



The Judiciary, State of Hawai‘i

**Testimony to the Thirty-Second Legislature
2023 Regular Session**

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Friday, February 3, 2023, 9:30 AM
State Capitol
Conference Room 016 & Videoconference

by
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Bill No. and Title: Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of Hawai‘i 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 in Hawai‘i. In addition, this bill would eliminate the constitutional authority for the Chief Justice to appoint per diem judges in Family and District Courts which is critical to ensuring continuity of operations in those courts.

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



Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of Hawai'i to Amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained

Senate Committee on Judiciary

Friday, February 3, 2023 at 9:30 AM

Page 2

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.

The nine members of the Judicial Selection Commission (Commission), a majority of whom must be non-lawyers, decide whether to retain a judge or justice at the end of the judge or justice'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 evaluations of the justices, 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

¹ Penny J. White, *Judicial Courage and Judicial Independence*, 16 J. Nat'l Ass'n Admin. L. Judges 165. (1996) available at <https://digitalcommons.pepperdine.edu/naalj/vol16/iss2/1/> (last checked 1/30/23).

² *Id.* at 166 (quoting Judge John Parker, *The Judicial Officer in the United States*, 20 TENN. L. REV.



Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of
Hawai‘i to Amend the Manner in which Justices and Judges are Appointed,
Consented to, and Retained

Senate Committee on Judiciary

Friday, February 3, 2023 at 9:30 AM

Page 3

Senate Bill No. 1074 is similar to measures introduced during past legislative sessions that also proposed significant changes to the judicial retention process by giving 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

Similarly, during the 2021 legislative session, the Hawai‘i Legislature adopted House Concurrent Resolution 5, Senate Draft 1 (HCR 5 SD1) to establish a Joint Committee on Judicial Selection.⁶ This committee was tasked, in part, with developing “clear, written standards for evaluating applicants and petitioners for judicial office.”⁷ The committee comprised six members with one each appointed by the Speaker of the House, the Senate President, the Governor, the Chief Justice, the HSBA, and the Hawai‘i Women Lawyers. In December 2021, the Report of the Joint Committee on Judicial Selection was concluded. The report includes a “finding that Hawai‘i’s model of judicial selection, which is designed to foster the merit-based selection and retention of judges, is an exemplary model that should be maintained.”⁸ The Joint Committee further stated that it “opposes judicial elections and does not favor other transformative changes that would alter the fundamental character of

703, 705–06 (1949)).

³ See HB 1311 (2019); SB 673 (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 https://www.capitol.hawaii.gov/session/archives/measure_indiv_Archives.aspx?billtype=HCR&billnumber=5&year=2021 (last checked 1/30/23).

⁷ *Id.* at 3.

⁸ See https://www.capitol.hawaii.gov/reportuploads/00AllFilesFINALeditedbkmrk_12-03-2021.pdf at 5 (last checked 1/30/23).



Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of Hawai‘i to Amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained

Senate Committee on Judiciary

Friday, February 3, 2023 at 9:30 AM

Page 4

Hawai‘i’s selection process.”⁹ The proposal in Senate Bill No. 1074 for judicial retention decisions by the Senate is counter to the findings of the 2021 Joint Committee.

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.¹⁰ 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.¹¹ 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.”¹² With respect to the retention of judges, it elaborated:

[Y]our Committee recommends that any justice or judge petition the judicial selection commission for retention in office, or inform them of his or her intent to retire. Your Committee is of the opinion that retention through review by a nonpartisan commission is more desirable than simple reappointment by either the governor or the chief justice. It is intended that the commission in its review and retention function again perform the same function of excluding or at least lessening partisan political actions and also ensure that capable judges are kept on the bench. This review and retention process, in tandem with the judicial selection commission, is intended to provide an unbiased and effective method of maintaining the quality of our jurists.¹³

(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.¹⁴ 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.

⁹ *Id.*

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

¹¹ Stand. Comm. Rep. No. 52, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 621 (1980).

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

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

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



Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of
Hawai'i to Amend the Manner in which Justices and Judges are Appointed,
Consented to, and Retained

Senate Committee on Judiciary

Friday, February 3, 2023 at 9:30 AM

Page 5

The Current Retention Process Ensures An Independent And Accountable Judiciary

The Constitution requires that the Commission operate in a “wholly nonpartisan manner.”¹⁵ 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.¹⁶ 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.¹⁷ At least one member must be a resident of a county other than the City and County of Honolulu.¹⁸

If this measure is passed, it would give the Senate the authority to approve or reject the retention of justices, 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 or justices near the end of their judicial terms¹⁹ and petition to be retained, the Commission conducts thorough evaluations. A judge or justice 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

¹⁵ Haw. Const. art. VI, § 4.

¹⁶ *Id.*

¹⁷ In 1994, the Hawai'i Constitution was amended to change the composition of appointees to the Commission. The amendment reduced the number of the Governor's appointees from three to two, reduced the Chief Justice's appointees from two to one, and increased the number of appointees by the Speaker of the House of Representatives and the President of the Senate from one each to two each. S.B. 2515, 16th Leg., Reg. Sess. (HI. 1994). It further required one member of the Commission to be a resident of a county other than the City and County of Honolulu. *Id.*

¹⁸ The Commission currently has two members who reside in counties other than the City and County of Honolulu.

¹⁹ Currently, district and family court judges serve six-year terms; judges and justices on the circuit, intermediate, and supreme court serve ten-year terms.



Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of
Hawai'i to Amend the Manner in which Justices and Judges are Appointed,
Consented to, and Retained

Senate Committee on Judiciary

Friday, February 3, 2023 at 9:30 AM

Page 6

Judiciary website. The Commission invites public comment on whether the judge or justice 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 and justices 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 and justices are evaluated at approximately three year intervals by attorneys who have appeared before those judges and justices 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 and justice. The judge or justice then meets with members of the Judicial Evaluation Review Panel to discuss the results. A Judicial Evaluation Review Panel consists of a non-practicing member of the HSBA, a retired judge, and a respected lay person from the community. The evaluation results are confidential, provided only to the individual judge or justice, the Chief Justice, and members of the review panel. However, upon request by the Commission, copies of the individual judge or justice's evaluation results are provided to the Commission for its use in reviewing a judge or justice'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 or justice. Based on all the information gathered, the Commission then votes on whether the judge or justice should be retained for an additional term.

The HSBA also conducts confidential attorney evaluations of judges and justices, midway through their terms and when they are in the retention process. Results are shared with each judge or justice, 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



Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of Hawai‘i to Amend the Manner in which Justices and Judges are Appointed, Consented to, and Retained

Senate Committee on Judiciary

Friday, February 3, 2023 at 9:30 AM

Page 7

context.

The Proposed Senate Reconfirmation Process Would Have Significant Limitations

Under Senate Bill 1074 (2023), the Commission’s decision—either affirmative or negative—as to whether a justice 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 justice 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 evaluations of the justices, 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 justice’s performance in a particular case into a broader context, i.e., the body of the justice’s work.

Moreover, the justice may not be able to respond to criticisms that are raised in the Senate’s hearing process regarding their rulings in specific cases. The Revised Code of Judicial Conduct prohibits judges or justices 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.²⁰

Thus, justices 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 evaluations or resource person interviews to contextualize those concerns. The Senate would have only part of the picture, and neither the justice 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

²⁰ 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.”



Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of
Hawai'i to Amend the Manner in which Justices and Judges are Appointed,
Consented to, and Retained

Senate Committee on Judiciary

Friday, February 3, 2023 at 9:30 AM

Page 8

example, it will substantially lengthen the time that each justice is subject to the retention process, from six months to between nine to twelve months. The justice would undertake that process while still performing their regular judicial duties.

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.”²¹ After nearly 40 years of a merit-based system, Hawai'i has the most diverse state judiciary in the nation.²² In fact, currently, 49% of all full-time judges and justices in Hawai'i are female, and in the district and family courts as well as the appellate courts the percentage of appointed female judges and justices is higher at 55%.²³ 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.²⁴ It is critical that our retention process does not create artificial obstacles to maintaining and expanding the diversity of the Judiciary.

