jeanette Castagnetti did exactly what a judge is supposed to do. In *Nelson v. HHL*, she held that, "The legislature has failed to appropriate sufficient sums to the Department of Hawaiian Home Lands for its administrative and operating budget in violation of its constitutional duty to do so. This failure includes every fiscal year since at least 1992." And now you have a \$28 million wild card in the State budget.

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\*Certified by the National Board of Trial Advocacy. The Supreme Court of Hawaii grants Hawaii certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association.

Testimony of Thomas D. Farrell  
SB 328  
February 4, 2017  
page 2

Maybe Castagnetti was wrong, but we have an appellate process to deal with that. Instead, this legislature immediately embarked on a campaign to degrade Hawaii's judiciary and destroy judicial independence. Last session, you proposed to elect judges, to cut their retirement pay, and to require their repeated reconfirmation. All of these bills received overwhelming opposition and died in the 2016 session. You did manage, however, to zero out the Judiciary's supplemental budget request--an act of unprecedented irresponsibility.

Well, I'm sorry that you have to deal with *Nelson v. HHL*, and to be honest, I'm not looking forward to paying more taxes if that's what it takes to comply. However, it seems to me to be a good thing that there is some way for the Hawaiians to enforce the rights and benefits promised to them by our Constitution and laws. That's why we have a judiciary. It exists to protect the rights of all, and to ensure that we are a nation of laws and not a nation of unrestrained majoritarian tyranny.

We know exactly what will happen if our judges have to come before you periodically in order to keep their jobs. If ever there was a living example of why you should not be given the power to reconfirm judges, her name is Margery Bronster. She had to come back to the Senate to keep her job when Ben Cayetano was reelected and wanted to keep her as his Attorney General. She had the temerity to take on the Bishop Estate in Ben's first term, and this august body refused to reconfirm her in retaliation for it. That's what we can expect the Senate to do with judges and, over time, the corrosive effect will be that no judge who wants to keep his job will dare to make an unpopular decision.

Our Constitution grants you the power to advise and consent, and that means that you pass on whether a judge is qualified before he or she is appointed. You aren't entitled to a money-back guarantee, nor should you ever be given that power.

Today, we have an administration in Washington that is contemptuous of the rule of law and the principle of judicial independence. Just the other day, our President referred to a federal judicial officer who dared to rule against the government as a "so called judge." The days ahead will be trying times for our republic, and I hope that it will not commit suicide. Yet if it does, perhaps at least the State of Hawaii can remain an outpost of freedom and decency.

That is why this obnoxious bill should never have been introduced, and must never pass out of this committee.

February 5, 2017

Senate Committee on Judiciary and Labor  
State Capitol  
415 South Beretania Street  
Honolulu, HI 96813

**TESTIMONY IN OPPOSITION TO SB 328**

Senator Gilbert S.C. Keith-Agaran and Committee Members:

My name is Thomas Michener. I am an evening, part-time student at the William S. Richardson School of Law at the University of Hawai‘i at Mānoa. I am submitting this testimony IN OPPOSITION to SB 328.

As early as 1840, Hawai‘i recognized the importance of an independent judiciary. The constitution signed by Kamehameha III that year provided that, after island governors gave their appointed judges the certificate of office, judges “shall not be turned out, except by impeachment . . . .”<sup>1</sup>

Even earlier, leading up to the ratification of the U.S. Constitution, the Framers considered an independent judiciary so important that judges had no term limit; judges kept their office “during good Behavior.” The reason given in the Federalist No. 78: “That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.”

The Federalist does go on, stating that “[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence[,]” a sentiment with which I essentially agree.

If the choice is, however, between our current system of retention by the Judicial Selection Commission and retention by the Senate—the choice before this Committee—I support our current system.

Commission Members are selected through various means, including some by the Legislature and Governor, allowing a wide variety of voices to be heard. When up for retention, the Commission evaluates the judge, using the objective criteria of the Judicial Performance Program. The Commission also solicits input from the public on retention. If a problem arises before a judge is up for retention, the Commission on Judicial Conduct can investigate and judges can be removed, if necessary.

