

**JOURNAL**  
**of the**  
**SENATE OF THE**  
**TWENTIETH LEGISLATURE**  
**of the**  
**STATE OF HAWAII**

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**Special Session of 2000**

**Convened Thursday, August 3, 2000**

**Adjourned Friday, August 4, 2000**

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THE  
TWENTIETH LEGISLATURE  
STATE OF HAWAII  
SPECIAL SESSION OF 2000  
JOURNAL OF THE SENATE

FIRST DAY

Thursday, August 3, 2000

The Senate of the Twentieth Legislature of the State of Hawaii, Special Session of 2000, was called to order at 10:08 o'clock a.m., by Senator Norman Mizuguchi, President of the Senate, in accordance with the following Proclamation:

"August 3, 2000

PROCLAMATION

I, Norman Mizuguchi, President of the Senate of the Twentieth Legislature of the State of Hawaii, pursuant to the power vested in me by Section 10, Article III of the Constitution of the State of Hawaii, and at the written request of two-thirds of the members to which the Senate is entitled, do hereby convene the Senate in Special Session for the purpose of carrying out its responsibility established by Section 3, Article VI of the Constitution of the State of Hawaii for a period of two (2) days commencing on Thursday, August 3, 2000, at 9:00 o'clock a.m.

/s/ Norman Mizuguchi  
Norman Mizuguchi  
President of the Senate"

The Divine Blessing was invoked by the Reverend Alan Urasaki, Aiea Hongwanji Buddhist Temple, after which the Roll was called showing all Senators present with the exception of Senators Hanabusa and Inouye who were excused.

At this time, Senator Chun, Majority Floor Leader, and Senator Slom, Minority Floor Leader, welcomed Senator Ron Menor to the Senate. The Governor appointed Senator Menor on May 16, 2000, to fill the vacancy in the 18<sup>th</sup> Senatorial District. In accordance with the memorandum by President Mizuguchi dated May 31, 2000, Senator Menor assumed the following Senate Standing Committee assignments formerly held by Senator Randy Iwase:

- Vice Chair, Committee on Health and Human Services;
- Member, Committee on Ways and Means; and
- Member, Committee on Transportation and Intergovernmental Affairs.

At 10:13 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 10:15 o'clock a.m.

**MESSAGES FROM THE GOVERNOR**

The following messages from the Governor (Gov. Msg. Nos. 1 to 3) were read by the Clerk and were referred to Committees:

Gov. Msg. No. 1, submitting for consideration and consent, the nomination of CLIFFORD L. NAKA to the office of Judge, Circuit Court of the Fifth Circuit, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, for a term of ten years, was referred to the Committee on Judiciary.

Gov. Msg. No. 2, submitting for consideration and consent, the nomination of DERRICK H.M. CHAN to the office of Judge, 23rd Division, Circuit Court of the First Circuit, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, for a term of ten years, was referred to the Committee on Judiciary.

Gov. Msg. No. 3, submitting for consideration and consent, the nomination of DANIEL R. FOLEY to the office of Associate Judge, Intermediate Appellate Court, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, for a term of ten years, was referred to the Committee on Judiciary.

**JUDICIARY COMMUNICATION**

Jud. Com. No. 1, submitting for consideration and consent, the nomination of DAVID W. LO to the office of Judge, District Court of the First Circuit, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, for a term of six years, was read by the Clerk and was referred to the Committee on Judiciary.

Senator Slom rose on a point of personal privilege and stated:

"Mr. President, I rise on a point of personal privilege.

"First of all, I want to thank my colleagues for making it possible for the Minority Leader and myself to be here instead of in Philadelphia this week, because it's much more pleasant being with our colleagues rather than enjoying more than two of us in a given room. So I want to thank you again for the very timely scheduling of this particular event.

"Secondly, I want to ask if anyone has found the mysterious Bob Watada campaign letter of September 1999, because we've searched our office and we don't seem to have a copy of it, and the Senate President didn't seem to have received it, and the Judiciary co-chair said he didn't receive it. Nobody received it. Of course that did not stop the Honolulu Advertiser from editorializing that we all had notice and we all had information, so we should have acted upon it. But then the Advertiser usually does things like that.

"In addition, I want to take note of the fact that again the court has let the state off the hook. And I'm speaking specifically of Judge Ezra's ruling to grant the state yet another extension on Felix/Cayetano. It's been eight years and running. We have missed deadline after deadline. The last deadline in the federal consent decree was June 30. We missed that. We now have until December 31, 2001. Hopefully, from the state's standpoint, some of these children will be grown up and in college or somewhere else by the time that the state has to act.

"We've spent a great deal of time during the 2000 session talking about accountability, and generally it was aimed at teachers. And I said at the time that if we're going to talk about accountability, all of us should be accountable -- the governor, the Senate, the House, the cabinet level positions, and everyone else -- and yet we don't do that. It's really a shame, because any taxpayer, any businessperson

who gets hauled before either a state or federal judicial body, they have to do their things on time. They don't get extensions. But it seems that the state government continues to get extensions and we continue not to do the things that we are bound to do. So I find that very disturbing, Mr. President.

"And finally, I note that the good gentleman who gave us our words of wisdom this morning was talking about the 17 points. And the first point that he mentioned was the ability for people to assemble regularly. He didn't mention, though, that they should assemble behind closed doors and leave parts of the group out of the decision-making process. That was either an oversight on his part or on Buddha's part, or on the Democratic majority. And I still find it very difficult to comprehend that you still hold meetings behind closed doors to make decisions, and that we have to read about things like Special Sessions in the newspaper.

"So I would urge my colleagues again, if we're going to take these things seriously about doing the people's business and doing it openly, that it includes every member of the State Senate and that the decisions be reached in that manner.

"Thank you very much, Mr. President. I'm glad to be back here, even if only for two, five, ten, twelve days. Aloha."

#### STANDING COMMITTEE REPORTS

On motion by Senator Chun, seconded by Senator Slom and carried unanimously, the Clerk was authorized to receive Standing Committee Reports on Governor's Messages and a Judiciary Communication for consent to judicial nominations. In consequence thereof, and subsequent to its recessing at 10:20 o'clock a.m., the Senate took the following actions:

Senators Chumbley and Matsunaga, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. 1) recommending that the Senate consent to the nomination of DAVID W. LO to the office of Judge, District Court of the First Circuit, for a term of six years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, and in accordance with Jud. Com. No. 1.

In accordance with Senate Rule 36(6), action on Stand. Com. Rep. No. 1 and Jud. Com. No. 1 was deferred until Friday, August 4, 2000.

Senators Chumbley and Matsunaga, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. 2) recommending that the Senate consent to the nomination of CLIFFORD L. NAKEA to the office of Judge, Circuit Court of the Fifth Circuit, for a term of ten years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, and in accordance with Gov. Msg. No. 1.