The Bill Would Reduce Services Provided To The Public At District Court And Family Courts When The Presiding Judge Is Not Available

The bill also proposes to eliminate the constitutional authority for the Chief Justice to appoint per diem judges.²⁵ This proposed change would have a devastating impact on the ability of the Judiciary to deliver services to the public when the presiding judge is not available. Currently, the District Courts and Family Courts will rely on a per diem judge to adjudicate matters when the presiding judge is not available (e.g., due to vacancy, illness, vacation, or family emergency). The Judiciary currently has 39 per diem judges appointed in the various circuits to serve on an as needed basis.²⁶ This bill's proposal to eliminate the constitutional authority of the Chief Justice to appoint per diem judges could result in courtroom closures and negatively impact the ability of the Judiciary to serve the public when the presiding judge is not available.

²¹ Malia Reddick, et al., *Racial and Gender Diversity on State Courts, an AJS Study*, 48 No. 3 Judges' J. 28, 30 (2009).

²² 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> (last checked 1/30/23).

²³ See <https://www.courts.state.hi.us/wp-content/uploads/2022/06/Judicial-Diversity-Data.pdf> (last checked 1/30/23).

²⁴ 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.”).

²⁵ Per diem judges serve on a short term basis, and are called in to serve for the day as needed.

²⁶ See HRS § 604-2(b).



Senate Bill No. 1074, Proposing Amendments to the Constitution of the State of
Hawai‘i to Amend the Manner in which Justices and Judges are Appointed,
Consented to, and Retained

Senate Committee on Judiciary

Friday, February 3, 2023 at 9:30 AM

Page 9

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.”²⁷ Our current merit-based system serves the public well by ensuring that qualified judges and justices 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 justices are selected by merit and retained without regard to political considerations. Justices 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 justices, this bill’s approach is not consistent with the goal of improving the quality of justices. 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.

Lastly, the proposal regarding per diem judges could have a negative impact on the ability of the District Courts and Family Courts to deliver services to the public.

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

²⁷ William S. Richardson, *Judicial Independence in Hawaii*, 1 U. HAW. L. REV. 1, at 4 (1979).

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Judiciary**

February 3, 2023

S.B. No. 1074: PROPOSING AN AMENDMENT TO THE CONSTITUTION OF
THE STATE OF HAWAI‘I TO AMEND THE MANNER IN
WHICH JUSTICES AND JUDGES ARE APPOINTED,
CONSENTED TO, AND RETAINED

Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

The Office of the Public Defender opposes S.B. No. 1074, which would authorize the Hawai‘i Senate to approve or reject subsequent terms of office for supreme court justices following a determination on a petition for judicial retention by the Judicial Selection Commission (“JSC”).

Hawai‘i’s current merit-based system of judicial retention is preferable to the procedure proposed by S.B. No. 1074. First, the proposed process would limit the information available to a body that makes the ultimate decision. Second, placing the final decision with the Senate would risk politicizing the retention process. Third, the current system provides that all three branches of the government, including the Senate, have a say in who serves on the JSC.

Confidentiality

Currently, a judge must notify the JSC of their intention to seek retention in office when their term is approaching expiration. The JSC then seeks public comment, which are kept confidential, by publishing newspaper advertisements and posting on the Judiciary website. The JSC further seeks input from confidential resource persons from within the bar and the justice system. The confidential information received from the public and from the resource persons is used to assist the JSC in their decision to retain the supreme court justice.

Confidentiality encourages attorneys to come forward and express their views freely and candidly. Confidentiality protects attorneys and their clients’ concerns of potential retaliation or influence on pending decisions.

If the Senate is granted the authority to consent to or reverse the decision of the JSC, comments (written and oral testimony) regarding retention will become public record. Attorneys, who are reluctant or unwilling to share the same information publicly to the Senate will be discouraged from participating in the evaluation process.

Furthermore, if the Senate is authorized to approve or reject subsequent terms of office for supreme court justices, the JSC may be compelled to defend its position, or to answer questions regarding its position before the Senate, and in doing so, information which should be kept confidential may become public.

Politics and Special Interests

Critical to a fair and impartial judiciary is judicial independence. Judges and justices must have the ability to decide cases without outside pressure or influence. They must be independent and free from interests outside of the cases that are before them. Hawai'i's current merit-based system preserves judicial independence.

The late Chief Justice William Richardson recognized the importance of an independent judiciary:

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 [1978 constitutional] convention history indicates that *the primary purpose of the new retention process is to exclude or, at least, reduce partisan political action.*

Judicial Independence: the Hawaii Experience, 2 U. Haw. L. Rev. 1, 4 (1979) (emphasis added).

The Office of the Public Defender is concerned that the procedure proposed by this bill would inject politics and special interests into the retention process. In the political arena, justices are more likely to be singled out for their decisions or rulings on controversial cases rather than their records as a whole.

The U.S. Supreme Court's decision in the Citizen's United v. Federal Election Commission removed regulatory barriers to corporate electioneering. Across the country, special interest groups and political action committees have taken aim to

unseat justices and 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 justices if S.B. No. 1074 would be instituted.

Retention is different from consent to a judicial appointment, as the former is a comment on one's performance on the job, and the latter is a comment on the possibility of doing a good job. The JSC is in the best position to decide if one's performance is following the best practices of the job and would not be swayed by political opinion regarding that job performance. The JSC does not have to answer to the electorate. If this bill were to pass, then anytime the Supreme Court took up an issue regarding the constitutionality of a statute or a civil decision regarding the State as a party, it could be argued that the leverage held by the Senate regarding retention would create the appearance of a conflict of interest. Thus, only justices or substitute judges with no possibility of seeking retention could sit on such cases.

Diverse Representation

The JSC is comprised of nine members. A majority of the members must be non-lawyers. The legislative and executive branches of government are represented in the retention process, as the President of the Senate appoints two members, the Speaker of the House appoints two members, and the Governor appoints two members. This bill, however, will effectively the final retention authority in only one branch of the government.

Distributing commissioner appointment power across all three branches of government, as well as to the state bar association, helps preserve the JSC's goal of "nonpartisan" evaluations by protecting against capture by a single partisan motive or special interest. Spreading out appointment power also lessens the likelihood that commissioners will share political goals or allegiances, therefore making it harder for any particular interest to control the JSC's decisions.

Thank you for the opportunity to comment on this measure.

Hawai‘i State Trial Judges Association

**Testimony to the Thirty-Second State Legislature
2023 Regular Session**

**Senate Committee on Judiciary
Regarding SB1074**

Senator Karl Rhoads, Chair

Senator Michael Gabbard, Vice Chair

Hearing on Friday, February 3, 2023, 9:30 a.m.

State Capitol, Conference Room 016 & Videoconference

Written Testimony Only

by

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

Hon. Summer M.M. Kupau-Odo, President

Hon. Michael K. Soong, Vice President

Hon. James R. Rouse, Secretary

Hon. Andrew T. Park, Treasurer

On behalf of the Hawai‘i State Trial Judges Association (“HSTJA”), thank you for the opportunity to comment on SB1074, which proposes 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** SB1074. 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 justices 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. SB1074 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 justices may 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 justices 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

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*

As proposed, SB1074 authorizes the Senate, rather than the nonpartisan Judicial Selection Commission, to approve or reject subsequent terms of office for justices. For 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.

2. SB1074 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 justice is retained, whether intentional or not, gives the appearance that members of the Legislature or other outside interests seek to influence 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.

SB1074 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. When judicial vacancies are left unfilled for extended periods of time, court proceedings will be postponed and judicial decisions delayed. Delays are compounded if the Chief Justice cannot appoint per diem judges to serve in the district courts, as SB1074 proposes.