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<sup>1</sup> The 1840 Constitution is available here: <http://www.llmc.com/OpenAccess/docdisplay.aspx?textid=46283859>

These provisions that now govern the retention of judges ensure that the decision to retain a judge will be protected from the vagaries of the political process, that the decision will be based on that judge's overall performance as a judge, not based on his or her decision in an individual case. These provisions ensure that diverse perspectives will be considered in a decision to retain and ensure that a judge, if he or she exceeds the power of the office, is properly disciplined.

Imagine a scenario similar to the Mark Zuckerberg Kaua'i land dispute, except that, in this scenario, the retention of judges is decided by the Senate and the judge assigned to the case is soon up for retention. Perhaps this judge has ruled for kuleana parcel owners in previous quiet title actions. Rather than drop the suit, as Mr. Zuckerberg did, this wealthy landowner decides to pour money into the retention vote. The vote goes his way and the judge is removed. Now, a judge more inclined to the landowner's position will hear the case, or getting a replacement draws out the process, forcing the kuleana parcel owners to settle for very little. Where would that leave them, the now-former owners of land that their families worked for generations?

Society's groups often have differing, competing, or opposing interests. It is one of the great features of a democracy that various groups can have their voices heard and considered. The majority, however, can, and sometimes does, disregard the rights of the minority. Because the leaders in a democracy are the majority, often protecting one group from another means protecting the ruled from the ruler, those with power from those without. In this system, the legislature and the executive are put in the difficult position of trying to respond to their constituents' competing concerns and doing what they think is best for as many people as they can. But, ultimately, they are elected by the majority and will likely be most responsive to those who elect them—which sometimes can be an influential few.

A check on the power of the majority is the judiciary, which rules based on the law and not based on the passing sentiments of the time. But, the judiciary must remain independent to do this. The Bill now before this Committee would erode the Judiciary's current independence, hobbling its ability to rule based only on the law. Therefore, the Committee should vote against this Bill and continue to enable the Judiciary to decide not for the person with influence, but for the person who has none.

Respectfully submitted,  
Thomas J. Michener



**From:** [p.tearson](#)  
**To:** [JDLTestimony](#)  
**Subject:** Bills SB328 and SB673  
**Date:** Saturday, February 4, 2017 2:50:44 AM

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- This proposal would take away our separation of powers. The Judiciary is 1 of 3 branches of government that, through our system of checks and balances, helps to ensure no one branch wields excessive influence. Re-retention by the Senate would influence our judges and justices, blurring the separation of powers among the 3 branches.
- This proposal would invite political influence on the Judiciary undermining public confidence and trust in the fairness and impartiality of the courts.
- When a judge faces re-retention, the judge faces retrospective views by the Senate, public, political action committees, special interest groups, and other entities, any of which may have had an interest in a particular result in a particular case. This may result in intense political pressure during the re-retention process.

Judges need to be impartial and not worry about whether they will be 'liked'.

**TESTIMONY IN OPPOSITION**  
**S.B. 328**

TO: Senator Gilbert S.C. Keith-Agaran, Chair  
Senator Karl Rhoads, Vice Chair  
Senate Committee on Judiciary and Labor

FROM: Troy J.H. Andrade, Ph.D., J.D.

RE: OPPOSITION to S.B. 328, 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

DATE: Wednesday, February 8, 2017  
TIME: 9:00 A.M.  
PLACE: State Capitol, Conference Room 016  
415 South Beretania Street

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I write today in my individual capacity to express my strong opposition to S.B. 328.

A touchstone of any truly democratic society is the respect for the rule of law and the principle of separation of powers, in which the Executive and Legislative branches make and enforce laws, and the Judicial branch independently interprets laws and adjudicates disputes. The State of Hawai‘i currently embodies this rich tradition, particularly in terms of ensuring an independent Judiciary. Indeed, it was the leaders of the “People’s Convention” in 1978 that enshrined the importance of the independence of the Judiciary. Our beloved William S. Richardson advocated to ensure that the judicial branch would be free from political pressure and partisan influences—the idea being that the people can only trust the justice system if that system can be impartial and free from biases. This bill would upend that rich legacy.