In accordance with Senate Rule 36(6), action on Stand. Com. Rep. No. 2 and Gov. Msg. No. 1 was deferred until Friday, August 4, 2000.

Senators Chumbley and Matsunaga, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. 3) recommending that the Senate consent to the nomination of DERRICK H.M. CHAN to the office of Judge, 23rd Division, Circuit Court of the First Circuit, for a term of ten years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, and in accordance with Gov. Msg. No. 2.

In accordance with Senate Rule 36(6), action on Stand. Com. Rep. No. 3 and Gov. Msg. No. 2 was deferred until Friday, August 4, 2000.

Senators Chumbley and Matsunaga, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. 4)

recommending that the Senate consent to the nomination of DANIEL R. FOLEY to the office of Associate Judge, Intermediate Appellate Court, for a term of ten years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, and in accordance with Gov. Msg. No. 3.

In accordance with Senate Rule 36(6), action on Stand. Com. Rep. No. 4 and Gov. Msg. No. 3 was deferred until Friday, August 4, 2000.

#### ADJOURNMENT

At 7:10 o'clock p.m., the Senate adjourned until 2:00 p.m., Friday, August 4, 2000.

## SECOND DAY

Friday, August 4, 2000

The Senate of the Twentieth Legislature of the State of Hawaii, Special Session of 2000, convened at 2:09 o'clock p.m. with the President in the Chair.

The Divine Blessing was invoked by the Reverend Alan Urasaki, Aiea Hongwanji Buddhist Temple, after which the Roll was called showing all Senators present with the exception of Senators Buen, Inouye and Matsuura who were excused.

The President announced that he had read and approved the Journal of the First Day.

## ORDER OF THE DAY

## ADVISE AND CONSENT

Stand. Com. Rep. No. 1 (Jud. Com. No. 1):

Senator Chumbley moved that Stand. Com. Rep. No. 1 be received and placed on file, seconded by Senator Matsunaga and carried.

Senator Chumbley then moved that the Senate consent to the nomination of DAVID W. LO to the office of Judge, District Court of the First Circuit, for a term of six years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Matsunaga.

Senator Matsunaga rose in support of the nominee and said:

"Mr. President, I rise in support of the nominee.

"David W. Lo holds a B.A. degree from the University of Hawaii and a J.D. degree from the University of the Pacific's McGeorge School of Law. Mr. Lo has served as a district court per diem judge since 1997, and has been the proprietor of his own private law practice since 1986. His professional and community activities include the Court Annexed Arbitration Program, the American Arbitration Association, the Medical Claims Conciliation Panel, and the Mayor's Advisory Committee on Law Enforcement Planning.

"Nine members of the District Court of the First Circuit; the Hawaii State Bar Association; two members of the Office of the Public Defender; the Prosecuting Attorney of the City & County of Honolulu; twelve members of the legal community; and one private citizen testified before the Senate Judiciary Committee. Mr. President, all testimony unanimously supported Mr. Lo's nomination. Testifiers indicated that Mr. Lo is an individual of impeccable character, that he is compassionate and empathetic. He possesses a commitment to educating the public about our judicial process that extends beyond the courtroom and into the community. The Committee also heard testimony that Mr. Lo is intelligent, articulate, and has an excellent judicial temperament that highly qualifies him for the position of District Court Judge in the First Circuit.

"Mr. President, during the Senate Judiciary Committee hearing, the Committee diligently questioned the nominee regarding his commitment to educating the community about the judicial process, his thoughts on judicial restraint, and his view of how the motor vehicle insurance statutes should be changed. Your Committee believes that the nominee adequately responded to the Committee's inquiries.

"After full consideration of the background, character, experience, and qualifications of the nominee, your Committee has

found Mr. Lo to be qualified for this position. Mr. President, this appointment comes with great support and is very well deserved. I am confident that Mr. Lo is committed to excellence in judicial performance and will serve our District Court of the First Circuit well. I urge my colleagues to consent to this nomination.

"Thank you."

The motion was put by the Chair and carried on the following showing of Ayes and Noes:

Ayes, 22. Noes, none. Excused, 3 (Buen, Inouye, Matsuura).

At this time, Senator Matsunaga introduced Judge Lo and his family to the members of the Senate.

Stand. Com. Rep. No. 2 (Gov. Msg. No. 1):

Senator Chumbley moved that Stand. Com. Rep. No. 2 be received and placed on file, seconded by Senator Matsunaga and carried.

Senator Chumbley then moved that the Senate consent to the nomination of CLIFFORD L. NAKEA to the office of Judge, Circuit Court of the Fifth Circuit, for a term of ten years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Matsunaga.

Senator Chumbley rose in support of the nominee and stated:

"Mr. President and colleagues, I stand in support of this nomination.

"Mr. President, Clifford L. Nakea holds a B.A. from St. Mary's College and a J.D. degree from the University of San Francisco School of Law. Mr. Nakea has served as a District Court Judge in the Fifth Circuit since 1980. His professional and community activities include the Hawaii State Bar Association; the American Judicature Society; St. Catherine School Parish Council; the YMCA, Kauai; and trustee of the Kauai Museum.

"The Senate Judiciary Committee heard from members of the legal community as well as private citizens who came forward to voice their support for Mr. Nakea. Three members of the District Court of the Fifth Circuit; the Hawaii State Bar Association; three members of the Office of the Public Defender; the Prosecuting Attorney of the County of Kauai; the Contractors Association of Kauai; and two members of the legal community testified in support of Mr. Nakea. Testifiers indicated that he is a man of high moral character, a caring and compassionate person, and that he is highly qualified to serve in this position. In addition, we heard testimony that Mr. Nakea's integrity and sense of fairness has always been beyond reproach and that he is well deserving of this nomination.

"One person did testify in opposition to Mr. Nakea's confirmation.

"During the hearing, Committee members diligently questioned the nominee regarding the use of his leadership skills to improve the Judiciary, his thoughts on providing immunity from liability to counties that administer beach parks, and his views on how to improve the juvenile justice system on Kauai. The Committee also discussed with Mr. Nakea his view on confidentiality of juvenile records and judicial restraint.

"As you can see, colleagues, this appointment is well deserved. I am confident that Mr. Nakea's background, character, experience and qualifications make him more than qualified to serve on the

Circuit Court of the Fifth Circuit. I urge all of my colleagues to consent to this nomination.

"Thank you."

Senator Chun also rose in support of the nominee and stated:

"Mr. President, I stand in favor of the nomination of Clifford Nakea for the position of Circuit Court Judge for Kauai.

"Mr. President, Judge Nakea has served the people of Kauai as a judge, admirably, for the past 20 years. Judge Nakea's legal knowledge, character, temperament, and work ethic is beyond reproach. Judge Nakea's commitment to Kauai extends beyond the courtroom. It also extends to his service to the community, which is also well noted.

"I urge all my colleagues to confirm Judge Nakea and to elevate him to the position of Circuit Court Judge."