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, including justices, 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 them 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 and justices 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 and justices. Both 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, justices who issue controversial decisions that senators or their constituents disagree with prior to their retention hearing would be placed in intolerable positions in that justices 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 justices. We also note that in the event it disagrees with a court's interpretation or application of a law, it is within the province of the Legislature to make changes to the law, such as to clarify legislative intent.

Additionally, because confidentiality is a necessary tool for the Judicial Performance Program to gather meaningful information to evaluate judges and justices, senators involved in the retention process would lack key information about a justice covering the justice's 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, justices 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 increasing the work of senators and cost to taxpayers for a retention process that would be incomplete and inefficient.

6. If enacted, SB1074 will discourage qualified and experienced attorneys from seeking judicial office.

A partisan retention process for judges or justices 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 or justice should or should not be retained.

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

Testimony to the Senate Committee on Judiciary

Senator Karl Rhoads, Chair

Senator Mike Gabbard, Vice Chair

Friday, February 3, 2023, 9:30 a.m.

State Capitol, Conference Room 016 & Videoconference

by

Francine Dudoit-Tagupa, R. N.

Vice Chair, Judicial Selection Commission,

And Members of the Judicial Selection Commission

SB1074: 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 Rhoads, Vice Chair Gabbard, and Members of the Committee:

The Judicial Selection Commission (JSC) strongly OPPOSES the proposed amendments in SB1074.

The Hawai'i State Constitution, Article VI, Section 3 charges the Judicial Selection Commission (JSC) with the responsibility to determine whether every justice or judge should be retained in office. The JSC recognizes that Senate Bill No. 1074 proposes to amend the procedure specifically for retaining justices, however, the JSC testimony applies to both justices and judges.

The JSC strongly OPPOSES the proposed amendments in SB1074 for two primary reasons:

1. POLITICS, JUDICIAL INDEPENDENCE AND STRICT CONFIDENTIALITY.

Subjecting the Judicial Selection Commission's (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.

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 justices and judges through a review process 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. At least one member of the Commission must be a resident of a county other than the City and County of Honolulu. The makeup of the Commission thus affords both houses of the Legislature, the other two branches of government, the Bar, and a neighbor island resident 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. The inclusion of at least one neighbor island resident adds to the diversity of perspectives on the Commission.

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 Hawai'i's community. To remove politics from the decision process, JSC members must forego political activity during their term. Commissioners can vote, but cannot actively participate in partisan politics – such as attending 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. The Commissioners cannot reveal or discuss their interviews with applicants, petitioning justices or judges, or resource people. JSC members cannot reveal or discuss what goes on or is said in the meetings. The JSC code of strict confidentiality encourages the honest discussion of an applicant's, justice's or judge's character, temperament, integrity, legal and decision-making skills. A JSC applicant's or petitioning justice's or judge's file contains personal financial records such as credit reports and financial stability, personal health and family issues and confidential letters from 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.

The JSC workload is intense. In 2022 alone, the Commission received 140 applications for 8 vacancies and 9 petitions for retention. During 2021, there were 134 applications received for 9

vacancies and 4 petitions for retention. At the height of the pandemic crisis in 2020, 344 applications were received for 15 vacancies and 6 petitions for retention. Each file is handled in the most secure manner and reviewed meticulously, which means careful reading of information provided from each 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, confidential references and background check reports, 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. The collective experience of the Commissioners indicates 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 who are known for their excellent legal expertise and trustworthy personal qualities. The JSC serves Hawai'i well by preserving a strong, diverse and independent judiciary.

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

The proposed amendments in SB1074 requires that the JSC 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 to expect the Commission to adequately perform and complete its necessary work. To require the Commission to provide a copy of the petition for retention with a written notice of the Commission's recommendation would violate the confidentiality requirement under Article VI, Section 4 of the State Constitution and Rule 5, Section Two: Confidentiality of the Judicial

Selection Commission Rules. A justice's or judge's petition for retention is used as part of the JSC's deliberations and shall not be disclosed outside of any commission meeting.

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, other publications and the JSC's website 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 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

Bill No. SB1074, 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 3, 2023
Page 6

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 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 90-days to provide comments to the Commission about the petitioning justice or judge. However, the Commission shortened the 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 the JSC's limited resources 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.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

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

The Thirty-Second Legislature, State of Hawaii
The Senate
Committee on Judiciary

Testimony by
Hawaii Government Employees Association

February 3, 2023

S.B. 1074 - 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 S.B. 1074 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 judgment. 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,

Randy Perreira
Executive Director



TESTIMONY

Senate Committee on Judiciary
Hearing: Friday, February 3, 2023 (9:30 a.m.)

TO: The Honorable Karl Rhoads, Chair
The Honorable Mike Gabbard, Vice Chair

FROM: Rhonda L. Griswold
HSBA President

RE: Senate Bill No. 1074
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

Thank you for the opportunity to submit testimony on Senate Bill 1074, which proposes amendments to the Constitution of the State of Hawaii. The Board of the Hawaii State Bar Association (“HSBA”) considered this bill, and upon conclusion, the Board voted to oppose this bill, finding that the bill would, in all probability, have an adverse impact on the legal profession, on legal services provided to the public, and on the independence of the judiciary.

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

Senate Bill 1074 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 on the Hawaii Supreme Court. 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 are meant to respect the rule of law and to impartially apply the rule of law in all cases.

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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 for justices by providing the opportunity for a referendum on how justices have decided cases during their term in office. In contrast to the JSC’s confidential evaluation process, in a Senate hearing, a justice may be called upon to explain 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 may not make statements on pending matters before the court, and so justices would not be able to respond to the specifics of pending cases in a retention hearing.

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.

Justices would not be able to provide a counterweight to anecdotal concerns expressed by disappointed litigants or special interest groups. As a result, justices 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.

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.

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COMMITTEE ON JUDICIARY

Senator Karl Rhoads, Chair

Senator Mike Gabbard, Vice Chair

Friday, February 3, 2023

Room 016

9:30 AM

OPPOSITION TO SB 1074 - JUDICIAL APPOINTED, CONSENTED, AND RETAINED

Aloha Chair Rhoads, Vice Chair Gabbard 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 4,058 Hawai'i individuals living behind bars¹ and under the "care and custody" of the Department of Public Safety/Corrections and Rehabilitation on any given day. We are always mindful that 965 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.

Community Alliance on Prisons appreciates the opportunity to offer testify in **opposition** to SB 1074. We support an independent judiciary. One of the basic tenets of our democracy is that the three branches of government - Executive; Legislative; and the Judiciary - are our system of checks and balances to ensure that one branch is not usurping the powers and responsibilities of another branch.

JUDICIAL INDEPENDENCE²

"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

¹ Department of Public Safety, Weekly Population Report, January 23, 2023.

https://dps.hawaii.gov/wp-content/uploads/2023/01/Pop-Reports-Weekly-2023-01-23_George-King.pdf

² THE NEWSROOM GUIDE TO JUDICIAL INDEPENDENCE.

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

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.

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.*"



Senate Committee on Judiciary

Friday, February 3, 2023, 9:30 am, Conference Room 016 and Videoconference

SB 1074

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

TESTIMONY

Donna Oba, Legislative Committee, League of Women Voters of Hawai'i

Chair Karl Rhoads, Vice Chair Mike Gabbard, and Committee Members:

The League of Women Voters of Hawai'i opposes SB1074.

The Judicial Selection Commission (JSC) currently has the sole authority to approve or reject justices and judges who seek reappointment. The proposed Constitutional amendment would (1) require JSC to inform the Senate when it recommends the reappointment of a justice or a judge, and (2) authorize the Senate to approve or reject the JSC's recommendations, and (3) lengthening the time frame between judicial nomination and Senate decision from thirty days to sixty days.

We do not support Constitutional authorization for the Senate to reject the JSC's decisions. 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.

