



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

ON THE FOLLOWING MEASURE:

H.B. NO. 1311, PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 12, 2019 **TIME:** 4:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Robyn Chun, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General offers the following comments and suggests amendments to House Bill No. 1311.

This bill proposes amendments to article VI of the Hawai'i Constitution pertaining to the manner in which state district court judges are appointed and judges and justices are retained for an additional term and extends the time period from 30 to 90 days for certain decisions to be made or actions to be taken in the appointment and consent process.

With respect to the question appearing on the ballot, the question as stated (see page 8, line 12, to page 9, line 3) should be clarified. It consists of three related, but independent questions to which a voter should be allowed to separately answer "yes" or "no". However, as it appears in this bill, it is unclear whether each question can be answered separately or whether the question asks for a single all or nothing "yes" or "no" vote to all three questions. This potential confusion can be addressed by setting forth three separate questions for each of the three amendments in this bill and by providing a box to check for "yes" and a box to check for "no" for each question. See article XVII, section 2 of the Hawai'i Constitution ("each amendment shall be submitted in the form of a question embracing but one subject; and provided further, that each question shall have designated spaces to mark YES or NO on the amendment"); Id.,

article XVII, section 3 (requirements for ratification of amendments proposed by the legislature shall be the same as provided in section 2 of this article for ratification at a general election).

With respect to the change in the time period for certain action to be taken in the appointment and consent process, the question posed on page 3, lines 3-7, is vague with respect to the reference to “certain processes.” We suggest revising the first question as follows:

Should the deadlines for the following actions or decisions be extended from 30 to 90 days:

- (a) For the governor to appoint a person from a list of not less than 4 and not more than 6 nominees to fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts;
- (b) If the governor fails to make an appointment to fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts within 90 days of receipt of the list of nominees from the judicial selection commission, the appointment shall be made by the judicial selection commission with the consent of the senate;
- (c) If the senate fails to reject any appointment to fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts within 90 days after receipt of the governor’s appointment, the senate shall be deemed to have consented to the appointment; and
- (d) If the chief justice fails to make an appointment to fill a vacancy in the district court within 90 days of receipt of a list of not less than 6 nominees from the judicial selection commission, the appointment shall be made by the judicial selection commission with the consent of the senate.

In addition, the second question regarding the appointment process for district court judges should be clarified. We suggest revising the question to read:

“Should the process to appoint, consent to, and retain a district court judge for a term of office be amended to make the senate consent procedures for district court judgeship nominees the same as the

senate consent procedures for supreme court justices and intermediate court of appeals and circuit court judges?”

With respect to the third question, for clarity we suggest amending the question to read:

“Should the senate be authorized to approve or reject a subsequent term of office for a justice or judge who has asked to be retained?”

There are otherwise no legal concerns with this bill. Thank you for the opportunity to testify on House Bill No. 1311.



The Judiciary, State of Hawai‘i

Testimony to the House Committee on Judiciary

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 12, 2019 4:00 PM
State Capitol, Conference Room 325

by

Rodney A. Maile

Administrative Director of the Courts

Bill No. and Title: House Bill No. 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained.

Judiciary’s Position:

The Judiciary respectfully, but strongly, opposes this bill, which would radically restructure the system for retaining justices and judges in Hawai‘i.

1. It is the Judiciary’s responsibility to protect individual freedoms under the constitution. This bill would undermine the independence of Hawai‘i’s judiciary by transforming the judicial retention system from one based on merit and competency to one that would be inherently susceptible to political considerations.
2. The basic structure of the current system has served Hawai‘i well. While we always look for possible improvements to how the system operates, this bill would fundamentally restructure the process.
3. The current system was adopted at the 1978 Constitutional Convention. It reflects a careful balancing of various interests and views, ensuring 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. This bill would fundamentally restructure the process and have substantial negative consequences.



House Bill No. 1311, Relating to Constitutional Amendment; Justices; Judges;
Senate Consent Procedures; Term Renewals
House Committee on Judiciary
Tuesday, February 12, 2019 4:00 PM
Page 2

The nine members of the Judicial Selection Commission (Commission), a majority of whom must be non-lawyers, decide whether to retain a judge at the end of the judge's term. The political branches of government are guaranteed 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 more than 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 bill has the effect of placing final retention authority in one part of one branch of the government in place of a system that includes representation from all branches of government.

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 encourages public trust in the courts by providing the Judiciary with the independence necessary 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."¹ 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.²

House Bill No. 1311 is similar to measures introduced during past legislative sessions that also proposed significant changes to the judicial retention process by giving

¹ 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>.

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



House Bill No. 1311, Relating to Constitutional Amendment; Justices; Judges;
Senate Consent Procedures; Term Renewals
House Committee on Judiciary
Tuesday, February 12, 2019 4:00 PM
Page 3

the Senate the authority to reject or approve subsequent terms of office for justices and judges.³ In response, many members of the legal profession and community expressed concern that the proposed changes to the retention process would erode the independence of the Judiciary as an institution, and undermine judges' ability to decide cases based on the constitution, rules of law, and facts presented without fear of reprisal from outside interests.

Subsequent to the introduction of those bills, the American Judicature Society's Special Committee on Judicial Independence and Accountability issued a report reaffirming that Hawai'i's current system of judicial retention promotes a fair and impartial administration of justice. After conducting an extensive review of judicial fairness, impartiality, independence, and accountability in Hawai'i and across the nation, the Special Committee recommended that "no fundamental changes be made to Hawai'i's balanced system of judicial selection and retention, as originally implemented pursuant to the 1978 Constitutional Convention."⁴ The Special Committee further concluded that the current system "maintains judicial accountability to ethics, the principle of impartiality, and the Constitution and the law. Judicial elections or retention decisions by the Senate would compromise these goals."⁵

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.⁶ 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.⁷ The Committee described the 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."⁸ 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

³ See SB673 (2017); see also SB 2239 (2016), HB 2139 (2016), SB 2420 (2016), HB 2140 (2016); SB 328 (2017).

⁴ Special Comm., Am. Judicature Soc'y, *Report of the AJS Special Committee on Judicial Independence and Accountability II* 2 (2017).

⁵ *Id.* at 15.

⁶ 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 344–56 (1980).

⁷ Stand. Comm. Rep. No. 52, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 621 (1980).

⁸ 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 620 (1980)



House Bill No. 1311, Relating to Constitutional Amendment; Justices; Judges;
Senate Consent Procedures; Term Renewals
House Committee on Judiciary
Tuesday, February 12, 2019 4:00 PM
Page 4

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.⁹

(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, rather than on the law, would be detrimental to the judicial process.¹⁰ 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.”¹¹ 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.¹² 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 selected by the attorneys of the State.¹³ At least one member must be a resident of a county other

⁹ 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 623 (1980).

¹⁰ 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 371–72 (1980).

¹¹ Haw. Const. art. VI, § 4.

¹² *Id.*

¹³ 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,



House Bill No. 1311, Relating to Constitutional Amendment; Justices; Judges;
Senate Consent Procedures; Term Renewals
House Committee on Judiciary
Tuesday, February 12, 2019 4:00 PM
Page 5

than the City and County of Honolulu.¹⁴

If this measure is passed, it would give the Senate the authority to approve or reject the retention of justices and judges, which would diminish, if not extinguish, the role of the Commission in the retention process thereby divesting the House of Representatives, and the Executive and Judicial branches of government of their representative roles as well. This would disrupt the balance of power between the branches of government.

Currently, the Commission has two functions. First, it identifies the most qualified candidates for vacant judgeships. Second, when judges near the end of their judicial terms¹⁵ 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 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

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.*

¹⁴ The Commission currently has four members who reside in counties other than the City and County of Honolulu.

¹⁵ Currently, district and family court judges serve six-year terms; judges and justices on the circuit, intermediate, and supreme court serve ten-year terms.



House Bill No. 1311, Relating to Constitutional Amendment; Justices; Judges;
Senate Consent Procedures; Term Renewals
House Committee on Judiciary
Tuesday, February 12, 2019 4:00 PM
Page 6

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 retention process culminates with the Commission conducting an in-person interview with the judge. Based on all the information gathered, the Commission then votes on whether the judge should be retained for an additional term.

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 current retention process is thorough, and 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 as a “recommendation” 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



House Bill No. 1311, Relating to Constitutional Amendment; Justices; Judges;
Senate Consent Procedures; Term Renewals
House Committee on Judiciary
Tuesday, February 12, 2019 4:00 PM
Page 7

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.¹⁶

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, 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.”¹⁷ After nearly 40 years of a merit-based system, Hawai‘i has the most diverse state judiciary in the nation.¹⁸ In fact, currently, 41% of all full-time judges and justices in Hawai‘i are female, with an equal number of men and women serving as judges

¹⁶ 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.”

¹⁷ Malia Reddick, et al., *Racial and Gender Diversity on State Courts, an AJS Study*, 48 No. 3 *Judges’ J.* 28, 30 (2009).

¹⁸ 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>.



House Bill No. 1311, Relating to Constitutional Amendment; Justices; Judges;
Senate Consent Procedures; Term Renewals
House Committee on Judiciary
Tuesday, February 12, 2019 4:00 PM
Page 8

in district and family court statewide. If enacted, this bill would significantly alter the nature of a judicial career, and may make many highly-qualified attorneys less inclined to seek judicial appointment.¹⁹ 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.”²⁰ 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. Hawai‘i’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.

Respectfully, the Judiciary strongly opposes this bill. Thank you for the opportunity to testify.

¹⁹ 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.”).

²⁰ William S. Richardson, *Judicial Independence in Hawaii*, 1 U. HAW. L. REV. 1, at 4 (1979).

Testimony to the House Committee on Judiciary

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 12, 2019, 4:00 p.m.

State Capitol, Conference Room 325

by

Ronette M. Kawakami, Esq.,

Vice Chair, Judicial Selection Commission,

And Members of the Judicial Selection Commission

HB1311: PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Judicial Selection Commission (JSC) strongly OPPOSES the proposed amendments in HB1311 for two primary reasons:

1. POLITICS, JUDICIAL INDEPENDENCE AND STRICT CONFIDENTIALITY.

Subjecting JSC's decisions on the retention of justices and judges to Senate confirmation after a public hearing would jeopardize judicial independence and strict confidentiality, principles at the heart of the current judicial retention process.

Bill No. HB 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges are Appointed, Consented To, and Retained

Committee on Judiciary

February 12, 2019

Page 2

Our community places a very high value on an independent judiciary, which is at the core of a democratic society. The citizen delegates at the 1978 State Constitutional Convention established the Judicial Selection Commission because they were highly concerned about 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 most desirable. They believed that such a commission would ensure a process that minimizes partisan political actions in the retention of 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 whom are appointed. 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 and are uncompensated for their time and service. At no 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

Bill No. HB 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges are Appointed, Consented To, and Retained

Committee on Judiciary

February 12, 2019

Page 3

fundraisers, being a member of a candidate's campaign, or serving on another state commission or board.

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 2017 alone, we received 353 applications for 13 vacancies and four petitions for retention. During 2018, we received 172 applications for 10 vacancies and three 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 all applications being a minimum of 39 pages without attachments. After reading the applications, the JSC meets with numerous 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.

The proposed amendments in HB1311 requires that the Commission start and complete its retention-vetting and decision-making process within 90 days from the time it receives the petition for retention for a justice or judge. This is clearly an insufficient and unrealistic period of time within which to expect the Commission to adequately perform and complete its necessary work.

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 for retention, the Commission immediately publishes a notice in a relevant newspaper of general circulation and other publications announcing that a particular justice or judge has petitioned for retention and solicits comments and input from the public as to whether such a justice or judge should be retained. The notice presently allows the public a 60-day period within which to submit comments and input on the petitioning justice or judge. All received comments and input are kept confidential and carefully scrutinized by the Commission and further investigated, if necessary, including follow-up interviews with any of the commenters. Depending on the amount of feedback received from the public, this process may take additional weeks to perform.

The Commission, in addition to reviewing the file of the petitioning justice or judge (which could be voluminous), schedules and meets at mutually available dates and times and invites

Bill No. HB 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges are Appointed, Consented To, and Retained

Committee on Judiciary

February 12, 2019

Page 5

various resource people (e.g., stakeholders in the judicial system such as the Hawai'i State Bar Association, lawyer groups, lawyers who have appeared before the petitioning justice or judge, lawyers who represent governmental agencies appearing regularly before the petitioning justice or judge) to appear before the Commission to discuss the petitioning justice or judge and his/her work. During this time, the Commission also meets with the petitioning justice or judge to extensively interview and to thoroughly discuss his/her work. In some instances, if there have been concerns expressed about the petitioning justice or judge, the Commission may and has taken the opportunity to re-examine the petitioner by asking him/her to return for a second interview. The second interview allows the petitioning justice or judge a fuller opportunity to consider and reflect upon the concerns expressed in the first interview in order for the Commission to receive a fair and balanced view of all opinions expressed.

Under the present timetable for its decision set forth in the State Constitution, the Commission has consistently had to use the full 6-month period to announce the petition for retention, vet the petitioning justice or judge, and arrive at its decision. The Commission previously allowed the public a 90-day period to comment to the Commission about the petitioning justice or judge. However, the Commission recently shortened that comment period to 60 days in order to allow more time for the Commission to more thoroughly investigate the comments that are received. To now truncate the entire Commission decision-making process to a total of 90-days stresses and does a disservice to the vetting and decision-making work of the Commission.

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

**Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on
Judiciary**

February 12, 2019

H.B. No. 1311: PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED

Chair Lee and Members of the Committee:

We strongly oppose passage of H.B. No. 1311 which would give the Senate the option to consent to or reject a judicial petition for retention in office following a determination on a petition for judicial retention by the Judicial Selection Commission. We believe that our current merit-based system of judicial retention is preferable to the procedure proposed by H.B. No. 1311. 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.

H.B. No. 1311 seeks to give the Senate the option to exercise the final determination on all petitions for retention after the JSC has made a determination on the same. In essence, the JSC's decision would be relegated to the status of a recommendation to the Senate. 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 H.B. No. 1311 would to be instituted. Our current system of judicial retention 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.



TESTIMONY

House Committee on Judiciary

Hearing: Tuesday, February 12, 2019 (4:00 p.m.)

TO: The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair

FROM: Derek R. Kobayashi
HSBA President

RE: House Bill No. 1311
Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in which Justices and Judges are Appointed, Consented To, and Retained.

Dear Chair Lee, Vice Chair San Buenaventura and members of the House Committee on Judiciary:

Thank you for the opportunity to submit testimony on House Bill 1311, which proposes amendments to the Constitution of the State of Hawaii. The Board of the Hawaii State Bar Association (“HSBA”) considered this bill at a special meeting on February 4, 2019. At the conclusion of the discussion, the Board voted unanimously to oppose this bill, finding that the bill 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

House Bill 1311 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 this bill because it undermines 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.

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

OFFICERS

Derek R. Kobayashi, President
P. Gregory Frey, President-Elect
Karin L. Holma, Vice-President
Russ S. Awakuni, Secretary
Paul W. Naso, Treasurer

DIRECTORS

Steven J.T. Chow
Rebecca A. Copeland
Vladimir Devens
William A. Harrison
Geraldine N. Hasegawa (East Hawaii)
Kristin E. Izumi-Nitao
Carol S. Kitaoka (West Hawaii)
Erin M. Kobayashi
Corianne W. Lau
Kai K.A. Lawrence (Kauai)
Jacob L. Lowenthal (Maui)
Lisa W. Munger
Mark K. Murakami
Zale T. Okazaki
John M. Tonaki

YLD PRESIDENT

Summer Kaiawe

IMMEDIATE PAST PRESIDENT

Howard K.K. Luke

HSBA/ABA DELEGATE

James A. Kawachika

EXECUTIVE DIRECTOR

Patricia Mau-Shimizu

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”¹:

- “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.² The JSC has strict rules regarding abuse of position, conflict of interest, and confidentiality.³ 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.⁴

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. The JSC 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.

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 substances 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

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

² Hawai‘i Constitution, art. VI, § 4.

³ Rule 5, *Judicial Selection Commission Rules (JSCR)*.

⁴ Hawai‘i Constitution, art. VI, § 4.

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*.⁵ It should be noted that there is no barrier to spending by out of state interest groups in other state elections.⁶ 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 this bill. Thank you for the opportunity to comment.

Respectfully submitted,



DEREK R. KOBAYASHI
President, Hawaii State Bar Association

⁵ 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.

⁶ 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 with candidates favorable to their positions.



February 11, 2019

Chair Representative Chris Lee
Vice Chair Representative Joy A. San Buenaventura
House Committee on Judiciary
Hawaii State Capitol
415 S. Beretania Street
Honolulu, HI 96813

Re: **HB 1311: *Proposing Amendments to Article IV of 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 12, 2019
Hearing Time: 4:00 p.m.

Dear Representative Lee and Representative Buenaventura:

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 co-chair of the AJS Standing Committee on Judicial Selection, Retention, and Accountability, and as a practicing attorney in private practice in Hawaii since 1982. AJS opposes HB 1311, which proposes to amend the Hawaii State Constitution to require Senate consent to all petitions for retention of justices and judges, among other things.

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 entity¹ 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.

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

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

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.² As Chief Justice Richardson observed:

“The goal of a judicial selection system is not merely to find good judges. An effective mechanism also removes judges from political pressure in order to ensure judicial independence. The process should also encourage public confidence in the judiciary; that is, the public must be assured that its judges are competent and that their decisions are made on an impartial basis.”

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.³ Applicants are evaluated on the basis of background, professional skills, character, and other specified criteria relating to merit.⁴ 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.⁵ The final selection is subject to confirmation by the Senate.

For subsequent terms, justices and judges seeking to renew their terms petition the JSC to be retained in office and are evaluated by the JSC. Petitioners are evaluated by the JSC on the basis of the same merit-based criteria specified for appointment.⁶ In addition to publication of a notice seeking public comment, the JSC considers inputs from various sources of information, including the Hawaii State Bar Association’s (“*HSBA*”) confidential attorney evaluations of justices and judges, confidential evaluations of justices and judges submitted by attorneys pursuant to the Judicial Performance Program, under Rule 19 of the Rules of the Supreme Court, and comments from the Commission on Judicial Conduct, which receives information and complaints concerning allegations of judicial misconduct or disability, among other things.

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

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

⁴ Judicial Selection Commission Rules, Rule 10.

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

⁶ Judicial Selection Commission Rules, Rule 10.

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 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, considered multiple inputs from various informed sources, and determined that the petition should be rejected or approved, the proposed legislation would effectively replace the JSC as the final arbiter for retention petitions.

Retention and Judicial Fairness and Impartiality.

If the current selection and retention process is merit-based, producing a fair and impartial judiciary, the proposed legislation would effectively replace this process with one in which unknown considerations or influences will be perceived as overriding factors at the retention stage, and in so doing, undermine public faith in the fairness and impartiality of the judicial system in Hawaii.

Senate hearings on judicial retentions would likely include public review of the cases decided by the justices and 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. But because the Rule 19 and HSBA attorney evaluations, the determinations by the Judicial Conduct Commission, as well as juror evaluations, are confidential, the Senate would lack the information that these sources provided to the JSC. Moreover, the numerous resource persons who speak with the JSC on the assurance of confidentiality may be unwilling to share the same information in a public forum. Thus, the proposed Senate re-confirmation process will not have the benefit of these significant sources of information, which are available to the JSC.

Further, a judge seeking retention would be ethically precluded from responding to questions before the Senate about pending cases. Hawai'i Revised Code of Judicial Conduct, Rule 2.10, does not allow a judge to make any public statements on pending or impending matters.⁷

Thus, if the proposed legislation is enacted, justices and judges who make rulings in controversial cases before retention would be largely defenseless during the retention hearing -- unable to respond to the specifics of a pending case, and unable to have the decision makers refer to the judicial evaluations or other resources serving as counterweights to concerns expressed by disappointed litigants, for instance. In cases where the Senate rejects a retention

⁷ 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.”

Chair Representative Chris Lee
Vice Chair Representative Joy A. San Buenaventura
House Committee on Judiciary
February 11, 2019
Page 4

petition over the more-informed recommendation of the JSC (to approve the petition), the public perception will be that political considerations have effectively led to the firing of a sitting justice or judge -- a justice or judge who was not only qualified to be appointed, but was also qualified to be retained based on input from the HSBA, the Commission on Judicial Conduct, and the Judicial Performance Program.

In other cases in which the Senate consents to a petition over the JSC's recommendation to reject it, a justice or judge could be retained by the Senate without having had an opportunity to consider potentially serious complaints voiced confidentially by, for instance, court staff or others. Such information and complaints may be difficult to elicit, but the JSC and current system provide complainants with a measure of confidentiality to encourage the voicing of such issues, through submissions to the Commission on Judicial Conduct, for example. In a Senate hearing, however, those voices are rarely ever heard. Replacing the JSC's informed determinations with the Senate's decision on retention petitions would further undermine the public confidence in the judicial system, and in the fairness and impartiality of those justices and judges surviving Senate re-confirmation.

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 appointing and 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 by requiring Senate re-confirmation of retention petitions based on little or no publicly available credible information, the proposed legislation would undermine public confidence in judicial impartiality and fairness.

In closing, we 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

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com



COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair

Rep. Joy SanBuenaventura, Vice Chair

Tuesday, February 12, 2019

4:00 pm

Room 325

OPPOSITION TO HB 1311- CON AM RE JUDICIAL APPOINTMENTS

Aloha Chair Lee, Vice Chair SanBuenaventura and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai'i for more than two decades. This testimony is respectfully offered on behalf of the families of **ASHLEY GREY, DAISY KASITATI, JOEY O'MALLEY, JESSICA FORTSON AND ALL THE PEOPLE WHO HAVE DIED UNDER THE "CARE AND CUSTODY" OF THE STATE** as well as the approximately 5,400 Hawai'i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day. We are always mindful that more than 1,600 of Hawai'i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

HB 1311 proposes amendments to the Constitution of the State of Hawaii relating to the appointment and retention of justices and judges and changes the required time frames from thirty to ninety days for the process to appoint and consent to a justice or judge. Harmonizes the senate consent procedures for district court judgeship nominees to mirror the senate consent procedures relating to supreme court justices and intermediate court of appeals and circuit court judges. Authorizes the senate to approve or reject subsequent terms of office for justices and judges.

Community Alliance on Prisons opposes the ongoing attacks of the Judicial Branch. What problem arose that prompted this constitutional amendment?

JUDICIAL INDEPENDENCE

"Judicial independence" is the principle that judges should reach legal decisions free from any outside pressures, political, financial, media-related or popular. Judicial independence means judges must be free to act solely according to the law and their good faith interpretation of it, no matter how unpopular their decisions might be. It means judges need not fear reprisals for interpreting and applying the law to the best of their abilities. **An independent judiciary is a cornerstone not only of our justice system but of our entire constitutional system of government.**

However, such independence must also be balanced by *judicial accountability*. Judges are required by their oath of office and canons governing their conduct to perform their duties accurately and ethically, according to the rule of law. If they fail to do so, two major remedies exist: one for judicial error and the other for judicial misconduct. If a judge errs in deciding a case, the decision may be appealed. At both the federal and state levels, parties may appeal unfavorable decisions on the basis of some inaccuracy, such as factual error or misapplication of the law. If a judge engages in misconduct, disciplinary options exist. Federal judges only hold their offices "during good behavior," and Congress may impeach and remove federal judges for certain types of misconduct. States have their own judicial disciplinary bodies (some an arm of the state's highest court, others an independent governmental entity) that investigate and discipline state judges for misconduct. At the state level, an array of sanctions is available, from modest censure to removal from the bench and referral for criminal prosecution.