The motion was put by the Chair and carried on the following showing of Ayes and Noes:

Ayes, 22. Noes, none. Excused, 3 (Buen, Inouye, Matsuura).

Senator Chumbley then introduced Judge Nakea and his family to the members of the Senate.

Stand. Com. Rep. No. 3 (Gov. Msg. No. 2):

Senator Chumbley moved that Stand. Com. Rep. No. 3 be received and placed on file, seconded by Senator Matsunaga and carried.

Senator Chumbley then moved that the Senate consent to the nomination of DERRICK H.M. CHAN to the office of Judge, Circuit Court of the First Circuit, for a term of ten years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Matsunaga.

Senator Chumbley rose in support of the nominee as follows:

"Mr. President, I rise to speak in support of this nomination.

"Mr. President and colleagues, Derrick H.M. Chan holds a B.A. degree from the University of Hawaii and earned his J.D. degree from the California Western School of Law. Mr. Chan served in a professional capacity at the Department of the Attorney General, the Office of the Public Defender, and the Office of the Prosecuting Attorney of the County of Kauai. His professional and community activities include AYSO, the Iolani Ohana Organization, Moana Girls' Athletic Club, and Danceworks Kids.

"During the Senate Judiciary Committee hearing, the Committee heard testimony from the Federal Social Security Administration; a Deputy Attorney General; eighteen members of the Office of the Public Defender; four members of the Prosecuting Attorney of the Counties of Hawaii, Kauai, and Maui; the Hawaii State Bar Association; the Hawaii Carpenters Union; thirty members of the legal community; five private businesses; and eight private citizens. There were a lot of people testifying, Mr. President. All testimony unanimously supported Mr. Chan's nomination, noting that he is honest, even-tempered, fair, and diligent. Testifiers indicated that he has a strong work ethic. In fact, it's rumored that he gets up at 4:15 every morning to travel to Kauai by plane, and he beats everyone to the office, including the janitors.

"Committee members diligently questioned the nominee regarding his qualifications, including his experience with criminal court cases and his lesser experience in civil cases, as well as his views on alternatives to trials, such as Drug Court and drug

treatment options. Mr. Chan satisfactorily responded to the Committee's inquiries, and the importance of drug treatment. Your Committee believes that the nominee adequately responded to the Committee's inquiries.

"Mr. President and members, we believe this appointment is well deserved. I am confident that Mr. Chan's qualifications and his lengthy experience will make him an excellent Circuit Court Judge. I urge all of my colleagues to consent to this nomination."

Senator Chun also rose to speak in support of the nominee and said:

"Mr. President, I stand in favor of the nomination.

"Mr. President, I have mixed feelings about voting for the confirmation of Mr. Chan. On one hand, I believe he's going to be an excellent circuit court judge, but on the other hand, I think we're going to be losing a very excellent and admirable first deputy prosecutor for the County of Kauai. I think, all in all, when we weigh everything, I believe the state deserves and is entitled to Mr. Chan's services as a judge.

"I'm going to miss seeing Mr. Chan on Fridays as we used to pass each other in the airport as he was leaving Kauai to go to Honolulu and as I was arriving from Honolulu.

"Judge, you are an admirable person. Your character stands out in such a way that even us lawyers recognize that. I believe that you will be a very good circuit court judge. Kauai's loss is Honolulu's gain."

The motion was put by the Chair and carried on the following showing of Ayes and Noes:

Ayes, 22. Noes, none. Excused, 3 (Buen, Inouye, Matsuura).

Senator Chumbley introduced Judge Chan and his family to the members of the Senate.

At 2:24 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 2:27 o'clock p.m.

Stand. Com. Rep. No. 4 (Gov. Msg. No. 3):

Senator Chumbley moved that Stand. Com. Rep. No. 4 be received and placed on file, seconded by Senator Matsunaga and carried.

Senator Chumbley then moved that the Senate consent to the nomination of DANIEL R. FOLEY to the office of Associate Judge, Intermediate Appellate Court, for a term of ten years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Matsunaga.

Senator Matsunaga rose in support of the nominee and said:

"Mr. President, I rise in support of the nominee.

"Mr. President, the members of the Senate Judiciary Committee have heard considerable thoughtful testimony -- both for and against -- the appointment of Daniel R. Foley to the Intermediate Court of Appeals. This appointment has generated strong feelings, and we acknowledge the many people who came forward to present their comments.

"In testimony before the Committee, the Hawaii State Bar Association (HSBA), which follows the American Bar Association Guidelines for Reviewing Qualifications for Candidates for State Judicial Office, noted the criteria that these guidelines consider. These criteria are integrity, legal knowledge and ability,

professional experience, judicial temperament, diligence, financial responsibility, public service, collegiality, and writing ability. Under these guidelines, the HSBA has determined Daniel R. Foley to be 'highly qualified' – the highest of its three ratings.

"Mr. President, I believe we might do well to consider these criteria in our deliberations today. The first one is **Integrity** -- The great poet Horace once said, 'A good and faithful judge prefers what is right to what is expedient.'

"Mr. Foley's supporters stressed that his moral courage is strong and that he has never hesitated to tackle tough cases and issues – no matter how unpopular the cause. In his work he has consistently displayed intellectual honesty and fidelity to long-standing legal principles.

"While there are those who will find it difficult to distinguish between an attorney's personal qualities and his or her professional role as an advocate for unpopular persons or causes, Mr. Foley had done an outstanding job in his role of advocate. As a result, he has generated strong resentment by those who are uncomfortable with the cause of his advocacy. What is so often overlooked is that merely because one acts successfully as an attorney for those expressing an unpopular viewpoint, does not mean the viewpoint is shared.

"The second criteria is **Legal Knowledge and Ability** -- 'The law is not the private property of lawyers, nor is justice the exclusive province of judges and juries. In the final analysis, true justice is not a matter of courts and law books, but of a commitment in each of us to liberty and mutual respect.' Jimmy Carter

"Mr. Foley has shown a thorough understanding of the law, and his colleagues have stated that he enhanced that understanding with diligent preparation and a clear and intelligent advocacy. His work is distinguished by an astute understanding of people and social policy, as well as an appreciation of the point of view of the other side. He has been commended for his common sense, and his ability to see the larger issues in a case.

"While he is publicly associated with what the press has called the 'gay rights marriage' case, he has developed a reputation in the legal community as a preeminent attorney on constitutional law. As a result, he is able to identify and articulate the Constitution and established legal precedent.

**Professional Experience.** In addition to his distinguished legal practice, for several years Mr. Foley also taught a course on civil rights at The William S. Richardson School of Law. In that venue he might very well have approached his teaching as an advocate of civil rights, but he did not do so. His presentations were thoughtful, knowledgeable, and fair, and his students rated him highly for his ability to pass on that knowledge.