The League supports a merit system of judges, through a selection process that is as free of political influence as possible, and judicial independence sufficient for the Hawaii State Judiciary to operate as a co-equal third branch of government.

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.

Unlike elected officials who are politically accountable to voters, justices and judges should be accountable for how they interpret the law. Before reappointing a justice or judge to another term, the JSC holds judges accountable by soliciting confidential feedback and comments from a variety of sources. Of the nine members of the JSC, two are appointed by the President of the Senate and two are appointed by the Speaker of the House.

The selection of judges is an important factor in establishing the trustworthiness and independence of the judiciary in a democratic society. Judicial 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.

The Brennan Center for Justice noted in 2016 that Hawaii's method of reselecting judges was a model of judicial independence. "By diffusing reselection power among members of a deliberative, nonpartisan body instead of leaving it with voters or the political branches of government, Hawaii promotes a system in which judges are evaluated on their entire record, and not punished for a politically unpopular decision."¹

If Hawaii's Constitution is changed as proposed by SB 1074, public confidence in the independence of the judiciary would suffer because the Senate reconfirmation process would expose justices and judges to political pressure from special interests. Moreover, if forced to defend their decisions in Senate hearings, some excellent justices and judges might be discouraged from seeking reconfirmation

Lengthening the time frame to appoint and consent to reappointment may cause vacancies to remain open longer than the current 30-day time frame. While judiciary positions sit vacant, important judicial work would have to be assigned among a group of justices and judges and who are already hard-pressed to serve the public.

We urge members of the Committee on Judiciary to oppose the Senate reconfirmation provisions in SB1074 and preserve an independent judiciary reappointment process in Hawaii.

Thank you for the opportunity to submit testimony.

¹ Cody Cutting, Brennan Center for Justice, "The Aloha State: A Model for Selection Judges?", September 6, 2016, www.brennancenter.org/our-work/analysis-opinion/aloha-state-model-selecting-judges



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February 2, 2023

Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Senate Committee on Judiciary

Re: LETTER ON BEHALF OF THE HAWAII STATE COMMITTEE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS IN OPPOSITION TO SENATE BILL NO. 1074 PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF HAWAII TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.

Hearing Date: February 3, 2023 at 9:30 a.m., Conference Room 016

Dear Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

I submit this testimony in opposition to S.B. No. 1074 in my capacity as the Chair of the Hawaii State Committee of the American College of Trial Lawyers.

I am the former Attorney General of the State of Hawaii, having served under Governor Neil Abercrombie. I have been a practicing lawyer for the past 40 years, since 1978. I served as the President and Director of the Hawaii State Bar Association, Lawyer Representative for the U.S. Court of Appeals of the Ninth Circuit, Northwest Regional Governor of the National Asian Pacific American Bar Association, Vice Chair of the Hawaii Supreme Court Rule 19 Committee on Judicial Performance, Chair and Director of the Aloha Tower Development Corporation, and on numerous Bench Bar Committees. I served as a Co-Vice Chair on the Task Force on Civil Justice Improvements. I have appeared in court many, many times, both in Circuit Court and District Court. I have also appeared before the Hawaii Supreme Court and the U.S. Court of Appeals of the Ninth Circuit.

Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
February 2, 2023
Page 2

The Fellows of the American College of Trial Lawyers from the State of Hawaii have approved this letter. The following Fellows of the American College of Trial Lawyers, including Bert T. Kobayashi, Jr., a former Hawaii State Committee Chair for the American College of Trial Lawyers, John S. Edmunds, a former Member and Vice Chair of the Hawaii State Judicial Selection Commission, Walter S. Kirimitsu, a former Member of the Hawaii State Judicial Selection Commission, Mark Davis and William C. McCorriston, have specifically requested that their names be included as joining in this letter.

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

The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings. Additional information about the College, as well as a list of the Hawaii Fellows, is available at the College website: <https://www.actl.com/>

S.B. No. 1074 states, in part, that “[t]he purpose of this Act is to propose amendments to article VI, section 3, of the Hawaii State Constitution to: ...[a]uthorize the senate to approve or reject subsequent terms of office for a supreme court justice.”

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

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

One of the core values of the College is the improvement of the administration of justice. In keeping with that purpose, one of the College's

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

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

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

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

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

Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
February 2, 2023
Page 4

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

On behalf of the Hawaii State Committee of the American College of Trial Lawyers, I respectfully oppose S.B. No. 1074. As stated above, while courts must be accountable, the College believes that it is preferable that they be accountable to the Constitution and the rule of law rather than to partisan and political pressure. In keeping with its core values, the College defends existing judicial selection systems that are based on something other than partisan political elections, like Hawaii's system, when efforts are made to supplant them with systems that are more partisan and political in nature than the then existing one. Judicial independence is best served if politics are removed, insofar as possible, from the judicial retention process. The framers of our State's Constitution understood this, and designed a retention system accordingly. We urge the Committee to hold this bill.

Very truly yours,



DAVID M. LOUIE

for

KOBAYASHI SUGITA & GODA, LLP



TESTIMONY IN OPPOSITION TO THE RETENTION PROVISIONS OF SENATE BILL 1074

Friday, February 3, 2023, at 9:30 A.M.
Conference Room 016 & Videoconference

To: The Honorable Karl Rhoads, Chair
The Honorable Mike Gabbard, Vice Chair
Members of the Senate Committee on the Judiciary

From: The Hawai'i Friends of Civil Rights
Co-Chairs Amy Agbayani and Pat McManaman

The Hawai'i Friends of Civil Rights submits testimony in **Opposition to the Retention Provisions of S.B. 1074** which would reserve to the Senate the power to consent or to reverse the decision of the judicial selection commission regarding the retention of justices.

The proposed constitutional amendment raises concerns that the existing retention of justices is conducted in private and forgoes Senate review. These concerns mischaracterize a nonpartisan process that provides checks and balances and values public input.

In its search to establish a qualified and independent judiciary, the delegates to the 1978 Constitutional Convention approved the creation of the Judicial Selection Commission (JSC). The JSC is a non-partisan commission of nine members representing all three branches of government and the bar association. Of its nine members, two each are appointed by the senate president and the speaker of the house providing the legislature with balanced and proportional oversight and input in the retention process.

Public input is also sought by the JSC during the retention process. Judicial Selection Commission Rule 12(B) requires the JSC to provide public notice of the names of all justices

seeking retention and further advises the public of their right to submit written comments. At its discretion, the JSC may also hold hearings that may be either opened or closed to the public and at which interested parties may testify before the commission. Judicial Selection Rule 12(E).

Delegates to the 1978 Constitutional Convention understood that the rule of law is the most basic requirement of a civilized society and that an independent judiciary is an essential ingredient of the rule of law. A constitutional amendment that subjects justices to an up or down vote by the Senate risks the politicization of an independent judiciary.

Thank you for the opportunity to testify on this measure.



February 2, 2023

Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Senate Committee on Judiciary

Re: S.B. 1074, 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: Friday, February 3, 2023, 9:30 a.m., Room 016

Dear Chair Rhoads, Vice Chair Gabbard, and Members of the Committee on Judiciary:

Hawaii Women Lawyers (“**HWL**”) submits testimony in **strong opposition** to S.B. 1074 which, among other things, proposes constitutional amendments to authorize the Senate to approve or reject subsequent terms of office for a supreme court justice and thereby consent to, or reverse, the decision of the Judicial Selection Commission (the “**JSC**”).

Hawaii Women Lawyers is a lawyer’s trade organization that aims 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.

S.B. 1074 is very similar to H.B. 1311 that was proposed in 2019, which HWL also opposed. We again strongly oppose this proposal to vest the power to decide judicial retention with the Senate, instead of with the JSC, where it currently and, we believe appropriately, resides. Although this current bill targets the retention procedures for justices, if passed, it may also lead to efforts to adopt similar procedures for all judges.

