FORTIETH DAY

Wednesday, March 19, 1980

The Senate of the Tenth Legislature of the State of Hawaii, Regular Session 1980, convened at 11:00 o'clock a.m., with the President in the Chair.

The Divine Blessing was invoked by Reverend Tetsuun Ama of the Honpa Hongwanji Mission, Hawaii Betsuin, after which the Roll was called showing all Senators present, with the exception of Senator Saiki who was excused.

The President announced that he had read and approved the Journal of the Thirty-Ninth Day.

At this time, the following introductions were made to the members of the Senate:

Senator Kawasaki introduced guests from the State of Oregon, home of the great statesman, Senator Wayne Morse, Republican (District 41) State Representative Mary McCauley Burrows and her husband, Chuck, from Eugene, Oregon.

Senator Anderson then introduced 37 members of the Area Wide Horizons Senior Citizens Club of Waialua, Oahu.

MESSAGE FROM THE GOVERNOR

A message from the Governor (Gov. Msg. No. 107), transmitting the State Housing Plan, a functional plan designed to implement the Hawaii State Plan, prepared by the Hawaii Housing Authority in compliance with Chapter 226, Hawaii Revised Statutes, was read by the Clerk and was referred to the Committee on Housing and Hawaiian Homes, then to the Committee on Economic Development.

HOUSE COMMUNICATIONS

The following communications from the House (Hse. Com. Nos. 307 to 309), were read by the Clerk and were disposed of as follows:

A communication from the House (Hse. Com. No. 307), informing the Senate that the report of the Committee on Conference on the disagreeing vote of the Senate to the amendments proposed by the House to Senate Bill No. 1703, S.D. 1, was adopted by the House; and Senate Bill No. 1703, S.D. 1, H.D. 1, C.D. 2, passed Final Reading in the House of Representatives on March 18, 1980, by not less than two-thirds vote of all of the members to which the House is entitled, was placed on file.

A communication from the House (Hse. Com. No. 308), informing the Senate that pursuant to the disagreement of the Senate to the amendments proposed by the House to Senate Bill No. 2134-80, and the request for a conference on the subject matter thereof of said amendments, on March 18, 1980, the Speaker appointed Representatives Blair, Chairman, Aki, Kobayashi, Segawa, Shito, Ikeda and Lacy as Managers on the part of the House for the consideration of said amendments, was placed on file.

A communication from the House (Hse. Com. No. 309), informing the Senate that the House has reconsidered its action taken on March 18, 1980 in passing Senate Bill No. 1703, S.D. 1, H.D. 1, C.D. 2, on Final Reading, was placed on file.

SENATE CONCURRENT RESOLUTION

A concurrent resolution (S.C.R. No. 40), entitled: "SENATE CONCURRENT RESOLUTION ADOPTING A FUNCTIONAL PLAN FOR HOUSING", was offered by Senator Wong, by request, and was read by the Clerk.

By unanimous consent, S.C.R. No. 40 was referred to the Committee on Housing and Hawaiian Homes, then to the Committee on Economic Development, then to the Committee on Ways and Means.

SENATE RESOLUTION

A resolution (S.R. No. 194), entitled: "SENATE RESOLUTION CONGRATULATING AND COMMENDING YAEKO ONO FOR HER OUTSTANDING CONTRIBUTIONS TO EDUCATION", was jointly offered by Senators Young, Mizuguchi, Cayetano, Kuroda, Cobb, Machida, Toyofuku, Ushijima, Yamasaki, Wong, Chong, Campbell, George, Saiki, Ajifu, Anderson, Carpenter, Soares, Carroll, Abercrombie, O'Connor, Yim, Yee, Hara and Kawasaki, and was read by the Clerk.

On motion by Senator Young, seconded by Senator Mizuguchi and carried, S.R. No. 194 was adopted.

STANDING COMMITTEE REPORT

Senator Yamasaki, for the Committee on Legislative Management, presented a report (Stand. Com. Rep. No. 736-80), informing the Senate that Senate Resolution Nos. 191 to 193 and Standing Committee Report Nos. 719-80 to 735-80 have been printed and are ready for distribution.

On motion by Senator Yamasaki, seconded

by Senator George and carried, the report of the Committee was adopted.

ORDER OF THE DAY

MATTERS DEFERRED
FROM MARCH 12, 1980

Standing Committee Report No. 679-80 (S.B. No. 1829-80, S.D. 2):

By unanimous consent, action on Stand. Com. Rep. No. 679-80 and S.B. No. 1829-80, S.D. 2, entitled: "A BILL FOR AN ACT RELATING TO THE HAWAII BUSINESS CORPORATION ACT", was deferred until Thursday, March 27, 1980.

Standing Committee Report No. 695-80 (S.B. No. 1828-80, S.D. 2):

By unanimous consent, action on Stand. Com. Rep. No. 695-80 and S.B. No. 1828-80, S.D. 2, entitled: "A BILL FOR AN ACT RELATING TO THE HAWAII NONPROFIT CORPORATION ACT", was deferred until Thursday, March 27, 1980.

Standing Committee Report No. 725-80 (Gov. Msg. No. 92):

By unanimous consent, action on Stand. Com. Rep. No. 725-80 and Gov. Msg. No. 92 was deferred to the end of the calendar.

Standing Committee Report No. 726-80 (Gov. Msg. No. 93):

Senator O'Connor moved that Stand. Com. Rep. No. 726-80 be received and placed on file, seconded by Senator Cobb and carried.

Senator O'Connor then moved that the Senate consent to the nomination of Wendell K. Huddy as Sixth Judge, Circuit Court of the First Circuit, for a ten-year term, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Cobb.

Senator O'Connor then rose to speak in favor of the nomination as follows:

"Mr. President, I rise to speak in favor of this nomination and the consent to the nomination.

"Mr. Huddy, now serving as a temporary judge of the First Circuit Court, has had a distinguished practice of law in the State of Hawaii and has served consecutively as District Court Judge with a good record and as temporary Circuit Court Judge with a good record.

"As Circuit Court Judge he has handled a variety of cases including criminal cases, waiver cases for the Family Court and civil cases. All of his records that we investigated, on the part of the Judiciary Committee, were excellent and we highly recommend the Senate consent of Judge Huddy."

The motion was put by the Chair and Roll Call having been ordered, was carried on the following showing of Ayes and Noes:

Ayes, 23. Noes, none. Excused, 2 (Saiki and Yee).

Standing Committee Report No. 727-80 (Gov. Msg. No. 94):

Senator O'Connor moved that Stand. Com. Rep. No. 727-80 be received and placed on file, seconded by Senator Cobb and carried.

Senator O'Connor then moved that the Senate consent to the nomination of Simeon R. Acoba, Jr., Twelfth Judge, Circuit Court of the First Circuit, for a ten-year term, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Cobb.

Senator O'Connor then rose to speak in favor of the nomination as follows:

"Mr. President, I rise to speak in favor of this motion to consent.

"Mr. Simeon R. Acoba, Jr., has practiced law as a private practitioner in the State of Hawaii for the last 12 years. He has had a distinguished practice; he has been involved in almost every type of legal case imaginable; his record is excellent and, overall, he has demonstrated the integrity and morality which one would expect of a circuit court judge.

"For those reasons and because of his intelligence and ability as an individual, your Judiciary Committee strongly urges that the Senate consent to Mr. Simeon R. Acoba, Jr."

Senator Carroll also rose to speak in favor of the nomination as follows:

"Mr. President, speaking in favor of this nomination, anybody who can share office space and get along with Ben Cayetano for seven years demonstrates not only a judicial, but judicious temperament and I urge the consent of this nomination."

Senator Cayetano, after the statement of the previous speaker, requested

the Chair for a ruling on a conflict of interest and the Chair ruled that Senator Cayetano was not in conflict.

The motion was put by the Chair and Roll Call having been ordered, was carried on the following showing of Ayes and Noes:

Ayes, 24. Noes, none. Excused, 1 (Saiki).

Standing Committee Report No. 728-80 (Gov. Msg. No. 95):

Senator O'Connor moved that Stand. Com. Rep. No. 728-80 be received and placed on file, seconded by Senator Cobb and carried.

Senator O'Connor then moved that the Senate consent to the nomination of Philip T. Chun, Fourteenth Judge, Circuit Court of the First Circuit, for a ten-year term, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Cobb.

Senator O'Connor then rose to speak in favor of this nomination as follows:

"Mr. President, I rise to speak in favor of the nomination.

"Mr. Philip T. Chun has served in a variety of legal capacities in this community, including the Corporation Counsel of the City and County of Honolulu, and in private practice as an attorney for approximately 15 years. His entire record has been excellent.

"In the last five years he has served both as a District Court Judge and as an acting Circuit Court Judge. He has had an excellent record in those areas.

"The Judiciary Committee, after carefully reviewing the record of Judge Chun, soundly recommends that he be consented to as a First Circuit Court Judge."

The motion was put by the Chair and Roll Call having been ordered, was carried on the following showing of Ayes and Noes:

Ayes, 24. Noes, none. Excused, 1 (Saiki).