In requiring “the senate to consider consent to renew the term of office of the justice or judge[,]” S.B. 328 places the power of judicial retention in the hands of a future Senate—a political branch that may prioritize fidelity to partisan results over the judge’s interpretation of the constitution and the laws. As Chief Justice Richardson cautioned: “Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision.” This bill would certainly turn every judicial decision into a political one, thereby eroding the integrity of the judicial system and the rule of law. I cannot sit idly as one of the pillars of our democratic system is unjustifiably attacked.

To show the broad opposition to these attacks, I have attached for the Committee’s consideration a recent piece by the Star Advertiser’s Editorial Board that also advocates for protecting the integrity of judicial selection. I humbly ask that this bill be deferred indefinitely.

# Protect integrity of judicial selection

Suspicion is mounting — and so is the evidence — that members of the Legislature, perhaps unhappy with certain court rulings, are trying to weaken the independence of Hawaii's Judiciary through intrusive legislation.

Chief Justice Mark Recktenwald told the Star-Advertiser editorial board last week that the Legislature's recent efforts to drastically change how the Judiciary operates "certainly are grounds for concern for us."

Indeed. Last year, the Legislature considered ill-advised proposals that called for the election of judges; Senate approval to retain sitting judges; and a reduction in the amount of judges' pensions. All of them failed. The Legislature did, however, reject nearly all supplemental budget requests proposed by the Judiciary.

This year, the Legislature is at it again. Bills in the House and Senate resurrect a proposal to amend the state Constitution to give the Senate final authority over whether a judge or justice is approved for a subsequent term, taking that role away from the Judicial Selection Commission.

It's a bad idea. The legislation would upend a system carefully established in the 1978 state Constitution, which created the independent commission to manage the process of selecting and retaining judges and justices.

Currently, the governor or chief justice nominates a judge from a short list prepared by the commission; the Senate can approve or reject the nomination. The commission, however, decides on whether a sitting judge's term should be extended for another 6- or 10-year term.

It's a system unique among the states; elsewhere, most judges are either re-elected by voters or reappointed by elected officials. But Hawaii's farsighted reforms are better, and should be preserved.

Before 1978, the governor or chief justice would appoint the judges they wanted with the advice and consent of the Senate. Decisions about subsequent terms were made unilaterally.

Judges could be chosen based on their connections to their political sponsors; appointments and reappointments could be traded for political favors.

The legislation (House Bill 1 and Senate Bills 328 and 673) purport

to make the judicial retention process more transparent and accountable to the public — a worthy goal. However, the bills would re-establish the same danger of improper influences the commission was created to avoid.

The current system employs multiple safeguards to ensure, as much as possible, that the selection and retention of judges is handled in an unbiased, consistent and thorough manner, while still giving elected officials a voice.

Six of the commission's nine members are chosen by elected officials — two by the governor and four by the Legislature. The chief justice chooses one, and the Hawaii Bar the other two.

The commissioners serve single 6-year terms, which are staggered to ensure continuity, but also fresh perspectives; a member can't vote on the same candidate for both the original appointment and retention.

The commission reviews a broad range of information — a questionnaire, public comments, interviews, surveys of lawyers, the judge's record, evaluations by the Hawaii Bar and other sources — before coming to a well-informed decision.

Under the proposed legislation, the Senate could ignore the commission's conclusions and make up its own mind.

On what basis? The politics of the moment, presumably.

Nonetheless, critics have a point when they argue that the commission's processes are too secretive. Most of the information collected is done in confidence to ensure candid responses, and remains secret after a decision is made.

The commission could crack open its vetting process to increase public confidence in its work. A recent study from the Brennan Center for Justice at New York University's School of Law offered numerous worthy suggestions. Among them: establishing more formal review procedures and measurable performance benchmarks, and providing the public with more information on how the judge met, or didn't meet, the established standards.

The integrity of Hawaii's Judiciary comes from decisions by judges and justices that are based on the law, not political pressure. This independence should be guarded, jealously.