**Judicial Temperament** -- 'Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.' Socrates

"This is a critical factor in determining success on the bench. We heard that Mr. Foley is a reflective person who is willing to listen to every side of an issue before making a decision. That he is patient with everyone – from his clients to opposing counsel – and treats all with respect and courtesy. Indeed, his patience and civility were affirmed over and over again by those testifying in yesterday's hearing.

**Diligence, Collegiality, Writing Ability.** The Intermediate Court of Appeals handles almost half of the appellate caseload in the state, and in areas such as family and administrative law, they are essentially the court of last resort. Integrity, talent, and hard

work must be the hallmark of these judges. Mr. Foley has been praised by many of his colleagues for these very qualities. He has been described as an articulate and thoughtful speaker, as a superb writer, and as a distinguished attorney with a national reputation as a successful defender of constitutional rights.

"Mr. President, Mr. Foley's critics have argued that an advocate who is such a strong 'warrior' for his cause cannot make the transition to a jurist who must view things in balance. Mr. Foley is a student of the Constitution who is committed to the rule of law. To illustrate how he would serve as a jurist, he spoke of his role model, John Marshall, appointed by President John Adams in 1801 as Chief Justice of the U.S. Supreme Court.

"Justice Marshall served 34 years, the longest tenure of any Chief Justice, and did much to strengthen the judicial branch of government. Many scholars hold that Marshall was the founder of constitutional law and judicial precedent. His decision in Marbury v. Madison in 1803, declared the power of the Supreme Court to invalidate an act of Congress if that act was in conflict with the Constitution. Marshall's strict reading of the Constitution stemmed from his study of the Federalist Papers. Mr. Foley has stated that he would follow Justice Marshall's lead as a judge on the Intermediate Court of Appeals.

"History has shown us justices who successfully transitioned from an advocacy role to that of jurist. Thurgood Marshall, before appointment to the Supreme Court by President Lyndon B. Johnson, was known for his efforts with the NAACP to end racial segregation. His work on the Court, however, reflected a broader mission – he built a structure of individual rights that became the cornerstone of protections for all Americans. He believed that once individual rights were accepted, blacks or whites could rise or fall based on their own ability. Indeed, Justice Marshall is a fine example of how an advocate successfully made the transition to jurist.

"Another is Ruth Bader Ginsberg. Before appointment to the Supreme Court by President Clinton, she was the founder and counsel for the Women's Rights Project of the American Civil Liberties Union – a position from which she argued six cases before the U.S. Supreme Court. Five of these resulted in landmark decisions on gender equity. Yet, as a justice, Ginsberg is viewed as a stickler for details and a legal scholar profoundly interested in the real-life applications of the law. She has not been the radical that some were expecting given her background.

"Finally, such a jurist also sat on our own State Supreme Court. When Justice Edward H. Nakamura joined the high court, there were fears that he would be one-sided since he was a labor attorney with no prior experience on the bench. But that did not happen. After his death, a Star Bulletin article dated September 12, 1997, quoted attorney Jared Jossem, former state Republican Party chairman who was Nakamura's legal adversary in about 50 cases. Mr. Jossem stated, 'As a justice, he adopted a more centrist view balancing the specific interests of unions and employers.'

"With respect to **Judicial Objectivity** -- The Greek philosopher Philo Judaeus said, 'A judge must bear in mind that when he tries a case, he is himself on trial.'

"Mr. President, the concerns raised by many of the opponents to Mr. Foley's nomination stem from his work arguing before the Supreme Court on the same sex marriage issue. Mr. Foley has indicated that he would recuse himself from cases on that issue. But more importantly, we must remember that while the Intermediate Court of Appeals handles much of the appellate caseload in this state, the critical, high-profile cases -- like Baehr v. Lewin, involving a question of first impression or interpretation of

the state or federal constitution -- would go before the Supreme Court, not the ICA.

"Mr. Foley candidly admitted at the confirmation hearing that judicial objectivity is a valid issue. He also honestly assessed his ability to be objective in spite of his background as a civil rights advocate. After all, to be effective, a good appellate attorney must objectively analyze the opposing side. It is through this mental exercise that one develops the skills of a true legal scholar. Mr. Foley believes he can put aside any personal opinions and any legal positions that he took as a practicing attorney in order to objectively, fairly, and judiciously decide a case. Your Committee on Judiciary also believes he can.

"Mr. President, Mr. Foley will be one of four judges on the appellate court. The other judges are James Burns, Corrine Watanabe, and John Lim, all of whom are seasoned appellate court judges. Despite my belief in Mr. Foley's abilities and integrity, it would be presumptuous to suggest that Mr. Foley himself could dictate the decisions of the Intermediate Court of Appeals. Mr. Foley humbly acknowledged his intent to be a team player. Your Committee on Judiciary believes he will.

"Thank you, Mr. President."

Senator Bunda then rose in opposition to the nominee and stated:

"Mr. President, I rise in opposition to the nomination.

"Mr. President, there is no doubt in my mind that Dan Foley is a qualified candidate for the job. Qualified in every respect but one. Yes, he is a good attorney. Yes, he is knowledgeable of the law. Yes, he appears to be well respected among his peers. But this is not about peer acceptance. We do not only represent the interests of Mr. Foley's peers alone; we represent the interests of all the people of this state.

"This vote today is about whether Dan Foley can make the transition from advocate to jurist. He says he can. I want to believe he can. But what stops me is the feeling that he is trying to downplay the passion of his convictions as an advocate for civil rights in an attempt to convince Senators of his ability to be a neutral judge.

"Mr. President, this confirmation process, for me, is like being at a party convention . . . where people try their best to please the crowd with centrist positions, but walk away with the same extremist views.

"Confirmation by the Senate is a final step, Mr. President, in the judicial selection process. It is the people's only chance to have their say through their elected representatives. That being the case, my vote is not only my opinion, but also those of my constituency. The calls and faxes I've received have been in solid opposition to the confirmation of Dan Foley.

"As Legislators, we all need to be concerned about the integrity of the process. The judicial selection process should produce nominees who are not only capable of fair and impartial decision-making, but who the public can accept as fair and impartial decision-makers. It is clear to me that public perception of Dan Foley's ability to be a fair and impartial judge is reason enough to oppose his confirmation. Frankly speaking, Mr. President, it should have been enough to preclude his nomination.

"Mr. President, I think it's great that we have lawyers like Dan Foley. You would want them on your side because of their inner fortitude and the gift they possess to do great things. I believe the people of this state need such advocates who test the strength of our

laws, but they also deserve judges who they feel will uphold the law without personal bias.

"Mr. President, I feel Dan Foley's confirmation today will further erode public confidence not only in our judicial system, but in our legislative processes as well. For these reasons, Mr. President, I must vote no.

"Thank you."

Senator Sakamoto also rose in opposition and said:

"Mr. President, I also rise in opposition to the appointment, and I agree with my colleague from Wahiawa in many of his comments.