In our constitutional system of government, an independent judiciary serves two goals. First, it enables the judges to make impartial decisions. Second, it keeps the other political branches in check. Scholars tend to divide judicial independence into two distinct but intertwined varieties: *decisional* and *institutional*.

- *Decisional independence* refers to a judge's ability to render decisions based only on the facts of each case and the applicable law, free of political, ideological, or popular influence.
- *Institutional independence* distinguishes the judiciary as a fully co-equal branch of government, separate from the legislative and executive branches.

To understand just how prized and rare a circumstance true judicial independence is, just look abroad. The American recipe of judicial independence is relatively rare. It requires a full-fledged judicial branch on an equal footing with other branches of government, that has the power to review the constitutionality of laws enacted by the other branches, and whose judges cannot be removed from office at the whim of displeased litigants or public officials. American federal and state judges and judicial scholars regularly travel to other parts of the world, particularly where democracies are emerging, to help nations understand how an independent judiciary operates and how to establish one.¹

U.S. Supreme Court Justice Stephen Breyer explained,

"The good that proper adjudication can do for the justice and stability of a country is only attainable if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or in compliance with the will of powerful political actors. Judicial independence provides the organizing concept within which we think about and develop those institutional assurances that allow judges to fulfill this important social role."

¹ THE NEWSROOM GUIDE TO JUDICIAL INDEPENDENCE.

<https://constitutionproject.org/wp-content/uploads/2012/10/37.pdf>

CASES THAT ILLUSTRATE THE IMPORTANCE OF JUDICIAL INDEPENDENCE

Were it not for an independent judiciary, America would be a very different place. Judges have acted courageously to make unpopular decisions throughout our history knowing that, to an extent, they would be protected by the federal or a state constitution. A wide array of constitutional and civil rights have been recognized and upheld only because of an independent judiciary, as the following cases demonstrate:

- *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955) (overturning the "separate but equal" doctrine and finding racial discrimination in public education to be unconstitutional)
- *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting organized prayer in public schools)
- *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the 14th Amendment requires that the constitutional right to counsel apply to state prosecutions)
- *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that, prior to interrogation, police must clearly advise the suspect of the so-called "Miranda warning" - i.e., right to remain silent, right to counsel, etc.)
- *Loving v. Virginia*, 388 U.S. 1 (1967) (nullifying laws prohibiting interracial marriage)
- *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (affirming that symbolic speech is protected by the First Amendment)
- *New York Times Co. v. United States*, 403 U.S. 713 (1971) (barring governmental "prior restraint" to prevent publication of the "Pentagon Papers")
- *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing three-pronged test for determining whether a governmental activity violates the constitutional separation of church and state)
- *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a right to privacy that includes a woman's qualified right to terminate a pregnancy)
- *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (recognizing "hostile environment" claim for sexual harassment)
- *Texas v. Johnson*, 491 U.S. 397 (1989) (upholding First Amendment right to burn U.S. flag)
- *U.S. v. Eichman*, 496 U.S. 310 (1990) (upholding again, post-*Johnson* and post-Flag Protection Act of 1989, First Amendment freedom to desecrate flag)
- *Romer v. Evans*, 517 U.S. 620 (1996) (overturning state law intended to deny rights to homosexuals as a class)
- *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (permitting discrimination claim for same-sex harassment)
- *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning state statutes banning same sex sodomy)

Community Alliance on Prisons urges the committee to hold this bill and respect that there are three EQUAL branches of government. This is our important system of checks and balances.

Mahalo for this opportunity to testify.

TESTIMONY OF THOMAS D. FARRELL

Regarding House Bill 1311,
Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the
Manner in Which Justices and Judges are Appointed, Consented To, and Retained.

Committee on Judiciary
Representative Chris Lee, Chair/Repteentative Joy San Buenaventura, Vice Chair

Tuesday, February 12, 2019, 4:00 p.m.
Conference Room 325, State Capitol

Good afternoon Representative Lee and members of the Committee:

“Strongly oppose” is hardly adequate to describe my disgust with House Bill 1311.

As a preliminary matter, I do not oppose those amendments that seek to harmonize the process for appointment of district judges with those of other judges. The remainder of the bill, however, is appalling. And those of you who sit on this committee and signed your name to this thing should be ashamed of yourselves.

I had hoped that the blowback from *Nelson v. DHHL* was past us. Unfortunately, every session, the attacks on the independence of the judiciary keep coming back. Cutback judges’ retirement, play havoc with the judiciary budget, allow the legislature to intervene in any civil or criminal case, and of course, bring judges back for re-confirmation at the end of each term (or make them run for election). This is the playbook, and every time I think the bar and other concerned members of the community have driven a wooden stake into the heart of this monster, it rises again with the dawn of each new session. And I’ll keep coming back to oppose it.

For those of you who have short memories, you may wonder what I’m talking about when I refer to *Nelson v. DHHL*. Back in November of 2015, Judge Jeanette Castegnetti did exactly what a judge is supposed to do. 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 you wound up with a \$28 million wild card in the State budget.

Maybe Castegnetti was wrong, but we have an appellate process to deal with that. In fact, the Supreme Court did overturn her calculation of the damage award as inconsistent with its prior opinion on the subject. Before that happened, however, the legislature embarked on a campaign

Divorce ♦ Paternity ♦ Custody ♦ Child Support ♦ TROs ♦ Arbitration
also handling national security cases involving revocation or denial of security clearances

700 Bishop Street, Suite 2000, Honolulu, Hawaii 96813
Telephone 808.535.8468 ♦ Fax 808.585.9568 ♦ on the web at: www.farrell-hawaii.com

to degrade Hawaii's judiciary and destroy judicial independence. All of these bills received overwhelming opposition and died in in the 2016 session. You did manage, however, to zero out the Judiciary's supplemental budget request---an act of unprecedented irresponsibility. And then these bills came back in 2017, and in 2018, and here we go again in 2019. Can we stop this, please?

I'm sorry that you had to deal with *Nelson v. DHHL*. However, it seems to me to be a good thing that there is some way for 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 the Senate periodically in order to keep their jobs. If ever there was a living example of why the legislative branch 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 the Senate 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 a politically unpopular decision.

Our late Chief Justice Bill Richardson, 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.

Our Constitution grants the Senate 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 the legislative branch ever be given that power.

That is why this obnoxious bill should never have been introduced, and must never pass out of this committee.



P.O. Box 37158, Honolulu, Hawai`i 96837-0158
Phone: 927-0709 henry.lifeoftheland@gmail.com

COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair

Rep. Joy A. San Buenaventura, Vice Chair

DATE: Tuesday, February 12, 2019

TIME: 4:00pm

PLACE: Conference Room 325

Aloha Chair Lee, Vice Chair San Buenaventura, and Members of the Committee

Life of the Land is Hawai`i's own energy, environmental and community action group advocating for the people and `aina for 49 years. Our mission is to preserve and protect the life of the land through sound energy and land use policies and to promote open government through research, education, advocacy and, when necessary, litigation.

The Legislature has the power to create laws, and to override court decisions with new laws.

HB 1311 states that the "legislature believes that to promote transparency" it must eliminate "incongruous" actions between different governmental policies. In the last few years the Legislature has gone outside of its lane within the three co-equal branches of government to attack the Judiciary for doing its job. At press conferences, Legislators have bragged about "forcing" the Judiciary to revise court decisions to accommodate Legislative power grabs.

Instead, the Legislature could look inward and start the reform process by reversing its positions of limiting community television streaming of legislative hearings, ending the practice of telling testifiers to stand on their testimony, and limiting the public to 2 minutes of oral testimony while allowing certain people unlimited time to testify and even to lie.

Mahalo

Henry Curtis

Executive Director

HB-1311

Submitted on: 2/10/2019 3:44:51 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Leimomi Khan	Democratic Party of Hawaii, Hawaiian Affairs Caucu	Oppose	Yes

Comments:

The Hawaiian Affairs Caucus of the Democratic Party of Hawaii OPPOSES this legislation. The current selection system has integrity and works well. It has produced outstanding judges. If we are to assure the integrity of the system, it must not be politicized. Doing so encroaches upon the Judiciary system. Judges are duty bound to render decisions that protect rights even when the decision proves highly unpopular with the other co-equal branches of government. If judges are to carry out effectively this important role, they must be accorded independence in the selection and retention process. Please do not pass HB1311.



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

**House Committee on Judiciary
February 12, 2019, 4:00 PM, Conference Room 325**

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

TESTIMONY

Joan Platz, Legislative Committee, League of Women Voters of Hawai'i

Chair Chris Lee, Vice-Chair San Buenaventura, and Committee Members:

The League of Women Voters of Hawai'i opposes HB1311 which suggests amending Article VI Section 3 of the Constitution of the State of Hawai'i 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 change if the voters approve this amendment. 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 proposed amendment is premised on the argument that the legislative branch of government should have the authority to reconfirm justices and judges, but the Senate already has confirmation authority for appointment of justices and judges.

The League of Women Voters of Hawai'i 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..."¹

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

¹ League of Women Voters Hawai'i, 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 | 808.531.7448 | voters@lwv-hawaii.com

accountable to voters, judges should be accountable for adhering to the law.² This is the basic reason why we do not support permitting the Senate to reverse the JSC's retention of a justice or judge.

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."³

² 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

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



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

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 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." ⁴

If this bill passes 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.

Hawai'i'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."⁵

Regarding Section 3, (1) of the proposed amendment to Article VI, to lengthen the time frame to appoint and consent to reappointment, this will probably mean vacancies would remain open

⁴ 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>

⁵ American Bar Association, page 7, available at https://www.americanbar.org/groups/judicial/conferences/lawyers_conference/committees/coalition_for_justice.html



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

longer than the current 30 day time frame; while positions sit vacant important judicial work would have to be juggled among a group of judges who are already hard-pressed to serve the public. We do not support this change.

We urge members of the Committee on Judiciary to oppose the Senate reconfirmation provisions in HB1311 and preserve an independent judiciary reappointment process in Hawaii.

Thank you for this opportunity to testify.

COMMITTEE ON JUDICIARY
Testimony to the House of Representatives
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Regarding HB1311

HEARING
February 12, 2019

State Capitol, Conference Room 325

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 47 years, specializing in Civil Trial practice.

(2) I write regarding House Bill 1311, specifically 1(3).

(3) I write in opposition to House Bill 1311, specifically 1(3).

CONTENT

House Bill 1311 attempts to propose and amended 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 any 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

HB-1311

Submitted on: 2/9/2019 4:43:58 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Bianca Isaki	Individual	Oppose	Yes

Comments:

February 9, 2019

Re: Opposition to H.B. 1311, proposing amendments to the Constitution of the State of Hawaii relating to the appointment and retention of justices and judges

Aloha Representatives,

I'm an attorney licensed in Hawai'i writing in **opposition to HB1311**. 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. In other jurisdictions, this has resulted in intense political pressure during the re-retention process and greatly affected the ability of especially public interest litigants to obtain fair, impartial judgments.

Please do not advance HB 1311. Mahalo for considering my testimony,

Bianca Isaki, Ph.D., Esq.

JAMES KAWASHIMA ALC

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

February 11, 2019

Representative Scott Saiki
Representative Della Au Belatti
Representative Chris Lee
Representative Dee Morikawa
Representative Mark Nakashima
Members, House Committee on Judiciary

Re: Bill No.: HB1311

Hearing Date: Tuesday, February 12, 2019
Time: 4:00 p.m.
Place: Conference Room 325
State Capitol
415 South Beretania Street

**Dear Representative Saiki, Representative Belatti, Representative Lee,
Representative Morikawa, Representative Nakashima and
Members of the House Committee on Judiciary:**

I am a former member of the Judicial Selection Commission. I have been a member of the Hawaii State Bar since 1972 with over 46 years of experience in the practice of law in Hawaii. **I respectfully, but strongly, oppose this bill.**

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

"There is no liberty, if the power of judging be not separated from the legislative and executive powers."

- Montesquieu, Spirit of Laws (1752)

A Frenchman thus concisely expressed what we Americans know: the best possible form of government is one built upon a foundation of separation of the legislative, executive and judicial functions. Judicial independence is a core value of such a system, our system, one that ensures our liberty.

February 11, 2019

Page 2

"Judicial independence" is an oft misunderstood phrase. Justice Randall Shepard, Chief Justice of the Indiana Supreme Court and President of the Conference of Chief Justices, puts it simply: "Judicial independence is the principle that judges must decide cases fairly and impartially, relying only on the facts and the law." The proposed bill endangers the independence of the judiciary by politicizing the retention process. Judges must be free to decide cases based on the rule of law, without fear of reprisal from outside sources.

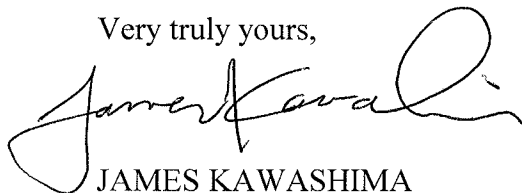
Chief Justice Michael Wolff of Missouri, in his 2006 State of the Judiciary address, elaborated eloquently:

"Independence," quite frankly, is both overused and misunderstood. It should not be interpreted, either by the public or by any judge, to mean that a judge is free to do as he or she sees fit. Such behavior runs counter to our oaths to uphold the law, and any attempt to put personal beliefs ahead of the law undercuts the effectiveness of the Judiciary as a whole. Better stated, "independence" refers to the need for courts that are fair and impartial when reviewing cases and rendering decisions. By necessity, it also requires freedom from outside influence or political intimidation both in considering cases and in seeking the office of judge. Courts are not established to follow opinion polls or to try to discern the will of the people at any given time but rather are to uphold the law. The people rely on courts to protect their access to justice and to protect their legal rights. For the sake of the people, then, judicial independence must always be coupled with the second stated measure - accountability.

The current retention system assures both independence and accountability. Upon the submission of a judge's Petition for Retention, the Judicial Selection Commission conducts a thorough evaluation of the judge's performance and tenure on the bench. The current retention process has served our state well since its inception following the 1978 Constitutional Convention. It is efficient, thorough, founded upon diverse input and decision-making, and most of all, minimizes outside political influences. It is a system of which we can be proud. There is no sound basis to change it.

More testimony will be provided at the hearing on February 12, 2019.

Very truly yours,

A handwritten signature in black ink, appearing to read "James Kawashima". The signature is fluid and cursive, with a large loop at the end.

JAMES KAWASHIMA



PRESIDENT
Malcolm Lutu

VICE PRESIDENT
Robert Cavaco

TREASURER
James "Kimo" Smith

SECRETARY
Don Faumuina

DIRECTORS AT LARGE
John Haina
David "Kawika" Hallums
Jason Boquer-Wintjen

HONOLULU CHAPTER CHAIR
Nicholas Schlapak

HAWAI'I CHAPTER CHAIR
Todd Pataray

KAUA'I CHAPTER CHAIR
Christopher Calio

MAUI CHAPTER CHAIR
Mark Vickers

Main Office & Honolulu Chapter
1717 Hoe Street
Honolulu, Hawaii 96819-3125
Ph: (808) 847-4676 "84 SHOPO"
(800) 590-4676 Toll Free
Fax: (808) 841-4818

Hawai'i Chapter Office
688 Kino'ole Street, Room 220 B
Hilo, Hawai'i 96720
Ph: (808) 934-8405
Fax: (808) 934-8210

Maui Chapter Office
1887 Wili Pa Loop, Suite #2
Waituku, Hawai'i 96793
Ph: (808) 242-6129
Fax: (808) 242-9519

Kaua'i Chapter Office
4264 Rice Street, Lihue
Mailing Address:
P.O. Box 1708
Lihue, Hawai'i 96766
Ph: (808) 246-8911

February 11, 2019

U.S. MAIL/FAX: 808-586-6531

The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice-Chair
House Committee on Judiciary
Hawaii State Capitol, Room 302
415 South Beretania Street
Honolulu, HI 96813

Re: **HB1311-Amendments to Article VI relating to the manner in which Justices, Judges are appointed, consented to and retained**

Dear Chair Lee and Vice-Chair San Buenaventura:

I write to you on behalf of the State of Hawaii Organization of Police Officers ("SHOPO") in strong opposition to HB1311 which relates to amending the manner in which Justices and judges are retained.

While there are often different and sometimes conflicting views and opinions held between the three branches of government, we believe a strong, transparent and unbiased government is rooted in a foundation based on a strong and respectful separation of powers. The existing system of checks and balances that allows and encourages differing views and opinions is exactly what keeps the judiciary branch in check without undue political influence or pressure.

We believe that HB1311 will turn the process of selecting and retaining judges into an overly politicized process and undermine the existing system in place. The current system of selecting and retaining justices and judges through the Judicial Selection Commission ("JSC") serves its purpose of selecting and retaining only those who merit selection and retention and dismisses those who do not.

The process of selecting and retaining judges through the JSC was the result of the 1978 Constitutional Convention. Thus, the existing system and process that has been in place for nearly four (4) decades was the product of careful thought, debate and consideration before it was adopted and implemented. After nearly 40 years, the current selection and retention process that involves an extensive and non-political review of a judges' qualifications, abilities and body of work has worked well. Although no process can ever be considered "perfect," the system and process utilized for so many years is the fairest and best system available to review, evaluate and determine whether a judge is worthy, based on merit, to be selected or retained in judicial office.

The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice-Chair
House Committee on Judiciary
February 11, 2019
Page 2

Re: HB1311-Amendments to Article VI relating to the manner in which Justices, Judges are appointed, consented to and retained

Deviating from the current process as advocated by HB131 raises the serious risk of politicizing and compromising the judiciary's independence. Interjecting potential political pressure into a process that seeks to keep such pressure at bay can only unfairly create the risk that a judge will have in the back of his/her mind the political ramifications of a particular decision or ruling. I think we can all agree that should never be part of a judge's thought process when interpreting and applying the law to the facts of a specific case. To allow such interjection would unquestionably be detrimental and cause irreparable harm to our current system of justice. After all, our judges are human and although they exhibit the highest degree of legal discipline, judicial independence is what preserves the integrity of the entire judicial process and system. Any compromise or intrusion into judicial independence can only lead to unfavorable and negative consequences, despite the best of intentions behind this bill.

Commissioners who serve on the JSC come from various legal and non-legal backgrounds and include appointments made by the Senate President, House Speaker, Governor and Chief Justice. Thus, all three branches of the government have a say in who serves on the JSC. We have faith that the aforementioned appointing authorities give much thought and consideration to their selection because they understand the critical role each commissioner plays in the selection and retention of a judge. In turn, the process by which the JSC reviews and evaluates a judicial candidate insures and facilitates a thorough, candid and honest review and critique of our judges from both within and outside the judiciary system, including the solicitation of public input by the JSC.

The one thing we have not heard in regard to HB131 is why the system that has been in place for nearly 40 years should suddenly be changed, especially in such a drastic fashion in calling for a constitutional amendment. If there are existing problems with the current process, we are not aware of them and as police officers we are intimately involved with the courts. Our officers interact with the courts and judges on a daily basis. As police officers, we appear in courtrooms across the State of Hawaii providing testimony in critical cases that often result in new case law. Our participation in the judicial system has resulted in not only new case law but at times some very unpopular decisions. Not surprisingly, we have had some differing views and disagreements over rulings and decisions rendered by our judges and if we did not, I would say something was wrong. However, disagreeing with a judge's ruling does not mean that we believe a judge is incompetent or that the system of selection and retention is somehow defective and should be changed. It is the exact opposite in that we believe the systems functions extremely well and has selected and retained judges of the highest legal competence and ability.

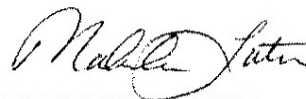
The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice-Chair
House Committee on Judiciary
February 11, 2019
Page 2

Re: HB1311-Amendments to Article VI relating to the manner in which Justices, Judges are appointed,
consented to and retained

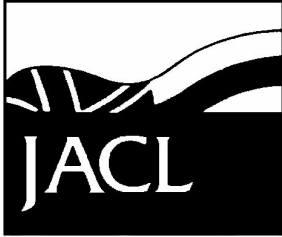
We have the utmost respect for our judges whether we agree or disagree with a particular ruling because we understand that judges have very difficult jobs. Based on our experience, we see first hand how the many judges have executed their duties and responsibilities with courage, well reasoned decisions that exhibit careful consideration, and a genuine effort to render decisions based on their honest legal interpretation and application of the law and facts of the case. That is all we can ask of any judge whether we agree or disagree with a particular decision. And when we may have disagreed with a decision or ruling, we always have the option of exploring having a law changed through the legislature. That is one of the most powerful checks on the judiciary that your honorable body controls as a branch of government.

In closing, I can attest to the fact that the quality of judges on the bench during the last 30 years that I have been serving as a police officer reflects a system and process that protects judicial independence and has provided the judiciary with intelligent, dedicated, diligent, respectful and fair-minded judges. On the other end, if it appears that a particular judge may not be up to the task and demands of the job, we have seen the JSC move to deny a petition for retention. As the old adage goes, "If it ain't broke, don't fix it" which we think applies fittingly to this bill. We thank you for allowing us to be heard on this very important issue and respectfully hope your committee does not support this bill.

Respectfully submitted,



MALCOLM LUTU
President



JAPANESE AMERICAN CITIZENS LEAGUE

HONOLULU CHAPTER

P.O. BOX 1291, HONOLULU, HAWAII 96807

EMAIL: honolulu@jacl.org WEBSITE: www.jaclhonolulu.org

Working For A Greater America

Board Members

February 11, 2019

Kent Mori Walther
President

Geoff Sogi
1st Vice President

Alison Kunishige
2nd Vice President

Kenyon Tam
Treasurer

Sean Ibara
Secretary

Susan Arnett

Della Au Belatti

Shawn Benton

Alphonso Braggs

Liann Ebesugawa

David Forman

Jacce Mikulanec

Trisha Nakamura

Jamie Yamagata

Legal Counsel

Benjamin Kudo

Advisory Council

Allicyn Hikida-Tasaka

Clayton Ikei

William Kaneko

Colbert Matsumoto

Alan Murakami

To: Committee Chair Chris Lee
Members of the House Committee on Judiciary

From: Kent Mori Walther
President, Japanese American Citizens League – Honolulu Chapter

Re: **OPPOSITION TO H.B. NO. 1311 PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.**

Chair Lee and Members of the Committee:

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.

House Bill No. 1311 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 pages 7-8, lines 4-6, 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.

While this does not mandate the election of judges or justices, 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.

The 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 money expenditures as well as efforts to satisfy some sort of litmus test to gain the greatest voter support.

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. 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. There is the seminal case integrating our schools, *Brown vs. Board of Education*. There are 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 *Bayer vs. Levin*, 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 enabling 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 6000 attorney members, and shares those comments with the JSC. Also, the JSC meets personally with so-called "resource" persons in the community seeking input about a specific judge. While the proceedings before JSC are private in order to provide all of the resources the fullest opportunity to give frank, honest input, there is no question there is significant information from diverse sources which cover 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 Hawaii'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, independent, and 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 on retention are based on the same important factors.

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

Thank you for the opportunity to comment on this measure.

MCBA

Maui County Bar Association

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



February 9, 2019

The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
and Members of the Committee on Judiciary

TESTIMONY IN OPPOSITION TO:

H.B. 1311 - PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

Hearing: Tuesday, February 12, 2019, 4:00 P.M.