**TRUDY K. T. SENDA**  
**359 Molo Street**  
**Kapaa, Hawaii 96746**

February 3, 2017

Hon. Gilbert S. C. Keith-Agaran  
Chair of the Senate Committee on Judiciary and Labor

RE: SB 328 and SB 673  
Hearing Date: Wednesday, February 8, 2017  
Time/Place of Hearing: 9:00 a.m., Conference Room 016

My name is Trudy K. T. Senda, and this testimony is submitted in my individual capacity in opposition to SB 328 and SB 673, both of which measures propose amendments to the Hawaii Constitution concerning the appointment and/or retention of judges and justices.

By way of background, I am a recently retired judge of the District Court of the Fifth Judicial Circuit. I served as a full time District/Family judge from May 2001 to December 31, 2016. During my 15 ½ years on the bench, I went through an initial confirmation process with the Hawaii State Senate and two retention hearings with the Judicial Selection Commission.

I have the utmost respect for our State legislators and appreciate that some may have significant concerns about judicial decisions in various cases. However, I write in strong opposition to these measures because I believe they will undermine judicial independence. I also believe that an unintended but real consequence of this legislation will be the erosion of public trust in government. The proposed legislation will fundamentally change the constitutionally mandated procedure for merit selection and retention of judges in Hawaii; this is in direct contrast to the current processes, which were designed to ensure impartiality of the courts while still preserving judicial accountability.

I believe the testimony of some other individuals/organizations-- submitted in opposition to the bills—have divulged negative impacts from resultant delays in judicial selection as well as the likelihood of increased costs arising from special sessions for legislative decision-making on retentions. I concur with but will not repeat those arguments here.

My greatest and deepest concern with these bills are that they will severely compromise judicial independence and, in addition, will erode public confidence in the integrity of a fair, impartial and co-equal branch of our government. Judicial independence is at the core of our democracy and must be zealously protected to insure the fair administration of justice to/for all of our citizens.

Judges must be free to make fair and just decisions based on the constitution, the rule of law and the facts presented by the parties, without fear of reprisal by outside interests, including the other branches of government. Judicial independence is integral to ensuring fair and impartial decision-making for all who appear in Hawaii courts seeking justice. In applying the law to the facts of a case, independent and responsible judicial decision-making serves to protect the minority from the majority, the poor from the rich, the unpopular from the popular, and in some cases, individuals from government overreaching.

The concept of judicial independence is plainly evident in Article VI, sections 3 and 4 of the Hawaii Constitution which allows for the nine-member Judicial Selection Commission, who “shall be selected and shall operate in a wholly nonpartisan manner,” to determine whether a judge or justice should be retained for another term. At the 1978 Constitutional Convention, the Judiciary Committee was highly concerned with the potential for political influence and abuse in the existing selection system. It was the Committee’s firm belief that a judicial selection commission system, commonly referred to as a “merit based system,” would provide for a more qualified and independent judiciary.<sup>1</sup>

As proposed, these two bills would authorize the senate, rather than the nonpartisan judicial selection commission, to approve or reject subsequent terms of office for judges and justices. For judges seeking retention, having to appear before the senate for retention hearings is precisely the type of political or partisan pressure that undermines judicial independence and delegitimizes the role of the courts in administering justice.

The people of this State deserve judicial independence in every case decided by the courts. They deserve a judiciary that is free from a selection and retention process that could appear or suggest that judicial decision making is influenced by partisan pressure or special interests. The public must have confidence in the courts and that judges will decide legal disputes in line with the justice system’s traditional notions of fairness and equal treatment under the law.

Even if there is no motivation or intention to do so, the act of proposing a bill to amend the constitution to authorize the senate to determine whether a judge or justice is retained will most certainly give the appearance that members of the legislature or other outside interests seek to influence judges’ rulings. If the public perceives that the legislative branch or special interests are attempting to influence judicial decisions by way of the selection or retention process, public trust in government and the pillars of our democracy will diminish. Public perception that parties cannot get a fair shake in the courts will, without question, erode the public’s trust in the impartiality of the courts and the government as a whole.