Standing Committee Report No. 729-80 (Gov. Msg. No. 96):

Senator O'Connor moved that Stand. Com. Rep. No. 729-80 be received and placed on file, seconded by Senator Cobb and carried.

Senator O'Connor then moved that the Senate consent to the nomination of Ronald B. Greig, Fifteenth Judge, Circuit Court of the First Circuit, for a ten-year term, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Cobb.

Senator O'Connor then rose to speak in favor of the nomination as follows:

"Mr. President, I rise to speak in favor of the consent to the nomination of Ronald B. Greig to the First Circuit Court.

"Judge Greig has been in private practice of law in our community for in excess of 20 years.

"For the past seven years he has served, first, as a District Court Judge, and has, recently, served as a temporary Circuit Court Judge. His private practice has been exemplary; his decisions on the bench have been excellent; he is extremely well qualified, and the Judiciary Committee firmly recommends that he be consented to as a First Circuit Court Judge."

The motion was put by the Chair and Roll Call having been ordered, was carried on the following showing of Ayes and Noes:

Ayes, 24. Noes, none. Excused, 1 (Saiki).

Standing Committee Report No. 730-80 (Gov. Msg. No. 100):

Senator O'Connor moved that Stand. Com. Rep. No. 730-80 be received and placed on file, seconded by Senator Cobb and carried.

Senator O'Connor then moved that the Senate consent to the nomination of Kei Hirano as Circuit Judge of the Fifth Circuit, for a ten-year term, in accordance with the provisions of Article VI, Section 3, of the Constitution of the Hawaii State Constitution, seconded by Senator Cobb.

At this time, Senator O'Connor rose to speak in favor of the nomination as follows:

"Mr. President, I rise to speak in favor of the Senate's consent to the nomination of Kei Hirano as the Judge of the Fifth Circuit.

"Judge Hirano is a Kauai boy who grew up on Kauai, went back there after he passed the bar and has practiced on Kauai for all his life. He was the Corporation Counsel for the County of Kauai and served as District Judge for many years until being appointed

as the temporary Circuit Court Judge on the Island of Kauai.

"His overall background, his education, his intelligence and his general outlook on life have just been excellent. We cannot more highly recommend Kei Hirano to be judge of the Fifth Circuit."

Senator Carroll also rose to speak in favor of the nomination as follows:

"Mr. President, I rise to speak in favor of Judge Hirano.

"The other judges which have been mentioned today -- Huddy, Acoba, Chun and Greig -- are all well-known in this community. With Judge Hirano, this is not the case.

"I had the occasion to appear before him and I have found him to be as competent or more competent than any of the circuit court judges that we have in this circuit. The particular case I am referring to was an inflammatory and very convoluted matter and I was extremely pleased with the conduct, the judicial temperament, and the ability of this gentleman. I think he will become more well-known in the community on the circuit court bench. I strongly urge the consent of his nomination."

Senator Kawasaki then rose to speak in favor of the consent of Judge Hirano as follows:

"Mr. President, I too would like to urge the unanimous consent of Judge Hirano.

"I don't know the man personally, but I've respected and admired his recent decision ... his judicial decision to uphold the law. That is the case in which he fined one of our labor unions $30,000 -- similar action other judges may have been reluctant to emulate.

"I think this man proved that the law applies equally to all segments of our community here, including the labor unions, and I think he demonstrated his judicial integrity and his courage.

"I urge the unanimous consent of this man as a paragon of what judges should be in this state."

The motion was put by the Chair and Roll Call having been ordered, was carried on the following showing of Ayes and Noes:

Ayes, 24. Noes, none. Excused, 1 (Saiki).

RE-REFERRAL OF HOUSE BILLS

The President made the following re-referral of a House Bill that was received on Monday, March 3, 1980:

House Bill	Referred to:
No. 2064-80	Committee on Judiciary

The President made the following re-referral of House Bills that were received on Monday, March 10, 1980:

House Bill	Referred to:
No. 2071-80, H.D. 1	Committee on Ways and Means
No. 2361-80, H.D. 1	Committee on Ways and Means

The President made the following re-referral of House Bills that were received on Wednesday, March 12, 1980:

House Bill	Referred to:
No. 1958-80	Committee on Ways and Means
No. 2035-80, H.D. 2	Committee on Ways and Means

The President made the following re-referral of House Bills that were received on Thursday, March 13, 1980:

House Bill	Referred to:
No. 1772-80, H.D. 2	Committee on Ways and Means
No. 2217-80, H.D. 1	Committee on Ways and Means
No. 2752-80, H.D. 2	Committee on Ways and Means

MATTER DEFERRED FROM EARLIER ON THE CALENDAR

Standing Committee Report No. 725-80 (Gov. Msg. No. 92):

Senator O'Connor moved that Stand. Com. Rep. No. 725-80 be received and placed on file, seconded by Senator Cobb and carried.

Senator O'Connor then moved that the Senate consent to the nomination of James H. Wakatsuki, Fourth Judge, Circuit Court of the First Circuit, for a ten-year term, in accordance

with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Cobb.

At this time, Senator Ajifu moved to reject the nomination of Speaker Wakatsuki as a judge of the Circuit Circuit of Hawaii, seconded by Senator Soares.

The Chair then asked: "Is it my understanding, Senator Ajifu, that you are amending the committee report?"

Senator Ajifu replied: "No, Mr. President, I am amending the main motion as proposed by the chairman of the Judiciary Committee."

Senator Mizuguchi, rising on a point of order, stated as follows:

"Mr. President, I believe that the motion is improper and it should be ruled out of order. I believe that after discussion and debate of the respective nominee that the movant and the whole Senate will have an opportunity to vote to consent or to reject that nominee. For that reason, Mr. President, the motion should be ruled out of order."

Senator Anderson then rose to object on the point of order and stated as follows:

"Mr. President, while I don't support the amendment, I think the amendment is in order and I respect the right of Senator Ajifu to make it.

"I ask for a roll call vote on the motion, please."

The Chair replied in the affirmative and stated that "the Chair will recognize the motion for an amendment to the committee report. Those voting in favor approve the amendment. Those against will be against the amendment, then we will go to the main motion to consent." (Note: The Chair made a correction to this ruling on the 41st Day to the effect that committee reports are not amendable on the floor.)

Senator Abercrombie, rising on a point of information, asked: "Mr. President, is it your rule then that the amendment is in order?" and the Chair replied in the affirmative.

Senator Soares then asked the Chair for a discussion on the amendment and the President allowed him to proceed.

Senator Ajifu, at this time, rose to speak in favor of the rejection and stated as follows:

"Mr. President, based on the revised Hawaii State Constitution, the function of this body with regard to confirmation of judicial appointments has been changed. In the past, the Senate had to take action to confirm an appointment before a judicial nominee could take office. Since the changes by the Constitutional Convention were made, our role has been changed. Now, the appointment is automatically confirmed if the Senate does not act to reject the nomination.

"Mr. President, I think it is vital that we, as the confirming body for judicial appointments, take a very serious look at the caliber of appointments to the Hawaii court bench. We will have no role at all in confirmations of judges if we say nothing and take no action. The reasons for my motion today are many.

"Particularly in the case of the appointment of a sitting member of the Legislature, it is incumbent upon us to act with great caution and sensitivity.

"This nomination in particular will reflect upon the actions of the entire Legislature if the individual in question remains in his elective office through the end of the session.

"It is our responsibility to make sure that the integrity of this Legislature is maintained and not placed in question and also to guard the reputation and high standards of our courts.

"This body was never meant to act as a rubber stamp for judicial appointments. And no appointment should ever be assured of a guaranteed place on the bench so long as the Senate is mandated by the Constitution to review any recommendations.

"In this case, Speaker Wakatsuki would essentially be holding two positions at the same time, that of Speaker of the House of Representatives as well as that of circuit court judge.

"He would be placing himself as well as the rest of us into a conflict situation because he would be holding his legislative position at the same time that numerous bills are acted upon which relate to the Judiciary, the penal code and criminal justice system in general. As Speaker, he is in an influential position to determine the fate of such legislation. Even if he abstained from voting, his influence would be felt among his fellow legislators.

"It is again our responsibility to assure that appointments we confirm are above reproach. I submit here that the Speaker is inviting reproach, public concern and questioning by insisting upon retaining his legislative position.

"If he is to be appointed, if he wants to conduct himself in a careful, judicious manner, then I recommend to this appointee that he leave his legislative position to avoid any possibility of criticism and community concern.

"Mr. President, may I remind the members of this Honorable Body, for those of you who are supporting Speaker Wakatsuki, you should vote 'no' on that motion.

"I urge your support for this motion. Thank you."

Senator O'Connor then rose to question as follows:

"Mr. President, as I understand it, the motion to amend is to amend the motion to consent by striking the word 'consent' and adopting the word 'reject' and that the next vote that we take will be on whether or not the amendment should be allowed, and that if the amendment is allowed we will then, if it's allowed, vote on it. If not, then we'll vote on the main motion?"

The Chair replied in the affirmative stating that "we will go back to the main motion."

At this time, Senator Carpenter rose on a point of information as follows:

"Mr. President, as I understand it, the motion before us is an amendment and in fact is, or perhaps, dual -- an amendment and a substitute motion.