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Maui County Bar Association (“MCBA”) STRONGLY OPPOSES H.B. 1311. First, the proposed re-confirmation process would unwisely politicize the decision of whether or not to retain judges. Second, the proposed re-confirmation process would have the undesirable effect of limiting and skewing the information available to the body that makes the ultimate decision, and limit transparency in the process of evaluating judges for retention. Third, the proposed re-confirmation process would deter qualified attorneys from seeking judgeships.

I. THE BILL WOULD RESULT IN POSSIBLE POLITICIZATION OF A RETENTION DECISION.

The independence of the Judiciary is paramount in our constitutional framework. The proposed re-confirmation process 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. This bill 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. Giving the 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.

II. RETENTION DECISIONS WOULD BE BASED ON INCOMPLETE AND SKEWED INFORMATION.

In shifting the ultimate decision-making power to the Senate, and thereby conducting most of 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.

OFFICERS

WILLIAM PANNELL
President (2019)

VACANT
Vice President
(President Elect)

ELIZABETH CUCCIA
Secretary (Acting)

BRANDON SEGAL
Treasurer (Acting)

BOARD OF DIRECTORS

LAUREN AKITAKE
BEVANNE BOWERS
MICHAEL COLLINS
WENDY HUDSON
DAMIR KOULIEV
BENJAMIN LOWENTHAL
YUKARI MURAKAMI
DANIELLE SEARS
SARAH SIMMONS
BRADLEY SOVA
NANCY ZHAO

LOREN TILLEY
Immediate Past President

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 associations, 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, and the Senate would not have the benefit of any confidential information that was provided to the Commission.

III. QUALIFIED ATTORNEYS WOULD BE DISCOURAGED FROM APPLYING FOR JUDGESHIPS.

This bill would, in effect, discourage qualified attorneys from applying for new judgeships, or possibly limit the number of qualified applicants because of financial or career considerations. Our communities and justice system are best served when many qualified candidates apply for judgeships. This bill could deprive the public of their right to have the most qualified candidate for judicial appointment.

Thank you for the opportunity to provide testimony.



Luna O Na Papa Alakai

Pelekikena
A. Makana Paris

Hope Pekekikena
Ekahi
Randi Fernandez

Hope Pelekikena
Elua
Matthew Gumapac

Puuku
Denise Kekuna

Kakauolelo Hoopaa
Sai Furukawa

Kakauolelo Hooholo
Palapala
Kamuela Werner

Pelekikena Hala
Koke
Yvonne 'PeeWee'
Ryan

Luna Alakai
Kuni Agard
Puamana Crabbe
Kanani Pali
Marlene Sai
Jennifer Smythe
Bruce Wong

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

www.pkhcc.org

Founded in 1964
by Liliuokalani
Kawananakoa Morris

Committee on Judiciary
Tuesday, February 12, 2019
4:00 pm Conference Room 325
State Capitol
415 South Beretania Street

Re: HB1311 - PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

Aloha Chair Chriss Lee, Vice-Chair Joy A. San Buenaventura and honorable members:

The Prince Kūhiō Hawaiian Civic Club (PKHCC) **OPPOSES** HB1311. 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.

Founded in 1964, PKHCC was organized to promote the education and social welfare of people of Hawaiian ancestry and objectives include supporting high ethical standards in business, industry and the professional fields of enterprise.

PKHCC urges the committee to **HOLD** HB1311.

Me ke aloha,

A. Makana Paris
Pelekikena

HB-1311

Submitted on: 2/9/2019 9:47:15 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
amy agbayani	Hawaii Friends of Civil Rights	Oppose	No

Comments:

My name is Amy Agbayani, co-chair of the Hawai'i Friends of Civil Rights. HFRCR supports policies and programs that protect civil rights, diversity and social justice. I respectfully oppose this bill which authorizes the senate to approve or reject subsequent terms of office for justices and judges.

As a former chair of the Judicial Selection Commission, I participated in decisions on the nomination of applicants and retention of judges. In my experience, each member of JSC made every effort to make assessments and decisions based on good, comprehensive information from multiple sources and after deliberation.

I believe the membership of the JSC allows for a good balance and representation of lawyers, non-lawyers, the Governor, Chief Justice, Senate and House, Oahu and other islands. The current JSC practice on retention is fair, comprehensive and provides adequate access and allows for an independent judiciary.

I respectfully urge you to vote no on HB 1311

Appellate Section Hawaii State Bar Association

February 10, 2019

Hearing on H.B. No. 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in Which Justices Judges are Appointed, Consented to, and Retained

House Judiciary Committee, February 12, 2019 at 4:00 p.m.

Dear Chair Lee, Vice-Chair San Buenaventura, and Members of the Committee:

The Appellate Section of the Hawaii State Bar Association is **strongly opposed** to H.B. 1311.¹ The existing process by which justices and judges are retained strikes a careful balance between protecting the independence of the judiciary and providing accountability. This bill would fundamentally alter that system in a manner that will negatively impact judicial independence and should be rejected for that reason.

Under the Hawaii Constitution, the Judicial Selection Commission reviews retention petitions for judges and justices every ten years. The Commission has nine members, six of whom are appointed the political branches. Two of these are appointed by the President of the Senate, two by the Speaker of the House, and two by the Governor.

By permitting the Commission to decide retention every ten years, Hawaii's constitution strikes a precise balance. There are other methods on opposite extremes: The federal system has lifetime appointments, while other states hold elections for their judges. Both of those systems have obvious flaws that Hawaii's does not. Hawaii's system, in contrast, rests carefully in the middle. Judges and justices are appointed by Governor (or the Chief Justice for district court judges) and confirmed by the Senate. This is a public and naturally political process. Once confirmed, their term extends only ten years, unless they are retained by the Commission. The Commission receives confidential feedback of practicing attorneys who have appeared in front of the judge or justice, among other things. The existing process thus offers oversight and accountability. This bill would displace that role with a senatorial "veto" power over the retention of judges and justices, and by so doing politicize the process.

The politization of the retention process would threaten the independence of the Judiciary. An independent judiciary is a backbone of the American structure of government, which depends upon the three branches acting both independently and in tension with each other. Because of the role in which judges and justices must serve, the Judiciary needs independence in order to fulfill its role as a co-equal branch of government. Politicizing the retention process

¹ The views and opinions expressed here are those of the HSBA's Appellate Section. The HSBA Board has not reviewed or approved the substance of the testimony submitted.

would hinder the judges' and justices' independence and undercut the public's confidence in an independent judiciary.

We are also concerned that the extension of the nomination process proposed in the bill will cause lengthy vacancies in judgeships statewide. The bill would triple the time for the Governor to nominate a judge or justice, and for the Senate to act on the nomination, from 30 days apiece to 90 days apiece. This may cause delays, which will operate to the particular detriment of the smaller circuit courts on the neighbor islands.

For these reasons, the Appellate Section strongly urges that this bill be deferred indefinitely or held.

Thank you.

Michelle Comeau, Section Chair
Deirdre Marie-Iha, Legislative Liaison



HOUSE COMMITTEE ON JUDICIARY
REPRESENTATIVE CHRIS LEE, CHAIR
REPRESENTATIVE JOY A. SAN BUENAVENTURA, VICE CHAIR

TESTIMONY IN **STRONG OPPOSITION** TO HOUSE BILL NO. 1311
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

Tuesday, February 12, 2019, 4:00 p.m.
State Capitol, Conference Room 325

Dear Chair Lee, Vice Chair San Buenaventura, and members of the Judiciary Committee:

Earthjustice, the nation's leading public interest environmental law firm, hereby submits testimony strongly opposing HB1131.

Our democracy is rooted in and depends upon separation of powers among the three co-equal branches of government. All citizens, including the grassroots community groups we represent, should be able to rely on the courts to fairly and impartially resolve disputes and uphold the rule of law. All judges and justices should have independence to interpret the law and administer justice without fear of political retribution from the elected branch of government. HB1311 would severely undermine these democratic principles by allowing politics to improperly influence the judicial process.

For these reasons, Earthjustice strongly opposes HB1131.

Sincerely,

Kylie W. Wager Cruz
Attorney
Earthjustice

Pratt Law Hawai‘i, LLC

Sandra Ann Kau‘ionālani Pratt-Aquino, Esq.

45-735 Wainānā St., Kāne‘ohe, Hawai‘i 96744 (by appointment only)

P: (808) 393-1948 E: kaul@prattlawhi.com W: prattlawhi.com

February 11, 2019

Testimony in Opposition to the House Committee on Judiciary on HB1311

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 12, 2019 4:00 PM

Aloha House Committee on Judiciary:

My name is Sandra Ann K. Pratt-Aquino and I am an attorney licensed to practice law in the State of Hawai‘i. I submit this testimony in *strong opposition* to HB1311, which proposes amendments to Article VI of the Constitution of the State of Hawaii to amend the manner in which Justices and Judges are appointed, consented to, and Retained.

I see this as a direct assault on our judiciary to politicize and to control this branch of government. In a worst-case scenario, the legislature could retaliate against a judge if he or she issued a decision adverse to the legislative branch by not confirming that judge. This is not how I desire for government to work. The judiciary is intended to function independently as a check on the executive and legislative branches. The current system is set in this way to promote such independence and the separation of powers. It should stay that way. Additionally, as a practicing attorney, judges are already overwhelmed in our current system and doing their best to serve Hawai‘i. To make them have to go through the reconfirmation process is not what I would like for our government.

Finally, I am very disappointed at this bill as I see the legislature over-reaching into a branch of government intended to hold legislators accountable. It appears like a power grab to reform our government to allow the legislative branch the greatest control of the judicial branch.

Respectfully, I disagree with this approach and I ask you to oppose this measure.

Mahalo,

Sandra Ann K. Pratt-Aquino, Esq.



TESTIMONY
House Judiciary Committee
Hearing: Tuesday, February 12, 2019 at 4:00 p.m.

TO: The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair

FROM: Emiko L. Meyers
President, Kauai Bar Association

RE: House Bill No. 1311, Proposing Amendments to Article VI of the
Constitution of the State of Hawaii to amend the Manner in which Justices
and Judges are Appointed, Consented to, and Retained

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee, thank you for the opportunity to submit testimony on HB 1311, proposing amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained.

My name is Emiko L. Meyers and I am the President of the Kauai Bar Association. I write today on behalf of the Kauai Bar Membership regarding the above bill. The Kauai Bar **STRONGLY OPPOSES** changing the manner in which Judges are appointed, consented to, and retained.

The Kauai Bar Association supports the current process by which judges are appointed and retained. We object to any changes, such as those proposed in HB 1311, that would potentially politicize the process.

Both the Senate and House have meaningful input in the retention process since they are the bodies that appoint four out of the nine members of the Judicial Selection Committee. Giving the Senate the authority to approve or reject the retention of justices and judges would inevitably politicize the judiciary. This is contrary to the intent behind the current system which was founded on the idea that the Judicial Selection Committee would employ a “merit based system.”

Finally, the Kauai Bar Association joins our Kauai HSBA representative Kai Lawrence, and The Judiciary, in their testimony submitted in opposition to this bill.

Thank you for your time and consideration.

Sincerely,

/s/Emiko L. Meyers,
Attorney & President, Kauai Bar Association

HAWAII FILIPINO LAWYERS ASSOCIATION

Officers

Jessica Domingo, President
Merlinda Garma, 1st Vice-President
Daniel Padilla, Secretary

Directors

Sergio Alcubilla
Kainani Alvarez
Earl Edward Aquino
Joanne Badua
Cassie Bagay
Sean Baz
Catherine Betts

Ron Federizo
Shelby Ferrer
Voltaire Gansit
Rebecca Gardner
Alana Peacott-Ricardos
Pearl Tamayo
Radji Tolentino

Date: February 11, 2019

To: Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair
House Committee on Judiciary

Re: Testimony on **H.B. 1311** – Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained

HB 1311: 2/12/19 at 4:00 p.m.-Conference Room 325

The Hawaii Filipino Lawyers Association (HFLA) appreciates the opportunity to submit this testimony in **OPPOSITION** to **H.B.1311**, which proposes 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, **HFLA believes this bill threatens to disrupt a quintessential tenet of our democracy – the separation of powers between the executive, judicial, and legislative branches of our state government.** Our nation’s founders enshrined these principles in our federal Constitution – which are duly mirrored in our state constitution - to divide the responsibilities of government between these three distinct branches so that one branch may not exercise the core function of another. The checks and balances inherent in our system ensure that the respective powers of each branch is exercised in a separate, independent, and equitable way so as to effectively promote liberty and prevent the concentration and abuse of power in any one of these three branches.

In the tumultuous political climate since the 2016 presidential election, our nation’s system of checks and balances have endured a persistent and troubling test as one branch seeks to overstep its bounds, assume and wield the powers of other branches, and challenge and erode the authority of the other branches to keep it in check. Our nation has been braced with great concern as it watches this branch abuse its power, while the others weather political and partisan efforts to infiltrate its ranks and eviscerate the powers and abilities conferred upon them by the Constitution. HFLA believes that it is critical – now, more than ever – to support and celebrate the independence of our Judiciary.

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 (JCP) has a vigorous process for reviewing and addressing reports of misconduct on behalf of judges, and may recommend a range of disciplinary sanctions, including voluntary retirement. The system in place right now is one based on merit instead of political influence and provides for a more qualified and independent judiciary.

At best, further adding to these three layers of robust review would be an unnecessary waste of government resources. At worst, the object and arduous processes of the JSC, JPP, and CJP 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 may engage in unfair and politically motivated sway or retribution in the courts. This measure threatens to undermine the Rule of Law and our Judiciary's informed, reasoned analyses and learned interpretations of it. Passing it would be a step backward, unnecessarily subjecting the judicial process to the whims of political influence.

Third, given HFLA's mission to: *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; 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 **this measure 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.

Finally, **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 this bill were instated, 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 this measure in opposition.



3-2600 KAUMUALII HWY, STE 1300 PMB 355,
LIHUE, HI 96766
PH: 808.346.3239 FX: 877.689.5990
EM: KAILAW.LA@GMAIL.COM

February 11, 2019

House Committee on Judiciary

Re: Testimony – Opposing HB 1311 Relating to the
Manner in which Justices and Judges are Appointed, Consented to, and Retained.
Hearing Tuesday, February 12, 2019, at 4:00 pm

“One must give one power a ballast, so to speak, to put it in a position to resist another.”
- Montesquieu, De l’Esprit des Lois (1748) [The Spirit of the Laws], Book V, Chapter 14.

Aloha,

Chair Lee and Vice Chair San Buenaventura, and Members of the Committee, thank you for the opportunity to submit testimony on HB 1311 relating to the manner in which justices and judges are appointed, consented to, and retained.

My name is Kai Lawrence and I am the Kauai Director on the HSBA Board. After meeting with the Kauai Bar Leadership, I write today personally and on behalf of the Kauai Bar regarding the above bill. The Kauai Bar **STRONGLY OPPOSES** the bill as it relates to the third stated purpose of the bill which is to “[a]uthorize the senate to approve or reject subsequent terms of office for a justice or judge.”

The bill notes that the impetus for this proposed change includes the fact that the current retention system, which does not require senate approval, is different from the initial appointment process which does require senate approval. This differentiation of the process is necessary to ensure that the legislative branch and the judicial branch do not overly influence one another. Referencing the Montesquieu quote above, the legislature may see their non-involvement in the retention process as ballast, or a weight limiting its reach, but this is precisely the purpose of ballast and precisely what our government of checks and balances needs to keep the ship steady. If the legislature held final say over matters of retention then this very power may influence judges and justices who seek retention to adjust their rulings in ways they feel may better their chances politically of being retained rather than ruling strictly upon law and precedent.

The bill also notes that the proposed change is also spurred by the fact that the Judicial Selection Committee’s (“JSC”) process for determining whether to retain a judge/justice is confidential. The confidentiality of the process again may be seen by the legislature as ballast. Granted, the legislature would like more oversight/control over the process, but it is the very fact that the process is confidential which gives the process greater power. Only through a confidential interview/investigation process can

the JSC¹ be confident that the interviewees can deliver candid remarks about judges/justices whom they have appeared before, and whom they may likely appear before in the future.

Finally, a report was recently issued by the American Judicature Society's Special Committee on Judicial Independence and Accountability reaffirming that Hawaii's judicial retention process is fair and impartial. The committee reviewed judicial fairness, impartiality, independence, and accountability across the nation and recommended that "no fundamental changes be made to Hawaii's balanced system of judicial selection and retention, as originally implemented pursuant to the 1978 Constitutional Convention."² The committee further concluded that the current system "maintains judicial accountability to ethics, the principle of impartiality, and the Constitution and the law[, and j]udicial elections or retention decisions by the Senate would compromise these goals."³

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kai Lawrence', followed by a horizontal line.

Kai Lawrence,
Attorney & HSBA Director for Kauai

¹ Noting that the nine-member JSC panel, a majority of whom must be non-lawyers, is made up of a broad cross-section of the community.

² Special Comm., Am. Judicature Soc'y, Report of the AJS Special Committee on Judicial Independence and Accountability II 2 (2017).

³ Id. at 15.



February 11, 2019

Representative Chris Lee, Chair
House Committee on Judiciary

Re: H.B. 1311, PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

Hearing: Tuesday, February 12, 2019, 4:00 p.m., Room 325

Dear Chair Lee and Members of the Committee on Judiciary:

Hawaii Women Lawyers (“HWL”) submits testimony in **strong opposition** to H.B.1311, which, among other things, proposes constitutional amendments to require Senate retention hearings for all judges.

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

We strongly oppose this proposal to vest the power to decide judicial retention with the Senate, instead of with the Judicial Selection Committee (the “JSC”), where it currently and, we believe, appropriately, resides.

This bill would disrupt the balance of power between the branches of government. The current model under the JSC affords a voice to all branches of government in their selection of commission members. By giving the Senate the authority to approve or reject the retention of justices and judges, the role of the JSC would be effectively nullified; subsequently divesting the House of Representatives, and the Executive and Judicial branches of their representative roles as well.

The current retention system encourages public trust in the courts by providing the Judiciary with the independence necessary to make decisions based on the law, free of outside pressure or influence. Judicial independence is a cornerstone of our judicial system that without which the rule of law could be severely compromised. The existing process is rigorous and allows for public input as well as information from periodic evaluations conducted by both the Judiciary and the Hawaii State Bar Association (“HSBA”). The JSC spends significant time on retention petitions. It reviews the confidential comments submitted after public notification of retention petitions, as well as numerous periodic judicial evaluations conducted by the Judiciary and the HSBA. These evaluations are based on {00364940.3}

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

confidential assessments of attorneys who have actually appeared before the judges. For judges who have presided over jury trials, the HSBA is also provided the evaluations of jurors in their trials. The JSC also reviews appellate opinions concerning decisions made by the judge, and conducts confidential interviews of many community resource persons. Finally, the JSC interviews the judge in a confidential setting, where questions can be asked regarding the judge's past decisions.

The proposed political process for judicial retention would not elicit the same quality of information available to the JSC. Moreover, it would require significant additional resources of the Senate if the reviews are to be of the same standard implemented by the JSC members. With an average of ten retention reviews a year, at various times of the year, this would require many special sessions and would require significant additional Senate resources.

Finally, the current merit-based system encourages judicial diversity. In fact, Hawai'i has the most diverse state judiciary in the nation. 41% of all full-time judges and justices in Hawai'i are female, and an equal number of men and women serve as judges in district and family court statewide. This diversity is directly attributable in many ways to Hawai'i's forty year adherence to a merit-based system rather than a political one. In connection therewith, HWL respectfully raises for the Committee's attention that with respect to the Supreme Court, this bill would solely impact one Supreme Court justice, who happens to be a woman. We understand and hope that this was not the intended effect, but, nonetheless, H.B. 1311 would have the practical effect of disproportionately affecting women.

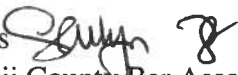
For these reasons, HWL respectfully opposes this bill. Hawai'i's current judicial selection and retention procedures were developed to ensure that judges are able to rule from the bench in a manner consistent with the law and without regard to political considerations. While we respect the Legislature's desire to seek ways to improve the present retention system for judges, we do not feel H.B. 1311 will accomplish this and in fact would undermine public confidence in the Judiciary. It would be detrimental for the public to perceive that judges make decisions based on a desire for Senate approval rather than the merits of the cases before them.

We respectfully request that the Committee **hold** H.B. 1311. Thank you for the opportunity to submit testimony on this measure.

Testimony to the House Committee on Judiciary

Tuesday, February 12, 2019 4:00 PM
State Capitol, Conference Room 325

TO: Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice-Chair

FROM: Sherilyn Tavares 
President, Hawaii County Bar Association

RE: **House Bill No. 1311**, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained.

Chair Lee, Vice Chair San Buenaventura, and Members of the House Committee on the Judiciary, thank you for the opportunity to submit testimony on House Bill No. 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained. The Hawaii County Bar Association (“HCBA”) respectfully, but strongly, submits this testimony in opposition of this bill, which would radically restructure the system for retaining justices and judges in Hawai`i.

Immediately after this measure was brought to my attention and recognizing the importance of these measures to member attorneys, the HCBA Board met and voted to oppose this bill, finding that it would have a great impact on the legal profession and legal services that are provided to the public. Our members were notified and informed to submit any of their own individual comments directly to this committee. We also gave our members an opportunity to inform the Board if there was strong opposition to the HCBA’s opposition, and none were received to date.

The HCBA determined that this legislation would not only undermine the independence of our judges, but also potentially politicize judicial decision making. Judges should remain independent to ensure that their decisions are based on the facts that are presented to it and to the applicable laws, free from political pressure and influence. The HCBA further determined that changes to the selection process, specifically extended timelines, would mean that vacancies would be extended for longer periods than it already is, possibly deterring qualified individuals from applying for such vacancies and creating delays for little or no benefit. Currently, it takes anywhere from 6-12 months (or longer on neighbor islands) from the time a position is advertised until a judge is sworn in. Tripling the time deadlines would make this even worse. Our island has witnessed firsthand over the past two years how long it takes to have a qualified judge appointed. The inability of litigants to have the same judge to oversee their entire legal matters in a timely manner creates much tension and stress. We do not encourage any system that would cause this issue to materialize yet again.

While it is important to have an accountable judiciary, we believe the retention or selection of judges in this State should not be changed as provided in the pending legislation. The process that we have works! Judicial independence is key to ensuring a just and sound future for all of Hawai`i.

Respectfully, the HCBA strongly opposes this bill. Thank you for the opportunity to testify.



AMERICANS FOR DEMOCRATIC ACTION

OFFICERS	DIRECTORS			MAILING ADDRESS
John Bickel, President	Melodie Aduja	Ken Farm	Stephen O'Harrow	P.O. Box 23404
Alan Burdick, Vice President	Guy Archer	Chuck Huxel	Doug Pyle	Honolulu
Marsha Schweitzer, Treasurer	Juliet Begley	Jan Lubin		Hawai'i 96823
Dylan Armstrong, Secretary	Gloria Borland	Jenny Nomura		

Feb. 10 , 2019

TO: Honorable Chair Lee & JUD Committee Members

RE: HB 1311 PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED

Opposition for hearing on Feb 12

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 HB 1311 as it would propose amendments to the Constitution of the State of Hawaii relating to the appointment and retention of justices and judges. We object to the part that authorizes the Senate to approve or reject subsequent terms of office for justices and judges. 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.

Thank you for your favorable consideration.