"Mr. President, yesterday the Judiciary Committee had the opportunity to hear testimony for and against four judicial appointees. All had many written and oral testimonies. Most were in support.

"Some of the supporters of nominees state items such as the following:

- 'Will give the public a level playing field';
- 'Sensitive to the community';
- 'Lead by example';
- 'People of this state will have a level of confidence.'

Statements like these represent what the public expects of a judge.

"Supporters of the nominees stated reasons why each nominee met the qualifications for the appointment and why the public would be well served.

"For Mr. Foley's confirmation, some of the comments were as follows:

- 'Work complemented the office of the public defender';
- 'Strong supporter of civil rights throughout his legal career';
- 'Made a career of the fight for individual rights';
- 'Motivated many young attorneys to enter fields of law where preservation of the rights of the little guy and the dispossessed was paramount';
- 'Effective advocate for expanding our state's civil rights laws';
- 'Unquestionably Hawaii's leading Bill of Rights and civil rights advocate and expert';
- 'Tireless advocate of individual rights';
- 'Working to help those who can't help themselves';
- 'Willingness to go beyond the call to assist someone whose rights he believed were infringed';
- 'Perceived as a "knee-jerk" liberal';
- 'Dan Foley -- representative of the liberal community';
- 'As attorneys, we are advocates';
- Relating to Thurgood Marshall as was mentioned: 'Thurgood Marshall argued a lot of civil rights cases that were not popular' as well. The comment from the person testifying was that 'he served the community very well as a Supreme Court Justice.' But my recollection, in speaking directly to Mr. Foley, is that he felt Thurgood Marshall was not an example because Thurgood Marshall continued to be an advocate after being on the bench.
- 'Perhaps it is his singular genius that he is able to identify and articulate the source of new or unrecognized rights in the text of the Constitution and established legal precedent.'

"These above statements by his supporters are fuel to what some of those who oppose him fear --



- A fear that he will indeed continue to find 'new or unrecognized rights in the text of the constitution and established legal precedent.' His singular genius will find these unrecognized rights. Whose rights will be diminished, as these new rights are unfurled before us?
- A fear that he will be like Thurgood Marshall and remain an advocate for civil rights. Marshall was a strong advocate for civil rights before his appointment and continued to be an advocate after his appointment to the bench. Some applaud the results. Yet, was that right? Did the judiciary system perform fairly?
- A fear that he will continue his 'career of the fight for individual rights' -- the rights of criminals over rights of others, the rights of homosexual couples over rights of married couples, the rights of street vendors over rights of pedestrians.
- A fear that he will continue to 'help those who can't help themselves' . . . perhaps helping those who are not even in the courtroom by expanding the rule of law beyond the case before the bench.
- A fear that he will continue to 'complement the office of the public defender' . . . perhaps rights of criminals over rights of victims; perhaps rights that erode law enforcement efforts -- our police, our courts, our prisons, our probation system, drug test laws, and who knows what else.
- A fear that he will continue to 'go beyond the call to assist someone whose rights he believed were infringed.' The issue is the rights that he believed were infringed.

"Yes, there's the rub. Mr. Foley was too strong an advocate that he is now heralded as the champion or the warrior -- a champion now asking to be moved up in our judicial system to rule over many, many cases affecting all of our people. 'Dan Foley -- representative of the liberal community.'

"Now, the above were parts of the supporting testimony. The opposing testimony has the following excerpts:

- The 'risk is Dan Foley will actually implement his beliefs';
- 'Deeply concerned about Mr. Foley's ability to be impartial and fair';
- 'Deeply concerned about Mr. Foley's willingness to set aside legal crusades';
- One testifier lamented that 'these days, law is made in courts';
- Can a man 'step away from what is inside him?' Meaning concern that Mr. Foley would 'legislate from the bench';
- 'So far left in his beliefs and values';
- 'Dedicated his life to working against the values and morals of the people of Hawaii';
- A man said that Foley referred to him and his wife as 'homophobes and bigots';
- 'His values are to change the heart of society, to wipe out our moral and religious values from government';
- 'He unfairly and maliciously characterized those who believe homosexual marriage is wrong, as bigots, homophobes, hate-mongers, and worse';
- 'He is a person who is incapable of having or showing tolerance and respect for those who disagree with him, especially those who disagree with him because of their spiritual or religious convictions';
- 'Offended by Dan Foley's stance and his advocacy';
- 'No aloha for the people of Hawaii or its values';
- 'Has least bit of respect for people who believe homosexuality is wrong'; and
- 'Demonized us.'

"Now comes Mr. Foley (some of his comments). And I'm not trying to take it out of context, but here are just a few of his comments:

- 'Developed reverence for the system';
- He said that sometimes 'lawyers don't always get it';
- He said that he believed in 'the system';
- When questioned about how he would be, my recollection is that he said, 'I Don't know what kind of judge I would be . . .';
- 'Don't know what type of jurist I would be . . .' Certainly he was hoping he would be the best, but these are some of his comments;
- As related to his background, he had 'not many jury trials';
- As related to the court system, he said, 'Appearance is an issue' -- appearance is an issue;
- Referring to jury challenges and rejections (when a jury is empanelled some are rejected, some are not), the agreement was 'to get a fair and impartial jury';
- Another comment, 'Reagan and Bush appointed conservative judges.' I make this as a point that there is acknowledgement that appointees are not all centrists upon putting on their robes.

"So what is the point? With our system, a fair trial is what everyone should have -- his or her day in court, a fair trial.

"When prospective jurors are interviewed and either selected or not, some are challenged. A policeman may be rejected. A person who had been involved with domestic abuse may be rejected. A person too much on one side of an issue or the other may be rejected. A person certainly too far on the other side of an issue may also be excused. Why? To get a fair trial so that no one is too far to one side or seemingly predisposed to one side or the other. Are they incompetent? No. Are they knowledgeable? Maybe too much so. Is the goal a fair trial? Certainly!

"Our court system depends on the people feeling that when they have their day in court, they will present their case before a fair court -- a fair jury and a fair judge. Some say that reality is what one perceives. Appearances do count. The system -- the system -- is most important -- fair and impartial jury, fair and impartial judges.

"I realize that he is not going to be sitting before jurors, however, he'll be hearing many cases, if confirmed, that have involved jury trials.

"Mr. President, since so many in one camp feel that Mr. Foley will be their civil rights champion on the bench, many people in the other camp fear that he will indeed be that champion -- going beyond the call, becoming the representative of the liberal community, and reading the constitution and our legal history where no one has read before and finding new and, up until then, unrecognized legal principles. Mr. President, Mr. Foley is identified so strongly with issues far to one side that many people feel that they will not have a fair day in court.

"The judicial system should come first. I urge my colleagues to choose the system and fairness. We should not allow our judicial system to be perceived -- to be perceived -- as one that is unfair. So I ask for my colleagues to vote today for the system and vote 'No' on this confirmation.