A constitutional amendment to give the Senate the power to approve or reverse JSC decisions on the retention of justices or judges would disrupt the balance of power between the branches of government and lead to the politicization of the retention process. 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/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 and essential to a healthy democracy. 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 confidential assessments of attorneys who have actually appeared before the justices/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.

For these reasons, HWL respectfully opposes this bill. Hawaii’s current judicial selection and retention procedures were developed to ensure that justices and 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 S.B. 1074 will accomplish this and in fact would undermine public confidence in the Judiciary. It would be detrimental for the public to perceive that justices or judges make decisions based on a desire for Senate approval rather than the merits of the cases before them.

Thank you for the opportunity to submit testimony on this measure.

SB-1074

Submitted on: 2/2/2023 8:30:02 AM

Testimony for JDC on 2/3/2023 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Johnathan C. Bolton	Testifying for HSBA Litigation Section	Oppose	Written Testimony Only

Comments:

Dear Chair, Vice-Chair, and Members of the Committee:

My name is Johnathan C. Bolton. On behalf of the Litigation Section of the Hawaii State Bar Association (“HSBA”) and its over 500 members, I am testifying in **strong opposition to SB1074**, which would amend the Constitution of the State of Hawaii to change the manner in which Justices and Judges are appointed, consented to, and retained.

There is no need or reasonable justification provided to support a change to our present successful process for judicial selection and continuation provided for by our Hawaii Judicial Selection Commission (“JSC”) which was created by the 1978 Hawaii Constitutional Convention. The proposed changes to the process will unnecessarily lengthen and complicate it, 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.

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. 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 SB1074 to our judicial continuation process is "more transparency". However, 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.

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/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 proposed SB1074, all Hawaii Judges and Justices which will require Senate confirmation or non-action, as the case may be, to continue in Judicial Office. This would 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.

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.

There is no need for Senate confirmation, or non-action, after applicants are already found qualified for retention in office by the JSC.

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, which would be a very expensive and time-consuming ordeal, especially for a Neighbor Island Judge. 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.

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.

Since 1978, Hawaii had had a proven, high quality and professional Judicial Selection Commission 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.

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. We 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.

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.

Very importantly, please consider in deciding whether or not you decide to vote/support for or against SB1074, 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.

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. If SB1074 is enacted, it is unknown whether 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.

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.

The HSBA Litigation Section believes that requiring the addition of Senate confirmation proceedings for judicial continuations in Hawaii is not a good idea. SB1074 will 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.

The Senate has other important and unique lawmaking responsibilities to focus on for the People of Hawaii.

Thank you for the opportunity to testify in **strong opposition** to SB1074

Johnathan C. Bolton
Chair, HSBA Litigation Section



Native Hawaiian LEGAL CORPORATION

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SENATE BILL 1074

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.

SENATE COMMITTEE ON JUDICIARY

February 3, 2023

9:30 am

Conference Room 016

The Native Hawaiian Legal Corporation (“NHLC”) submits testimony in strong opposition to Senate Bill 1074, which authorizes the Senate to approve or reject subsequent terms of office for Hawai‘i Supreme Court justices.

NHLC is the only non-profit law firm dedicated exclusively to Native Hawaiian issues. Our organization provides legal advocacy and information to Hawaiian communities, families, and individuals facing threats to the continuation of cultural practices and resources; housing insecurity due to pending issues with their leaseholds; risk of loss of ancestral lands and places of significance; and many other legal issues unique to the Hawaiian community. NHLC clients can be found across the pae ‘āina. They rely on an independent judiciary to resolve disputes and interpret and uphold the rule of law without fear of political retribution.

The late Chief Justice William S. Richardson, the namesake of the University of Hawai‘i’s law school, maintained that “in resolving disputes, courts interpret and develop law and act as a check on the other branches of government. In order to effectively perform these functions the judiciary must be free from external pressures and influences. Only an independent judiciary can resolve disputes impartially and render decisions which will be accepted by rival parties, particularly if one of those parties is another branch of government.” To this end, “Judges must be able to apply the law secure in the knowledge that their offices will not be jeopardized for making a particular decision.”¹

Judicial candidates for the Hawai‘i Supreme Court undergo a thorough vetting process involving the Governor and Legislature. This process provides those two branches of government ample opportunity to assess a potential justice’s readiness and fitness to serve on

¹ William S. Richardson, *Judicial Independence: The Hawai‘i Experience*, 2 U. HAW. L. REV. 1, 4 (1979), available at <https://scholarspace.manoa.hawaii.edu/server/api/core/bitstreams/2f5a4dc3-d03a-4b2c-a34e-1ced794f08ab/content>.

the State bench. After taking on that role, however, political confirmation no longer functions as a check to ensure judicial fitness and readiness. Instead, it functions as an infringement on judicial independence that poses a grave risk to the health of our democracy.

Requiring Senate reconfirmation of justices unnecessarily politicizes the judicial retention process and adds undue political pressure to justices ruling on controversial matters close to their retention. The separation of powers doctrine requires an independent judiciary functioning as a co-equal branch of government. Instead of upholding this tenet, this bill would make justices beholden to the Senate's political scrutiny rather than the rule of law, and create the appearance of political influence in our highest appellate court. This risks undermining public confidence in our judicial system, which is crucial for a functioning democratic society.

Overall, many in Hawai'i fighting for basic necessities, such as access to stable housing or the means to continue subsistence practices to feed their families, are from communities underrepresented in the political process. However, a lack of political power should be inconsequential when advocating in a judicial forum. For the judicial process to function properly, legal outcomes should not be swayed by political winds, but rather grounded in the rule of law and due process. This bill actively seeks to imbue political pressure and oversight into the judicial retention process, which risks undermining the avenues for relief available to aggrieved Hawaiian communities and families when advocating for positions counter to the economic and political interests of powerful stakeholders. This bill is not needed given the checks and balances in place between the branches of government, and would unnecessarily erode public trust in the judicial system alone.

For these reasons, we respectfully, but strongly, oppose Senate Bill 1074.

Me ka 'oia'i'o,



Makalika Naholowa'a
Executive Director



JAPANESE AMERICAN CITIZENS LEAGUE
HONOLULU CHAPTER
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Working For A Greater America

Board Members

February 2, 2023

Minda K. Yamaga
President

To: Committee Chair Karl Rhoads
Members of the Senate Committee on Judiciary

Shawn L.M. Benton
2nd Vice President

Geoff J. Sogi
Treasurer

From: Minda Yamaga
President, Japanese American Citizens League – Honolulu Chapter

Brandon M. Kimura
Secretary

Re: **OPPOSITION TO S.B. NO. 1074 PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE STATE OF HAWAI‘I TO AMEND THE MANNER IN WHICH JUSTICES AND JUDGES ARE APPOINTED, CONSENTED TO, AND RETAINED.**

Susan L. Arnett

Alphonso Braggs

Liann Y. Ebesugawa

Chair Rhoads and Members of the Committee:

David M. Forman

Sean Ibara

Jacce Mikulanec

Trisha Y. Nakamura

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 persons. 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.

Logan Narikawa

Senate Bill No. 1074 proposes a constitutional amendment to dramatically alter the process by which Hawai‘i supreme court justices are retained at the conclusion of a term and eliminates the chief justice’s authority to appoint per diem district court judges. For the following reasons, the JACL-Honolulu Chapter strongly opposes this bill. Specifically, we oppose the proposed language at pages 7-8, that would abolish the Judicial Selection Commission's (JSC) decision making authority in the retention of justices and replace it with a requirement for the state senate to vote on each petition for retention approved by the JSC and the removal of the chief justice’s authority to appoint per diem district judges at page 5 of this bill.

Legal Counsel

Benjamin Kudo

While this does not mandate the election of 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.

Advisory Council

Allicyn Hikida-
Tasaka

Clayton Ikei

William Kaneko

Colbert Matsumoto

Alan Murakami

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 justice was seeking to have our Senate overrule the JSC, it would require

an effort by that justice 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 justices would not have to engage in such conduct. If a justice lacking in sufficient judicial ability were to not be retained by JSC, that justice 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 Hawai'i, there was the issue of same sex marriage which began with a Hawai'i 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 Hawai'i 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 justices 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.