Sincerely,

John Bickel President





R. HERMMAN HEIMGARTNER,
President

REBECCA COLVIN,
Vice President

STEPHEN FRYE,
Vice President 2nd

LAUREN KENNEDY,
Treasurer

BRIT BARKER,
Recording Secretary

KORI WEINBERGER,
Communication Secretary

February 11, 2019

STATE OF HAWAII
HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY

RE: HB1311 – Proposing Amendments To Article VI Of The Constitution Of The State Of Hawai‘i To Amend The Manner In Which Justices And Judges Are Appointed, Consented To, And Retained.

Dear House Committee on Judiciary,

The West Hawai‘i Bar Association is a Neighbor Island Bar Association consisting of 111 attorneys that practice law primarily in West Hawai‘i. Our membership consists of attorneys in private practice, in the public sector working for both the State and the County, and non-profits. These attorneys practice in all different types of areas of law, including criminal law, family law, estate planning, elder law, civil litigation, and bankruptcy.

The West Hawai‘i Bar Association **strongly opposes** H.B. No. 1311: Proposing Amendments To Article VI Of The Constitution Of The State Of Hawai‘i To Amend The Manner In Which Justices And Judges Are Appointed, Consented To, And Retained.

The West Hawai‘i Bar Association has a number of concerns regarding this bill. This bill will take away the power from one branch of the government (the Judiciary) and vest that power into

another branch (the Senate). The United States of America and the State of Hawai‘i have a history of recognizing the immense benefits of a government balanced by a separation of powers. The bill states that its goal is for the purpose of “transparency” but the result will be to erode judicial independence and politicize the role of the district and family court judges. The proposed amendment would likely increase partisan political action in the judicial selection process. The result of injecting politics in the judicial retention process would be the erosion of the Rule of Law. It is critical that the people of the State of Hawai‘i have trust and confidence in the impartiality and fairness of our courts.

The West Hawai‘i Bar Association believes that the current judicial retention process is effective, efficient, and designed to support the independence of the Judiciary. H.B. No. 1311 fails to weigh the practical benefits of the current retention process. Consider for a moment the make-up of the Judicial Selection Commission: 9 members, no more than four of whom may be attorneys. The Chief Justice selects one. The Bar selects two. The Governor selects two. The Senate President selects two. The House Speaker selects two. Thus, four out of the nine members are selected by the Legislature. The Executive Branch selects two more. In total, six out of the nine members are selected from the Legislative and Executive branches. The West Hawai‘i Bar Association would also point out, but not belabor the point, that the Bar is not part of the Judicial branch of the government but consists of all of the attorneys licensed to practice law in Hawai‘i. All in all, the Legislative Branch already has almost half the influence in the retention process by its selection of four of the nine commission members.

Furthermore, the commission members serve staggered six-year terms. As such, there is a relatively high turn around of its members.

The District/Family Court judges deal with the vast majority of cases that come into our courts. From traffic, small claim, non-felony jury-waived criminal, TROs, divorce, custody, CWS, and a gamut of other types of cases, these judges preside over the majority of the cases in the court system. The District and Family Courts have been referred to as the people’s court as most of the citizens in our community that come in contact with the courts will be involved with either of

them. As such, eroding the judicial independence of these courts will not benefit the Rule of Law.

The West Hawai'i Bar Association sees little benefit in requiring the District/Family Court judges to go through a Senate review process when the current process works fine. The West Hawai'i Bar Association maintains that the current process balances the best of all worlds. First, the current system keeps judges accountable. Specifically, the District/Family Court judges can be denied retention by the Judicial Selection Commission. As explained above, the Judicial Selection Commission consists of high-qualified individuals selected by various bodies and branches of the government. The West Hawai'i Bar Association strongly believes that the Judicial Selection Commission does an excellent job of reviewing the retention of judges, including conducting thorough investigation and information gathering on judges' performance, temperament, proficiency, suitability, and conduct. It should be noted that the Judicial Selection Commission also provides public notice, including in newspapers, about judges up for retention. As such, the public is provided notice and the opportunity to provide input to the Judicial Selection Commission about the retention of judges.

The West Hawai'i Bar Association sees a Senate review as adding a political, popularity element to a process that should not be so. Being popular or politically favorable should not be a concern of a judge. Judges should follow the Rule of Law, along with having an appropriate judicial temperament, managing their case calendars, explaining their findings of fact and conclusions of law, and providing people with an equal and fair process to justice. Popularity and politics should not be a part of the equation.

Also, to be frank, there is a concern whether the most qualified individuals will seek to be District/Family Court judges if they become subject to a public, political vetting process every six years. And, there is a worry that a senate review process would unnecessarily delay the judicial appointment and retention process, especially for neighbor island judges. The courts take a handful of public holidays, but do not stop otherwise. Expanding the time to appoint judges is not acceptable. Justice delayed is justice denied. The appointment of judges and justices in a timely manner is critical to the efficient functioning of the courts.

In conclusion, West Hawai'i Bar Association believes that the current system of judicial appointment and retention works great. The proposed bill will not improve this system. Instead it will deteriorate judicial independence, the Rule of Law, and the efficient administration of justice. There is a firmly established reason, basis, and tradition on why the Judiciary should not be subject to the whims of a popularity or bipartisan political process. The reasoning for the bill is to promote transparency. However, it does not make sense to increase transparency at the expense of judicial independence, the Rule of Law, and the efficient administration of justice.

For all the foregoing reasons, the West Hawai'i Bar Association respectfully opposes this bill. Please contact me at (808) 756-7022 or Hermann@Kona.Attorney if you have any questions or concerns.

Very Truly Yours,



R. Hermann Heimgartner
President, West Hawai'i Bar Association

Hawai'i State Trial Judges Association

Testimony to the House of Representatives Committee on Judiciary Regarding HB1311

Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair
Hearing on Tuesday, February 12, 2019
State Capitol, Conference Room 325

by

Board Members on behalf of the Hawai'i State Trial Judges Association
Hon. James H. Ashford, President
Hon. Darien W.L.C. Nagata, Vice President
Hon. Adrienne N. Heely, Secretary
Hon. Brian A. Costa, Treasurer

On behalf of the Hawai'i State Trial Judges Association ("HSTJA"), thank you for the opportunity to comment on HB1311 which propose amendments to the Hawai'i 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** HB1311. With all due respect to the Hawai'i Legislature, this bill undermines judicial independence and erodes the public trust in government. The bill proposes to fundamentally change the constitutionally mandated procedure for merit 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. HB1311 proposes to extend the time to appoint and confirm new justices and 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 bill undermines 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 departments¹

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 allow 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.²

As proposed, HB1311 authorizes the Senate, rather than the nonpartisan Judicial Selection Commission, to approve or reject subsequent terms of office for judges and justices. For judges and justices 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.

¹ 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).

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

2. HB1311 erodes 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 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, whether intentional or not, gives the appearance that members of the Legislature or other outside interests seek to influence judges' and justices' rulings. If the public perceives the legislative branch or special interests are attempting to influence judicial decisions by way of the 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, retention, 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 and each petition for retention. Every applicant for a judicial vacancy 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. Likewise, every judge and justice seeking retention must fill out a petition for retention providing similar information, and also including assorted information regarding the applicant's work during his or her term on the bench. The Commission reviews the applications and references, then interviews applicants for each judicial vacancy and retention petition. 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. For new applicants, 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 are not disclosed to the judges to protect attorneys' concerns of retaliation by judges or influence on judicial decision making. Confidentiality 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 significant 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 on Judicial Conduct 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 on Judicial Conduct determines if a complaint warrants investigation and evaluation, and if so, the Commission on Judicial Conduct then conducts a confidential

investigation and hearing, and recommends dispositions to the Supreme Court. Upon sufficient cause, the Commission on Judicial Conduct recommends disciplinary action and further proceedings before the Supreme Court. Ultimately, the Supreme Court shall enter an order based on the Commission on Judicial Conduct'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.

HB1311 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 amendment seeks 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 to as long 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. When judicial vacancies 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 may be 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 judges 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 year 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, based on the assurance of confidentiality. These same resource people may be reluctant or unwilling to share the same information publicly before a Senate hearing.

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. If enacted, HB1311 will 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.

Hawai'i State Trial Judges Association Testimony in Opposition to HB1311
House of Representatives Committee on Judiciary
Tuesday, February 12, 2019
Page 7

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



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

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

The Thirtieth Legislature, State of Hawaii
House of Representatives
Committee on Judiciary

Testimony by
Hawaii Government Employees Association

February 12, 2019

H.B. 1311 – PROPOSING AMENDMENTS TO ARTICLE VI
OF THE CONSTITUTION OF THE STATE OF HAWAII
TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES
ARE APPOINTED, CONSENTED TO, AND RETAINED

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO raises serious concerns over the intent of H.B. 1311 which proposes to amend Article VI of the Constitution of the State of Hawaii relating to the appointment and retention of justices and judges.

It is essential for our judicial system to be composed of justices and judges who have the authority and autonomy to exercise their independent and impartial judgement. In order to guarantee the public's confidence, we must ensure that the entire process, including appointment, consent, and retention, is free from political influence or interference. If justices and judges must either return to the Senate for confirmation to renew each term or if the Senate is empowered to trump decisions made by the American Judicature Society, the decisions of the justices and judges may be swayed to ensure another term. While these proposed amendments to the Constitution can be construed as a mechanism to ensure checks and balances, it will have the opposite effect of politicizing the retention process by highlighting rulings on controversial decisions, cases that became cause célèbre, or of the moment issues that the Senate is pursuing. We agree that there could be more transparency in the process, however the current composition of and criteria for Hawaii's judicial merit selection system works.

Thank you for the opportunity to raise concerns over the impact of this Constitutional Amendment.

Respectfully submitted,

for Randy Perreira
Executive Director

HB-1311

Submitted on: 2/11/2019 4:23:33 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Oppose	No

Comments:

HAWAII ACCIDENT



LAW CENTER

February 11, 2019

HB 1311 Opposition

Via fax to (808) 586-6531

Chairman Representative Chris Lee
Vice Chair Representative Joy A. San Buenaventura
House of Representative Committee on Judiciary
Hawaii State Capitol

Re: House Bill No. 1311, Proposing Amendments to Article VI of the
Constitution of the State of Hawaii to Amend the Manner in which Justices
and Judges are Appointed, Consented to, and Retained
Hearing Date/Time: Tuesday, February 12, 2019, 4:00 p.m.
Place: State Capitol, Conference Room 325


Honorable Chair Lee, Vice Chair Buenaventura, and Members of the Committee:

As a private citizen who is also a trial lawyer, I submit testimony in opposition to House Bill No. 1311, which proposes a constitutional amendment to, among other things, allow the senate to affirm or reject the judicial selection commission's decision regarding the retention of a justice or judge.

I oppose House Bill 1311 because it threatens judicial independence by effectively replacing the merit-based retention system with one which would inject politics and special interests into the retention process. The judiciary should decide cases on their merits without fear of retribution.

Very truly yours,

Hawaii Accident Law Center



John Choi
President

The People's Choice Law Firm®
www.HiAutoAccident.com

1

Pacific Guardian Center, Makai Tower
733 Bishop Street, Suite 2390
Honolulu, Hawaii 96813

attorneyjohnchoi@gmail.com
Telephone: 808-792-8333
Facsimile: 808-536-4988

**Testimony of Kenneth S. Robbins, on behalf of the
Hawaii Chapter of the American Board of Trial Advocates (ABOTA)**
Regarding House Bill 1311
Committee on Judiciary
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 12, 2019, 4:00 p.m.
Conference Room 325, State Capitol

Dear Representatives Lee and San Buenaventura and members of the committee:

I submit this testimony individually and on behalf of ABOTA. I have practice law in Hawaii for 49 years, principally as a civil trial attorney. ABOTA is an honorary society of trial attorneys. Collectively, we have tried more civil lawsuits than any other honorary legal professional organization. Individually, I have tried more than 150 trials to a jury verdict. For this reason, ABOTA, as an organization and I, individually, are qualified, I believe, to testify regarding the impact of House Bill 1311 on the independence and integrity of our judiciary.

We have a selection process for judges which is the envy of almost all of the attorneys and judges with whom I have discussed the subject who practice as attorneys and preside as judges in other states. There is no doubt that 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 confront hostility if they had the courage to make a decision which is unpopular, but is in accordance with what the law dictates. Without doubt, 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.

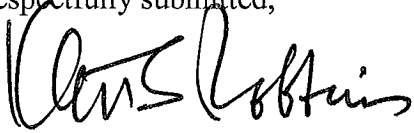
House approval for an initial judicial appointment is reasonable and fair. To undergo another House approval process for retention could well politicize decisions made before retention hearings are conducted and certainly may politicize decisions thereafter. I believe, and hope, that this proposed bill 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. Not only does the legislative branch have for reaching authority to evaluate individuals selected for initial judicial appointment, but more than 50% of the membership of the Judicial Selection Commission (“JSC”) is appointed by the legislative and executive branches of government. Therefore, there is ample opportunity for the other two (2) branches of government to express their views and opinions to the JSC on the retention of judges under the current system. Under the existing system, some judges are not retained. Anyone may come forward to express reasons why a judge should not be retained when retention of judges is under consideration by the JSC.

Testimony of Kenneth S. Robbins
February 11, 2018
Page 2

Our current system works well – better than in any other State. This bill, if enacted, will impact negatively the quality of the judiciary and the decisions they render.

For these reasons, ABOTA strenuously opposes House Bill 1311.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenneth S. Robbins". The signature is written in a cursive style with a large, stylized initial "K".

Kenneth S. Robbins
for the Hawaii Chapter of the
American Board of Trial Attorneys

February 12, 2019

Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair
House Committee on Judiciary
Hawaii State Capitol
415 So. Beretania Street, Honolulu, HI 96813

Re: HB1311 – PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

Alohas Rep. Chris Lee, Chair, and Rep. Joy San Buenaventura, Vice Chair, and Members of the Committee:

My name is Momi Cazimero. I **OPPOSE** House Bill 1311.

I am a concerned citizen, deeply troubled by this bill because I am old enough to remember when political appointments resulted in a lack of trust in the Judiciary. That is why Hawai‘i adopted the merit selection process. I have served on many community boards, including the Judicial Selection Commission, National Board of the American Judicature Society, AJS Hawaii, and currently—the Judicial Review Panel because I have trust in the balance they seek.

I also have confidence in the cornerstone of our Constitution that established three, separate branches of government—Executive, Legislative and Judicial. The goal of the founders was to provide the necessary checks and balance, to foster democratic aspirations.

William Richardson, for whom the University of Hawai‘i Law School is named, was Lt. Governor under John A. Burns and appointed Chief Justice of the Judiciary. His esteemed credentials in both the legislative and judicial branch inspired his ethics—and I quote: “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.”

In alignment with Richardson’s principles, the 1978 Hawaii Constitutional Convention established the Judicial Selection Commission to remove political influence on the Judiciary.

Chief Justice Richardson’s wisdom affirms the authority vested in the Judicial Selection Commission by the 1978 Constitutional Convention. That coalition has bolstered my resolve to support the independence of the judiciary. It is a core value of our democracy.

Unspoken in the **core value** of Richardson’s legal eloquence, is the protection of every individual or organization that rely on the court for justice. The people of Hawai‘i deserve an independent judiciary grounded **exclusively** in the Rule of Law. It is notable that when similar bills were submitted in prior sessions of the Legislature the opposition was overwhelming; prompting me to ask “Why?”

The scales of justice must not be tipped by external influence, and in my opinion, this bill attempts to compromise the independence of the Judiciary. For that very reason, I am here to urge this committee NOT to pass House Bill 1311.

Mahalo

HB-1311

Submitted on: 2/9/2019 2:41:33 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
sherry broder	Individual	Oppose	No

Comments:

My name is Sherry Broder and I am testifying as an individual. I have had the honor of practicing law in the courts of Hawaii for more than 40 years. In my opinion, it is clear that the current system of selecting, confirming and retaining judges is working very well. The community needs judges that have courage to make the hard decisions and to stand up for what is right, just and fair. An independent judiciary is critical to the proper functioning of democracy. Courts protect the rights of everyone, including businesses, individuals and even people who do not have access to the courts. Making confirmation process more lengthy and difficult will discourage the best and brightest from applying. In the federal system, Article III judges are appointed for life. Changing the current retention process and interjecting the legislature will undoubtedly cause the process to be vulnerable to politics and motivations coming from sour grapes from losers. Please do not hesitate to contact me should have any additional questions.

HB-1311

Submitted on: 2/9/2019 10:25:11 AM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
David Kimo Frankel	Individual	Oppose	No

Comments:

What is it about the concept of "judicial independence" that you don't understand?

HB-1311

Submitted on: 2/8/2019 9:16:44 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Ellen Godbey Carson	Individual	Oppose	No

Comments:

I urge the Committee to vote no on this bill. I am a retired attorney, having practiced for 35 years, served as president of the Hawaii State Bar and of Hawaii Women Lawyers Association. One of the most important functions of our judiciary is its independence. This bill threatens judicial independence by injecting the Senate into retention votes, rather than merely for initial appointments. You only need to look at our national politics to see what could happen if we give up judicial independence. We never would have progressed with racial integration, protection of women's rights, and many more civil liberties if judges and justices could be defeated through a non-retention vote that is subject to political decision-making based on the content of judicial opinions. We have a Judicial Selection Commission that provides fair and impartial ways to evaluate retention issues for our Judiciary. I urge you to reject this bill and any other efforts to defeat judicial independence.

Testimony of Daniel Foley in opposition to HB1311

Dear Mr. Chairman and members of the Judiciary Committee,

I submit this testimony in opposition to the provisions of HB1311 that propose a constitutional amendment to bring the senate into the judicial retention process.

The stated purpose of the bill in bringing in the senate is “to promote transparency in the judicial retention process.” A constitutional amendment is not required or necessary to accomplish this purpose. This purpose could be accomplished simply by an amendment to the Judicial Selection Commission Rules.

I have appeared before the Commission as an applicant for judicial office as a judge seeking retention. I have also appeared as a resource to the Commission on other applications for judicial office and petitions for retention. I believe the process works well, and we have outstanding judges as a result.

The demand for greater transparency in Commission proceedings is not new. Maybe it is time to review the Commission’s rules as they pertain to confidentiality in retention proceedings. The supreme court could do this, soliciting input from Commission members, legislators, attorneys, judges and other interested parties.

The confidentiality of retention proceedings serves a public interest. Confidentiality encourages attorneys and parties that appear before a judge up for retention to come forward and speak freely and candidly without worrying that their words will have any negative consequences for them, whether that worry is merited or not.

There needs to be a balance between confidentiality that serve a public interest and transparency. This bill does not do that. I believe a review of the Commission’s rules with input from interested parties is a way this balance can be achieved.

Respectfully submitted,

Daniel Foley

HB-1311

Submitted on: 2/9/2019 3:43:22 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Denise M. Hevicon	Individual	Oppose	No

Comments:

HB-1311

Submitted on: 2/9/2019 6:32:26 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jen Jenkins	Individual	Oppose	No

Comments:

HB-1311

Submitted on: 2/10/2019 10:15:00 AM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Chase Livingston	Individual	Oppose	No

Comments:

February 10, 2019

House Committee on Judiciary

Chase Livingston

RE: Opposition to HB1311

Dear Chair Chris Lee, Vice Chair Joy A. San Buenaventura, and Esteemed Committee Members:

Thank you for the opportunity to submit testimony on this important issue. My name is Chase Livingston, I am a third year law student at Richardson, and I testify against House Bill 1311. This bill represents an unfair and unnecessary involvement by the house in judicial affairs.

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. In fact, four of the nine 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 this bills (and similar senate bills) would undermine that effectiveness by allowing politics to seep into the judiciary. Requiring reconfirmation would undermine the independence of the judiciary by subjecting judges and justices to the political whims of the legislature. This is unacceptable.

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. This bill 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. This bill attempts to undermine that system.

This is why I urge you to oppose House Bill 1311.

Chase Livingston

HB-1311

Submitted on: 2/10/2019 11:17:20 AM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Erik Meade	Individual	Oppose	No

Comments:

Ending discrimination and supporting minority rights, by their very nature, are not popular stances with the majority. If Hawaii wants to continue to making progress toward equality it cannot move toward a a popularity contest for judges.

February 10, 2019

Dear Rep. Chris Lee, Chair; Rep. Joy A. San Buenaventura, Vice Chair; and Members of the House Committee on Judiciary,

The following is respectfully submitted in opposition to that part of H. B. No. 1311 regarding retention of justices and judges (collectively referred to herein as judges). The proposed bill would alter the present constitutional procedure by requiring the judicial selection commission to issue a recommendation to grant or to reject a judge's petition for retention and to transmit its "determination" along with the petition to the senate, which in its discretion "may vote to consent to or reject the petition." This provision allows the senate to override any recommendation by the commission; in effect the senate could decide to disapprove of retention in opposition to the commission's recommendation to approve, or to approve retention in opposition to the commission's recommendation to reject the petition. The bill does not set out any procedure in the senate by which either course is to be accomplished.

Hawai'i's selection procedure is unique in the nation in the sense that it is not based on an electoral procedure or a purely appointive one but was structured to maximize a neutral merit based selective process through review by a commission composed of representatives from all branches of government (including the senate), the bar and the public who serve staggered terms, a designated number of nominees from which the governor must appoint and a consent process in the senate. This serves as the foundation for the retention process. The retention process has three public interest advantages adapted to the constraints on a sitting judge and the continuing operation of the judicial system:

1. It provides members of the public and the bar the opportunity to submit confidential and protected comments on the request for retention without fear of any perceived retaliation
2. It allows the commission receiving information to engage in candid and open discussion, not the same as, but akin to agencies engaging in executive sessions in personnel matters
3. It focuses on matters of competence, conduct and character of the judge, rather than on rulings based on the merits of cases

The proposal would remove these safeguards and plainly eviscerate the function of the commission upon which merit selection and retention are grounded. The bill in effect, establishes two retention processes that may conceivably conflict not only

in terms of process but in terms of outcome, undermining confidence in the retention process and the judicial system.

Another collateral consequence is that the pendency of any cases involving the legislature or any pronouncements of legislative priority may affect the capability of any judge to sit on such cases during a reasonable period prior to the filing of a petition for retention. The public perception of any resulting influence on a judge's rulings from the possibility of an override would be detrimental to the efficacy of the outcome and would have to be avoided.

Thank you for the opportunity to present these observations.

Sincerely,

/s/ Simeon R. Acoba Jr.

Testimony to the House Committee on Judiciary
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

February 12, 2019 4:00 pm
State Capitol, Room 224

Submitted by Doris Ching, Educator
Emeritus Vice President for Student Affairs, University of Hawai'i System
Past Chair, Hawai'i Commission on Judicial Selection

HB 1311 Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

Very respectfully, I oppose HB 1311 which proposes to reconstruct the current procedure for retaining justices and judges in Hawai'i. As a former chair of the State Commission on Judicial Selection, I can personally attest to the prevailing process for decisions on judicial retention by the Commission as sturdy, respectable, and independent of political influence. I have directly witnessed and experienced the current method as one of high integrity that provides for public comment and input to the process and consideration, while sustaining judicial independence.

To assure a process for selecting and retaining highly qualified individuals who will serve the best interests of Hawai'i's diverse population, I thank you for the privilege and opportunity to present this testimony in opposition to HB 1311.

SIDNEY K. AYABE

ATTORNEY AT LAW
A LAW CORPORATION
1000 BISHOP STREET, SUITE 807 HONOLULU, HAWAII 96813
TELEPHONE: (808) 258-3724
AYABERESOLUTION@GMAIL.COM

February 10, 2019

The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: HB 1311 -- 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: Tuesday, February 12, 2019 at 4:00 PM
State Capitol, Conference Room 325

Dear Chair Lee, Vice Chair San Buenaventura, and other members of the Committee on Judiciary:

Thank you for the opportunity to submit testimony and comments on HB 1311. I am submitting this testimony as a member and former President of the Hawaii State Bar Association, and former member and Chair of the Hawaii Judicial Selection Commission. I am in strong opposition to HB 1311.