"In the light of the language of the Constitution which speaks of the Senate's position for rejection, the question I'd like to pose to the Chair is, does this motion supersede the motion to consent?"

The Chair replied that it does not supersede the motion to consent, that "it's merely an amendment to the motion to consent by deleting the word 'consent' and inserting the word 'reject'" and asked, "Am I correct, Senator Ajifu?"

Senator Ajifu replied as follows:

"Mr. President, my amendment really is a substitute amendment.

"There are five methods of amending the motion and the amendment procedure that I'm going through is asking for a substitution. If the motion to substitute is defeated, then we'll go back to the original motion as was made by the chairman of the Judiciary Committee."

At 11:35 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:40 o'clock a.m.

At this time, Senator O'Connor rose to speak against the amendment and briefly stated as follows:

"Mr. President, I simply would like to urge all members to vote against the amendment; thereby, in voting against the amendment, vote to consent, eventually, to the main motion."

Senator Cayetano then rose to ask the chairman of the Judiciary Committee to yield to a question and the chairman replied in the affirmative.

Senator Cayetano asked as follows:

"Mr. Chairman, will you explain to this body your understanding of the Constitutional Amendment regarding the consent to judges?"

Senator O'Connor replied as follows:

"Mr. President, the Constitutional Amendment gives the Senate a 30-day period within which to reject a nomination made by the Governor. The nomination is submitted to the Senate to consent or reject. If no action is taken within 30 days, then the Senate is impliedly acknowledging, under the wording of the Constitution, to consent to the nomination.

"If the Senate votes to reject, then of course the nomination is rejected and we go back to the Governor for another nomination."

Senator Cayetano further inquired as follows:

"Mr. President, I want to ask the chairman if it is his understanding that this body must affirmatively reject the nominee in order to not consent to the Governor's nomination. I think that is the point of confusion here today, and before I vote on this amendment I would like to know and would like to have it cleared up."

Senator O'Connor replied: "Mr. President, that is correct. If the body did not consent to a nomination it would then have to reject the nomination."

At 11:43 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:45 o'clock a.m.

At this time, Senator Anderson rose to state as follows:

"Mr. President, I have a copy before

me of the Rules of the Senate and on page 22 under Rule 51 it says, 'All amendments proposed to any bill or resolution shall be in writing, ...'.

"I don't have a copy of this amendment before me in writing and I question whether it's in order."

The Chair answered as follows:

"Senator Anderson, floor amendments are allowed to be made from the floor and the Chair will recognize floor amendments; however, it would be in proper order to have things placed on the senators' desks, but the Chair would have to recognize floor amendments as part of the procedure in parliamentary discussion and debate."

Senator Anderson further inquired, "Mr. President, will this stand good for all future bills coming before us, is it going to set a precedent?"

The Chair replied, "I would much prefer that amendments be placed in writing, but there are allowances in Cushing's for floor amendments."

Senator Ajifu then rose on a point of clarification and stated as follows:

"Mr. President, my amendment does not amend the committee report. My amendment is only a procedural point, it is not amending the committee report. It's just a procedural point in terms of parliamentary point, so, I think, this is what should be considered."

Senator Cayetano then further remarked as follows:

"Mr. President, one final point on this entire matter.

"The Con Con, the way it worded this amendment, has left us, I think, with a lot of confusion and doubt as to the procedure.

"I see nothing in the Constitutional Amendment which states that the consent of the Senate has to be given in the manner as it has been proposed by the chairman of the Judiciary Committee today. I see nothing in the amendment which prohibits any member from making a motion on the floor. There is nothing in this amendment which says that this matter has to go to committee, and I don't think this whole matter is affected any by our Senate rules."

Senator O'Connor then rose to clarify the matter as follows:

"Mr. President, I'm going to attempt to clarify our present situation.

"The Constitution says and I quote, '... that the appointment of the Governor shall be made from within a list supplied by the Judicial Selection Committee with the consent of the Senate. If the Senate fails to reject any appointment within 30 days thereof, it shall be deemed to have given its consent to such appointment.' It goes on to say what happens if there is rejection.

"Reading that section of the Constitution together with the Rules of the Senate, where such appointments are referred to committee for committee action and for the committee to report back to the body, taking all of that together, the normal procedure would be to have the Senate consent upon a motion, as we have for every other judge up to this time, and to seek a majority of votes for that consent.

"Normally, if such a vote were not obtained and there were less than the requisite number of votes to consent, then the appropriate motion at that time would be to reject, and I would anticipate a vote would be taken to reject.

"In the present circumstance, my good and learned colleague from Kailua has chosen to place the motion to amend and place the rejection first. I'm not debating, at this juncture, whether or not that's appropriate or inappropriate.

"The motion to amend is what we are presently voting on -- whether or not the main motion should be amended. If that vote is in the affirmative then there should be a motion of vote taken on the main motion as amended.

"What we are faced with right now is simply a motion to amend the main motion, to take first the question of rejection which, in the scheme of things, ordinarily would be taken after the regular vote.

"Again, I would urge everybody to vote against it."

Senator Soares, at this time, rose to speak in favor of the motion to reject and stated as follows:

"Mr. President, I am not a lawyer, although I've been called a 'sidewalk' attorney.

"I must evaluate the Speaker's qualifications for this judicial office as a man. As a man with whom I have interacted under the most intimate and telling circumstances for fourteen years. Fourteen years, Mr. President, and I might add, along with you and many others in this hall when we were in

the House of Representatives.

"I must evaluate this man according to my ideas of what a judge must be -- fair, impartial and just. In my view, the critical quality a judge must have is the ability to remove himself and his personality from a situation in order to assess the facts and the law and then act accordingly. In my fourteen-year relationship with the Speaker, I have not seen these qualities of impartiality and fairness.

"Finally, it is essential that the men and women we appoint to our courts have a sense of justice to all. They must not be biased in their dealings with others who are not part of a chosen group. They must not look the other way from minorities, and I say minorities in describing the minority of the majority as it still exists in these halls and have been there for the last 10 years, and others who are not in power.

"Such has not been the case with the nominee before us today, however. While exercising crucial decision-making positions in the Legislature, he has not dealt with groups equally or fairly. 'All men have not been created equal' in his eyes. He has treated many as 'more equal' than others and still does so. He's gotten the job done, but in so doing, he has created an atmosphere of distrust and resentment and unkept agreements.

"Mr. President, if his political skill is to be rewarded it must not be with a job which requires the very qualities he has ignored in accomplishing his political success.

"This political success cannot be the criterion by which we evaluate a person's judicial credentials.

"The people of Hawaii deserve fairness, and compassion and, yes, justice from their judges. And, I do not believe this nominee provides these qualities.

"Mr. President, I am also concerned and distressed to hear some of the schools of thought in this body on why they want to vote for the nominee. 'Vote yes and get him out of here once and for all.' Yes, once and for all vote to put the man on the bench for 10 years and pass him off to the public ... or, 'why bother, he's got the votes anyway.'

"Mr. President, the new politics for the Senate is not going to be a rubber stamp.

"I think it's very important for all of us to search our conscience and find out whether the qualities in this nominee are the qualities for a judgeship. This is the decision ... not being Speaker of the House, not whether he resigns or not, not whether or not we've been on his side or against him, but, is he fair, objective, can he compromise, can he bring people together for the good of our society.

"Mr. President, those are the reasons why I am voting for this amendment. A rejection is what I believe to be the right thing to do. I ask all my colleagues to vote for this amendment.

"Thank you."

At this time, Senator Abercrombie rose to speak in favor of the amendment as follows:

"Mr. President, I rise to speak in favor of the amendment.

"Mr. President, Oliver Wendell Holmes, in a book on Common Law written in 1881, stated that the life of the law has not been logic, it has been experience.

"There is an emerging controversy over Speaker Wakatsuki and the purpose of the Constitutional Amendment on appoint of justices and judges. Involved is a dispute between those who believe there should be a separation of powers and the recognition of incompatibility of office, and those who believe that it is right and proper for us to have politics as usual not only in the Legislature but in the judiciary.

"The Constitutional Amendment on appointment of justices and judges was based on the formulation by the Constitutional Convention, presented to the people of our state that this was a bona fide attempt...an attempt made in good faith, asking for the public trust to establish a Judicial Selection Commission which would bring before the Governor, with the consent of the Senate, names for vacancies in the office of the Chief Justice of the Supreme Court, etc., in respective other courts. The Judicial Selection Commission would present six nominees and, as the very able chairman of the Judiciary Committee has pointed out, a procedure was then to be followed.

"It has become obvious that this procedure, as outlined in the Counstitution and as analyzed by the Legislative Reference Bureau in its Constitutional Amendments information sheet, is a difficult one to implement. It's difficult precisely because it was an attempt to try and limit the amount of politics

that was involved, that is to say, to take, as much as was possible, politicians out of the process. I don't think anyone seriously thought even for a moment that politics per se would leave this selection process, but it was an attempt to put the politics into a circumstance in which it was felt that qualified people, judging their peers, would make recommendations to the Governor in such a manner that what politics was taking place within the bar, within the legal profession as such, would nonetheless focus upon qualification and would be a bona fide attempt to raise the level of the integrity, that is to say, the perception by the public of the integrity and capacity of our judges to render justice in our state. This is at point today.