Hawai'i'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, supreme court justices are evaluated 3 times during their 10-year term by the attorneys who appear before them. These evaluations are shared with the JSC when the justice comes up for retention. Additionally, the Hawai'i 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 justice. 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 justice has been on the bench.

It would seem that proponents of this legislation take issue with certain decisions of our 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 Hawai'i judicial ruling, they could immediately resort to amending the constitution to politicize the retention of a justice of Hawai'i's Supreme Court. We believe that is bad policy. Even if one could point to a specific retention decision of JSC with which they disagree, this process has served us well for many years. Not to mention that the legislature already plays a significant role in the retention of justices as four of the eight members of the JSC are appointed by the House Speaker or Senate President. The legislature is well represented at all times on the commission and dramatically shifting the balance of powers as proposed in this bill does not promote justice or diversity. As it stands, our judiciary is diverse, independent, and a contributing branch of our government.

Additionally, removing the chief justice's authority to appoint per diem judges is concerning. Per diem judges are integral to the functioning of our state courts because there are not enough full-time judges to cover all court proceedings. These deficits are caused by a variety of circumstances, including, personal leave, judicial training, or judicial vacancy between appointments. Backlogs and delays to justice cannot become the symbol of our judicial system. Removing this authority will lead to precisely such undesirable circumstances.

Hawai'i is a unique place with a unique history and population. Our courts exemplify the democracy of our state. Supreme court justices are nominated by an elected Governor and approved by elected state senators. 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.

Signed,

A handwritten signature in cursive script that reads "Minda K. Yamaga".

Minda K. Yamaga
President
JACL Honolulu Chapter

HAWAII FILIPINO LAWYERS ASSOCIATION

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Date: February 2, 2023

To: Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Senate Committee on Judiciary

Re: Testimony on SB 1074 - Proposing Constitutional Amendment to Amend the Manner in which Justices and Judges Are Appointed, Consented To, and Retained.

SB 1074: 02/03/2023 at 9:30 AM - Conference Room 016 and Video Conference

The Hawaii Filipino Lawyers Association (HFLA) appreciates the opportunity to submit this testimony in **OPPOSITION** to S.B.1074, 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 OP 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.



Testimony of the Former
Hawaii State Bar Association Presidents
relating to Bill SB 1074

TO: Chairman Karl Rhoads and Senate Judiciary Committee Members

FROM: Calvin E. Young
Past President, Hawaii State Bar Association
and the undersigned past HSBA Presidents

HEARING: Friday February 3, 2021 at 9:30 a.m.

Thank you for the opportunity to submit testimony and comments on SB 1074.

This testimony is submitted on behalf of many former presidents of the Hawaii State Bar Association and we collectively express our *strong opposition* to SB 1074.

SB 1074 would modify our current appointment system for Justices, by requiring consent of the Senate for a Justice retained by the Judicial Selection Commission (JSC) to renew a term of office.

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

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

Substantively, the JSC is well-positioned under our current system to evaluate the performance of sitting judges seeking retention. The JSC has access to a wide variety of sources to help the Commission members make their

Testimony of Former HSBA Presidents
SB1074
Hearing on February 3, 2023
Page 2

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

In contrast, if judicial retention were to become a public affair by requiring Senate reconfirmation of Justices approved for retention by the JSC, it would be close to impossible to protect the Justices from systemic political pressure. Such pressure would be brought, whether intentionally or inadvertently, by groups ranging from disgruntled litigants, to government officials, to the public at large, each of whom have an interest in a particular case and result. By way of example, it is quite likely that disgruntled litigants may come forward to speak during the Senate process against a Justice who did not provide the exact relief sought by the litigant. If the case is still pending, or if the issue raised is likely to come before the court again, then the Justice, under applicable rules of judicial conduct, will not be able to respond. In addition, the Senate will not have access to the confidential resource materials, which are available to the JSC. We believe Senate confirmation hearings are not the forum for disgruntled litigants.

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

For these reasons, we reiterate our strong opposition of SB 1074.

Sincerely,

/s/ Calvin Young

/s/ Paul Alston

/s/ Sidney Ayabe

/s/ Alan Van Etten

/s/ James Kawachika

/s/ Joel August

/s/ Dale Lee

/s/ Richard Turbin

Testimony of Former HSBA Presidents
SB1074
Hearing on February 3, 2023
Page 3

/s/ Wayne Parsons

/s/ Jeffrey Sia

/s/ Rai Saint Chu

/s/ Hugh Jones

/s/ Louise Ing

/s/ Carol Muranaka

/s/ Craig Wagnild

/s/ Gregory Markham

/s/ Jodi Yi

/s/ Howard Luke

/s/ Derek Kobayashi

/s/ Gregory Frey

/s/ Levi Hookano

/s/ Shannon Sheldon

/s/ Douglas Crosier



SENATE COMMITTEE ON JUDICIARY
SENATOR KARL RHOADS, CHAIR
SENATOR MIKE GABBARD, VICE CHAIR

TESTIMONY IN **STRONG OPPOSITION** TO SENATE BILL NO. 1074
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

Friday, February 3, 2023, 9:30 a.m.
State Capitol, Conference Room 016

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 SB1074.

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. Judges and justices should have independence to interpret the law and administer justice without fear of political retribution from the elected branch of government. SB1074 would severely undermine these democratic principles by allowing politics to improperly influence the judicial process.

For these reasons, Earthjustice strongly opposes SB1074.

Sincerely,

Kylie W. Wager Cruz
Attorney
Earthjustice

February 1, 2023

Dear Senator Rhoads, Chair; Senator Gabbard, Vice Chair; and Members of the Senate Judiciary Committee,

The following is respectfully submitted in opposition to that part of S. B. No. 1074 regarding retention of justices of the Hawai'i Supreme Court. My views here are substantially similar to those expressed in opposition to a like prior bill, H.B. 1311 (2019).

Proposed S.B. No. 1074 would alter the present constitutional procedure by requiring the judicial selection commission to issue a recommendation to grant or to reject a justice's petition for retention and to transmit its "determination" along with the petition to the Senate. The Senate in its discretion "may vote to consent to or reject the petition." This provision allows the Senate to override any recommendation by the commission. Hence, 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 and progressive in that it is not based on an electoral system or a purely appointive one. Rather it is structured to maximize a neutral merit-based selection process. This is accomplished through a commission whose members are composed of representatives from all branches of government (including the senate), and the bar and the public, and who serve staggered terms; a mandated number of nominees from which the governor must appoint; and a consent process in the Senate. The present retention process has three public interest advantages adapted to the constraints on a sitting justice (indeed all judges) 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 as the recipient of 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 in 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 conflict not only in terms of process but in terms of outcome, undermining public confidence in the retention procedure and the judicial system.

Finally, the pendency of any cases involving the legislature or any pronouncements of legislative priority may affect the capability of a justice to sit on such cases for a reasonable period prior to the filing of a petition for retention. The perception of influence on a justice's rulings from the possibility of a retention override would be detrimental to the efficacy of judicial decisions.

Thank you for the opportunity to present these observations.

Sincerely,

/s/ Simeon R. Acoba Jr.

Testimony to the Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Friday, February 3, 2023, 9:30 AM
State Capital, Conference Room 016 and Videoconference

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

Bill No. and Title: Senate Bill No. 1074, 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.

Position: I respectfully oppose the provision in Senate Bill No. 1074 proposing an amendment to the state constitution authorizing the Senate to approve or reject the retention of a Supreme Court Justice for subsequent office. I take no position on the other provisions in the bill.