Having served as President of the Hawaii State Bar Association as well as having served as Chair of the Hawaii Judicial Selection Commission, I am intimately familiar with the current appointment and retention system for justices and judges. Our current merit-based system for judicial selection and retention which was adopted at the 1978 Constitutional Convention is fair, reasonable and sound.

At present, the Judicial Selection Commission screens applicants for vacant judicial positions and submits names to the appointing authorities (either the Governor or the Chief Justice). Prior to the submission, applicants are thoroughly vetted by the Judicial Selection Commission by obtaining information through a number of different resources. Because of the confidential nature of the process, the Judicial Selection Commission receives information which it would otherwise not receive about an applicant. Following the appointment, the nominee's name is submitted to the Hawaii State Bar Association for input on whether he or she is deemed qualified for the position prior to the Senate confirmation hearing.

The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
February 10, 2019
Page 2

For the retention of judges or justices, the Judicial Selection Commission seeks public input by publishing in the newspaper the name of the judge or justice seeking retention. In addition, the Judicial Selection Commission also seeks input from a number of key resource people from diverse backgrounds. Judicial evaluations are reviewed. Although the retention process is confidential, the Legislature has input because four of the nine members of the Judicial Selection Commission are selected by the Legislature in addition to the Governor appointing two. Again, confidentiality plays an important role in encouraging individuals to candidly express their respective views about a judge or justice seeking retention.

HB 1311 will politicize the retention process of judges or justices seeking retention. If there are litigants who come forward to testify against a judge or justice, that judge or justice will be precluded from responding under applicable rules of judicial conduct. In addition, the Senate would not have access to some of the confidential resource materials available to the Judicial Selection Commission. That type of information is invaluable and provides the best information in determining whether an applicant for retention should or should not be retained. Furthermore, not having a confidential cloak over the Senate hearing process will preclude some individuals from testifying.

Judicial independence is paramount in maintaining the integrity of our democracy and administration of justice. Judges should not be subject to reprisal by outside interest. They should be allowed to make decisions based on the rule of law and the facts as presented to them. Judicial independence is undermined by requiring judges to appear before the senate for a confirmation hearing.

Our judicial selection process is heralded by many throughout the country as one of the best. We should maintain the present merit-based system which ensures judicial impartiality and accountability. Having been directly involved in the judicial selection process, I know that we have an appointment and retention process which works well.

For the above reasons, I am in strong opposition to HB 1311.

Respectfully submitted,



Sidney K. Ayabe

HB-1311

Submitted on: 2/10/2019 4:15:52 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Amy Monk	Individual	Oppose	No

Comments:

**TESTIMONY IN OPPOSITION
H.B. 1311**

TO: Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair
House Committee on Judiciary

FROM: Troy J.H. Andrade, Ph.D., J.D.

RE: OPPOSITION to H.B. 1311, PROPOSING AMENDMENTS TO ARTICLE VI
OF THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE
MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED,
CONSENTED TO, AND RETAINED

DATE: Tuesday February 12, 2019
TIME: 4:00 P.M.
PLACE: State Capitol, Conference Room 325
415 South Beretania Street

I write today in my individual capacity to express my strong opposition to H.B. 1311, a proposal reminiscent of a slew of bills introduced two years ago.

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 through the creation of the Judicial Selection Commission. 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 that “the senate may vote to consent to or reject” a petition for judicial retention, H.B. 1311 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 piece by the Star Advertiser’s Editorial Board from two years ago (after the first tranche of attacks against the judiciary) that also advocates for protecting the integrity of judicial selection and retention. 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.

House of Representatives
Committee on Judiciary
Conference Room 325, State Capitol
415 South Beretania Street
Tuesday, February 12, 2019, 4:00 PM

RE: Testimony in Opposition to H.B. No. 1311, A Bill for an Act Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges are Appointed, Consented to, and Retained.

Representatives:

We write as members of the Hawaii State Bar and concerned citizens to strongly oppose H.B. No. 1311, specifically the proposal to “Authorize the senate to approve or reject subsequent terms of office for a justice or judge.” Without doubt, far more knowledgeable people opposing this bill have submitted testimony discussing at length the concepts of “separation of powers” and “judicial independence.” So, we do not think it necessary to restate those arguments. It is enough for us to note that these concepts are considered fundamental to the political organization of the United States and of its individual states.

This bill claims to address two problems with the current process used by the judicial selection commission with respect to retaining justices and judges: that its deliberative process “takes place in private” and results in decisions that “are final and not appealable.” It is not clear, based on the proposed constitutional wording, how this amendment would result in any improvement over the current process. How does the process become more transparent by having the senate simply vote up or down on a particular justice or judge? How does the process become fairer by substituting the commission’s non-appealable decision with the senate’s non-appealable decision?

On the other hand, this amendment almost certainly will introduce political pressure on justices and judges who wish to continue working beyond their initial terms, thus jeopardizing their ability to make decisions based solely on the rule of law and undermining the concept of judicial independence.

Justices and judges occasionally make “unpopular” rulings. There are already ways to overturn legally incorrect rulings (the appeals process) and to remove incompetent or corrupt judges (the Commission on Judicial Conduct). And when those rulings are compelled by poorly written laws, the legislature can rewrite those laws. These are not perfect solutions and are not always available, but they are better than the alternative proposed here.

If there are weaknesses in the current judicial retention process, surely there are less drastic solutions to address them than amending the Constitution to weaken the separation of powers. The legislature should work with the judicial selection commission to explore those options. Justices and judges should be left to interpret and enforce the law, not cater to popular opinion or political constituencies.

Thank you for your time and attention.

Very truly yours,

John Padovan

Connie Chang

HARRISON & MATSUOKA

Attorneys at Law

William A. Harrison
E-mail: wharrison@hamlaw.net
Keith A. Matsuoka
E-mail: kmatsuoka@hamlaw.net
1001 Bishop Street, Suite 1180
Honolulu, Hawaii 96813
Telephone: (808) 523-7041
Facsimile: (808) 538-7579
Web: www.harrisonmatsuoka.net
www.hamlaw.net

Of Counsel:
Gene K. Lau
E-mail: glau@hamlaw.net
1001 Bishop Street, Suite 2828
Honolulu, Hawaii 96813
Telephone: (808) 376-4864
Facsimile: (808) 533-1248

February 10, 2019

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

COMMITTEE ON THE JUDICIARY

Chair: Rep. Chris Lee

Vice Chair: Rep. Joy A. San Buenaventura

DATE: Tuesday, February 12, 2019

TIME: 4:00PM

PLACE: Conference Room 325

State Capitol

415 Beretania Street

Honolulu, Hawai'i 96813

BILL NO.: **OPPOSE HB 1311 – WRITTEN TESTIMONY ONLY**

Honorable Representatives: Chris Lee, Joy A. San Buenaventura and members of the Committee on Judiciary.

Thank you for providing me this opportunity to offer written testimony **in strident opposition to House Bill 1311**

As background to this opposition, I am a criminal defense attorney who has practiced in all our courts for over 38 years. I am also a former Chair of the Judicial Selection Commission ["JSC"], having served my term on the Commission from 1991 -1997. This I believe, makes me keenly aware of the importance of an independent judiciary.



COMMITTEE: **COMMITTEE ON THE JUDICIARY**

Chair: Rep. Chris Lee

Vice Chair: Rep. Joy A. San Buenaventura

Date: Tuesday, February 12, 2019

Page 2

I strongly support the present merit selection and retention system and **oppose** any process that allows for more legislative involvement, believing that the present system lessens political influence in judicial appointments and retentions 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 jurisdictions which politicizes the selection and retention process, as this proposed bill does. In such states, special interests have a significant influence over the process thereby eroding the fairness and the equality of justice in the courts.

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 and retaining 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.

COMMITTEE: COMMITTEE ON THE JUDICIARY

Chair: Rep. Chris Lee

Vice Chair: Rep. Joy A. San Buenaventura

Date: Tuesday February 12, 2019

Page 3

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 and retention significantly increases the likelihood that minorities will be chosen to serve and retained on Hawai'i's courts. Ongoing research 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.

Similar bills have been introduced in previous years seeking to change our merit selection and retention system. As a result of those bills the AJS formed special committees to review Hawai'i's merit selection process. I sat on one of those committees which unanimously agreed that the proposed changes, such as the present bill, would do nothing to improve the present retention process. Thus, voted against any such changes to the current practice.

The present merit selection and retention procedure produces excellent judges, who are not influenced by the vicissitudes of public opinion. In short, a process that allows for such significant legislative review, such as proposed by this bill, does not afford Hawai'i's citizens with a just and level playing field, hence must be rejected.

Therefore, I strongly **oppose** HB 131.

Sincerely,



William A. Harrison

Testimony Presented Before the
House Committee on Judiciary
Tuesday, February 12, 2019, House Conference Room 325
by Brandon Marc Higa (as current law student)

Testimony in Opposition to HB1311

Chair Lee, Vice Chair Buenaventura, and Esteemed Committee Members:

Thank you for the opportunity to submit **testimony in opposition to House Bill 1311 Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in which Justices and Judges Are Appointed, Consented to, and Retained**. I am testifying in my capacity as a current law student at the William S. Richardson School of Law at the University of Hawai‘i at Mānoa.

The proposed constitutional amendment will “authorize the senate to approve or reject subsequent terms of office for justices and judges,” which would empower the legislative branch to have more influence over retention of current judges. Requiring reconfirmation would undermine the independence of the judiciary by potentially inserting a highly visible and public re-confirmation process that invite public pressure to current judges’ decisions on ongoing cases. While I am in support of preserving the sanctity of the courts, I do not feel the proposed constitutional amendment would further its intended goals because of the unpredictable nature of a public confirmation process.

I believe Hawaii currently has a robust and fair judicial selection process that maintains the separation of the legislative and judicial branches of government to minimize political interference in the courts. The current judicial selection process includes a nine-member judicial selection committee and senate confirmation for all judges and justices. In fact, four of the nine members are already appointed by legislative leaders. Judicial 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.

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. This bill would create a judicial climate where judges would fear political backlashes if their rulings were not in line with certain senators. Such an effect would tip the balance of scales away from judicial independence.

Respectfully,
s/Brandon Marc Higa
Student Bar Association President Emeritus ‘16

HB-1311

Submitted on: 2/10/2019 11:52:20 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Douglass Adams	Individual	Oppose	No

Comments:

HB-1311

Submitted on: 2/11/2019 6:48:08 AM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Kamaile Maldonado	Individual	Oppose	No

Comments:

I OPPOSE this measure because it undermines judiciary independence, authority, and discretion and obfuscates the delicate inter-branch checks and balances which are cornerstones to strong democracy.

Mahalo for the opportunity to comment.

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice-Chair

Testimony to the House Committee on Judiciary

Regarding HB 1311

Tuesday, February 12, 2019, 4:00 pm

State Capitol, Conference Room 325

Chair Lee, Vice-Chair San Buenaventura, and Members of the Committee, thank you for the opportunity to comment on HB 1311 which proposes amending the Hawaii Constitution regarding how judges and justices are appointed, consented to, and retained.

My name is Steven Alm and I am a retired (8/31/16) First Circuit Court Judge. I am testifying in opposition to HB 1311.

Hawaii's current system of judicial appointment and retention involves the Judicial Selection Commission, the appointing authority (Governor or Chief Justice), and the Hawaii Senate, in its advise 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 certainly not perfect, and, naturally, subject to criticism of individual judges' and justices' decisions in individual cases, is not often criticized for being influenced by politics, nor should it be.

Nationally and locally, however, there has recently been vocal criticism of judges and justices and their decisions based on political considerations. I, for one, don't believe that Hawaii judges or justices base their decisions on political considerations or out of worry of fear or favor from the other two co-equal branches of government. I also don't believe that any members of this Committee are hearing this bill with any political considerations in mind.

Recent media reports and a recent statement by a member of leadership in the Senate, however, have indicated that such political considerations are in fact, at play, both in certain court decisions and in legislative actions taken in response to those decisions. That, unfortunately, is the environment in which this bill is now being heard.

The public is cynical and distrustful as it is about the motives of our public officials, both nationally and locally. This bill, and others, that seek to in some way punish the Hawaii judiciary or seek to restrict its independence, would only serve to add to that cynicism.

Is the legislature going to be unhappy at times with a Hawaii Supreme Court ruling?

Welcome to the club!

That doesn't mean the justices are trying to make your life difficult. That is just the nature of the beast. I don't believe there is a single trial court judge in Hawaii who, at some time or another, did not disagree with a Hawaii Supreme Court ruling. That is how our system works. There has to be a final arbiter of what the law is. That is the Hawaii Supreme Court here in Hawaii. That is part and parcel of what I believe is the finest judicial system in the world.

The Hawaii Supreme Court is doing their level best (as I have seen first-hand when I have sat on the Supreme Court in place of a recused justice) to make the best decisions they can, based on the facts of a particular case and the law that applies to it. They make those decisions, however imperfectly, whether others will like the decision or not, because that is their job and that judicial independence is critical to the effective functioning of our system.

The Hawaii State Legislature, with the power of the purse, is placed in the unique position of funding its co-equal branch, the Hawaii judiciary. I implore you not to pass this legislation, which would serve to imperil the judiciary's independence and inject the specter of political considerations, both perceived, and real, into the process. It would serve to continue the narrative, which I do not believe is true, that the legislature withholds judiciary funding when it is unhappy with a particular court ruling and that the judiciary responds by ruling otherwise in the future.

Passing this bill would only deepen the cynicism the public already has and result in a diminution of respect for both the legislature and the judiciary.

Based on these considerations, I write in opposition to HB 1311. Thank you for the opportunity to be heard.

Steven S. Alm (808) 741-2009 and at stevenscottalm@gmail.com

Testimony to the House Committee on Judiciary

Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 12, 2019 4:00 PM
State Capitol, Conference Room 325

Bill No. and Title: House Bill No. 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained.

TESTIMONY OF MICHAEL K. LIVINGSTON OPPOSING House Bill 1311

I respectfully submit this testimony strongly opposing House Bill 1311.

I have practiced law in the courts of Hawaii for over thirty years. My law firm, Davis Levin Livingston, is a litigation firm that handles cases in State courts on all Islands. I am a Fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers.

House Bill 1131 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 bill.

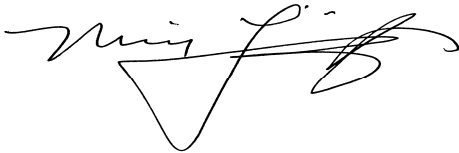
I respectfully submit that: (1) Hawaii’s present system of judicial selection and retention effectively preserves and protects the judicial independence that is essential in protecting the rights and interests of minorities; and (2) the existing checks and balances built into our democratic system provide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

In addition to the two overarching considerations set forth above, it is important to note that Hawaii's judicial system is not broken and does not need fixing. Indeed, Hawaii has the most diverse judiciary in the country, with judges at all levels subject to merit-based selection and retention processes that have helped to make our courts fair and impartial, and relatively free from political pressures.

I strongly oppose House Bill 1311 as an ill-conceived challenge to judicial independence and impartiality.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael K. Livingston". The signature is fluid and cursive, with a large, sweeping flourish at the end.

MICHAEL K. LIVINGSTON

**HOUSE COMMITTEE ON JUDICIARY
ATTN: CHAIR CHRIS LEE, VICE-CHAIR JOY SAN BUENAVENTURA**

**February 12, 2019, 4:00 p.m.
Conference Room 325**

Aloha Chair Lee, Vice-Chair San Buenaventura, 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 15+ 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 proud of our judges and of our merit selection system.

It remains extremely important that judges continue to be above the political fray. It is my considered and strong view that the proposed retention system in HB1311 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, would directly threaten 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 no accident that our Law School's namesake, Chief Justice William S. Richardson, became a leader in the Conference of the Chief Justices of the entire country 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," in the second volume of the Law Review of the then-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). Significantly, "CJ" has been proven 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 repeated *ad hominem* attacks on judges unfortunately provide an instructive current example. As Chief Justice Roberts felt the need to emphasize recently, judges are neither Republican nor Democratic judges—no matter what their background—once they take the judicial oath. Yet once confirmed, Article III federal judges enjoy the security of lifetime appointments, subject only to good behavior, as well as salaries that cannot be reduced.

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 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 HB1311. Nonetheless, the mere public perception of a possible legislative rejection hanging over a judge's good faith decision does damage to the public's faith in judicial decisions, even when such enhanced skepticism is an unintended consequence.

This recent presidential attacks on judges strongly suggest that if there ever were a time to be sensitive to and protective of the independence of the judiciary in the United States, that time is now. They further illustrate 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 became 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 fortunately avoided the bitter imbroglios 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). Though the stakes were certainly high, however, that controversial judgment was decisive 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 of us might begrudge particular decisions. We are proud of the Hawai'i justices and judges who are independent enough to protect the rights of minorities, at times that may mean standing up to the majority. This judicial independence remains a crucial element of the Rule of Law. I respectfully urge rejection of HB1311.

Mahalo and aloha,

A handwritten signature in black ink, appearing to read 'Aviam Soifer', with a stylized flourish at the end.

Aviam Soifer
Dean and Professor

HB-1311

Submitted on: 2/11/2019 12:01:49 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Sylvia Yuen	Individual	Oppose	No

Comments:

JUDGE RIKI MAY AMANO (Ret.)
1003 Bishop Street, Suite 1155
Honolulu, HI 96813

TESTIMONY IN OPPOSITION TO HOUSE BILL 1311
Proposing Amendments to Article VI of the Constitution of the State of Hawaii to
Amend the Manner in which Justices and Judges are Appointed, Consented to, and
Retained.

Committee on Judiciary

Tuesday, February 12, 2019 · 4:00 p.m. · Rm 325 · State Capitol

Dear Chair Lee, Vice-Chair San Buenaventura and Ladies and Gentlemen of the House
Committee on Judiciary:

Please accept this writing as my testimony in **strong opposition** to HB 1311. I am Riki May Amano, former district and circuit court judge of the Third Judicial Circuit, State of Hawai'i (1992-2003). While my objections to the bill are to all of the changes in their entirety, I am especially focused on the impact that adding another layer of review and appointment for retention of justices and judges, will negatively impact the judiciary and thus, the community.

Our judicial model in Hawai'i has been and continues to be one of the most progressive in the country. I am old enough to remember what the promise of statehood meant to the citizens of Hawai'i when we became the 50th State...fair governance by leaders we would elect, and the rights and privileges afforded by the U.S. Constitution. It is a source of pride that I had the chance to serve as a judge in a community where my family lived for more than 100 years; a judge in an Hawaiian judicial system that is the living embodiment of those American ideals.

When on the bench, I had the good fortune to attend the National Judicial College and interact with dozens of judges from all over the United States. Based on my observations, conversations and impressions, Hawai'i's judges stood apart from others in many ways but especially where integrity and public service were concerned. In the last 27 years, the dozens of judges I worked with personally were serious about the oaths they took to administer justice and faithfully and impartially discharge their duties under the constitutions.

In 2016, I wrote to oppose Senate Bills 2239, 2238 and 2420. Those bills were offered for the purpose of instituting changes to the selection and retention of justices and judges, instituting judicial elections and adding a legislative level of review. I wrote, *inter alia*: "On the issue of senate confirmation of judicial retention, I oppose this measure because it creates an unnecessary and inappropriate level of review. Being a

judge is an honor and a privilege; it is also an extremely difficult undertaking. No one goes to the bench completely prepared for the challenges. Frankly, it takes several years to really get a handle on all of the aspects of the job. I agree that retention review is an important aspect of accountability and best practices. The criteria for retention review should be consistent, expertly created and as neutral as possible. Senate confirmation of judicial retention would not be a good forum for that important function.” Those remarks are as true today as they were in 2016.

It appears that most, if not all of HB 1311’s time frame amendments are necessitated by the proposed additional layer of legislative review for judicial retention. The addition of legislative review for retentions and the expansion of time frames related thereto, present delay issues for the judiciary that will have a deleterious effect on case handling; most especially for the Third Judicial Circuit (Hawai`i Island). The Third Judicial Circuit has four circuit court judges, two of whom are in Hilo and the other two in Kona, more than one hundred miles away. Even with the new and improved Saddle Road, if a Hilo circuit court judge had to drive to Kona to “cover” a Kona circuit court judge, it will take at least one hour and forty-five minutes of driving time...**one way**.

Having an empty circuit court seat for any length of time means that one-fourth of the circuit’s cases...civil, criminal, probate, family, etc....will not be heard. Judges work very hard to keep their cases moving. Be it jury trial, motions hearings, settlement conferences or any myriad judicial procedures, having an empty circuit court seat for a minimum of 90 days will create a vacuum. Even with a temporary district court judge sitting in replacement, many important decisions pertaining to filed cases will not be made. A backlog of cases will ensue.

For all of the reasons set forth above, I respectfully request that you vote against the amendments proposed in HB 1311.

DATED: February 11, 2019.

Sincerely,

A handwritten signature in black ink, appearing to read 'Riki May Amano', written over a rectangular box.

Judge Riki May Amano (ret.)

HB-1311

Submitted on: 2/11/2019 12:56:50 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Tarita Keohokalole-Look	Individual	Oppose	No

Comments:

February 11, 2019

House Committee on Judiciary

Tarita Keohokalole-Look

RE: Opposition to HB1311

Dear Chair Chris Lee, Vice Chair Joy A. San Buenaventura, and Esteemed Committee Members:

Thank you for the opportunity to submit testimony on this important issue. My name is Tarita Keohokalole-Look, I am a 2nd year law student at Richardson and I testify against House Bill 1311. This bill represents an unfair and unnecessary involvement by the house in judicial affairs.

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. In fact, four of the nine 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 this bill (and similar senate bills) would undermine that effectiveness by allowing politics to seep into the judiciary. Requiring reconfirmation would undermine the independence of the judiciary by subjecting judges and justices to the political whims of the legislature. This is potentially dangerous and unacceptable.

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. This bill 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. This bill ultimately attempts to undermine that system.

This is why I urge you to oppose House Bill 1311.

Tarita Keohokalole-Look

February 11, 2019
House Committee on Judiciary
Caitlin Moon
RE: Opposition to HB1311

Dear Chair Chris Lee, Vice Chair Joy A. San Buenaventura, and Esteemed Committee Members:

Thank you for the opportunity to submit testimony on this important issue. My name is Caitlin Moon, I am a 3rd year law student at Richardson and I testify against House Bill 1311. This bill represents an unfair and unnecessary involvement by the house in judicial affairs.

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. In fact, four of the nine 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.

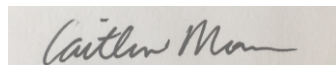
Hawaii's existing judicial selection process is considered the "gold standard" by many other states for its effectiveness in **keeping the courts free from direct political interference**. The measures proposed under this bill (and similar senate bills) **would undermine that effectiveness by allowing politics to seep into the judiciary**. Requiring reconfirmation would undermine the independence of the judiciary by subjecting judges and justices to the political whims of the legislature. This is unacceptable.

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. This bill 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. This bill attempts to undermine that system.

This is why I urge you to oppose House Bill 1311.