"As a result, we are now facing a situation in which we are not trying to deal with whether someone shall be both a legislator and a judge at the same time, but whether someone shall be both a politician and a judge at the same time, rendering inert, neutral, or even bastardized in the public eye the attempt that was made in the passage of the Constitutional Amendment in the first place.

"We are at a point where crime is regarded by our people as an issue that even supersedes that of inflation, a remarkable consequence in terms of the social order. We are at a point where our judiciary has been questioned in terms of its competence, in terms of its commitment to the Constitution and to justice, often unfairly -- in fact, probably more often than not, unfairly -- but nonetheless it falls to us, then, as guardians of the public virtue with all our failings and with all our needs and with all our egos, and with all our desires. Nonetheless, we have been put here by the people of this state as trustees on behalf of the Constitution and their good faith and their goodwill, and, in fact, in the public trust to oversee this process.

"Not even the Constitutional Convention desired, at the end, to remove completely from this body the capacity to affirm a judge because it was felt that, regardless of what kind of circumstances the Judicial Selection Commission would put into effect, in terms of trying to be as fair as they possibly could be, as objective as they possibly could be, this nonetheless was a political circumstance, in the sense that those who have been elected to guard the public trust should have the opportunity, I would rather say, the obligation of passing judgment in public as to whether or not someone should serve at this august level ... that is to say, to make decisions over the lives of other men and women, in a way that is not given to you or me, Mr. President.

"We may make laws, but we do not have the awesome responsibility of then judging how those laws shall be applied in the lives of our fellow citizens. There is a distinction there that has to be recognized, Mr. President, in case after case, after case, that I can cite and will only briefly.

"I put to you, Mr. President, to my fellow senators, that my views here about the proper purpose that we are about today is grounded on Holmes' distinction. His insights, it seems to me, are particularly appropriate in responding to the present controversy. Few legal minds have been more seminal in coming to grips with the propositions involved and few have been more incisive in disseminating that thought to the lay public.

"In Mr. Eugene Rostow's book The Sovereign Perogative he quotes Holmes as saying 'a page of history may not be worth a volume of logic.' This view is in seeming contradiction to that expressed in the epigraph which I began my talk on, my plea I should say. What Rostow seeks to emphasize, however, is Holmes' awareness of the contrapuntal themes necessary to the creation of legal orchestrations. Holmes maintained in The Common Law, and I quote: '... the law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage ...'.

"That is what we're confronted with here today, not the legalisms of a poorly written document from the Attorney General's Office that hangs its hat on a sorry hook of a single case in the State of Alabama in 1943 involving two gentlemen who were both seeking the same seat, not one gentleman who is seeking to keep two seats.

"Rostow makes clear that he believes Holmes' great contribution to the definition of law was his approach in 'the future tense.' Holmes stressed the necessity of anticipating where the law would and should go by focusing on the sources of present pressure for societal alteration and by developing personal resources of social analysis that resemble the calling of what to him was a Renaissance

Man. For Holmes, law was 'the witness and external deposit of our moral life' and its history was 'the history of the moral development of the race.'

"In Mr. Rostow's view, this attitude is central to understanding the jurisprudence of the past quarter century, Mr. Speaker, Mr. President, ... you see, I have him in my mind, I really do ... (I think this is so important today). It manifests the 'evolution of "the law that is" into the law we think it ought to become.'

"You see, that's where we come into the picture. Speaker Wakatsuki is not practicing law in the other house, he is making law, just as we are. We're making law today, we're making precedent today just as a judge does in a court when the Speaker becomes a judge, and it's incumbent upon us today to recognize what we're doing and why we're doing it and be able to answer for ourselves.

"In the dilemma just created, judges, in Holmes' view, 'are called on to exercise the sovereign perogative of choice.' This imperative, Rostow sees as the foundation of judge-made law in what he terms 'American Legal Realism or Sociological Jurisprudence.'

"No one, I think, today, who pays any attention to the circumstances of decision-making in the judiciary believes other than that.

"Obviously, with decision after decision made in the judiciary there are social consequences which may be called sociological jurisprudence, for lack of another term, but nonetheless that covers it. It is imperative that we understand that and if in the process we have someone who is both making law, who is then subsequently to judge the law that he made while he is a judge and qualifies under the law to be a judge, whether or not he has taken an oath or assumed an office or getting paid. If that is the circumstance, then we are in a situation in which we are at what Holmes called the very foundation of what constitutes the judiciary in the sovereign perogative of choice.

"For some, this choice raises enormous ambiguity as regards the universe governed by idealized concept of universal justice. I'm not talking about that today; I'm not talking about some kind of idealized versions; I'm talking about politics pure and simple and politicians exercising their sovereign perogatives of choice ... where bills go and don't go, who kills what, what kind of excuses are to be made, what kind of deals could be made.

"It is not a question of the personality, in my judgment, at this level, of the Speaker or even of his character. It is a question and a point to be raised to the public-at-large as to whether or not we are creating circumstances for an individual to take advantage. This is the key. It matters not that one could stand and say he is an honorable man.

"I can quote all of Mark Anthony's speech in that respect. This is not the question. The question is, are we institutionalizing a situation in which we will have established that one may be both a judge and a politician at the same time when the Constitutional Amendment that we have adopted in this state clearly operates in the opposite direction? True, there are states, there are jurisdictions in which judges are elected, but this is not one of them.

"We have to be true to this Constitution and this approach, which the people of this state have made manifest by virtue of voting for it by an overwhelming majority, and we are bound to obey that Constitution.

"Holmes said 'that the universe has in it more than we understand...has no bearing on our conduct. We may leave the unknown the supposed final evaluation of that which in any event has value to us. It is enough that the universe has produced us and has within it, as less than it, all that we believe and love...If our imagination is strong enough to accept the vision of ourselves as parts inseverable from the rest, and to extend our interest beyond that boundary of our skin, it justified the sacrifice even of our lives for ends outside ourselves.' And that's what we are called upon to do today.

"We are engaged in a political act, that's quite true, but it has a boundary far outside our skin. It has a boundary and is establishing a perspective for the public for generations to come for legislators after us. Establishing a perspective which, if not in true adherence to the Constitutional Amendment, will put us in danger, I believe, of being seen as individuals who could not rise to the occasion but rather took the expedient way.

"The Honolulu Advertiser of March 15, 1980 offers an excellent summation of the rather disparate psuedo-reasoning currently being employed to justify this farce over Representative Wakatsuki's transparent effort to be both a judge and a politician-legislator, thus, serving the interest not of the Constitution but of politics.

"My analysis draws nothing from the Hawaii Supreme Court's Office of Disciplinary Council, contrary to the implication of the Advertiser. I could care less what the Council thinks for precisely the same reason cited by both the Advertiser and those who raised the issue of the Council's irrelevance in the current debate, as retired Judge Masato Doi and Representative Richard Kawakami have done. The reason is, in sum, that the Constitution provides the legislators may not be held to answer before any other tribunal for their actions. Rather, we as legislators are the sole determinators of our responsibility to each other. I agree and said so long before the aforementioned individuals or newspaper.

"Representative Kawakami has gone on to differentiate legislators and legislator-attorneys by stating that legislators who are attorneys make laws. They are not practicing law when engaged in their legislative function. I agree again, fully. Conversely, he says the canons of ethics for attorneys do not prescribe what lawyers may do as legislators but only focuses on conduct before the bar. Again, I agree fully.

"The business of rejection of Representative Wakatsuki as a judge is entirely an internal matter of the Senate -- a test of its fidelity and commitment to the public trust. The problem is a failure to extend the above reasoning to its obvious conclusion. We are not talking about Speaker Wakatsuki as a member of the Legislature if he is affirmed here today. He will be a judge and no amount of verbal gymnastics will alter that reality. He will not be a lawyer practicing law in the Legislature, he will be a judge making laws in the Legislature -- an intolerable affront to the separation of powers.

"The Advertiser is its own worst advocate, as usual. It states, and I quote, 'The fact is the Legislature is full of lawyers who appear regularly in court and also pass laws and budget and salary bills dealing with the judiciary.' This is not only true but entirely true with our part-time legislative system. But I have yet to hear those same attorneys who pass laws, in turn, passing judgment on those laws, or those who appear in court under them as does a member of the judiciary.

"Does anyone in the Senate care to dispute that, should a judge become a candidate for legislative office, let alone elected, that judge would immediately be in conflict with his or her duty? Does anyone seriously care to dispute that resignation should be immediate upon the filing for candidacy by a judge for public office? Can you picture the situation of a judge-candidate commenting on cases which may be at the center of attention in the very same Advertiser to which I've referred? Can you picture the scene of a judge being a candidate, let alone elected to office, continue to conduct trials, rule on evidence, hand down sentences? The public and the judiciary will be outraged.