"Thank you, Mr. President."

Senator Tam rose to speak in support of the nominee and said:

"Mr. President, I rise to speak in favor of the appointment of Daniel R. Foley to the Intermediate Appellate Court. I am making

this statement for the record because of the emotional climate on Mr. Foley's confirmation here today.

"The basis of my decision is on the fundamental qualifications established by the Judicial Selection Commission. The qualifications are based on the following:

1. Integrity and moral courage;
2. Legal ability and experience;
3. Intelligence and wisdom;
4. Compassion and fairness;
5. Diligence and decisiveness;
6. Judicial temperament; and
7. Such other qualities that the commission deems appropriate.

"I thank the current Judicial Selection Commission for making the qualifications public. When I was first elected as a Senator six years ago, the qualifications for selecting judges were not publicly available.

"In closing, my job as a Senator is to allow the public to testify on a candidate's qualifications as established by the Judicial Selection Commission as established by the Constitution of the State of Hawaii. Thus, if proof cannot be presented by testimony through a public hearing that the candidate does not meet the qualifications, then the candidate shall be confirmed by the Senate in accordance with the Constitution of the State of Hawaii. I am not here to vote on the basis of a single self-interest issue -- the issue of same-sex marriage."

Senator Hanabusa also rose in support of the nominee and stated:

"Mr. President, I, too, rise in support of the nominee.

"Mr. President and colleagues, I have had the distinct pleasure and honor of actually working against and with Mr. Foley. Believe it or not, in a couple of our cases Mr. Foley represented defendants. One defendant was a corporation, in fact, to my plaintiff -- a woman who claimed to be sexually harassed.

"Also in my practice I've had the distinct honor to be co-counsel with Mr. Foley, because as many of you have stated, on issues of constitutional law and ramifications, in my opinion, there is no one better. As an attorney, if anyone has a problem or an issue that needs to be addressed, it is Dan Foley who I recommend.

"Yes, it's true, many believe Dan Foley represents these less sympathetic causes. For example, we think of Dan Foley as the gay and lesbian couples' attorney. We think of Dan Foley representing T-shirt vendors. We think of Dan Foley standing for the ACLU and challenging, on behalf of prisoners, the system. But that's not all that Dan Foley does.

"In this election year, for example, how many of you, my colleagues, are going to seek SHOPO's endorsement? Do you know that there is a charter provision that prohibits police officers from exercising their first amendment right to participate in political activities? It wasn't until 1996 when SHOPO went to Dan Foley and asked him to take the challenge for them so that they could exercise that first amendment right and they could participate in the political process.

"What is unfair about all of this is when you think of Dan Foley, you don't think of the person who represents police officers, the person who's given police officers the right to exercise their first amendment right. You have defined him by these very less than sympathetic causes. And that is the Dan Foley many of you are speaking up against.

"As a legislator, as a person, as an attorney, I find it very disconcerting that you would define a person, especially an attorney, by the people he represents. It is almost akin to saying because he is such an effective and efficient advocate, that he must pay the price because we are going to judge him by his success. Think about it. That is one of the most absurd conclusions that anyone can reach, but that is the conclusion you are reaching.

"My support for Mr. Foley is unequivocal. Let me tell you why. It is true -- the Dan Foley I know is not afraid to take on politically incorrect issues. He is not afraid to help the underdog. And he is not afraid to say what needs to be said and what needs to be argued on unpopular matters. Step back . . . How many of you, my colleagues, like to think of yourselves as the champion of the underdog? The one who's going to speak for those who are disenfranchised? You're going to go out there and fight for the little guy. Just take away the aspect of an attorney, and you are out there saying you are like Dan Foley. We may, unfortunately, not do it as well.

"The other part of Dan Foley is that he is somebody who gives more than 100 percent for cases that may pay him less than 1 percent. Now that is an honorable trait of any profession, but especially among us attorneys.

"Let me tell you something else about Dan Foley. I have heard the protest against him. I have received faxes. I have received phone calls. The Dan Foley I know will react to it like this -- he would say, 'Isn't the constitution a wonderful instrument? Isn't the freedom of speech the most precious of our rights? And isn't it true that equal rights and due process for all is something that we should all be willing to fight for?'

"It is uncanny to sit here and to hear civil rights almost being used as a bad word. I find that especially disturbing. Last June I was honored to participate in the Medal of Honor ceremony in Washington, D.C. I find it disturbing that those people who went out to fight for that which is American, that which is the United States, for democracy and all that comes with it -- which includes the constitution, which includes civil rights -- that we would sit here and almost, somehow, use that in a disparaging way.

"Now let's turn to the real issue here -- Dan Foley as a jurist. My colleagues, I've spent the past two days with the Ninth Circuit Court of Appeals which usually sits in San Francisco but, lucky for me, are here in Honolulu -- two days of arguing before a three person panel. They brought clearly to my mind what we as attorneys . . . and we are the ones who practice before the Intermediate Court of Appeals, the Hawaii Supreme Court, and in my case, the Ninth Circuit . . . brought clearly into mind what is it that you want. You want the intelligence. You want the objectivity. You want the impartiality. You want the ability to reason. And you want judicial temperament.

"I can tell you as someone who has appeared before the Ninth Circuit an innumerable amount of times, the Hawaii Supreme Court while they were still taking arguments, the Intermediate Court of Appeals, and knowing many of these justices that sit, Dan Foley will have no problem meeting those criteria. And that is the criteria by which we are to look at him because that is the position for which he stands before us today.

"I must be candid about one thing -- what I am concerned about is whether there will be another Dan Foley; whether there will be someone else who'll be willing to take on these causes. Because I tell each and every one of you, there may be a day when you may be caught in a position where, for some reason, government has stepped out of line as far as you are concerned, or someone may be infringing upon your constitutional rights. And at that point in time, you're going to wish that there were Dan Foley, not because

of who you think he is, but because you know that he is a man of integrity, intelligence, and he will be your advocate.

"The one satisfaction that you may have is that if your case goes up to the Intermediate Court of Appeals, you know that there you will have someone with that intelligence, with that integrity and that unique ability to reason. That is what we want in those people who we put up to the Intermediate Court of Appeals and the Supreme Court.

"Thank you, Mr. President."

Senator Slom then rose in opposition to the nomination and stated:

"Mr. President, I rise to speak in opposition to the nominee.

"I don't make this decision lightly. In fact, I did not reach my final decision until about two hours ago. It was made after very careful deliberation and listening to all of the facts. As you know, Mr. President, I am not on the Judiciary Committee, but the courtesy of the co-chairs allowed me to sit in and I heard nearly three hours of testimony yesterday. I listened with an open mind to all the things that were said, and the further courtesy of the co-chairs allowed me to raise questions to the nominee.