Regards,



Caitlin Moon

KLEINTOP & LURIA, LLP

CHARLES T. KLEINTOP
TIMOTHY LURIA

DAVIES PACIFIC CENTER, SUITE 480
841 BISHOP STREET
HONOLULU, HAWAII 96813

TELEPHONE:
(808) 524-5183

NAOKO C. MIYAMOTO
KATHERINE M. M. LUKELA
ERIN M. KOBAYASHI
CASSANDRA B. BAGAY

FAX:
(808) 528-0261

EMAIL:
C.Kleintop@hifamlaw.com

February 11, 2019

Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair
Committee on Judiciary

Re: Testimony in Opposition to House Bill 1311
Hearing: February 12, 2019 at 4:00 p.m., Conf. Room 325

Dear Representative Lee, Representative San Buenaventura, and Members of the Committee:

I respectfully submit this written testimony in strong opposition to House Bill 1311 ("HB 1311").

My name is Charles T. Kleintop and I have been a practicing attorney here in Honolulu since 1976. I am the managing partner of Kleintop & Luria, LLP and my practice is almost exclusively in Family Court here on Oahu and on the Neighbor Islands. I am very concerned about HB 1311 and its ramifications.

Although this bill states that it seeks to "promote transparency in the judicial retention process", the bill does not do that. The bill simply provides the Senate with an opportunity to review the Judicial Selection Commission's retention decisions with respect to certain justices and judges. Under this bill, the Senate may vote to consent to or reject a retention petition, but it is not required to do so. It appears that the Senate simply wants to be able to pick and choose which justices and judges to challenge or not challenge if they petition for retention. The only logical reason for this to enable the Senate to challenge particular justices and judges about decisions they made while in the position they are seeking to retain. This effort by the Senate to interfere with and influence judicial decision-making could not be more obvious. It must be stopped if we are to ensure an independent judiciary in our state.

Senate consent, of course, is already required for a justice's or judge's initial appointment to the bench. This allows the Senate to vet a potential

February 11, 2019
Representative Chris Lee
Representative Joy A. San Buenaventura
Page No. 2

justice's or judge's qualifications before he or she ever takes the bench. The only apparent reason for the Senate to need to consent to a justice's or judge's retention on the bench is the Senate's desire to scrutinize the decisions made by that justice or judge since he or she has been on the bench. The Senate, of course, is not the appropriate organization to do this. The Judicial Selection Commission is the appropriate organization.

A second "consent" (or perhaps even more "consents") by the Senate is very troubling because, as noted above, it poses a direct threat to the independence of the judiciary. Justices and judges must be able to make decisions that they believe are appropriate under the law without fear of reprisal by the Senate or individuals or entities with ties to the Senate. If a party believes that a justice or judge has made an incorrect decision in a case, that party has legal remedies to challenge the decision. Further, if a justice or judge consistently displays poor decision-making, parties and attorneys have the opportunity to present their grievances to the Judicial Selection Commission which can then investigate those grievances when considering retention of that justice or judge. Finally, if a party or attorney believes that a justice or judge has violated his or her ethical obligations, that party or attorney can complain to the Commission on Judicial Conduct who will then investigate the complaint. In short, there are already more than enough checks in place on a justice's or judge's performance. Another level of review by the Senate is not necessary or appropriate.

As a family law attorney, I am particularly concerned about the effect such an ill-advised bill would have on Family Court judges. In most Family Court matters, at least one party, because of the emotional issues litigated in Family Court, is usually dissatisfied with the outcome of his or her case. There are, of course, many reasons a party may not prevail on his or her claims in Family Court, including a lack of evidence, a lack of credibility, or the equities of the situation. Through this bill, the Senate will be inviting disgruntled and dissatisfied Family Court litigants to bring their claims to the Senate when they already have other avenues available to pursue their grievances. This bill will surely then have the effect of undermining the public's confidence in the judicial process.

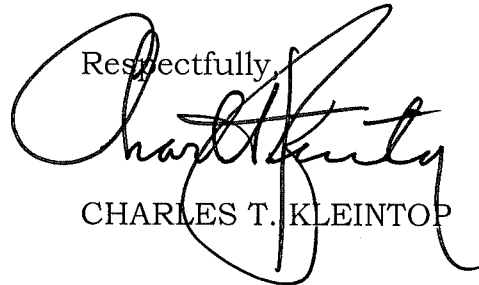
February 11, 2019
Representative Chris Lee
Representative Joy A. San Buenaventura
Page No. 3

Finally, I am concerned that litigants in Family Court who are politically connected will try to use those connections or threaten their spouses or partners with using them. No party or judge should have to be concerned that the decisions being made by the Family Court will be reviewed by anyone other than the appellate courts, the Judicial Selection Commission, or the Commission on Judicial Conduct.

This bill is unnecessary and will undermine the independence of our judiciary and the integrity of our judicial system. I respectfully request that it not move forward from this Committee.

Thank you for your consideration of my written testimony.

Respectfully,

A handwritten signature in black ink, appearing to read "Charles T. Kleintop", written over the typed name. The signature is fluid and cursive, with a large initial "C" and "K".

CHARLES T. KLEINTOP

CTK:ck

DATE: February 11, 2019

TO: Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair
House of Representatives Committee on Judiciary

FROM: Pohai Nu‘uhiwa Campbell, J.D.

RE: OPPOSITION to H.B. 1311, 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

DATE: Tuesday, February 12, 2019

TIME: 4:00 P.M.

PLACE: State Capitol, 415 South Beretania Street, Conference Room 325

Chair Lee & Vice Chair San Buenaventura:

I write today in my individual capacity to express my strong opposition to H.B. 1311.

Ultimately, 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. This bill would result in judges being selected based on their connections to political sponsors and figures, and appointments and retention would be traded for political favors. If allowed, this type of system would not be in the best interest of Hawaii’s citizens.

Separation of powers is one of the elemental aspects of our nation’s government, and the strength of our democracy depends on independent governmental branches, including an independent judiciary. Hawaii’s current system for the selection and retention of judges already balances the many important interests involved, and ensures both judicial accountability and judicial independence. This bill would construct and promote a system where judges would make decisions based on outside factors, including political repercussions.

As a former law clerk for judges at both the circuit court and appellate level, I have had first-hand experience in understanding why judicial independence is critical to the functioning of our judiciary, democracy and government. It is essential that our Hawai‘i judges have the ability to make decisions based on the laws and facts before them, without outside pressure or influence.

I humbly ask that this bill be deferred indefinitely. Mahalo.

Honorable Chris Lee, Chair
Honorable Joy A. San Buenaventura, Vice Chair
House Committees on Judiciary

HB 1311 **Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in which Justices and Judges are Appointed, Consented to; and Retained**

Hearing: February 12, 2019
4:00 p.m.

**TESTIMONY AGAINST HB 1311
RELATING TO PROPOSING AMENDMENTS TO ARTICLE VI OF THE
CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER
IN WHICH JUSTICES AND JUDGES ARE
APPOINTED, CONSENTED TO; AND RETAINED**

The Honorable Members of the Committee:

Thank you for allowing me to provide my feedback to House Bill 1311, which I consider very ill advised. By way of background, I have practiced law in Hawaii for close to 45 years; and therefore, I had an active practice before the 1978 Constitutional Convention that introduced the merit selection committee system that is currently in place. In addition, I have served as chair of a national committee for the American Association for Justice on the independence of the judiciary. The committee consisted of lawyers and justices from Supreme Courts from around the country and we reviewed legislative and constitutional issues that influenced judicial independence. Among our committee's work was to evaluate the impact of elected judges and other constitutional provisions that affected the independence of the judiciary.

In the early years of the '70s, before the merit selection system was adopted in Hawaii, the Governor simply appointed judges of his choosing who were then confirmed by the Senate. There was no effort to have an application process in which merit selection was an appropriate criteria. In practice, often politicians who needed more years before their retirement were appointed and easily confirmed by the Senate. The selection seemed to have little criteria for merit other than political connections.

In 1978 the Hawaii Constitutional Convention imposed one of the most innovative and progressive systems of merit selection that exists anywhere in the country. I have surveyed many of the procedures that exist in other states, which often are plagued by political pressure and motivation. The unique system that was adopted in 1978 involved nine members of a judicial selection commission, a majority of whom are non-lawyers. Each of the political branches are guaranteed a significant voice since the senate and house leadership appoint four members of the Commission. This new system adopted in Hawaii was insulated from unfair political pressure that often hangs over judges in other jurisdictions and which impacts both the perception of the independence of the judiciary and the quality of the decisions made by judges.

Certainly today, the independence of the judiciary is an issue of utmost concern on both the federal level and the state level. I am very concerned about the proposed change of the system that would allow the retention process to be subject to further political intervention. Decisions that are difficult such as the enforcement of constitutional rights, as well as decisions that may be unpopular or politically controversial should not be subject to the interference of any branch of government. There are few things that are more important and more endemic to the vitality of the judicial process than having judges that are completely independent and free of political considerations.

The current retention system supports the judiciary's commitment to the rule of law. It is a thoughtful process, which supports the independence of the judiciary and ensures that the judges often can remain free of outside pressure or influence.

I strongly oppose House Bill 1311 as has been introduced in the legislature in the past since it would introduce an element of political consideration to the retention process and bares the real concern that certain judicial decisions may be influenced by a future retention process that the judge may face. The public is entitled to a full and complete independent judiciary free of political interference and likewise the quality of judicial determinations and the quality of our judiciary will be impacted if political considerations such as the retention proposed in this Bill is adopted. Hawaii has one of the best systems in the entire country. It is one that insulates our judges from political consideration and allows them to take on the difficult, courageous and sometimes unpopular decision that characterizes a strong, independent judiciary. I strongly urge the rejection of House Bill No. 1311

Respectfully submitted,

Mark S. Davis
mdavis@davislevin.com
808 524-7500



KOREAN AMERICAN BAR ASSOCIATION HAWAII

KABAH Officers

President
Jin Tae Kim
jtkim@jtkimlaw.com

Vice President
Kelly Y. Uwaine
kyu@hawaiilaver.com

Treasurer
Chuck C. Choi
cchoi@hibklaw.com

Secretary
Jason Woo
jwoo@jasonwoolaw.com

Board of Directors

Amanda Chang
Daniel Pyun
James Lee
Rex Kim
Leighton Oshima
Sunny Lee
Tina Bae
Will Lee
Connie Chang

Address:
Topa Financial
Center
Bishop Street
Tower
700 Fourth
Street, Suite 1107
Honolulu, Hawaii
96819

February 11, 2019

Chairman Representative Chris Lee
Vice Chair Representative Joy A. San Buenaventura
Committee on Judiciary
Hawaii State Capitol
415 S. Beretania Street
Honolulu, HI 96813

Re: HB 1311 - PROPOSING AMENDMENTS TO ARTICLE VI OF 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 12, 2019

Hearing Time: 4:00 p.m.

Dear Representative Lee and San Buenaventura and fellow committee members:

The Korean American Bar Association Hawaii (“KABAH”), submits this testimony in **strong opposition** to HB 1311, especially those provisions concerning the requirement for senate consent or rejection for the retention of a judge or justice for another term.

KABAH, founded over 20 years ago, is a non-profit organization dedicated to defending and advancing the interests of Korean-Americans, fostering networking and leadership opportunities for Korean-American attorneys, promoting community service, and protecting civil rights. Our members consist of both attorneys in private practice and in public service, and while we may differ in age, experience, background, and political viewpoints, we are all united in our fervent belief in the rule of law. And critical to the rule of law is the fundamental principle of separation of powers and an independent judiciary.

No one can look upon our nation’s history and fail to recognize the importance of judges of strong moral character, temperament, knowledge, and experience to protect the rights and liberties set forth in our Constitution — especially when they are threatened by majoritarian impulses. We live in an age where judicial independence is under attack, where presidential tweets openly disparage judges for simply doing their job. Now more than ever, we need judges to apply law to facts without fear of populist sentiment or of retribution from the legislature.

We believe that the current process regarding retention of judges and justices in the State of Hawaii is satisfactory and needs no further review or amendment.

Senate control over retention would fundamentally change the retention process for the worse. In particular, Bill 1311 would invite political influence on the Judiciary and would threaten the independence of the Judiciary. The integrity of Hawaii's Judiciary should be zealously guarded. HB 1311 undermines our independent Judiciary and should be rejected.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Jin Tae Kim". The signature is fluid and cursive, with the first name "Jin" being the most prominent.

Jin Tae Kim
President of KABAHI

TESTIMONY:

Chair of House Committee on Judiciary: Representative Chris Lee

Bill: House Bill No. 1311 Proposing Amendments to Art. VI, Hawaii Constitution, amending it to change the manner in which Justices and Judges are appointed, consented to and, retained in office.

Date of Hearing: Tuesday, February 12, 2019, 4:00 PM, conference Room 325, Hawaii State Capitol

Name of Person Testifying: Shackley F. Raffetto, Chief Judge (Ret.), Second Circuit Court, State of Hawaii; Member, Hawaii Judicial Evaluation Review Panel

Testifying about: House Bill 1311, to the extent it requires Senate approval of judicial continuations for all Hawaii Judges

Position Presented/Offered: Very respectfully, I recommend against adoption of HB 1311. There is no need or reasonable justification provided to support a change to our present successful judicial continuation process provided for by our Hawaii Judicial Selection Commission which was created by the 1978 Hawaii Constitutional Convention. The proposed changes will unnecessarily lengthen and complicate present processes, interfere with providing timely justice for Hawaii citizens, deter our most highly qualified lawyers from considering judicial careers, and unnecessarily delay and politicize Hawaii's present and long-standing, very effective judicial continuation process

Testimony Offered for Consideration:

I have been a member of the Hawaii Bar for just short of 50 years. I was a civil trial lawyer about 25 years, a Per Diem District Court Judge for 7 years (District & Family Courts) and a Circuit Court Judge for 18 years, the last 12 years as Chief Judge of the Second Circuit. Since retirement I serve as a member of the Hawaii Judicial Evaluation Review Panel, reviewing the performance of Hawaii Judges & Justices. As a result of my experience, I am very familiar with Hawaii's judicial selection process, our judicial continuation process and the work of our Hawaii Judicial Selection Commission (JSC).

Becoming a competent trial lawyer, in addition to succeeding in law school and passing a bar exam, is almost entirely based upon one's experience as a trial lawyer. The more trial experience a lawyer has the greater the likelihood is that a lawyer will be a successful judge. Our ability to attract our most experienced and successful trial lawyers to seek judicial positions, then, is very important for providing the highest quality of justice for the People of Hawaii. Of course, it is essential that we have a judicial selection process that is fair, efficient and just, in order to ensure selection, and continuation in office, of our most highly qualified lawyers to serve as our judges.

Any Hawaii lawyer who seeks a judicial position knows that they will voluntarily submit to a very thorough and comprehensive vetting process of their professional experience, qualifications and personal and professional training, reputation, and background. This is as it should be since even though an applicant may be an experienced lawyer, their actual suitability and ability to serve successfully as a judge is initially unknown. The "merit selection" judicial selection process which was established as a result of Hawaii's 1978 Constitutional Convention has actually served the citizens of Hawaii very well.

The only justification offered to support the changes proposed in HB 1311 to our judicial continuation process is "more transparency". There are no findings or assertions that our present process is *not* serving the public interest well or that the proposed changes are likely to provide Hawaii with more highly qualified, better Judges and Justices. In actual fact, based upon my personal experience, our present judicial continuation process serves the People of Hawaii exceptionally well; and, as a result our present Hawaii Judiciary enjoys the highest level of public trust and confidence. We can be very proud of the work and contribution of our Judicial Selection Commission and the high level of public trust and confidence of the People of Hawaii in our Hawaii Judiciary.

It is very important to clearly understand the facts underlying the effects that HB 1311 may have upon our Hawaii Judiciary if it were to become law. 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. This means that there are a total of approximately 80 judicial officers; Judges and Justices of the Hawaii Judiciary. 46 District Court/Family Court Judges serve 6-year terms of office. All other Judges/Justices (34) serve 10-year terms. Almost all Hawaii Judges/Justices apply for continuation in office when their initial terms of office expire. District and Family Court Judges, because they serve 6-year terms of office, must serve at least 2 terms of office in order to "vest" for they and their families to receive minimum retirement benefits; and, often, they apply to serve 3 terms of office in order to achieve maximum retirement benefits.

It is also important to consider that most often when a lawyer seeks a judicial career, he or she is giving up, forever, the career they have built for themselves as a lawyer. It is also important to know, in considering the proposed changes, that Hawaii law requires that before a lawyer may legally apply to serve as a District/Family Court Judge that a lawyer must have held a license to practice law in Hawaii for at least 6 years. The time limit for applicants for positions in all other Courts is a minimum of 10 years. Given these time limitations, it is likely that any lawyer seeking a position as a Circuit Court Judge or appellate Court Judge will be *at least* 36 years of age. These "time limits" are no doubt designed to make sure that lawyers who apply to serve in Hawaii as Judges or Justices have at least a basic amount of experience as lawyers, before it is even possible for them to serve as Judges or Justices. It is more likely that a lawyer applying for a Judgeship will be in their 40s or 50s. I was 54 years old when a position became vacant, providing me with the opportunity to apply for a Second Circuit position. The pre-Judicial careers of lawyers who apply to become Judges or Justices in Hawaii were often highly

successful careers which, in fact, distinguished them in most cases as good potential candidates for Judicial Office. Once a lawyer leaves behind a successful career for a new career as a Judge or Justice, their old career is most often gone forever. The new Judge or Justice, and his or her family, no doubt hope to succeed in Judicial Office; and, that as a result of their successful service they will, eventually, earn and qualify for a State of Hawaii retirement, earned because of their years of public service to the People of Hawaii.

Under the proposed HB 1311, all Hawaii Judges and Justices which will require Senate confirmation or non-action, as the case may be, to continue in Judicial Office. HB 1311 will impose an enormous, and unnecessary, increase in time, effort and commitment upon Senators, Judges and Justices in order to carry out its mandate. Unfortunately, these increased burdens are unlikely to provide much, if any, increase in benefits to Hawaii's citizens. I will provide my reasons and analysis for this belief below in my testimony.

The increase in burdens upon Judges and Justices caused by this Bill, by increasing the duration and uncertainty of their continuation applications while waiting for Senate action or non-action, will interfere with and defer justice for the public. It already takes much too long for litigants to have their cases heard and decided in our Courts, especially civil cases. All Hawaii judges have very demanding daily calendars and they all work very hard. I have never heard a Hawaii Judge or Justice say that they had "extra time" or "free time" in their Courts. Unfortunately, time taken away from Court for a Judge or Justice translates into "justice deferred" for the public. There is an old saying amongst lawyers that, unfortunately, is very true: "justice delayed is justice denied". These negative impacts upon the public will necessarily increase under HB 1311 if Judges and Justices must seek redundant and unnecessary Senate confirmation, or non-action, on their judicial continuation applications, after already having been found qualified for retention in office by the Hawaii Judicial Selection Commission (JSC). The only *actual* rationale for HB 1311, requiring Senate confirmation proceedings for all judicial continuations seems to be that it will increase the authority of the Senate over our Judges and Justices. If these changes are to be mandated, then the public has a right to be informed of the reasons that justify such a major change; and, the benefits the public will derive from these changes.

From personal experience as a Circuit Court Judge, the process of applying for continuation for a Judge or Justice for an additional term of office is very arduous and takes a substantial amount of extra time, effort and Judiciary resources. The Hawaii Judicial Ethics Commission has advised that a sitting Judge or Justice is entitled to use Judiciary resources to prepare and submit his or her continuation application. Judicial continuation is a very important, career critical, evolution for a Judge or Justice. 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 applicant and his or her family. If Senate review of Judicial continuation is to be required, a Judge or Justice will be compelled to, as a practical matter, in addition to hours of preparation for and attendance at hearings before the JSC, make the effort to meet/introduce himself or herself to each member of the Senate. The reason for this is that the membership of the Senate changes regularly and Judges and Justices cannot rely upon

having met or be remembered by Hawaii's Senators whom they may have met during their initial Judicial application process. Judges and Justices will not take the chance that Senators will not be familiar with the Judge or Justice from their previous application for Judicial service, or their other contributions, such as service on Judiciary Committees, Drug Court, Veteran's Court, Environmental Court, and the like. From my own personal experience, flying to Honolulu to meet each Senator is a very expensive and time-consuming ordeal, especially for a Neighbor Island Judge. A Honolulu based Judge or Justice can basically "walk across the street", but a Neighbor Island Judge must fly to Honolulu and spend, basically, at least one whole day to meet as many Senators as possible. For a Judge or Justice seeking continuation this is time simply taken away from service to the public seeking justice in their Court, and "down time" for their Courtroom. If a Judge or Justice must be away, unfortunately the delivery of justice comes to a halt. Under current law, there are no Per Diem Judges who can "substitute" for Judges and Justices (except in District and Family Court) who will of necessity be preoccupied and away from their Courts. While it may appear, superficially, that requiring Senate review of judicial continuations serves principles of democracy and transparency, in reality the Bill will simply impose an extra layer of unnecessary bureaucracy and delay on an otherwise very efficient and effective process which has been in place with no problems since 1978. Ultimately, HB 1311 will result in short-falls in meeting the justice needs of Hawaii citizens and a waste of valuable resources. In Hawaii we already have a serious short-fall in providing Court access and justice for our citizens. The Hawaii Judiciary, under the leadership of our Chief Justice, has in recent years very effectively promoted new programs to provide legal services to unserved citizens of Hawaii, but there are still many problems of access to justice in Hawaii that are a continuing problem. The additional burdens this HB 1311 would place upon the public and the deferral of justice that will certainly occur are unwarranted and are not justified by any benefit described or claimed for the Bill.

Since 1978, we in Hawaii have had a proven, high quality and professional Judicial Selection Commission (JSC) that has successfully processed judicial continuations (as well as initial vetting of judicial applications), without additional Senate review or action. There has been a minimum of delay or interference with the services that our Judges and Justices provide to the People of Hawaii and the quality of Judges and Justices who have been continued in office has been uniformly the very highest. Because I had the honor to serve for so many years as a Hawaii Judge, and because I currently serve on the Hawaii Judicial Evaluation Review Panel, and was "continued in office" myself in Second Circuit, I personally know most of the Judges and Justices who have been approved for continuation in office by the JSC during the past 15 years or so. Because of this personal and professional experience and opportunity, I can personally attest that our Judges and Justices are truly excellent Jurists and we are very fortunate to have attracted such a group of high-quality lawyers to serve as members of our Judiciary. I believe it is unnecessary and would be a serious mistake to pass this Bill and require additional review by our Senate to the proven continuation process we already have had in place and functioning since 1978.

Our JSC has only one mission and it has proven itself to be highly competent in carrying out its mission. On the other hand, our Hawaii Senate, together with our House of

Representatives, has many other duties and responsibilities of lawmaking and ensuring that the People of Hawaii are governed by and under the best and most just legal structure possible and ensuring that Hawaii's legal structure is updated and modified in the best interests of our People. Together with its other important lawmaking and other duties to our citizens, one can imagine, given the number of Judges and Justices in Hawaii, probably all of whom will seek continuation in office (likely all 80 or most Judges and Justices over time), HB 1311 would create a large, additional, time-consuming responsibility to the Senate's already existing responsibilities for *initial* judicial confirmations.