"The charge, if not the actuality, if only by default of politics and politicking from the bench, would be manifest to everyone. Yet, who are we to say it's politics as usual when the whole process has been changed in an attempt to reduce, if not eliminate, the political factors by the passage of the Constitutional Amendment?

"Can we seriously dispute that in continuing in the Legislature, Speaker Wakatsuki will be involved in passing laws, for instance, the revamping of the juvenile justice system, the possible revamping of corporation law, campaign spending, to name only three of dozens of potential conflicts which as a judge he may face in a course of judicial decision-making.

"It cannot be argued that other legislator-lawyers have also voted on laws which they later administered as judges subsequent to their days as legislators because we are not addressing that instance. Here we are speaking of a legislator-judge voting on laws which he will later administer on formally... upon formally assuming the bench.

"Far from removing politics from the making of judicial appointments the Advertiser is championing the immersion of the nominations and politics of the lowest order.

"It is an old political trick, Mr. President, to assign to one's adversaries the title and/or circumstances which most closely resemble your own as a way of deflecting examination of one's own motivation or reasoning.

"In the instance of the Advertiser, after trumpeting that only the Legislature may make policy in this matter, it denounces those of us who oppose the nomination for not having 'produced a convincing, practical or reliable legal reason.'

"Alexander Solzhenitsyn, the Russian Nobel Prize Winner for Literature, has commented only too accurately on the increasing reliance on tortured legalisms as a deliberate avoidance mechanism for implementing and avoiding simple justice. That is, if something

isn't outright illegal, then anything goes.

"If you want to raise a question of fairness, of public confidence, if you want to address the regard for the interest and the spirit of the law, you are to be laughed out of the room or consigned to the category of an amusing anachronism. If you can find a loophole or, better yet, pretend one exists, then ram what you want through it and to hell with the propriety or the justice of it.

"It is obvious, Mr. President, from this analysis that Speaker Wakatsuki could remain as a member of the House but not simultaneously become affirmed as a judge in the interest of preserving the integrity of the separation of powers. It is not, and I will show you, it is not, a question of taking an oath. It is a question of qualifying under the law, and it is a question of the incompatibility of office. It is rooted so deeply into common law that it goes back hundreds of years. You cannot have a judge making the laws he or she will subsequently administer. You may have a legislator do so but to acquiesce to the former instance is to mock the Constitution. Nor is eligibility at question here in respect to Speaker Wakatsuki's nomination.

"I fully agree with the Attorney General in his citation of Answorth v. Hogan, which I have here, establishing the fact of eligibility. I do not dispute it. James C. Van Answorth v. Elwood L. Hogan, January 1969, again the Supreme Court of Alabama. (Perhaps we should all move to Alabama where these things are more easily explained.) It is the intent to remain a politician-legislator which is at point. It has been held over and over again that it is the incompatibility of the offices which is the key whether an office may be held simultaneously, whether or not an oath has been taken. Thus, in the end, the Attorney General relies totally on a single paragraph, from a single case, loaded with half phrases, quoted to make his point, which leaves connective material out and which, in turn, focuses its conclusion on a separate case which had little or nothing to do with the case before us except by extreme indirection; and even the case itself, as I've pointed out, involves a situation in which a person was nominated for an acting appointment as prosecutor in a county in Alabama by one governor and a subsequent governor nominated somebody else and there was an argument over which one should have the seat. Now, that can be related to what's going on here today by the Attorney General ... that is a trick that is worthy of a circus.

"The fact is that the Attorney General's Opinion is a put-up job and a poorly done one at that. The haste with which it was put together is no excuse for the poverty of its legal scholarship. I do not blame the Attorney General; he is, after all, an attorney acting on behalf of the client and making presumably the best case that he can.

"Unfortunately, senators, the Attorney General is not our attorney. I cannot accept, at face value, such a starved concoction as this opinion represents. It is an insult to one's intelligence to receive this opinion and say that it completes the matter. You would have to stuff your fist in your mouth to keep from laughing in the face of the person who told such a thing. To take this opinion seriously is to suspend your critical faculties to the point at which an emergency medical team should be called in to see if basic life signs could still be detected. For the benefit of the Attorney General and those senators who may still be breathing, I would like to cite a few instances concerning the issue before us, and I will cite only a few.

"For those who might be interested, I can assure you, and I hope you will take my word on it, that I have researched on virtue of annotation excerpts and effects of election to or acceptance of one office by an incumbent of another where both cannot be held by the same person. I hope that you will accept that there are at least 15 citations in here that I could make to you concerning this issue. I would like to quote from a very few, including one from Hawaii which was very conveniently left out by the Attorney General, and indicates as follows, because I think some of the philosophy that's involved here from judges in other states are extremely important inasmuch as the State of Alabama was referred to by the Attorney General as a reason for allowing us to do this thing today, which is to affirm both a judge and legislator-politician at the same time as <u>not</u> being incompatible in terms of office.

"'The distinction between a constitutional or statutory provision against double office holding and one relating to "eligibility" of a person already in office to be elected or appointed to another office is well pointed out...' They cite a particular case in Georgia, and I quote: 'It does not merely render membership in that body incompatible and inconsistent with the holding of any of the other offices mentioned ... nor is it mere provision against holding of two offices at the same time...for in the latter case the effect would have been to oust the person elected to the general assembly, and taking a seat by virtue of such election, from

the office previously held. But where ineligibility to the second office results from the holding of the prior office, then the result is that the election to the second office is void and his right to hold the other remains unaffected.' That's not what we're talking about in this eligibility question. It's a complete red herring. It's not a question of whether the Speaker would be ineligible to hold the second office; it's a question of trying to hold both at once.

"'At common law. It is a well-settled rule of the common law that a person cannot at one and the same time rightfully hold two offices which are incompatible, and, thus, when he accepts appointment to the second office, which is incompatible, and qualifies, he vacates, or by implication resigns, the first office.'

"Mr. President, it cannot be said that if the Speaker is affirmed today by virtue of the rejection of this amendment that he is not a judge; that he has not accepted it. In the absence of a clear recitation to you, to the public, that he will not accept the judgeship; he is in effect a judge.

"The whole question in common law over and over again has been acceptance. Whether you take the oath at a different time, actually, assume the office as you have assumed the office of President and assumed the podium, that may be at one time or another, as a matter of fact, In the 1943 Alabama case, cited by the Attorney General, it's January 18, 1943, that's when Mr. Knight rolled in there. Now, we're not talking about that here; we're not even mentioning that at all, any more than, Mr. President, than you and I were not qualified under the law to be senators when we were elected.

"The fact that on the third Wednesday in January when we took oath and then assumed the seat on the floor and you assumed the presidency, either on that day or one day thereafter (it's a bit blurred in my mind, and probably yours too) ... the fact of the matter is that you were nonethelsss, under the law, qualified as a senator of this state. It's just that your duties, in particular, in respect to the session, had not been assumed at that point, and you had accepted that. This is the key. Not only the common sense key but the common law key, and that's what, I think, we have to keep in mind here.

"There is no vacancy because the oath of office has not been taken. Then the question as related to us by the Attorney General, in respect of having taken the oath of office, relates to an argument between two people over who took the oath of office first, in terms of whether or not they are entitled to keep that office. It has nothing to do with what we're talking about here today. It mocks the Constitution.

"I can cite, as I cite these cases ... I would like to read another from Pombo v. Fleming, which might be of interest inasmuch as it took place in Hawaii in 1933.

"'...the court says that the acceptance of a second offer incompatible with one already held vacates the first, even though the title to the second office fails, as where the election is void; ...' and it goes even further. Even if the second office turns out to be void, in terms of whether or not that election or appointment is a valid one, you nonetheless vacate the first. This was in relation to the office of chairman and executive officer and the office of supervisor which the particular individual had held prior to his acceptance. I'm quoting now from the Supreme Court of the State of Hawaii, Pombo v. Fleming (1933) 32 Hawaii, 818. As a mere supervisor his duties were much more restricted than were those of the supervisor who was also chairman and executive officer. If he had remained in the office of supervisor to which he was elected he of course could not have performed the duties that were imposed by law upon the chairman and executive officer. The two offices, therefore, were incompatible. The rule is well-settled that the acceptance of the second office incompatible with the one already held vacates the first and this is true even though the title to the second office fails as where an election is void. This is in the State of Hawaii, not in Alabama, and that makes good common sense as well as good common law.

"In the instance of People v. Russell, New York State, the court held on the effect of appointment of election to two offices at the same time, 'The law does not favor the multiplication of offices in one person, and where they are inconsistent with each other, or where such multiplication has a tendency to impair the public service,' very important, '...it will be held that the occupant must surrender the one or the other if both appointments were conferred upon him at the same time, or, if they were conferred at different times, the acceptance of the one last made forfeits the first.'

"Now, the public convenience...we have been trying here and I have heard it said over and over again not only in committees in which I have attended but in the Judiciary

Committee, upon occasion, when I've been there, that we do not have enough judges; that we have case loads that are too high; and, yet, we say that we are to allow another 30 days to the Speaker to clear up his law practice and then he will take the oath of office.