In the long run, the public and *all* branches of government, the legislature, the governor, and the courts, benefit from judicial selection and retention that is merit based and free from any process that might tend to indicate imposing pressure on judicial decisions.

The current selection and retention process for judges is set up to ensure merit selection, judicial impartiality and accountability; this process should remain intact. Article VI, section 4 of the Constitution requires the judicial selection commission to be nonpartisan. Commission members cannot hold political office and cannot take an active part in political management or political campaigns. Of the nine commission members, the governor appoints two (one of whom must be a non-lawyer), the president of the senate and the speaker of the house of representatives each respectively select two members, the chief justice appoints one, and members of the Hawaii bar select two of its members by way of election. The commission consists of no more than four licensed attorneys. Commission members do not receive any compensation for their service.

The Commission reviews applicants for each judicial vacancy and all petitions for retention. Every applicant or petitioner must provide information and details regarding, among other things, his or her educational background, professional experience, ethical and/or judicial conduct complaints, if any, criminal record, if applicable, and health and tax information. The Commission reviews the applications/petitions and references, and personally interviews each applicant/petitioner. The Commission also receives in person testimony from individuals who have been deemed as knowledgeable resources regarding the applicant/petitioner. The Commission considers a wide scope of factors, including professional background and experience, character, integrity, moral courage, wisdom, fairness, compassion, diligence, decisiveness, judicial temperament and other qualities. In sum, the current processes of the Commission provide a fair, efficient and comprehensive framework for judicial selection and retention.

Lastly, I believe that a partisan retention process for sitting judges will discourage qualified and experienced lawyers from seeking a judicial career. When an attorney becomes a judge, his or her loyalty is to the constitution and the law. An attorney who aspires to become a judge must seek to serve the public rather than to be a part of a partisan process; currying favor in a partisan process goes against the core of judicial independence and impartiality.

For the above-mentioned reasons, I am opposed to these bills. Thank you for considering my testimony.

Sincerely,

/s/ Trudy K.T. Senda

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<sup>1</sup> Stand. Comm. Rep. No. 52, in *1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 621 (1980).

**From:** [Wendy](#)  
**To:** [JDLTestimony](#)  
**Subject:** opposing SB328 and SB673  
**Date:** Friday, February 3, 2017 12:48:24 PM

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Aloha,

I just wanted to voice my opposition to bills SB 328 and SB 673.

Separation of Powers is an intrinsic aspect of our federal and state constitutions. Passage of these bills would blur the lines and invite all kinds of influences. Best to stay with the constitution. Especially in these unruly times. The more confidence citizens have in their government upholding the constitution, the better off we'll be.

Although there are always merits in making adjustments to the system, real improvement is not something to be done with the wave of a hand. Real long-term improvement should evolve gradually over time until it obvious to everyone that a particular way of doing things no longer works.

Thank you,

Wendy Raebeck  
Kapa`a, Kaua`i

# HARRISON & MATSUOKA

*Attorneys at Law*

William A. Harrison

E-mail: [wharrison@hamlaw.net](mailto:wharrison@hamlaw.net)

Keith A. Matsuoka

E-mail: [kmatsuoka@hamlaw.net](mailto:kmatsuoka@hamlaw.net)

Gene K. Lau, of Counsel

E-mail: [glau@hamlaw.net](mailto:glau@hamlaw.net)

Davies Pacific Center  
841 Bishop Street, Suite 800  
Honolulu, Hawaii 96813  
Telephone: (808) 523-7041  
Facsimile: (808) 538-7579  
Web: [www.harrisonmatsuoka.net](http://www.harrisonmatsuoka.net)  
[www.hamlaw.net](http://www.hamlaw.net)

February 7, 2017

*Via Web: [www.capitol.hawaii.gov/submittestimony.aspx](http://www.capitol.hawaii.gov/submittestimony.aspx)*

## COMMITTEE ON THE JUDICIARY & LABOR

**Chair: Sen. Gilbert S.C. Keith-Agaran**

**Vice Chair: Sen. Karl Rhoads**

DATE: Wednesday, February 8, 2017

TIME: 9:00 AM

PLACE: Conference Room 016

State Capitol

415 Beretania Street

Honolulu, Hawai'i 96813

**BILL NO.: OPPOSE SB 328**

Honorable Senators: Gilbert S.C. Keith-Agaran, Karl Rhodes and members of the Committee on the Judiciary and Labor.