Our JSC is effectively structured to efficiently and competently represent the public, as well as all branches of Hawaii government. Our JSC has proven itself to be highly representative of our Island communities as a whole, including our Neighbor Island communities. It is staffed by persons whose specific purpose and expertise is to vet, help select; and, if warranted, vote to continue our Judges and Justices for an additional term in office. As a Circuit Court Judge, and especially when serving as Chief Judge of Second Circuit, I have had many opportunities to meet with and work with our Judicial Selection Commission. Just as all Judges and Justices, I applied to and appeared before our Commission for initial vetting and judicial selection; and, 10 years later, I requested continuation to a second 10-year term of office. In addition, the Commission often solicited my opinion about initial judicial applicants as well as continuation applications, for Judges and Justices all over our State. In my experience, the JSC members spend a great deal of time-consuming outreach, research and investigation in order to gather information, both public and private, including interviews with members of the public, lawyers *and* judiciary staff, about the performance and reputation of our Judges and Justices. The JSC does this in order to thoroughly vet the past performance of our Judges and Justices and their individual fitness to continue in Judicial Office. During the time I was applying for continuation as a Circuit Court Judge, members of the JSC actually came to my Court and observed while I presided over Court proceedings. I was impressed that they would take the time to be so thorough and complete in their investigations. I have always been impressed with the serious and professional manner in which the JSC members carry out their duties and responsibilities. Of course, like our Senate, the JSC membership changes from time to time, but it has always been composed of distinguished, highly experienced lawyers and distinguished lay-members who are highly competent and professional. Everyone who serves on the JSC takes their responsibility to the People of Hawaii very seriously, just as I did as a Circuit Court Judge. I think it is important to note here that of the 9 JSC members, no more than 4 can be lawyers; 2 are selected by our Governor, 2 by the Speaker of our House of Representatives, 2 by the President of our Senate, 1 by our Chief Justice and 2 by the attorneys of Hawaii. I don't know how one could make a Commission more "representative" of the people of Hawaii than is our JSC. The JSC is obviously one of the most important Commissions in our State of Hawaii and I have always been very impressed with its work and proud that our State selects our Judges and Justices based upon merit rather than by an election. Judges and Justices are selected in states like California by vote; I have never understood how a voting selection process could be in the best interests of a state's citizens vs. a merit selection process such as we have here in Hawaii. I am also a member of the State Bar of California and I have always suspected that the best judges are not selected by the California election process. We

have the best system and are blessed to have a truly excellent Judicial Selection Commission; and, dedicated, concerned citizens who are diversely selected to serve on the Commission, as free as humanly possible from political influence and/or any kind of human bias.

It is also important to point out that in order to carry out its duties, the JSC, especially when considering Neighbor Island Judicial candidates, both for initial appointment and for judicial continuation applications, travels to each of our Islands in order to in order to carry out its duties 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, fair (both in actual fact and in appearance, especially to the Judges involved) and allows the Commission to gather information and interview persons knowledgeable about the performance and reputation of the Judge locally. This practice also, very importantly, promotes the minimum disruption of the Judge's court calendar and the regular business of the Court, that is, providing justice for our citizens. In this way, the justice needs of the public are the least negatively impacted by this process. Personally, I really appreciated this and believed I was being treated fairly. The presence of the JSC onsite is especially important for neighbor-Island Judges and is a confidence-builder for both the Judge and the community in which he or she is serving.

Very importantly, please consider in deciding whether or not you decide to vote/support for or against HB 1311, the fact that when our Judges and Justices are seeking continuation in office they are very much *not* "unknown quantities" regarding their past actual judicial performance, reputation on the Bench, suitability for continuing in judicial office and continued performance of their judicial duties in service to the citizens of Hawaii. It is important to consider that when a lawyer initially applies for Judicial office, neither the JSC, Governor/Chief Justice or Senate really knows whether the applicant lawyer can actually serve successfully as a Judge or Justice. I believe that this fact completely justifies the exhaustive vetting and examination of each person who applies to serve as a Judge or Justice, including confirmation by our Senate. These decisions are obviously very important for the citizens of our State. A Judge or Justice has enormous power and responsibilities; only our best and most experienced lawyers should be considered for selection to these important positions; I completely agree! Sometimes, as we all know, the decisions of our Judges or our Justices are very important and can even effect citizens of our entire United States. I can share from many years of experience that being a successful Judge or Justice requires many qualities that are very different from those which might make a person a very successful lawyer. No one can actually know whether a particular applicant actually possesses these very important personal qualities until he or she assumes the important responsibilities of Judicial Office. That is, these are personal qualities that are "unknowable", at that point. No one can really know. For instance, how can we know whether the lawyer applying to serve Hawaii as a Judge or Justice can be "decisive" (some Judges cannot make a decision, the basic skill of a Judge!), whether they will be lazy or procrastinate in issuing Orders of the Court (Judges who cannot do this, I know, are not, should not, and have not been continued in office by the JSC), trade on the prestige of their Office for personal influence or benefit, how will they treat judiciary staff, will they have the initiative or dedication to make "extra" contributions (like serve on a Committee, start a Drug Court or Veteran's Court or Environmental Court and gain the knowledge to

accomplish such benefits for Hawaii), are they a leader (I believe Judges and Justices *should* be leaders in our communities, we need them!), will keep current on the latest appellate court decisions, will they have the ability to relate to and take care of a jury (very important for a Circuit Court Judge), will they have the ability to relate to or talk to citizens who come before Small Claims Court, will they possess the empathy to help citizens in difficult Family Court cases, or will they actually possess other "judicial" qualities that are very important for a Hawaii Judge or Justice to possess, but which may not be actually relevant to the every-day practice of law as a lawyer in the community? Serving as a Judge is a very different experience and responsibility from practicing law as a lawyer. Serving as a Judge is an experience which a person/lawyer can only truly appreciate and understand after one actually presides on the Bench over cases that are very important for the citizens involved, for the lawyers involved and for our Hawaii communities. In criminal cases; murder, rape, child abuse; very serious community cases.

Contrast the above with a situation where a Judge or Justice is applying to be continued in Judicial Office. It is very different situation when a Judge or Justice applies for continuation in Judicial Office for an additional term of office. Literally, *everything* is known about the service, decisions and judicial temperament of the Judge or Justice displayed during their previous term of service. All of this information is available to and examined by the JSC *before* deciding whether to vote to continue a Judge or Justice for another term of Judicial Office. Given the importance to the People of the State of Hawaii about who serve as our Judges or Justices and exercise the power of Judicial Office, this is as it should be. I question whether, if HB 1311 is enacted, the Senate vetting process will actually be capable of adding anything of value, and not be counteractive, to this already very efficient, thorough and well established JSC process and decision making for continuation of Judges and Justices. I doubt it. And, the process proposed in HB 1311 will most likely have a negative effect over all. HB1311 is actually really unnecessary, it will only negatively prolong the process of judicial continuation, and it will not add value to this very important process.

I would like to share (I hope it will be helpful) that when I applied for continuation as a Circuit Court Judge, I was required by the JSC to provide information about literally everything I had done as a Circuit Court Judge, and as Chief Judge of Second Circuit (which included administrative supervision of Second Circuit), during the previous 10 years that I had served. This was very exhaustive; it took literally hundreds of hours and included information about every case I had presided over that had been appealed, comments by lawyers who appeared in my Court, comments from the Public, comments from Jurors, the results of appeals, copies of any written decisions, Committees I had served upon, any extra-Judicial activities, my personal financial information, etc., etc. The vetting process was very similar to the information required for my initial application for appointment to Circuit Court except, in addition, it also included my actual service as a Circuit Judge. Everything that could be relevant to my past service in Circuit Court and my application for judicial continuation in office was required and reviewed. It was, literally, the most exhaustive production of professional and personal information I had ever searched for and provided. And, for reference, I had held a *Secret Security Clearance* from the US Government as a US Naval Officer in the Judge Advocate General's Corps. (qualified US

General Courts Martial Judge serving as a trial judge in the US Navy & Marine Corps. Trial Judiciary) and a former US Marine Corps. Officer Candidate!

As a result of its very thorough information requirements and investigations, the JSC has available to it a wealth of information, in great detail, about the *actual service* of all Hawaii Judges and Justices, as well as information about 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 for judicial counseling of every Hawaii Judge and Justice during their term of service. Generally, these performance evaluations occur every two years and, in addition, when a Judge or Justice is approaching retention. Since I serve on the Hawaii Judicial Evaluation Review Panel I can share that these are very detailed, provide a great deal of information about the Judge's performance, including comments from lawyers who have appeared before the particular Judge. All of these reports are available to the JSC when it considers a continuation application from a Judge or Justice. On the Judicial Evaluation Review Panel we use these reports to provide valuable "feed-back" to Judges and Justices in order to help them to evaluate their performance and perceptions about them of lawyers and the public. I, personally, as a Circuit Court Judge, participated and received evaluations from this Panel. That is, I was on the "receiving end" of these evaluations. They provided extremely helpful feedback. Serving as a Judge or Justice is, by its nature, an "isolating" experience; it is very valuable to have opportunity to receive direct feedback about one's judicial performance, candidly, in a helpful and instructive environment. Otherwise, a Judge or Justice is unlikely to receive or be exposed to valid, critical feedback. Judges and Justices need this kind of feedback and it is very important that the Hawaii Judiciary has created this opportunity. In addition, this kind of feedback is very helpful to Judges and Justices; and, it can literally make the difference when one later applies for continuation in office. It is easy, believe it or not, to be completely unaware of aspects of one's behavior on the Bench that may be perceived negatively by lawyers or the public of which the Judge or Justice is completely unaware, because of the unique isolation that results from serving in Judicial Office. In fact, former Chief Justice Ronald T.Y. Moon used to caution new Judges about what he referred to as this "Black Mumu Syndrome" effect; which was very good advice for new Judges! This is an effect that is not well recognized by the public, certainly, but it is important for Judges and Justices to recognize. The JSC, again, has access all of this information as a part of its investigation and evaluation of judicial continuation applications. Public input is, of course, also solicited about Judge and Justice performance during this process. Thus, the members of the JSC are uniquely knowledgeable about the service of the applicant-Judge at the point in time during which their continuation in office is under consideration. I think, the JSC is far better informed than the busy members of the Senate ever could be and I believe that it would be unfair to place this additional burden upon the branch of our Legislature that is so important to ensuring that the laws of the State of Hawaii are up to date, fair and just.

Closing: Thank so much for taking the time to read my comments on HB 1311. My comments (which I apologize are perhaps too lengthy) arguing in opposition HB 1311 are heartfelt and sincere. I believe that requiring the addition of Senate confirmation proceedings for judicial

continuations in Hawaii is not a good idea. Such an additional process of confirmation - no action, is not necessary in order to ensure that our State is served by the best Judges and Justices we can select. To enact HB 1311 would be a mistake that we will all regret. HB 1311 will clearly not add any value over the existing excellent and highly experienced JSC continuation process, which was put in place in the wisdom of the Hawaii Constitutional Convention of 1978. This is a proven process that has produced an excellent cadre of Judges and Justices for the State of Hawaii. Our current JSC process works very well, and there has been no convincing argument or finding that could justify changing the extant process. The negative impact that HB 1311 will certainly have upon the delivery and delay of justice services to the People of Hawaii during the extended proposed continuation process is obvious. Our JSC has competently processed judicial continuation applications for many years and has produced a really excellent Judiciary. There is no need for our current procedure to change and deflect the Senate from its more important and unique lawmaking responsibilities to the People of Hawaii. Finally, the only effect of this Bill would be to delay and complicate the providing of justice, deter outstanding lawyers from pursuing follow-on judicial careers, and the processing of continuation of competent Judges and Justices unnecessarily. Our Senate, and our House of Representatives already have very many important duties and responsibilities of lawmaking for all of us as Hawaii citizens. The 1978 Constitutional Convention came up with an excellent process that has worked very well, and I highly recommend that it not be changed or altered. For the reasons stated above, I recommend a "no vote" on HB 1311. I would be very happy to provide further information, thoughts or experiences of our judicial selection and continuation process to anyone who might wish to contact me. jsraffetto@aol.com

Thank you so much for this opportunity to be of assistance.

Sincerely,

Shackley F. Raffetto
Chief Judge (Ret.), Second Circuit, State of Hawaii

HB-1311

Submitted on: 2/11/2019 2:34:58 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Craig P. Wagnild	Individual	Oppose	No

Comments:

The current system for judicial retention is a long-standing and effective balance of interests put in place as a result of the 1978 Constitutional Convention. It protects the judiciary and those who serve in it from undue political pressure while ensuring oversight by those who are best able to review and comment on the performance of our judges. While there is no perfect system, the proposed changes suggested by this bill would have significant negative effects on our judiciary and those who serve in it, as well as a potential chilling effect on those who may consider serving as a judge. The primary problem is that the changes sought by this bill would significantly undermine the judiciary's independence and turn judicial retention into a political process. The very essence of an independent judiciary is thwarted when judges are forced to have their decisions second-guessed by politicians as a part of the process that decides whether they can continue to serve in the judiciary. We need an independent and accountable judiciary - one that is free from corruption and political influence. Where have I heard this before? Oh yeah, the Constitution, as well as just about every book written about the separation of powers and an independent judicial branch charged with interpreting the laws. Every one of our elected representatives should break out their copy of the Federalist Papers and remind themselves and their colleagues why this bill is a bad idea.

Craig P. Wagnild
Bays Lung Rose Holma
2013 President, Hawaii State Bar Association

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

c/o 841 Bishop Street, Suite 480
Honolulu, Hawaii 96813

CHAIR
DYAN K. MITSUYAMA
dyan@mitsuyamaandrebman.com

VICE-CHAIR / CHAIR-ELECT
MICHELLE MOORHEAD
michelle.moorhead@legalaidhawaii.org

SECRETARY
ERIN M. KOBAYASHI
e.kobayashi@hifamlaw.com

TREASURER
NAOKO MIYAMOTO
n.miyamoto@hifamlaw.com

February 11, 2019

To: Representative Chris Lee, Chair
Representative Joy San Buenaventura,
Vice-Chair
House Judiciary Committee

Representative Sylvia Luke, Chair
Representative Ty J.K. Cullen, Vice Chair
House Finance Committee

Fr: DYAN K. MITSUYAMA, Chair
MICHELLE K. MOORHEAD, Vice-Chair
Family Law Section of the Hawaii State Bar Association

HEARING DATE: February 12, 2019 4:00 p.m.

Re: Testimony in Opposition to HB 1311: Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges are Appointed, Consented to, and Retained.

Dear Committee Chairs Lee and Luke, Vice Committee Chairs San Buenaventura and Cullen, and fellow distinguished committee members:

It appears this bill seeks 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, comprised of approximately 145 members state-wide, opposed this measure in the past 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 HB1311.

Sincerely,

/s/Dyan K. Mitsuyama

Dyan K. Mitsuyama, Chair, Family Law Section
Michelle K. Moorhead, 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.*

Testimony to the House Committee on Judiciary
Regarding HB No. 1311
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair
Tuesday, February 12, 2019, 4:00 p.m.
State Capitol, Conference Room 325
Respectfully Submitted By Richard K. Perkins, Circuit Judge (Retired)

Thank you for the opportunity to comment on HB No. 1311, 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 testimony is submitted in opposition to HB No. 1311.

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 forty years and are now potentially subject to radical change pursuant to HB No. 1311. 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 position taken by the Judiciary in its testimonial submission on this bill. Beyond this, the only thing I can think of that might be relevant to the Committee's deliberations on the bill 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, HB No. 1311 does 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 HB No. 1311 as a rationale for transferring ultimate authority over retention decisions from the Judicial Selection Commission to the Senate, as others have argued in the past, 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, HB No. 1311 be rejected for the reasons given in the testimony on that bill submitted by the Judiciary.

TRISHA Y. NAKAMURA, ESQ.
PO Box 61619, Honolulu, Hawai'i 96839
(808) 741-3502 • trishanakamura@gmail.com

To: The Honorable Chris Lee, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
Honorable Members, State House Committee on Judiciary
Fr: Trisha Y. Nakamura, Esq.
Date: February 11, 2019
Re: **Strong Opposition to HB 1311**

Hrg: Tues., Feb. 12, 2019 at 4 p.m. Rm 325

Aloha Chair Lee and Members of the Committee on Judiciary,

I strongly oppose House Bill 1311 (HB1311) which proposes a constitutional amendment to unnecessarily and dramatically change to the already-stringent process by which Hawaii State District, Circuit, and Appellate judges and justices are retained once their term has ended.

The proposed language to terminate the authority of the Judicial Selection Commission (JSC) to make decisions on whether judges and justices are retained and replace such by State Senate action is of particular concern. One of the strengths of our State is our strong Constitution and existing processes to ensure the courts are free from the political pressures and influences that elected judges face.

As an attorney who has represented thousands of clients in our court system and appeared before our courts (District, Circuit, and the Supreme Court in) in criminal and criminal family matters, I know how important a neutral and fair decisionmaker was in the administration of justice. Frequently, the judges I appeared before were faced with difficult questions that impacted people's lives: whether to lower bail for an indigent client or whether to sentence a college student found guilty of a crime to jail. The work of sitting on the bench is challenging enough. Our democratic process and the citizens who depend on the independence of the three branches of government can ill-afford to have our courts subjected to outside political influences. Our courts should not be faced with any appearance of impropriety.

There are already strong processes in place for judges have their work reviewed and evaluated. The Judiciary solicits input from attorneys on judges facing evaluation; the Hawaii State Bar Association solicits comments from its members to share with the JSC. As an attorney, I looked forward to those opportunities to comment and freely did so. The process works: not all judges are retained and judges do take note of their evaluations.

Please continue to protect our citizenry and democracy. Do not weaken the Constitution that so many have worked to keep strong. Please do not send this measure forward.

Thank you for the opportunity to provide comment.

Testimony to the House Committee on Judiciary
Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 15, 2019 4:00 PM
State Capitol, Conference Room 325

by

Ronald Ibarra
Kailua-Kona, HI 96740
jri6501@yahoo.com

Bill No. and Title: House Bill No. 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained.

Position: I respectfully oppose House Bill No. 1311.

Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary:

My name is Ronald Ibarra and I retired as a judge in the Third Circuit after twenty-eight years. I was the Administrative and Chief Judge for twenty-four years. Prior to my appointment to the bench, I served as the Managing Director, Corporation Counsel and Deputy Prosecutor for Hawaii County. I was also in private practice.

I respectfully oppose H.B. 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the manner in which justices and judges are appointed, consented to and retained. There are many reasons why I oppose H.B. 1311, which have been covered by the Judiciary and Hawaii State Bar Association. I will only address my professional experience in this testimony.

I have presided over many high publicity, controversial cases throughout my twenty-eight years. I have always strived to base my decisions on the law, free of outside pressure or influences, or whether parties were rich or poor. There were many times when my courtroom was filled with interested spectators, including people with influence in the community or a media reporter being present. This can be a high public interest case like murder, sexual assault or even a civil environmental or land use case.

I can sincerely say that because of our current system of retaining judges allowing for judicial independence, I was not influenced by special interests or politics in making tough decisions.

I have heard from my former colleagues in states where judges are subject to political influences that they hope they are not assigned a case with controversial issues prior to their retention election.

House Bill No. 1311 would undermine the independence of Hawaii's judiciary by changing the retention system from one based on competency to one that would be susceptible to political considerations.

During my twenty-eight years, I appeared twice before the Judicial Selection Commission (JSC) for retention. I also served as a resource for judicial appointments and retention. The JSC had voluminous information regarding my ten-year performance on the bench. Those confidential comments were from attorneys, parties, jurors, and even lay people in the community. I was able to respond candidly to any issue raised without concerns that this would be in the news. Often times, there are comments from attorneys and/or parties who have disagreed with my decisions.

House Bill No. 1311 would have a chilling effect on attorneys, parties, and jurors if their comments regarding a judge is not kept confidential for fear of retaliation.

Hawaii's system in the appointment and retention of justices and judges is not perfect, but the system is working well. Judges are selected based on merit and retained without regard to political considerations.

I respectfully oppose H.B. 1311.

Thank you for the opportunity to testify.

RICHARD NAIWIEHA WURDEMAN
Attorney at Law, A Law Corporation

Pauahi Tower, Suite 720, 1003 Bishop Street, Honolulu, Hawaii 96813
Telephone: (808) 536-0633 * Facsimile: (808) 536-0634
e-mail: rnwurdeman@rnwlaw.com

February 11, 2019

Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair
Members of the House Committee on Judiciary

RE: House Bill No. 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges are Appointed, Consented To, and Retained.

Dear Chair Lee and Members of the House Committee on Judiciary:

I am writing to you in **support** of House Bill No. 1311, Proposing Amendments to Article VI of the constitution of the State of Hawaii to amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained.

As an attorney with an extensive litigation background and who has appeared before justices and judges at every level in the State courts as well as in every circuit for over the last twenty-five (25) years, I believe I have a pretty comprehensive familiarity with the subject. I would like to first say that a vast majority of the judges are very dedicated jurists, who are fair and impartial, who render thoughtful and well-reasoned decisions, and who maintain an exemplary level of judicial temperament. However, like in any other process, there is always room for improvement, and contrary to the Judiciary's position and its opposition to the instant bill, I believe the revised process will actually allow for more transparency in the review of judges at the time of retention, which I believe is lacking in the confidential process that is currently followed through the Judicial Selection Commission. I believe that transparency will increase, rather than decrease, the public confidence in our judiciary.

I also respectfully disagree with the Judiciary's assertion that Senate confirmation in the retention process will somehow affect the independence of the judiciary. Justices and judges are already sworn to be independent and fair and impartial and the confirmation process would not and should not change that commitment and oath that our justices and judges take. It is not the process, but individual jurists who might allow their decisions to be potentially influenced by an upcoming confirmation in a retention process. I actually believe that a vast majority of judges would retain their independence, fairness, impartiality, and ethical commitments, regardless of any

Representative Chris Lee, Chair
Members of the House Committee on Judiciary
February 11, 2019
Page -2-

scrutiny in a confirmation process and a renewed process, as called for in the instant bill, would not affect those vast majority of jurists who abide by and who take very seriously the oath to which they are sworn.

Please do not hesitate to contact me should you need any further information or comment.

Thank you for your consideration.

Respectfully submitted.

Very truly yours,

/s/ Richard Naiwieha Wurdeman
Richard Naiwieha Wurdeman

Testimony to the House Committee on Judiciary

Rep., Chris Lee, Chair

Rep. San Buenaventura, Vice Chair

Tuesday, February 12, 2019 4:00 PM

State Capitol, Conference Room 325

**HB1311, PROPOSING AMENDMENTS TO ARTICLE VI OF THE CONSTITUTION OF
THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND
JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.**

I humbly submit testimony in opposition to that part of this bill which authorizes the senate to approve or reject subsequent terms of office for justices and judges. The current and long standing practice of the State Judicial Selection Commission deciding on retention of the judges is sound and preserves judicial independence. Hawaii should be proud of having this practice for retention of judges. The current practice is thorough, comprehensive, fair and provides access to the public to input. This practice is free from politics and a strong example of judicial independence.

Respectfully,

Walter S. Kirimitsu

Former member of the Judicial Selection Commission

Former State Intermediate Court of Appeals Court Judge

Testimony to the House Committee on Judiciary
Rep., Chris Lee, Chair
Rep. San Buenaventura, Vice Chair

Tuesday, February 12, 2019 4:00 PM
State Capitol, Conference Room 325

HB1311

I am Ronald T.Y. Moon, former Chief Justice of The Supreme Court of Hawai'i (1993–2010). I strongly oppose HB1311.

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 the decision.

The 1978 Constitutional Convention, in establishing the Commission on Judicial Conduct (CJC) 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 sources 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 HB1311.

February 12, 2019

To: The Honorable Chris Lee, Chair
House Committee on Judiciary

From: Marie N. Milks, Judge (retired)

Re: HB1311 - Hearing scheduled for February 12, 2019 at 4:00 p.m., Room 325

My name is Marie N. Milks, and I am providing this written statement, in **strong opposition** to HB 1311.