"Now, if this multiplication of role in offices has a tendency to impair public service, it is quite clear that it should be eliminated. There are annotations in respect, and these are under the American Law Report, I'm sure the lawyers in this room are quite familiar with them, on judges holding other public offices, which I think, Mr. President, is extremely important for the reason that I wish to present to you a situation, if we took it from the opposite side of view, where the judiciary is, and I wish to quote here under People v. Sanderson, and I would be very happy, of course, to provide these.

"I trust, my friends, that you will take my word that I am, in fact, holding these annotations and reading to you from them correctly. I am reading, of course, those things which would make the best case for me. It's easy to do because virtually everything I found makes the case for me. The Attorney General is doing the same thing; it's just that he's done it so poorly.

"Now, if this is the case, it still comes down to a judgment call here. I don't deny that. I wouldn't deny it for a moment. I'm certainly not going to go careening all over the state law library in an attempt to find two or three cases out of thousands that might have been ruled the other way. It might have been, by the way, so minor, that it didn't go on then to the Supreme Court of the United States where an entirely different adjudication might have taken place. I would like to remind us of that.

"Let me quote from People v. Sanderson, because I think there's a philosophy here that is really going to prevail or not prevail on the vote. 'The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments, the offices of the justice of the peace and mayor in this instance are not tenable by one person at the same time; and the acceptance of the office of mayor by a justice of the peace is, of itself, a vacation of the first office.' It's acceptance here; that's all we're talking about.

"In another, People v. Provines, in California, 'it was held that the office of police commissioner, not being an office belonging to one of the departments of the state as defined in the constitution, was not incompatible with the office of police judge.'

"I'm not trying to pull fast ones here. What they're trying to say here is that there is case law that has been made over and over again on this question of incompatibility, and it has often been ruled that in certain instances, as the one I've just cited, it is not an incompatibility of office, but I cannot find a single case where judges are concerned at the level of which we are speaking. I cannot find a single case which does not say that a clear incompatibility exists and therefore is anathema to the Constitution.

"In a very telling, to my mind a very telling commentary in the case, Watson v. Cobb in Kansas, the judges said as follows: 'It involves the question of whether a vacancy existed in the office of the chief justice' in that state and it involves the question of whether one could hold two offices at the same time. 'The court stated that the object sought to be accomplished was to remove high judicial officers as far as possible from the temptation to use the power and influence of their position and authority for their own advancement, and to prevent their minds from being distracted from their legitimate duties by ambitious hopes and struggles for preferment, to raise them above from those political and partisan contests so unbecoming the desired purity, impartiality, and calmness of the judicial character.'

"How on earth is Judge Wakatsuki to remain impartial and calm of judicial character and be above partisan and political contest so undesirable and unbecoming of that office for the next 30 days?

"'In comparing the provisions applicable to the legislature or to the executive offices, the court states' (and I think this is particularly apropros of what we are going to do) 'that one cannot examine these several provisions without perceiving at once that the purpose of the judiciary clause is to prevent a vacancy by the acceptance or holding of any other office during the term for which the incumbent was elected, while the purpose of the provision for the legislative and executive offices is to create a vacancy in case of their acceptance of certain specified classes of offices. If the governor of the state, while in office, be elected as one of the justices of the supreme court, his acceptance of the latter position would vacate at once the former.'

"Now, are we to say then that as another branch of government, the true equal of the executive branch, in terms of the power and in terms of the obligations and duties decreed to us by the Constitution, that we not find ourselves in exactly the same kind of position in respect to the judiciary?

"The decision concludes, 'The ineligibility of the "justices and judges" attaches to them as individuals, and not merely in office, and extends not only while they hold office, but during the term for which they are elected. Nor is the principle changed when the office emanates from another authority. The constitutional inhibition remains the same. It is still the law which governs the courts of this state -- an unchanging and unbending rule from which there is no escape.' There will be no escape unless we create one today, Mr. President.

"I will state further to you, Mr. President, in the case of Howard v. Harrington, something I think that speaks eloquently to the point. 'It is well-settled that one person cannot hold two incompatible offices, and that the acceptance of the latter office vacates ipso facto the prior one.' How many times would the Attorney General have gone through just this little bit of research and found exactly the same thing? 'Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered.' I want to repeat that, 'The public has a right to know which is held and which is surrendered. It should not be left to chance, or the uncertain and fluctuating whim of the office holder to determine. The general rule, therefore, that the acceptance of and qualification for an office, incompatible with one then held, is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public.'

"It is not up to the whim of you or I or the Speaker or anyone else as to whether or not he or she wants to remain in the Legislature or assume the duties of a judge. On the contrary, the incompatibility of office mandates that one make a choice and make it not by semantical definitions of oath taking, but rather, as is stated here, that the public has the right to know whether or not the public trust has been maintained.

"I wish then to move to my final argument by discussing the public trust, both from case law point of view and from the point of view of my conclusions upon reflecting on this material.

"In Richardson v. Richardson in 1928 in New York, where the governor appointed a supreme court justice to act as a commissioner in proceedings for the removal from office of the president of the borough of Queens, a discussion ensued as to what in fact were the duties of the judiciary, and how they should be best maintained, how best they could be maintained. It was held that the service of the supreme court justice as a commissioner in such a removal proceeding was prohibited, and the interesting reason why it was prohibited I would like to read to you because they concern the public trust, and I quote: 'Since within the constitutional prohibition there was an acceptance of a "public trust." ... In such circumstances, the "public trust" does not cease to be continuing and permanent because the judge may be willing to fulfill it on one occasion and unwilling on another.' Willing on one occasion and unwilling on another -- willing 30 days from now when the session is over but not unwilling when he takes an oath some time after that.

"We directed that the Constitutional Convention come about. We gave people the opportunity to vote on it and they did it. It was the direct result of the efforts of many of the people who are here today in this Legislature that the Constitutional Convention came about, and regardless of what we may think or not think of the efficacy of that convention, we are nonetheless bound by what resulted from it as affirmed by the voters.

"The court goes on, 'The policy at the root of the constitutional prohibition reinforces this conclusion. The policy is to conserve the time of the judges for the performance of their work as judges and to save them from the entanglement, at times the partisan suspicions, so often the result of other and conflicting duties. Some of these possibilities find significant illustration in the very cases before us now. Here is an inquiry which has already separated the respondent for more than two months from the discharge of his judicial duties, and which is likely to continue for many more weeks to come.'

"Does anyone doubt that the Speaker, in clearing up private law practice, will be disenabled from doing so with any great dispatch for at least the next 30 days because he is going to be in the Legislature? And if we have a session which runs beyond the 18th of April, it will be longer. 'Interference so prolonged with assignments to judicial duty is the very evil that was meant to be hit by the prohibitions of the constitution directed against

dual office.' I don't think it can be much clearer.

"I would like to conclude then by going over State v. St. John which is the key to the Attorney General's opinion that it is allowable for the Speaker to continue as a Speaker, while nonetheless qualifying under the law as a judge.

"I want to point out also that the Attorney General neglected to mention that he is only putting forward in his opinion a definition, part of a definition of office holding which does not speak to the actual opinion that was rendered in the case. And in that definition, very conveniently rejects to point out, '...a person elected to office of county solicitor was not required to wait until the date when the term of office began before taking oath of office, but he had a right to delay taking oath of office until that time.' Interesting how oath of office came into it. There's no talk here in this case that is cited by the Attorney General about whether he had the right to delay the oath of office. I don't deny that the Speaker can delay taking the oath of office probably till 'kingdom come.' He may delay it until the time of the election, or beyond, I don't know, but that has nothing to do with the instant case. It has nothing to do with the instant case now in this Legislature.

"The arguments, as I stated, was over which governor had the right of appointment in naming the solicitor of an Alabama county. But, the Attorney General has made, in my judgment, a fatal error. The holding office definition is not made in isolation. The decision in respect of addressing the question of holding two offices and, secondly, what holding office means states without equivocation that the operative key is 'qualifies according to law.' Two simple points, I believe, destroy the Attorney General's Opinion, and, in fact, senators, indicate beyond doubt in my mind the following.

"I believe that it is flatly illegal for Speaker Wakatsuki to remain in the House of Representatives upon the expiration of 30 days from the time of his nomination, unless he himself rejects accepting the judgeship offered him within that time frame. The Attorney General's case citation itself helps to prove that, and I want you to take particular note of that please, because we have just gone through a period of confusion and argument and discussion here on this floor as to what in fact is involved in this expiration of time and what the exact role of the Senate is.

"My contention is that once the name comes forward, and I'm sure the Judiciary chairman could affirm it, that there are series of steps that take place. The Constitutional Amendment would see to it that, whether this Senate rejects or does not reject or whether the Governor brings down the name or whether he does not bring down the name, the Judicial Selection Commission itself has the right of appointment, at the conclusion of the various steps, if they are not satisfactory in terms of having a judge appointed. All it takes is 30 days. What we're doing here is courtesy. The Governor does not even have to bring down this name until the day of the appointment. Read it!

"If the Governor fails to make an appointment within the 30 days of presentation or within 10 days of the Senate's rejection of any previous appointment, the appointment shall be made by the Judicial Selection Commission from the list, with the consent of the Senate. If the Senate fails to reject, it shall be deemed to have given its consent to such appointment. It's 30 days that makes a judge, whether we are in session or not in session, it makes no difference.