"I am not basing my vote on one single issue or one single action, because I do not believe in that, either in this case or in any other case. I think that there are many sides to any issue. But I do know this -- the people of this state are crying out because they feel disenfranchised. They feel that no one is listening to them and no one represents them. And why do they feel that way? They feel that way because for over 40 years now there has been no balance in the state administration, no balance in the state legislature, and no balance in the state judiciary. We are one of the only states in the union that has neither initiative, referendum, recall, nor the election of judges. So where do the people go unless they go to us?

"The question and the issue about this system come up all the time whether we're talking about the educational system, we're talking about the criminal/judicial system, or anything that we're talking about. The good Senator from Moanalua brought this up today. But you know when all is said and done, we are the system. We have to take responsibility and accountability for what we do, and I, for one, was very troubled with a number of the things that I heard yesterday. What I heard was this, basically -- and again, let me reiterate as everyone has said and everyone in this room, I'm sure, agrees, including those opponents of the nominee sitting in the auditorium -- no one is questioning the ability, the knowledge, the experience, the intelligence, or even the integrity of this nominee.

"As the good Senator just said, we are bound by the criteria that are set up by the selection committee. But in fact, who has selected the selection committee? The political process and the criteria have come from lawyers -- by lawyers and for lawyers. It is true, Mr. President, that yesterday a number of past adversaries of the nominee were there to say that even though we were on opposite sides, the gentleman was fair, and we have no doubt. And I'm sure that they were telling the absolute truth, because these were men and women of integrity. But the fact is -- they too are lawyers. And the problem with the lawyers is that too many times we use that one criterion, collegiality -- the ability to get along with one another, the understanding that some day, some day, that person is going to be up for a political appointment, some day that person may be running for office, or some day that person may even be the subject or the object of the famed and growing retribution of the governor of the State of Hawaii.

"Therefore, when we talk about lawyers, it's important to realize, and I agree with my colleague who said, 'In a difficult situation,

you would want a Dan Foley representing you.' That may be true, except that the nominee has been and has shown selectivity in terms of the first amendment. In other words, there has been a great deal of emphasis on the rights of criminals and prisoners and very little in terms of victims of those prisoners and those criminals. There has been a great deal of sensitivity to one particular lifestyle within a community, while at the same time demeaning the lifestyle, the values, and the beliefs of other people who hold different lifestyles in the community.

"While not making a decision on that single issue, that single issue has been one of the most divisive forces within our community lasting for nearly nine years. It has sapped us of resources. It has divided individuals. It has divided our community. So if in fact, Mr. President, we want to put the community back together, it would seem to make sense that we would want someone who has the ability to bring people together that would not further either the reality or the perception of continued divisiveness. That is not the case with the nominee today.

"I feel that finally we look at this situation of being a team player. And I asked the nominee yesterday where he would look for experience since he does not have any experience as a jurist and he is being elevated to what was referred to earlier as the 'court of last resort,' a very important court. But there is no one in this room who does not know and does not believe that the nominee is on a fast track for appointment to the State Supreme Court. That is a given. That's where we're going with all this. So it is important that we look at this particular step and if, in fact, as the nominee said yesterday, he will seek the advice and the counsel and the guidance of those individuals who are already there and will be a good team player. That's part of the problem, Mr. President, that everyone is such a good team player in our state, that we have produced a state that is behind every other state in terms of legislative and judicial initiatives.

"This is the judiciary that gave us the decision that said that blank votes would be no votes, after the fact. This is the decision from the judiciary that gave its blessing to the staggered terms that we're now in a special session to try to undo. This is the judiciary that had not raised any issues, or none of the attorneys who talk about civil rights, while the issue was being debated.

"In terms of the appointment, one can only wonder why the governor chose this individual with such division apparent within the community, unless he knew two things: (1) this individual would not be a threat to him or to the government in terms of raising first or other amendment issues; or (2) if one were to take a more cynical approach that this is part of the 'in your face' style/this is how I feel about a 70 percent majority in the state of this particular jurisdiction. One can only wonder why the decision was made, but now we have to wrestle with it. We have to come down on the side of yea or nay. And as I say, it's a difficult decision. And it's not the individual as much as it is what happens with this system, and we must be responsible for that system.

"It was said by the nominee yesterday and by the head of the Bar Association, and said again today, that oftentimes a person who is appointed, we don't know how they're going to turn out. And we may perceive them as being either very liberal or very conservative or whatever term you want to use, and then they surprise us. Well, if we really look closely at the examples that are given, those examples are the exceptions, not the rule. Because, for the vast majority -- over 95 percent of all appointees -- we know exactly how they're going to vote, exactly what their predisposition is, and particularly when you have a man of honor, a man of honor like the nominee, who is extremely passionate and believes in what he's doing, then you know where it's going to go. The example was brought up of Ruth Bader Ginsberg as not turning out as radical as

some people thought . . . by whose definition? That's the difference. And if you look at her decisions and her votes, there are no surprises there.

"We have got to take accountability and responsibility for where we're going in this state and whether or not we want everybody to be in lock step and to be part of the team and part of the rubber stamp, or whether or not we truly want and deserve and respect change in our community. And if we do, then we have to look to people who will bring that change and will be viewed with the same kind of moral courage because they happen to believe in God or spirituality or individual rights and freedoms, and a particular basic tenant and lifestyle which right now doesn't seem to be politically correct.

"In the final analysis, my colleague from Palolo, who was quoting some of the past jurists, used the quotation, 'law is not the private property of lawyers.' I could not agree more. But right now, we're in a situation where all we're doing is relying upon one group of lawyers to anoint another group of lawyers. It is time that we listen to and respect all voices within our community, including the silent majority.

"Thank you, Mr. President."

Senator Levin rose to speak in support of the nominee and stated:

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

"Mr. President, this nomination is controversial for one reason, and one reason only. Like the Senator from Waianae, I must express the one regret that there are too few individuals in our community who are willing to take on unpopular causes. But be that as it may, this judgeship is a new challenge that Mr. Foley wants to take on, and we should applaud him for that.

"The notion that we should deny confirmation to him because he took on unpopular causes would send a message across this state that would be most unfortunate. The message we should want to send to young and old alike, but especially to the young, is that courage, integrity, and a belief in the ideals of our democracy are going to be rewarded, not punished.

"I urge this confirmation."

Senator M. Ige rose in opposition to the nomination and said:

"Mr. President, I rise to speak against this nomination.

"Mr. President, the question that comes to my mind is, If this nominee had his way, would we be having T-shirt vendors selling T-shirts on every street corner in Waikiki, on every beach, with no rules, with no regulations? Mr. President, that's not my primary reason for not supporting this nomination.

"Mr. President, a vote for this nomination is a vote for same-sex marriage in Hawaii, plain and simple. With this confirmation, same-sex marriage may not happen today or tomorrow, but rest assured that like the sun rising, it's coming. It will happen. With this nomination, same-sex marriage for Hawaii is not a question of if, but when.

