

STAND. COM. REP. NO.

2481

Honolulu, Hawaii

FEB 19 2016

RE: S.B. No. 2238
S.D. 1

Honorable Ronald D. Kouchi
President of the Senate
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawaii

Sir:

Your Committee on Judiciary and Labor, to which was referred
S.B. No. 2238 entitled:

"A BILL FOR AN ACT RELATING TO JUDICIAL ELECTIONS,"

begs leave to report as follows:

The purpose and intent of this measure is to:

- (1) Make conforming amendments to implement a constitutional amendment proposing the establishment of judicial elections; and
- (2) Require the Judiciary, Office of Elections, and Campaign Spending Commission to study appropriate methods of implementing a judicial election system in the State and submit a written report, including proposed legislation, to the Legislature.

Your Committee did not receive any testimony in support of this measure. Your Committee received testimony in opposition to this measure from the Judiciary; Judicial Selection Commission; Office of the Public Offender; Hawaii State Bar Association; Family Law Section of the Hawaii State Bar Association; West Hawai'i Bar Association; Kauai Bar Association; Hawai'i County Bar Association; Hawai'i Women Lawyers; American College of Trial Lawyers; Justice at Stake; American Judicature Society; Common Cause Hawaii; League of Women Voters of Hawaii; American Civil Liberties Union of Hawaii; Hawaii Filipino Lawyers Association; Hawaii Government Employees Association, AFSCME Local 152,

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AFL-CIO; and fifty individuals. Your Committee received comments on this measure from the Campaign Spending Commission.

Your Committee finds that while Hawaii has a judicial merit selection system, approximately twenty-two states select their state judges through partisan or nonpartisan elections rather than merit selection. Proponents of judicial elections believe that the public should have the opportunity to select judicial candidates in open, contested elections; merit selection does not eliminate politics from the selection process, but instead transfers popular politics to behind-the-scene political control; and that merit selection may exclude minorities from the bench or diminish their chances of filling judicial seats. An amendment to the Hawaii State Constitution would be necessary to implement a judicial election system. Your Committee notes that S.B. No. 2239 (Regular Session of 2016) proposes a constitutional amendment to require judges to be elected to serve six-year terms. This measure makes conforming amendments to the Hawaii Revised Statutes to carry out the requirements of S.B. No. 2239, if that measure is ratified.

However, before considering an amendment to the Hawaii State Constitution to repeal the State's merit selection system and adopting an election process for state justices and judges, your Committee further finds that discussion and planning are necessary. This measure requires a study to ensure that the implementation of a judicial election system would be carried out efficiently and effectively without compromising the integrity of the election process or the State's judicial system.

Your Committee notes the concerns raised in testimony submitted regarding campaign finance issues related to the judicial elections. While much of the testimony, including the Judiciary's comments, refers to the impact of Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010) in support of the existing Missouri Plan scheme of judicial selection, your Committee further notes that a few bring to your Committee's attention the more recent and relevant discussion regarding the funding of judicial elections in Williams-Yulee v. The Florida Bar, 575 U.S. _____ (2015).

Your Committee recognizes that Hawaii does not have a history of electing its judges, but notes that "[i]n 39 [s]tates, voters elect trial or appellate judges at the polls." Williams-Yulee, 575 U.S. at _____. The United States Supreme Court observed:



Judges are not politicians, even when they come to the bench by way of the ballot. And a [s]tate's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A [s]tate may assure its people that judges will apply the law without fear or favor and without having personally asked anyone for money. Williams-Yulee, 575 U.S. at ____ (Roberts, C.J., Plurality Op.).

Your Committee further notes the importance of public confidence in the integrity of judges stems from the place of the Judicial branch in government. Unlike the Executive or Legislative branches, the Judicial branch "has no influence over either the sword or the purse ... neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The Judiciary's authority therefore depends in large measure on the public's willingness to respect and follow the Judiciary's decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 (1954); Williams-Yulee, 575 U.S. at _____. Of particular note, Chief Justice Roberts observed: "States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians." Williams-Yulee, 575 U.S. at _____.

The Judiciary in its testimony refers to "Justice at Risk", an empirical study by Professor Joanna Shepherd of Emory University, which used sophisticated empirical research techniques to analyze 2,345 business-related state supreme court opinions from all fifty states and over 200,000 contributions to sitting justices. While mentioning one of the conclusions, the Judiciary fails to include in its testimony the conclusion that "[t]he empirical relationship between business contributions and justices' voting for business interests exist only in partisan and nonpartisan election systems; there is no statistically significant relationship between money and voting in retention elections." ACS Press Release (June 11, 2013).

Therefore, your Committee believes that further discussion is necessary regarding a constitutional amendment proposing a judicial election system before conforming amendments are made to the Hawaii Revised Statutes. However, further discussion can



result from the Judiciary, Office of Elections, and Campaign Spending Commission studying appropriate methods of implementing a judicial election system.

Accordingly, your Committee has amended this measure by:

- (1) Deleting part I, which proposes conforming amendments to the Hawaii Revised Statutes to implement the requirements of S.B. No. 2239 (Regular Session of 2016);
- (2) Making conforming amendments to reflect the deletion of part I;
- (3) Inserting an effective date of January 7, 2059, to encourage further discussion; and
- (4) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 2238, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 2238, S.D. 1, and be referred to your Committee on Ways and Means.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Labor,



GILBERT S.C. KEITH-AGARAN, Chair



The Senate
 Twenty-Eighth Legislature
 State of Hawai'i

Record of Votes
Committee on Judiciary and Labor
JDL

Bill / Resolution No.:* SB 2238	Committee Referral: JDL, WAM	Date: 2/10/16		
<input type="checkbox"/> The Committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
KEITH-AGARAN, Gilbert S.C. (C)	✓			
SHIMABUKURO, Maile S.L. (VC)		✓		
GABBARD, Mike		✓		
██████████				
KIM, Donna Mercado	✓			
THIELEN, Laura H.		✓		
SLOM, Sam				✓
TOTAL	2	3	0	1
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature:				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Only one measure per Record of Votes