Thank you for providing me this opportunity to offer testimony **in strident opposition to Senate Bill 328.**

As background to this opposition, I am a criminal defense attorney who has practiced in all our courts for over 36 years. I am also a former Chair of the Judicial Selection Commission ["JSC"], having served my term on the Commission from 1991 -1997.



COMMITTEE: **COMMITTEE ON THE JUDICIARY & LABOR**

**Chair: Sen. Gilbert S.C. Keith-Agaran**

**Vice Chair: Sen. Karl Rhodes**

DATE: Wednesday, February 8, 2017

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I strongly support the present merit selection system, and **oppose** a process that allows for more legislative involvement, believing that the present system lessens political influence in judicial appointments while providing for accountability to the public. In a merit selection system, a commission screens potential appointees and presents a list of qualified candidates to the appointing authority. The governor appoints one person from the list of Circuit Court and Appellate Court candidates. The Chief Justice appoints from a list of District Court candidates. Once appointed, judges are vetted by the Legislature and the public. That vetting process removes any concerns the public and the legislature has with an appointee.

Similarly, the retention process is conducted in a balanced and fair manner, allowing for any concerns to be addressed and considered by a group of commissioners that already reflect all the appropriate stakeholders in our community. The present retention process reduces the role of special interests and money in the retention process, and increases the quality of state judges, thereby increasing the public's trust and confidence in a fair and independent judiciary. There has been a plethora of horror stories coming out of the State of Vermont which adopted a process like this proposed bill. In Vermont, special interests sought the ouster of certain judges, because the judges did not agree with their position.

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

Merit selection and retention advances diversity on the bench. Recent AJS research indicates that merit selection is the most effective way to advance diversity on state high courts. Even after controlling for a wide range of factors that may influence diversity on the bench, merit selection significantly increases the likelihood that minorities will be chosen to serve and retained on Hawai'i's courts. Ongoing research

COMMITTEE: **COMMITTEE ON THE JUDICIARY & LABOR**

**Chair: Sen. Gilbert S.C. Keith-Agaran**

**Vice Chair: Sen. Karl Rhodes**

DATE: Wednesday, February 8, 2017

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has consistently found that merit selection and retention is as effective as other methods of selection for promoting women and minorities to the state bench. Indeed, during my tenure on the JSC, our Commission added much need diversity to our courts. Retention was handled in an evenhanded manner with appropriate input from all segments of our community.

The framers of the current system, the delegates of the 1978 Constitutional Convention, set forth the present system to “[lessen] partisan political actions and also to ensure that capable judges are kept on the bench.” 1 Proceedings of the Constitutional Convention of Hawai’i of 1978, at 623 (1980). To institute the proposed changes would eviscerate the foundation for an independent judiciary.

Merit selection and retention produces excellent judges, who are not influenced by the “current” public rancor. In short, a process that allows for such significant legislative review, such as proposed by this bill, is not good for Hawai’i and the people you represent!

Sincerely,

A handwritten signature in black ink, appearing to read "William A. Harrison", with a long, sweeping horizontal line extending to the right.

William A. Harrison

**From:** [Willis Moore](#)  
**To:** [JDL Testimony](#)  
**Subject:** SB 328 & SB 673  
**Date:** Friday, February 3, 2017 9:26:50 AM

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As a professor of USA History and Political Science, I write to support these two bills. If I understand clearly, they will still allow a judge to reapply for an additional term, AND, have this request vetted by the Judicial Selection process. I strongly favor having the Hawai'i Senate confirm such recommendations. Being OPPOSED to electing judges, and believing the Hawai'i system is basically a good one, I still feel there needs to be Senate oversight of the judiciary in addition to present system's once-for-always oversight.

Mahalo

Prof Willis H A Moore