"Without equivocation, in State v. St. John, the constitution of the State of Alabama, on the point of holding two office, it refers without equivocation, I should say, that qualifying under law is the determinant in what constitutes qualifying according to that law. Repeats itself, in other words. All it means is read what the constitution says, and the constitution says qualifying under law.

"Speaker Wakatsuki will qualify under law after 30 days as a judge unless he is rejected. There can be no dispute that he qualifies under the law as a judge after 30 days, unless he is rejected. And if he qualifies under the law, under the Constitution, then the two offices come into play no matter when the hell the oath taking takes place.

"In Hawaii, in order to qualify according to law, it is not necessary for anything to happen other than for 30 days to elapse before one becomes a judge after proper nomination. That's the beginning and ending of it. No hearings are necessary, no Senate votes are necessary, no discussion of any kind is necessary or required. Such activities might be useful in the public interest but have nothing whatsoever to do with qualifying the nominee, under the Constitution, to become a judge. It is automatic upon the lapsing of the time period. The Senate may choose to reject the nominee but that activity bears no relation to the nominee's

qualifying under the law of the Constitution other than to prevent the assumption of the nominee to the judicial post; that is, the Senate's power is strictly limited to rejection and then only if the name actually comes before the body. There's no provision in law requiring that this be done or even requiring that nominees be made while the Senate is in session.

"Senators, in other words, we are ostensibly removing politics from the process of judicial selection. Our Constitution is not that of Alabama in 1943. I daresay, Alabama's constitution is not as it was in 1943. To my knowledge, there was no provision in the Alabama constitution in 1943 that, provided upon nomination, a candidate for judicial office would become a judge in the absence of express rejection by the Alabama Senate within a 30-day period. The Hawaii State Constitution, however, does provide for exactly that proposition and provision. That is what constitutes qualification under the law.

"Mr. President, we go before the public, we go before student bodies, we go before our constituents, and we say to them that we are concerned with the law; that we are concerned that the law be obeyed.

"Mr. President, I will contend to you and to fellow senators the necessity of voting 'aye' on this amendment to substitute the word 'reject.' The necessity is such that I do not believe we can come before the public and say that we have done as is the will embodied in the Constitution if we do not reject the Speaker as a judge.

"I find no great pleasure in saying this, regardless of the fact of what I might feel or not feel about how I was treated in the House, or what's happening now to bills. However it works, that's all part of the swirl of political life. But, I also never anticipated that I will find myself in a position where bills that I was associated with, and activities that I engaged in during the course of my legislative existence, would be subject to the will and/or whim of someone who was a judge and no longer a legislator, someone who was a judge and no longer a politician.

"I've worked too hard and I've been involved too long with my constituents and my supporters. As the Speaker indicated in his testimony in the Judiciary Committee, that his first obligation was to his constituents and his supporters, not to the Constitution and not to the people of this state, but to a sub-political entity made up of individuals who voted for him for office. This is not the intent nor the spirit of the Constitutional Amendment. It is anathema to find a situation existing in which someone can take that kind of attitude and still say that he is qualified to be a judge and to accept that judgeship, not upon his affirmation or the lack of rejection, or however it's going to be phrased here today, but upon his deciding as an individual exempt from all that all the rest of us find ourselves not only in relation to, but under, the majesty of law, that which we are sworn to uphold -- that kind of oath that we took here.

"It's not for my convenience...after all, if I vote 'no' and the Speaker becomes a judge, how is it an advantage to me? How is it an advantage to anyone who votes 'no,' and he succeeds? Contrarily, how is it to the advantage, one might say, of affirming him as a judge? Do you go to the Speaker and say 'don't be mad at me, I voted for you, because now you're a judge and you can still be a legislator; remember that I voted "yes."' Is that how one is supposed to do it, because that's exactly the way it's going to happen. It's going to happen psychologically, if not in terms of actuality of the relationship of this body to the other.

"This is a two-house Legislature, that too has been affirmed by our people, that they want two houses in the Legislature and we are supposed to be a check and balance on one another. How are we then as a Senate to come whole before the House of Representatives if we have done this deed today in affirming the Speaker as a judge and allowing him to continue as a politician? It's not fair to my constituents, it's not fair to my supporters, it's not fair to the Constitution of this state, it's not fair to the constituency of the state, that is to say, every citizen and resident alien in the state who comes under the Constitution's protection, and it's not fair to the supporters of that Constitution to have the Speaker remain.

"Finally, there is the argument about politics. We want to get the Speaker out. Would that we could under those circumstances. Is that political? Of course, it's political. But the Constitution doesn't say anything in here that I'm able to find ... this Constitution shall prevail so long as it's convenient politically. I don't see that anywhere in here. I don't see any where in this Constitution that it says that one person shall have advantages that others do not have because it's more convenient for that particular faction or party. And most certainly then, that charge is two-edged; this is the sword that cuts very deep with both sides because if it is political to want

the Speaker to resign and there is no merit in asking the Speaker to resign upon becoming a judge, then what indeed is political about that judge remaining a Speaker of the House of Representatives? If that isn't political, then I don't know what is. Will he not make judgments every day? Will he not conduct the affairs of the House as Speaker? Will he not make references and referrals? Will he not name conference committees? Will he not cast votes? If that isn't political then the word political doesn't exist.

"Mr. President, if the Speaker is allowed to do as he wishes to do, that is to say remain a politician and a judge at the same time, when expressly forbidden, then I think that he has every right to be contemptuous of this Senate. I think that he has every right to say that if someone is dumb enough to let me do what I want to do, I'm going to be smart enough to take advantage of it. I think that he would find himself in a position of being able to conduct business entirely outside the realm of the articles of faith that we have in this body and I'm saying this body as a Legislature. He could operate entirely outside the realm because he will no longer be of it, but he most certainly will be in it.

"There is no choice then for me, regardless of the consequences and regardless of the designations that shall be placed upon the motivation, let alone the reasoning involved in my action. There is no choice but to uphold the Constitution, both of the United States and this state, in voting 'aye' on this amendment and substitute the word 'reject,' for in doing so, we will in fact be affirming not the judge in the politician, but affirming the fact of our fidelity to the Constitution and our capacity to act on behalf of the public trust."

At this time, Senator Ushijima rose on a point of clarification as follows:

"Mr. President, as a matter of procedure, I am a little confused as to what is before this body. I understand there is an amendment to the committee report."

The Chair answered: "There is a substitute motion to delete the word 'consent.'"

Senator Ushijima then asked as follows:

"Mr. President, in all the years that I've had the experience of being in the Legislature, this is the first time that there is a motion to amend a committee report. We don't have anything else before the body except the committee report. Are we in this motion amending the committee report? Is that it?"

The Chair replied in the affirmative.

Senator Ushijima further remarked and asked as follows:

"Mr. President, I think the proper motion before this body here is the action on the Governor's Message. That is the action before this body, and I think the proper motion is either to reject the Governor's Message or to approve, or consent to the Governor's Message.

"Never in my experience have I ever gone through with all the debate of amending a committee report. Is this the right procedure?"

The Chair replied as follows:

"Senator Ushijima, the Chair has ruled that the motion is proper and we'll be voting on the motion, if there are no further discussions."

Senator Kawasaki then rose to speak in favor of the motion to reject and stated as follows:

"Mr. President, I speak in favor of the motion to substitute the word 'reject' for the word 'consent' ... the intent that's intended here.

"I will not prolong the vote on this particular issue because I couldn't have heard a more brilliant exposition by any member of the Senate in the 13 years that I've been here, a more brilliant presentation of sound, profound arguments in favor of the proposition to reject the nominee.

"I just want to add one thought and one bit of information here. I had spoken to the Speaker of the House, because he is a good friend of mine, to tell him that I respected his abilities and his service to the community as a Speaker, as a member of the House of Representatives for many years, that I would be inclined to vote for his confirmation; however, I questioned him on the propriety of his continuing to serve after confirmation by the Senate, and I advanced the same reasons that the senator from the 6th District so brilliantly expounded here. I told him, 'Jimmie, while I will vote for you, if you resign, you force my hand on the basis of propriety, on the basis of principle that I would like to expect. I am going to vote "no" on your confirmation, and, likely, others of a same inclination are going to vote to reject your confirmation. The decision is entirely yours, would you please keep this in mind.'

"When the Speaker decided as he had told the media and people in the

other body that he will not resign, he brought upon himself the votes that are going to sustain a rejection point of view.

"I don't believe that we have the 13 votes to completely effectuate a rejection, but, I think, more important than the number of votes that are going to be here to reject, is the maintenance, at least in this body, that we respect the very principles expounded by Senator Abercrombie an hour ago.

"There have been times here in this body, in my 13 years, that I've been appalled at speeches and fatuous reasoning advanced for and against a proposition, a bill under discussion, in this chamber. This is not one of those days. Never in my 13 years have I been more proud to have been a member of a body , which has in its body, members who are capable of doing deep research, who are capable of doing profound reasoning to advance his point of view. In this particular case, a vote to substitute.