Chair Rhoads, Vice Chair Gabbard, and members of the Senate Committee on Judiciary:

My name is Ronald Ibarra and I retired as a Circuit 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 have presided over many high publicity, controversial cases throughout my judicial career. I have always strived to base my decisions on the law and evidence, free of outside pressure or influences, or the parties financial status. There were many times when my courtroom was filled with interested spectators, including people with influence in the community or media reporters. 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.

The Supreme Court Justices are on a bigger stage. They decide cases that have statewide interest and impact and they should be able to decide a controversial case on the evidence and the law without concerns that the case would be the subject of a senate retention hearing.

Senate Bill No. 1074 proposed amendment to the Hawaii Constitution pertaining to changing retention process for Supreme Court Justices would undermine the independence of the Hawaii's top court by changing the retention system from one based on competency to one that would be susceptible to political considerations.

Testimony to the Senate Committee on Judiciary

SB 1074

Ronald Ibarra

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 my responses would be in the news. Often times there were comments from attorneys and or parties who have disagreed with my decisions.

Senate Bill No. 1074 proposed amendment to the Hawaii Constitution would have a chilling effect on attorneys, parties, and jurors if their comments regarding a justice is not kept confidential for fear of retaliation.

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

I respectfully oppose Senate Bill No.1074 to the extent it proposes to amend the Hawaii Constitution on the retention process of Supreme Court Justices. I take no position on the other provisions in the bill.

Thank you for the opportunity to testify.

February 2, 2023

To: Senate Committee on the Judiciary

From: Marie N. Milks, Judge (retired)

Re: SB 1074 - hearing on February 3, 2023 at 9:30 a.m., CR 016/Videoconference

My name is Marie N. Milks, and I am providing this written statement, in **strong opposition** to SB 1074.

Regrettably, my schedule does not allow me to attend the meeting in person nor by videoconference. However, I ask that my voice be heard and that I be counted among any others who are against the proposed legislation.

I am retired, but still active handling legal matters, servicing as a mediator and arbitrator, thus continuing my relationship with members of the bar. Oftentimes, we have discussions about the impact of appellate decisions. I continue to have a deep and abiding interest in a strong and independent judiciary.

You have undoubtedly been briefed by others who have provided their reasoned views on why this measure is unnecessary. When an attorney initially applies for a judicial position, the Judicial Selection Commission reviews the application and proceeds to undertake its investigation into qualifications and fitness of that individual to serve.

Thereafter, when any judicial officer seeks retention, notice is provided to the public and the public is included in the review of that officer's performance - in addition to an ongoing review that is rigorous and robust.

Decisions that are scrutinized rely on our expectations that the judge or justice is abiding with the oath and allegiance to the rule of law and both the Hawaii and the United States Constitutions.

Our Supreme Court is the court of last resort. When all else fails, we are reminded of the spirit of the Constitution that assures us that our justices will be true to their duty to adhere to the law, without favor to any individual or cause, with respect for all and with integrity and courage.

Wd have witnessed many hearings of the qualification process. They require that all interested parties are able to provide any and all information necessary to the Judicial Section Commission and its process, with the expectation that the Commission will do its job, with knowledge that all matters, warts and all, can be brought to them in strict confidence.

I urge this Committee to carefully consider SB 1074. Again please know that I stand in strong opposition to it.

Testimony to the Senate Committee on Judiciary

The Honorable Karl Rhodes, Chair

The Honorable Mike Gabbard, Vice Chair

Friday, February 3, 2023, 9:30 a.m.

State Capitol, Conference Room 016 & Videoconference

by

Momi Cazimero

Bill No. And Title: SB 1074 – 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 Senator Karl Rhoads, Chair, and Senator Mike Gabbard, Vice Chair, and Members of the Judiciary Committee:

My name is Momi Cazimero. I OPPOSE Senate Bill 1074.

I remain 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 value and trust the independence, balance, fairness and leadership practiced by the Judiciary branch of our State .

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 for the people of Hawai‘i.

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.”**

Guided by 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.

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 Senate Bill 1074.

Mahalo

**TESTIMONY IN OPPOSITION
S.B. 1074**

TO: Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Senate Committee on Judiciary

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

RE: OPPOSITION to S.B. 1074, 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: Friday, February 3, 2023

TIME: 9:30 A.M.

PLACE: State Capitol, Conference Room 016 and Videoconference
415 South Beretania Street

I write today in my individual capacity to express my strong opposition to S.B. 1074, 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, S.B. 1074 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.

I humbly ask that this bill be deferred indefinitely.

Testimony Presented Before the
Senate Committee on Judiciary
Conference Room 016 & Videoconference
Friday, February 3, 2023
9:30 a.m.
by Brandon Marc Higa

Testimony in Opposition to SB 1074

Chair Rhoads, Vice Chair Gabbard and Committee on Judiciary Members:

Thank you for the opportunity to submit **testimony in opposition to Senate Bill 1074 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 licensed attorney and doctoral candidate (S.J.D.) 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

**SENATE COMMITTEE ON THE JUDICIARY
ATTN: CHAIR KARL RHOADS, VICE-CHAIR MIKE GABBARD**

February 2, 2023, 9:30 a.m.

Aloha Chair Rhoads, Vice Chair Gabbard, 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 after being the Dean at the William S. Richardson School of Law for 17 years. From what I have studied and taught about judges and about how they are selected and retained across the United States and in other countries, I know that Hawai'i has substantial reasons to be proud of our judges and of our merit selection system.

It has been and 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 SB 1074 has the potential to do great harm. An enhanced role for the Senate in the renewal of Justices and Judges, as proposed, 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—and 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 a directly relevant article, "Judicial Independence: The Hawai'i Experience," published in the Law Review of our 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). "CJ" proved to be prescient when he added, "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, former President Donald Trump's repeated *ad hominem* attacks on judges provide an instructive example. Chief Justice Roberts felt the need to emphasize that judges are neither Republican nor Democratic judges--no matter what their background--once they take the judicial oath. And, 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.

Donald Trump's multiple attacks on judges show 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 illustrate how appealing it can be for an elected official, when displeased by a particular judge or a specific ruling, to take out that displeasure directly.

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.

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 likely to be controversial. Such a chilling effect might well not be the intended purpose of SB 1074. 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 if such enhanced skepticism is an unintended consequence.

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*, she quoted James Madison. As Madison introduced what became the Bill of Rights, he 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 have avoided the bitter imbroglios 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 U.S. Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000). Though the stakes were high, that controversial judgment was decisive and a new president was inaugurated peacefully. The same can be said about former President Trump's long string of loses in the courts. Moreover, even as the current U.S. Supreme Court hands down decisions that offend many of us, no one seriously suggests that the Justices lose their jobs. It is worth imagining how different the scenario would be if their future service 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 when 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, even when 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 SB 1074.

Mahala and aloha,

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

Aviam Soifer
Professor of Law

SB-1074

Submitted on: 1/30/2023 4:28:57 PM

Testimony for JDC on 2/3/2023 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

The people of Hawaii need to Have a say in this. Idea Voteing only!!!!

Honorable Karl Rhodes, Chair
Honorable Mike Gabbard, Vice Chair
Senate Committees on Judiciary

SB 1074

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 3, 2023
9:30 a.m.

**TESTIMONY AGAINST SB 1074
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 Senate Bill 1074, which I consider very ill advised. By way of background, I have practiced law in Hawaii for close to 50 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 Senate Bill 1074 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 Senate Bill No. 1074

Respectfully submitted,

Mark S. Davis
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808 524-7500

HARRISON & MATSUOKA

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February 2, 2023

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

SENATE COMMITTEE ON THE JUDICIARY

Chair: Sen. Karl Rhoads

Vice Chair: Sen. Mike Gabbard

DATE: Friday, February 3, 2023

TIME: 9:30 a.m.

PLACE: Conference Room 016
State Capitol
415 Beretania Street
Honolulu, Hawai'i 96813

BILL NO.: **OPPOSE SB 1074 - WRITTEN TESTIMONY ONLY**

Honorable Senators: Karl Rhoads, Mike Gabbard, and members of the Senate Committee on Judiciary.