Regrettably, I am teaching a class at the William S. Richardson School of Law at the same time as the scheduled hearing in this matter and therefore am unable to 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 any others 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, on seeking retention, the public is included in the review of judicial performance, in addition to ongoing review that is rigorous and robust. In addition, decisions are reviewed through an appellate process and no decision is made without transparency and the 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 all, and 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 knowledge that all matters, warts and all, can be brought to them 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 can be contacted at 808 - 226-5633.

Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair
Committee on Judiciary
House of Representatives of the State of Hawai'i

Lance D. Collins, Ph.D
Law Office of Lance D. Collins

Tuesday, February 12, 2019

Opposition to HB 1311 Proposing Amendments to Article VI of the Constitution

I strongly oppose this bill.

Proposing amendments to the constitution signify that there is some aspect of the institutional structure of government that needs change. This bill makes findings designed to warrant making such a proposal.

It finds: (1) the Senate is not involved in the process of judicial retention but involving it would promote transparency, (2) the process of judicial retention is private and not public, (3) the decision to retain is final and appealable, and (4) the confirmation process for district judges and circuit and appellate judges are not identical.

The proposed constitution attempts to resolve this by amending the constitution to: (1) involve the Senate in the retention process, (2) increase the time of the confirmation process from 60 days to 180 days, and (3) make the district court judge confirmation process the same as other judicial offices.

There is no evidence that adding the Senate to the retention process will promote anything other than formal transparency. However, there is strong evidence that doing so will politicize the retention process thereby politicizing the judiciary. The Senate would also not have access to the vast amount of confidential information collected by the commission during the retention process.

Hawai'i follows a modified version of the Missouri Plan that was developed to move judicial selection from political considerations to merit based considerations.

The 1978 Constitutional Convention settled on our current structure and composition of the commission because "such a group would be able to provide the necessary divergence of interests and views to be truly representative of the public and ensure that the selection process be as nonpartisan as possible." Stand. Comm. Rep. No. 52 in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 625 (1980)

Qualifications and limitations on commissioners were "intended [to] serve as a limitation on the partisan political influence on commission members... aimed at the elimination of all possible conflicts of interest which might violate the independent action of the commission or any of the individual members." Id. at 626 "It is intended that all these requirements work to preserve the independence and credibility of the commission." Id.

This merit system of selecting judges came from the same political movements in American life that sought to move the civil service from the spoils system to a merit based selection and retention system which is also mandated by our constitution. The main criticism of the Missouri Plan is that power over judicial appointments is transferred from the electorate to the bar association. However, in our state, the judicial selection commission has a majority of members who are not lawyers and a supermajority that are appointed by the political branches of government. The minimum number of members of the commission that are required to be lawyers is the lowest in the United States. Other than Maryland and Massachusetts that have no maximum, Hawaii also has the lowest maximum number of lawyers permitted to serve on the commission than any other state.

In 1994, the electorate decreased the number of commissioners appointed by the chief justice and increased the number of commissioners appointed by the House and Senate.

Our judicial selection commission has made great strides towards moving judicial selection based upon political or other considerations to one based upon considerations of merit. Inserting the Senate in the process of retention merely reinjects politics into a process that was carefully crafted to minimize and when possible eliminate such influences..

Another consideration that counsels against this change is that requiring neighbor island judges to take time off to fly to Honolulu to meet with Senators regarding their retention is an unfair and additional financial burden to those judges and the communities that they serve.

The argument that the determination to retain a judge is final and not appealable does not itself justify or warrant adding the Senate to the process. The decision of the Senate would similarly be final and not appealable. Transferring the final decision on retention to Senate does not alter what is found to purportedly be a problem which is that the retention decision is final and not appealable. The only difference is that it makes retention the object of the political branches and thereby politicizes the process and that final decision by the Senate will be based upon not having all the confidential information obtained by the commission.

Finally, there appears to be a reason for the difference between district court nominations and other judicial nominations. Whereas the governor appoints circuit and appellate jurists, the chief justice appoints district court judges. The governor is popularly elected and from the political branches whereas the chief justice is not. The dissymmetry between the nomination process therefore appears to reflect that difference. I do not have a position on this proposed change, but note that by making the confirmation process symmetrical in fact removes some power from the political branches in the process of confirming district court judges which appears to be at odds with the purported justification for adding Senate involvement in the retention process

Thank you for this opportunity to testify.

//

SUSAN M. ICHINOSE

Attorney at Law

February 11, 2019

The Hon. Chris Lee, Chair
The Hon. Joy A. San Buenaventura, Vice Chair
Hon. Members, House Committee on Judiciary

**Re: Bill No. and Title: House Bill No. 1311
Proposing Amendments to Article VI of the Constitution of the State of
Hawai'i to amend the Manner in which Justices and Judges are Appointed,
Consented to, and Retained.**

Hearing Date: Tuesday, February 11, 2019
Time: 4:00 p.m.
Place: Conference Room 325
State Capitol
415 South Beretania Street

Dear Representatives Lee, San Buenaventura, and Members of the House
Committee on Judiciary:

This testimony is being submitted for your consideration with regard to House Bill
No. 1311, which proposes to significantly revise, if not gut the spirit and intent of,
Article VI of the Constitution of the State of Hawai'i.

As you know, the State Constitution follows the path of the U.S. Constitution by
creating and empowering three separate branches of government to exercise a
system of checks and balances. In both Federal and State systems, no one branch is
designed to exercise more power than the other two.

In Hawai'i, in fact, the Legislative and Executive branches already have
significantly greater influence in the area of judicial selection than in the Federal
system. Hawai'i judges are appointed by the Governor and the Chief Justice to
limited terms rather than for life. While their power of appointment is constrained
insofar as they can only appoint from a list of names submitted by the Judicial
Selection Commission (JSC), the power of the Senate to advise and consent to their
appointments has never been limited.

The constitutional convention of 1978 approved an amendment calling for the
establishment of the Judicial Selection Commission to select judges based "solely on
their qualifications and not on political patronage," and the amendment was ratified

| P. O. Box
| 240749

| Honolulu, HI
| 96824-0749

| Phone
| 808.377.8800

| E-Mail
| smiaalaw@gmail.com

The Hon. Chris Lee, Chair
The Hon. Joy A. San Buenaventura, Vice Chair
Members of the House Committee on Judiciary
February 11, 2019
Page 2

by voters later that year. This move was seen as an answer to the highly political, insider nature of judicial appointments that had resulted in, *inter alia*, major scandals and injustice (*e.g.*, Judge Harold Shintaku). Two members of the nine-member JSC are lawyers elected by their peers to six-year, non-renewable terms; two other lawyers and five lay members are selected by either the Governor, the House Speaker, or the President of the Senate to similar six-year, non-renewable terms. All members are unpaid. They meet regularly to consider, interview, and vote on applicants for judicial positions. And because five members must be laypeople, non-lawyers always comprise the majority on the nine-member body. The Constitutional Convention determined that this ratio would provide a layer of insulation from politics.

Unlike the Governor and the Chief Justice, whose power of nomination now is limited to lists propounded by the JSC, the Senate has never been constrained by the present system from performing its traditional role. It has been, and continues to be, empowered to advise and consent to the appointment of judges. What House Bill 1311 proposes to do is to significantly enhance that power, and **re-inject politics into judicial appointments and retentions**. Moreover, it is a power that has never before existed in the Hawai`i Legislature. House Bill 1311 *creates* a power in politicians that no constitutional authority has ever before proposed.

Hawai`i's merit selection process to date has been praised by national juridical scholars as one of the most, if not the most, fair and merit-based systems in the 50 states. I am an attorney, and a former Chair of the Judicial Selection Commission, having been elected by members of the Bar to serve, 2007-2013. I have thus seen the system work; and it works exceedingly well. Please do not undo that system. Please do not pass House Bill 1311.

Mahalo, me ke Aloha Pumehana,



HB-1311

Submitted on: 2/11/2019 5:30:44 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Patricia Blair	Individual	Oppose	No

Comments:

LAW OFFICE OF HOWARD K. K. LUKE

ATTORNEY AT LAW
DAVIES PACIFIC CENTER
SUITE 410
841 BISHOP STREET
HONOLULU, HAWAII 96813

HOWARD K. K. LUKE
howard@hkkluke.com

TEL: (808) 545-5000
FAX: (808) 523-9137

February 11, 2019

Representative Christopher K. C. Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair
House Committee on Judiciary

Hearing: February 12, 2019

Re: Opposition to H.B. No. 1311

Dear Chair Lee, Vice Chair San Buenaventura, and fellow Members of the House Committee on Judiciary,

I am writing in strong opposition to House Bill 1311.

I respectfully ask you to consider what our Constitutional Convention of 1978 intended, and moreover what was accomplished, by the creation of the Judicial Selection Commission as a critical component in the selection and retention of our judges and justices. Over forty years have elapsed since a truly independent judiciary, as free as possible from real or perceived political influence, was envisioned by the delegates to the convention. I believe the test of time has not only proven that our system works; time and again it has been acknowledged not only in Hawai'i but in various parts of our nation, as perhaps the fairest and most comprehensively successful model in the selection and retention of judges.

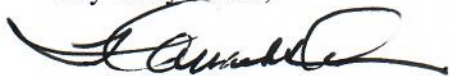
As I write this, I am aware that so many other voices have been raised in ardent opposition to the companion bill proposed by the senate, in SB 673. SB 673 provides "the senate may vote to consent to or reject the petition" for retention of judicial office. Identical language is found in HB 1311, at page 7, lines 18-19.

If the legislature had no voice in the initial review of judicial candidacy, I would be concerned, and would support appropriate legislative efforts to be part of the selection process. But it is clear that the members of our Constitutional Convention wanted to be sure that both the state senate and house of representatives had representation on the Judicial Selection Commission. Consequently, of the nine members of the commission, two are selected by the Senate President, and two more by the Speaker of the House. One member is selected by the judiciary through the Chief Justice of the Supreme Court, and two by the executive branch through the governor. Thus, of the three co-equal branches of government, the legislative branch has four members sitting on the Judicial Selection Commission, the executive branch has two, and the judiciary has one. Or, put another way, the legislature is represented by more members on the Judicial Selection Commission than the other two co-equal branches of government combined. This, to my mind, is sufficient representation by the legislature in the initial judicial selection process, and in the retention of judges and justices who wish to continue to serve.

I have served several terms as a member of the Board of Directors of the Hawaii State Bar Association (HSBA) in the past, and have been honored to serve as president of the HSBA in 2018. While I write in my individual capacity and not as a representative of any organization or entity, I can assure you that my past experience has convinced me that the current selection and retention process, with the extraordinary conscientiousness and thorough vetting by the Judicial Selection Commission, the open invitation for input from all members of our bar association by the HSBA, and with the existing procedure relating to advice and consent by the senate, should not be tampered with. No system for the selection and retention of judges may ever be perfect, but what we now have is optimal in maximizing the likelihood of obtaining the best candidates for judicial office, and minimizing the likelihood of political intrusion into the selection and retention of the men and women who aspire to continue to serve the ends of justice.

Mahalo for considering my testimony on House Bill 1311.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Howard K. K. Luke". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Howard K. K. Luke, Esq.

From: evelyn Lance <lance.evelyn@gmail.com>
Sent: Monday, February 11, 2019 3:57 PM
To: JUDtestimony
Subject: HR 1311

TO: HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY
Chris Lee, Chair

Re: HB 1311, Hearing February 12th, 4:00 PM

I am opposed to the provision in HB 1311 seeking to amend Article VI, section 3(3) of the state's Constitution "to authorize the Senate to approve or reject subsequent terms of office for a justice or judge" when seeking retention for another term for the following reasons.

I am a retired judge, having served in the Family Court of the First Circuit from 1980 to 1995. From 1998 to 2011, I served as a volunteer liaison for the American Bar Association's Rule of Law Initiative. "ABA-ROLI" was established in 1993 to assist governments - those leaving the Soviet Union and others - seeking to establish the rule of law. I served in eleven countries, many of them in Eastern Europe and Central Asia, working with their governments and judiciaries on methods for judicial selection and accountability. In the many nations where "telephone justice" had been common, there were aspirations for judiciaries which would inspire public trust. The American independent judiciary, achieved through a constitutional balance of powers was revered as the gold standard.

The concern expressed in HB 1311 is that because the deliberations of the Judicial Conduct Commission take place in private, there is insufficient transparency. There is in fact ample transparency in the opportunity for members of the public, including but not limited to those who have had dealings with the courts in general and the judge under scrutiny, to provide information to the Commission. The existing practice is that once the Commission has been informed of the judge's or justice's application for retention, it places a notice in public media of the application and invites all those who wish to do so to respond to the Commission. The Commissioners have been responsive to concerns raised and followed up with interviews, further contacts and investigations. Existing concerns have also been brought to the public through the media by individuals or groups with information they believed relevant to the retention of a judge.

Moreover, the Commission itself is a body itself representative of the public - nine individual commissioners chosen by individuals representing different sectors of the public and government.

Based on my experience, I believe that the present procedures for consideration of retention have significant transparency, and that a further confirmation process would be detrimental.

Respectfully,
The Hon. Evelyn B. Lance (retired)

HB-1311

Submitted on: 2/11/2019 6:39:12 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jacquelynn Levien	Individual	Oppose	No

Comments:

February 11, 2019

House Committee on Judiciary

Jacquelynn Levien

RE: Opposition to HB1311

Dear Chair Chris Lee, Vice Chair Joy A. San Buenaventura, and Esteemed Committee Members:

Thank you for the opportunity to submit testimony on this important issue. My name is Jacquelynn Levien, I am a practicing attorney, and I testify against House Bill 1311. This bill represents an unfair and unnecessary involvement by the house in judicial affairs.

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. In fact, four of the nine 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 this bills (and similar senate bills) would undermine that effectiveness by allowing politics to seep into the judiciary. Requiring reconfirmation would undermine the independence of the judiciary by subjecting judges and justices to the political whims of the legislature. This is unacceptable.

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. This bill 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. This bill attempts to undermine that system.

This is why I urge you to oppose House Bill 1311.

Jacquelynn Levien

HB-1311

Submitted on: 2/12/2019 6:53:23 AM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
William H. Lawson	Individual	Oppose	No

Comments:

This bill, HB 1311, is a clear attempt at a power grab by the legislature - the Senate in particular. This is probably not even constitutional. If this passes, the electorate should be considerably scared by you people. NO, NO, NO!



Hawaii

Holding Power Accountable

Common Cause Hawaii • 307A Kamani St. • Honolulu, HI 96813 • 808.275.6275

February 10, 2019

**Testimony IN OPPOSITON TO HB 1311
Proposing Amendments to Article VI of the
Constitution of the State of Hawaii to Amend
the Manner in which Justices and Judges
are Appointed, Consented to, and Retained**

**TO: Chair Chris Lee, Vice Chair Joy San Buenaventura and Members
of the House Committee on the Judiciary**

FROM: Barbara Polk, on behalf of the Board of Common Cause Hawaii

Common Cause Hawaii strongly opposes HB 1311. Currently the legislature has a role in the appointment of judges, but not in their renewal. There is very good reason for the current constitutional provision—namely that it protects the judiciary from the sway of current politics, and allows judges to develop and grow in their role and stay true to the principles of justice without looking over their shoulders to see whether their decisions please the legislature.

On the national level, this protection from the political realm is handled by appointing lifetime judges for many positions. The Hawaii system is a better one, since it requires periodic review of the performance of judges by an independent commission, while separating

To change to a system in which the Senate can second-guess the Judicial Selection Commission on retention of judges, would reduce judicial independence and upset the balance of powers that is a basic premise of American government.

We urge you to defer HB1311.

WRITTEN TESTIMONY ONLY TO THE HOUSE COMMITTEE ON JUDICIARY

Bill No. and Title: House Bill No. 1311, Proposing Amendments to Article VI of the Constitution of the State of Hawaii to amend the Manner in which Justices and Judges Are Appointed, Consented to, and Retained.

The Honorable Representative Chris Lee, Chair, House Committee on Judiciary

The Honorable Representative Joy A. San Buenaventura, Vice Chair

Tuesday, February 12, 2019 4:00 PM

State Capitol, Conference Room 325

By: Artemio C. Baxa
393 Aulii Dr.
Makawao, HI 96768

I respectfully oppose House Bill No. 1311, and strongly support the position of the Judiciary of the State of Hawaii as submitted in the written testimony of Rodney A. Maile, Administrative Director of the Courts. In addition, I respectfully submit the following:

By maintaining the present process in the retention of Justices and Judges, the general public is ensured a viable means of avoiding any appearance of impropriety. This is because the Constitution of the State of Hawaii requires that members of the Judicial Selection 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 or holding any political office or taking an active part in political campaigns. Under this system, if a member of the Judicial Selection Commission is involved in litigation either as an attorney or litigant, the Justice or Judge can issue a certificate of recusation. The case can then be reassigned to another Justice or Judge who will not face retention during that Commissioner's six-year term.

On the other hand, under the proposed House Bill No. 1311, when a Justice or Judge petitions for retention and the Judicial Selection Commission approves the petition, the Justice or Judge must still seek reconfirmation by the Senate. It is likely that some members of the Senate will be attorneys who either work for law firms engaged in litigation or are litigators themselves. There are no term limits for Senators. Thus, there will always be the possibility that the Justice or Judge must seek reconfirmation by a Senator directly involved in litigation before the Justice or Judge. There will be no other Justice or Judge to reassign the case to because all Justices and Judges must face reconfirmation by the Senate under the proposed amendment.

Based on the above, it is likely that parties in cases where a Senator or a member of a Senator's firm represents a party, the other parties will be concerned whether their case will be judged fairly knowing that at some point every Justice and Judge will have to return to the Senate for reconfirmation. This will seriously undermine the public's confidence in our system of laws and would be a disservice to the people of Hawaii.

PAGE TWO

With the foregoing, I again respectfully oppose House Bill No. 1311. Thank you for the opportunity of submitting my written testimony.

END OF TESTIMONY

Eden Elizabeth Hifo

1377 Akiiahala Street, Kailua, HI 96734

February 12, 2019

The Honorable Representative Chris Lee
& House Judiciary Committee Members

Re: Testimony Opposing H.B. 1311

Dear Judiciary Chair and Committee:

Please accept this testimony in opposition to House Bill 1311 which proposes a Hawaii State Constitutional Amendment to give the Hawaii State Senate power to reverse Judicial Selection Commission (JSC) decisions on retention of all judges. This proposed amendment would allow the Senate to override JSC decisions granting or denying retention.

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 Constitution Article VI governing the Judiciary, Section 4 establishing the Judicial Selection Commission makes clear in the strongest terms that it must act without regard to politics, and respectfully this Committee and the House in general can preserve that valuable tenet by rejecting this and any similar bills passed by the Senate. Specifically, Section 4 of the State Constitution reads as follows (emphasis added):

The COMMISSION shall be selected and SHALL OPERATE IN A WHOLLY NONPARTISAN MANNER. . . . NO MEMBER OF THE COMMISSION SHALL SERVE FOR MORE THAN SIX YEARS. . . .

NO MEMBER SHALL RUN FOR OR HOLD ANY OTHER ELECTED OFFICE UNDER THE UNITED STATES, THE STATE, OR ITS POLITICAL SUBDIVISIONS. NO MEMBER SHALL TAKE AN ACTIVE PART IN POLITICAL MANAGEMENT OR IN POLITICAL CAMPAIGNS. NO MEMBER SHALL BE ELIGIBLE FOR APPOINTMENT TO THE JUDICIAL OFFICE OF THE STATE SO LONG AS THE PERSON IS A MEMBER OF THE JUDICIAL COMMISSION AND FOR A PERIOD OF THREE YEARS THEREAFTER.

The House and the Senate (through Speaker and President) each appoint two members to the 9-member JSC, and each JSC retention decision requires at least 5 votes. The majority of JSC members must not be licensed attorneys. As has been pointed out by others, individual legislators (House and

Senate) can initiate input to the JSC regarding retention decisions either directly or through their appointed JSC representatives (who comprise total) and those communications like others from the public/court staff, etc. remain confidential. Thus, their input is allowed but not subject to the thorough information provided the JSC by the Judiciary itself on the individual judge's record and those who have appeared before the judge who petitioned for retention or other members of the public regarding character or reputation, etc.

Personal experience regarding past retention petitions included the JSC requirement for the judge to provide the number of appeals taken and whether the outcome was affirmance or reversal. The court staff at district and circuit court were consulted, the Judicial Discipline Commission also, and there were jury and attorney evaluations for circuit court cases that the Judiciary generated and used to provide judges individual consultations plus sent to the JSC upon retention petitions being filed. (See Footnote 1 below.)

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. 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 strengthens the positive aspects of any judge who is retained and more importantly guards against being eliminated from the bench for political reasons that would not be part of a legitimate JSC decision.

For the above reasons, we respectfully urge you to hold and not pass House Bill 1311. Retired First Circuit Court Judge Vickie Marks joins in this opposition to the House Bill.

Thank you for your consideration.

Sincerely,



Eden Elizabeth Hifo (joined by Vickie Mars), retired First Circuit Court judges

FOOTNOTE 1: Hawaii Constitution Section 5 of Article VI establishes the Commission on Judicial Discipline and gives it "authority to investigate and conduct hearings concerning allegations of misconduct or disability and to make recommendations to the supreme court concerning reprimand, discipline, suspension, retirement or removal of any justice or judge." The ultimate power resides in the Hawaii Supreme Court under Section 5 and ranges from "reprimand" to "removal of any justice or judge." This of course is a decision quite apart from any petition for retention, but the point is that the Hawaii Constitution empowers the Judiciary to act in this manner at any time during a judge's tenure while giving the JSC retention decision powers for which it receives info about complaints, etc. from the Judicial Discipline Commission. (Impeachment powers, Article III, Section 19, are reserved for the Legislature regarding high executive branch officials.)

HB-1311

Submitted on: 2/12/2019 1:58:31 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Sergio Rufo	RUFO LAW GROUP	Oppose	No

Comments:

This bill is an end-round to amend the Constitution and, more importantly, directly insert politics and politicians into the judiciary process (even more so that the current unspoken state of affairs). It violates the separation of powers clause and has the potential for judges to be owned by political interests and their powerful lobbyists, undermining completely all notions of fairness and access to justice. The Senate has a key and important role in the judicial selection process; giving it an expanded role would upset the delicate balance in this small Island State/community. There is enough corruption, do not enable more or create means to simplify it ostensibly legally. Thank you.

HB-1311

Submitted on: 2/12/2019 4:02:32 PM

Testimony for JUD on 2/12/2019 4:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Matthew S. Kohm	Individual	Oppose	No

Comments:

It is respectfully submitted that the proposed bill creates more problems than solutions. Governments have separate bodies of governance for a reason. The Senate, with all due respect, should not be determining which judges should be retained. That should be a matter for an independent body such as the Judicial Selection Commission. There is too great a risk that decisions made by one government body can/could influence the way the other (judiciary) does its job. There would also be the appearance that one body of government may have too much power over a co-equal branch such as the Judiciary.

Since this is a constitutional matter, the Legislature must create a proposal which is evaluated by the electorate. At least that is what I recall. It is submitted that the energy into this proposal is misplaced, and should not move forward. I can also see legal challenges occurring when one branch of government may have too much supervisory power over another in determining who shall stay and who shall not be retained. Our constitution was wisely drafted in this matter and should be followed.

Matthew S. Kohm Esq.

(As a lawyer I do practice before both our trial and appellate courts)

Thank you for considering my testimony.