"I say that no one here could more adequately have presented a case for a rejection of this nominee. And as the previous speaker has also said, this is not a vote against an individual, this is a vote to sustain a principle that has to be sustained if we are to keep faith with what our Constitution is all about. For that reason, I urge a 'yes' vote on the amendment to substitute the word 'reject' for 'consent.'"

Senator Anderson then rose to speak against the amendment as follows:

"Mr. President, I rise to speak against the amendment. I hadn't planned to, this morning, but ... in my 16 years in the Legislature, I've never heard more political rhetoric over nothing.

"I don't live in Alabama, Mr. President, I live in Hawaii. I'm sworn to uphold the Hawaiian Constitution, Mr. President. I'm sworn to uphold the Constitution as it's interpreted by the Attorney General until it's challenged and proved otherwise in the court, the third branch of government.

"Mr. President, if I've had you or previous Democratic presidents wave an Attorney General's opinion to me once from the rostrum, I've had it waved to me a hundred times over my 16 years.

"The Attorney General states, the Attorney General says, ... the Clerk's desk is full of 'Attorney General's' that each and everyone of you have used at one time or another to uphold your own personal point of view, no matter how wrong, at that particular time, you or I might have thought you might have been.

"I don't live in Alabama; I uphold the Hawaiian Constitution. We too as Republicans were concerned about the procedure, the timing. We participated with the President's office in getting clarification from the Attorney General's office, the office upstairs established by law for rulings and opinions under the Hawaiian Constitution. That man rules, right or wrong, that man rules, and I'm upholding it.

"I believe the Speaker is properly qualified. I think the Attorney General is very clear in his ruling. If he's not clear, any speaker or any president who wants to challenge it can go to the court across the street and challenge it.

"No one would believe that Mr. Wakatsuki is a one man power in the House. That's a 51-member body. Does that man have all the power to pass all the laws, or to kill everything that goes on over there? I can't believe that. One side of your voice tells me that we're not rubber stamps and that we shouldn't be rubber stamps. Are you then telling me that the 50 members there are rubber stamps, and that Wakatsuki says that this should die and it's going to die; or, if this is going to pass, it's going to pass. I don't believe it.

"I don't believe that the Democratic majority policy would let Speaker Wakatsuki put that entire body into jeopardy. I've got to believe that the 50 members, these other members in that House have some prestige, some credibility, some responsibility. I've got to believe the chairmanships to the various committees aren't going to let Speaker Wakatsuki, just because he's going to be a judge next month, kill any particular bills. This is a lot of nonsense, Mr. President.

"This amendment should die, and the arguments put forth should have been put forth before the consent of all the other five or six judges going through the same procedure that we're now challenging.

"I'm not sure whether the senator from Manoa is angry with the Attorney General; I'm not sure whether he's angry with the Constitutional Convention; or I'm not sure if he's angry with the Speaker. I ask that you all vote this motion down."

Senator Cobb also rose to speak against the amendment as follows:

"Mr. President, the hour is late and I apologize for speaking when

I had not planned to, but, I think a couple of items need to be clarified.

"During one of our hearings in the Judiciary Committee on the question of one of the nominees to the Supreme Court of the State of Hawaii, I asked the individual a question because I was concerned about his long and involved background in the labor movement, as to how he would be ruling on a question involving unemployment compensation for striking employees. He could not answer that question because he was, at that time, involved in litigation on that very point, before the Ninth Circuit Court of Appeals in San Francisco.

"It is apparent that that individual conducted a brilliant appeal because he prevailed in that case. Even though the court's ruling is contrary to my own feelings, I accept that.

"This is a very clear example of where an individual who has been confirmed by the Senate has continued very actively in his legal practice until such time as his affairs are settled. There was no precondition established by the Senate on this individual, nor do I think there should have been.

"Mr. President, there are a number of us here today who are fugitives from the House of Representatives, and I use the term literally, fugitives.

"When we were in the House and when we were dissidents, we used to say 'vote it up or down on the merits with no preconditions.' Well, Mr. President, I still believe that.

"I didn't impose any conditions on any nominee to the Supreme Court and I'm not about to start imposing any conditions on any nominee to the Circuit Court. When that individual has time to complete his work and take his oath of office and begin receiving his pay, well and good. But I think we should vote him up or down on the merits and not worry about any conditions, because if we start imposing conditions, then the same kind of conditions could go back and be imposed on some of our nominees to the Supreme Court of the State of Hawaii who have other work to complete before they end their law practice and before they become a judge, before they take that oath of office and receive pay in peformance of their duties.

"I don't want it to be said that I, as an individual, would want to impose any preconditions on the other House, that by removing the Speaker from his position and thereby weakening that House, that would be a precondition. I think it would be unacceptable as far as I am concerned.

"When I look at what happened with our Supreme Court nominee and the brilliant work that individual has done, even though I may not agree philosophically with that work, just as I have had my disputes with Speaker Wakatsuki and I've spent my time in 'Siberia,' as well ... I know the feeling; I know how hard we fought; I know how bitter some of those struggles have become, and I recognize the judgment call also as to whether or not the individual is fair or impartial, and I look at him and I recognize he is playing a role too; that he was cast in a role; and that all the times that we fought him, and sometimes bitterly, we were involved in a role. But, I cannot allow my prior disagreements with the Speaker to interfere with my judgment as to whether or not that individual should become a judge because I have yet to hear in the committee a sound argument against his legal qualifications to hold the judicial seat that his name is before the Senate for.

"Mr. President, I would practice what we preached in the House, let's vote on the merits with no precondition."

At this time, Senator Cayetano, rose to speak in favor of the amendment as follows:

"Mr. President, I think the two previous speakers missed the point completely.

"My vote on this matter has caused me much trouble. I too am a fugitive from the House. During the four years I spent there I had many disagreements with the Speaker, fought him bitterly on issues, but I also got to know him well, I think, as a man, as a human being.

"Mr. President, I have no reservations about the Speaker's intellectual ability, his ability to become an outstanding member of the bench. I have no doubts or reservations about his ability and courage to make difficult decisions under fire. I have no reservations about his basic honesty and integrity. When I heard that he had been nominated for the judgeship by our Governor, it was a moment of personal pleasure for me. I called him and offered my congratulations. Of course, I assumed that he would resign. I was surprised to find the next day that he did not intend to resign. And for me, there is the crux of the matter, if you want to put it that way.

"I don't want to go into a long philosophical

discussion about separation of powers. I think that was done quite well by the senator from Manoa; I don't want to repeat that again.

"This is a judgment call, but I think if the integrity and the concept and the honor of the principle of separation of powers is to be upheld, I have to support this amendment, notwithstanding my personal feelings for Speaker Wakatsuki."

The Chair then announced as follows:

"There is an amendment before this body. The amendment is to delete the word 'consent' and substitute in its place the word 'reject.' Those that will vote to support the amendment vote 'aye.' Those who are opposed to the amendment vote 'no.'"

Roll Call having been ordered, the motion to reject the nomination of Speaker Wakatsuki as a judge of the Circuit Court of Hawaii, failed to pass on the following showing of Ayes and Noes:

Ayes, 5. Noes, 18 (Anderson, Campbell, Carpenter, Chong, Cobb, George, Hara, Kuroda, Machida, Mizuguchi, O'Connor, Toyofuku, Ushijima, Yamasaki, Yee, Yim, Young and Wong). Excused, 2 (Carroll and Saiki).

At this time, Senator O'Connor rose to speak in favor of the motion to consent as follows:

"Mr. President, I rise to speak in favor of the motion.

"Mr. President, Mr. James Wakatsuki has practiced law in this jurisdiction for in excess of 20 years. During that time he has had a distinquished law practice, primarily in the business and corporate area. He has served in a variety of governmental jobs; he is knowledgeable and knowing in the law; he has a decent and fair approach and and an excellent judicial temperament which should serve him well as a judge of the First Circuit Court.

"I urge all to vote 'aye' in favor of this nomination."

Senator Abercrombie then rose to speak against the motion as follows:

"Mr. President, speaking to defeat the motion, very briefly.

"In reference to the previous speaker, inasmuch as my name was used and is appropriate now, I do believe that I was not speaking in anger. I heard only angry words from the senator who was engaged in characterizing my comments in that fashion. I was speaking much more in sorrow, I assure you, than in anger."

Senator Cayetano then stated as follows:

"Mr. President, in my opinion, this motion is now completely unnecessary. The Senate made its decision on voting on the previous motion. I respect that decision and I intend to vote 'yes.'"

Roll Call having been ordered, the motion to consent to the nomination of James H. Wakatsuki, Fourth Judge, Circuit Court of the First Circuit, for a term of 10 years, was put by the Chair and carried on the following showing of Ayes and Noes:

Ayes, 19. Noes, 4 (Abercrombie, Ajifu, Kawasaki and Soares). Excused, 2 (Carroll and Saiki).

ADJOURNMENT

At 1:15 o'clock p.m., on motion by Senator Mizuguchi, seconded by Senator Anderson and carried, the Senate adjourned until 11:00 o'clock a.m., Thursday, March 20, 1980.