Thank you for providing me this opportunity to offer written testimony **in strident opposition to Senate Bill 1074**

As background to this opposition, I am a criminal defense attorney who has practiced in all our courts for over 41 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.



SENATE COMMITTEE ON THE JUDICIARY

Chair: Sen. Karl Rhoads

Vice Chair: Sen. Mike Gabbard

Date: Friday, February 3, 2023

2 | Page

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.

The retention of Supreme Court Justices by the merit selection commission keeps politics out of the process. This bill seeks to inject the Legislature into judicial retentions and by doing so considerably politicizes the judicial process. It is my opinion that this bill is a disguised effort to undermine judicial independence at the highest level. A decision that would have disastrous implications, allowing the Legislature to remove any Justice that participated in a decision with which the Legislature did not agree. This flies in the face of our time-tested system of checks and balances.

In the present merit selection system, the JSC screens potential appointees and presents a list of qualified candidates to the appointing authority. The governor appoints individuals 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 thoroughly vetted by the Hawaii Bar, Legislature, and the public. That vetting process removes any concerns the Bar, public and the legislature have 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. I would add that the legislature appoints four (4) of the nine commissioners, already giving it the largest voice in the selection and retention process. 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

SENATE COMMITTEE ON THE JUDICIARY

Chair: Sen. Karl Rhoads

Vice Chair: Sen. Mike Gabbard

Date: Friday, February 3, 2023

3 | Page

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 composition of our selection commission ensures a balance between professional assessment of an applicant’s legal ability and the voice of citizens. In the aforementioned AJS survey only 1% of commissioners reported that political considerations were regularly included in commission deliberations.

Merit selection and retention advances diversity on the bench. Recent AJS research indicates that merit selection is the most effective way to advance diversity on state high courts. Even after controlling for a wide range of factors that may influence diversity on the bench, merit selection 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

SENATE COMMITTEE ON THE JUDICIARY

Chair: Sen. Karl Rhoads

Vice Chair: Sen. Mike Gabbard

Date: Friday, February 3, 2023

4 | Page

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 and justices, who are not influenced by the vicissitudes of public opinion. In short, a process that allows for such significant legislative review and oversight, 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** SB 1074.

Sincerely,



William A. Harrison

February 2, 2023

Chair Senator Karl Rhoads
Vice Chair Senator Michael Gabbard
Senate Committee on Judiciary
Hawaii State Capitol
415 S. Beretania Street
Honolulu, HI 96813

Re: **SB 1074: *Proposing Amendments to the Constitution of the State of Hawaii to Amend the Manner in Which Justices and Judges Are Appointed, Consented to, and Retained.***

Hearing Date: February 3, 2023
Hearing Time: 9:30 a.m.

Dear Senator Rhoads and Senator Gabbard:

Please allow this letter to serve as the testimony of the undersigned individuals, who are currently members of the board of directors of the American Judicature Society (“AJS”), and have been attorneys in private practice in Hawaii or active in the Hawaii business community for several years.

We respectfully oppose SB 1074, which proposes to amend the Hawaii State Constitution to require Senate consent to petitions for retention of justices of the Hawaii Supreme Court, among other things. We submit this testimony in our individual capacities and not on behalf of AJS, but we note that AJS has previously opposed similar proposed legislation (e.g. SB 2239 and 2420 in 2016, SB 673 in 2017, and HB 1311 in 2019).

Merit-Based Selection and a Fair and Impartial Judiciary.

A fair and impartial judiciary is essential to our democratic form of government. That goal has long been linked to the process of selecting and retaining judges and justices. As noted by William S. Richardson, former Chief Justice of the Hawaii Supreme Court, the method of selecting judges was a controversial issue in the constitutional conventions of 1950, 1968, and 1978, but the overriding concern was with the potential for political influence in the judicial selection process and its impact on the decision-making of judges selected and retained through that process.¹ 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

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

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.² Applicants are evaluated on the basis of background, professional skills, character, and other specified criteria relating to merit.³ The names of the most highly qualified applicants for the Hawaii District, Circuit, and Appellate Courts are submitted to the Chief Justice or the Governor, who must make the final selection from the list.⁴ The final selection is subject to confirmation by the Senate.

For subsequent terms, 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.⁵ 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.

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

² 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>.

³ Judicial Selection Commission Rules, Rule 10.

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

⁵ Judicial Selection Commission Rules, Rule 10.

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.⁶

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 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

⁶ 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 Senator Karl Rhoads
Vice Chair Senator Michael Gabbard
Senate Committee on Judiciary
February 2, 2023
Page 4 of 4

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.

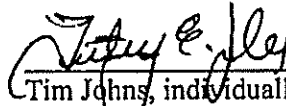
Very truly yours,



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SB-1074

Submitted on: 2/2/2023 2:08:47 PM

Testimony for JDC on 2/3/2023 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Joseph E Cardoza	Individual	Oppose	Written Testimony Only

Comments:

Chair: Hon. Karl Rhoads, Chair

Vice Chair: Hon. Mike Gabbard, Vice Chair

Committee: Senate Committee on Judiciary

Testimony of: Joseph E. Cardoza

Organization: None (Submitted as an Individual Citizen)

Hearing Date: Friday, February 3, 2023

Hearing Time: 9:30 a.m.

Place: Conference Room 016 & Videoconference

Hawai`i State Capitol

415 South Beretania Street

Honolulu, Hawai`i

Senate Bill: SB No. 1074

Position: Opposition to SB 1074 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

Dear Chair Rhoads and Members of the Senate Committee on Judiciary:

Respectfully, I am writing as an individual citizen in opposition to Senate Bill No 1074. This Bill proposes amendments to the Hawai`i State Constitution to extend time periods for the appointment and consideration of a justice's or judge's appointment, harmonize the senate consent procedures for district court judgeship nominees; and authorize the senate to approve or reject the retention of a supreme court justice for a subsequent term of office.

My opposition is focused, in part, on the fact that the current process used to appoint, consent to, and retain justices and judges is working. There is no compelling reason to change a process that has been working. There is no need to harmonize the process for consenting to district court judgeship nominees. Although there is a difference in process, the system is working. Also, changing the manner in which justices are retained is ill-advised. Three separate but equal branches of government is critical to our system of governing. Justices seeking retention will likely have cases pending before them that involve issues of significance to the legislative branch of government and/or individual citizens who may wish to testify at a retention hearing. Also, justices seeking retention will have issued ten years of decisions that some individuals may wish to rellitigate before the legislative branch of government. Senate confirmation on a petition for retention by a justice will also be time-consuming and burdensome. Changing the current system will not produce the benefits that warrant changing a process that already works.

Thank you for the opportunity to present this written testimony.

I do not plan to testify during the hearing on this Bill.

Testimony Regarding Senate Bill 1074
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
Sen. Karl Rhoads, Chair/Sen. Mike Gabbard, Vice Chair
Friday, February 3, 2023 9:30 a.m.

Good morning Chair Rhodes, Vice Chair Gabbard, and members of the committee.

I'm Tom Farrell and I have practiced law in Hawaii for forty-two years, the last twenty-eight of them almost exclusively in Family Court.

“Strongly oppose” is hardly adequate to describe my stance on Senate Bill 1074.

As a preliminary matter, I do not oppose those amendments that seek to harmonize the process for appointment of district judges, circuit judges, and appellate judges. I'm not thrilled about extending the time for filling vacancies, however. In family court, we can't wait six months to get a replacement judge.

The remainder of the bill is simply appalling.

I had hoped that the blowback from *Nelson v. DHHL* was past us. Unfortunately, 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. 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 to degrade Hawaii's judiciary and destroy judicial independence. All of these bills received

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overwhelming opposition and died in in the 2016 session. However the legislature did 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 in 2019, and now in 2023. Can we stop this, please?

I'm sorry that the legislature 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.