"It's like medical marijuana that we just passed. The idea was to get the big toe in the door and little by little, inch by inch, slowly but surely you get the whole ball of wax -- marijuana, dope, legalized in our community. What a strategy. You lull the community into acceptance, and if you can't get the whole loaf, you settle for one slice at a time.

"Last night I heard a politician on TV saying something to the effect that 'I don't need any polls to tell me how to vote. I know who I am. I know what I believe in.' Mr. President, how appropriate. A no vote on this nomination goes against the popular feeling in my community. There's no question. But we all, we all need to rise above what at times may seem popular and what at times may seem convenient, and do what we believe way down inside is the right thing to do.

"This issue reminds me of a discussion that I had with the late mayor of Kauai, Uncle Tony Kunimura. He said whatever decision you make, Marshall -- whatever decision you make -- always let your conscience be your guide. Because in the morning when you wake up and you look in the mirror, you're not going to see Harry, you're not going to see Tom, you're not going to see Susan -- you're going to see you. And you, that's all you've got. That's whom you will have to answer to. And as long as you lead by having your conscience be your guide, you will always be on the right side.

"Mr. President, same-sex marriage has no place in Hawaii -- not today, not tomorrow, not in our lifetime -- never mind the polls. Let your conscience be your guide. Let us all do the right thing -- vote no on this nomination."

Senator Sakamoto rose again and said:

"Mr. President, I just feel I need to make some things clearer.

"I'm not an attorney like our colleagues from Waianae and Palolo. Comments were made such as, 'because Mr. Foley represented a certain position, it does not mean that the viewpoint is shared'; or that 'it was very disconcerting to define an attorney by the people he represents.' There was also the comment that 'he gave more than 100 percent, for pay of less than 1 percent.' I don't question that you can be a mercenary. You can work for pay -- you hire me, I work; they hire me, I work. But I'm sure this nominee was not a mercenary working for pay. Some people feel he was their David in David and Goliath. Other people feel he was the Goliath in David and Goliath.

"I'm not here to advocate on those issues, but I do agree very strongly with my colleague from Waianae on the point that you want the impartiality. That is the basis of our system for a jurist, for a jury, for any part of our system -- you want the impartiality.

"Although the questions are thrown out about doing what he believes, there is no question. Or if there is a question, I didn't hear him say 'I was a mercenary just working for money,' especially when he then says, 'but I didn't get very much, and sometimes I worked for nothing.' And I praise him for that. I'm not demeaning him in his ability or his constitutionality or his working for civil rights, and I'm sorry if I implied that I am against civil rights or against individual rights. I am not against those rights, but I'm against finding new and unrecognized things, reading between the lines, that only a single genius can find. As an advocate, he is good. Fine -- he can be a person's David; he can be a person's Goliath, but I want no spear thrower on the bench or rock thrower on the bench, Mr. President."

Senator Anderson also rose in opposition and said:

"Mr. President, I will be voting no on this appointment.

"I'd like you to know that the appointee did send out a letter asking if he could meet with us. I did appreciate the letter, but he was one of the few that I did not request an appointment with. It was primarily because I did want to make sure that when I was looking at the options of voting aye or nay, I didn't want to have him come into the office and I'm sitting there, and then I'd have to

say I'm not really sure how I'm going to vote on you, Mr. Foley. And I wasn't sure at the time.

"I received many letters and faxes this morning and yesterday regarding the nomination of Mr. Foley. I've been working on this for a week. I'm not sure how many of you received an earlier notice of Mr. Foley's confirmation. It's very difficult for us to make a decision at the last minute when people say 'I'm opposed to him and you should vote accordingly.' That's difficult, ladies and gentlemen. If you're really opposed to someone and you have that knowledge, then fax us and phone us and ask us those questions as early as possible.

"Yesterday before we closed, Mr. Foley made a remark that made me a little more sure of why I was voting no. His remark was that some of his cases that he had sent to the Supreme Court, had he known then that Reagan was going to put in conservative judges, he would have heard those cases here. How can you be a fair person if a law that is passed is so broad, constitutional or otherwise, that if you're conservative you look at it this way and if you're liberal you look at it that way? I've heard people, mostly attorneys, say that the intent of the legislature was that the law should be this way.

"Well let me tell you, when I first got elected I was in Water, Land, and Hawaiian Homes. Mr. Oswald Stender was working for Campbell Estate and he came in and asked us to look at a bill on sugar lands that Campbell Estate had, because they had dedicated those lands and they received a tax write off. However, if they ever took those lands out of sugar, the roll back on taxes was going to be enforced. Say they did this for 30 years. Well, Mr. Stender came in and said, 'Campbell Estate has been doing it for the last 20 years. I don't see why we have to roll back if we're going to take these lands out. They're no longer as productive as we want it, so I don't think we should go ahead and have the taxes rolled back.' I agreed with him. So in the committee I said I'm sure it was not the intent of those legislators, and my chairman Mits Uechi was sitting next to me and he said, 'The hell it wasn't, I helped write that bill and that was our intent.' So when we write laws that are so broad that you can look at them any way you want, that's wrong, ladies and gentlemen. And that's why I'm opposed to this.

"I'm also opposed that Mr. Foley represents and has fought for positions with the ACLU. I just can't understand that. I told them yesterday, if you burn a flag, it's freedom of speech. If you burn a sheet, you can go to jail. But we didn't raise the civil rights on Iwo Jima. We raised the American flag. And it's a symbol that I'm proud of. I'm an American and I'm proud of it. And these are examples of my concerns.

"I've never seen an attorney that has said 'we will fight for those and we will change it.' Even when we write a resolution to congress, our own legislators turn it down -- Republicans and Democrats. There are a hell of a lot of attorneys there and I don't see why they can't change what's there.

"So I'm opposed to many things that Mr. Foley has stood for. I will agree with everybody on his intelligence and the whole bit. However, they told me I should vote for him because it's such a great opportunity for the judicial system and the attorneys. I don't represent the judicial system and the attorneys -- I represent the people of the State of Hawaii. That's why I will be voting 'no,' Mr. President. I urge my colleagues to consider my reasons and vote 'no' on this appointment.

"I don't mean to embarrass Mr. Foley or his family or anyone else. I just cannot vote aye on this particular nominee. Thank you, Mr. President."

Senator Nakata then rose to speak in favor of the nominee and said:

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

"Mr. President, I have been an advocate for most of my adult life for those who are in a weaker position, let me put it that way. I'm sorry that such people will be losing this advocate if we approve this nomination.

"As an advocate, you use your skills, your creativity, your intelligence to advance the cause of those that you represent. Being a judge is a different role. It is a more deliberative role. I would feel safe with the law and with our constitution in the hands of Mr. Foley. That is why I support the nomination. But I do have a deep regret that a person who has always been an advocate for the underdog is being lost. As an advocate, it must have been a difficult decision for him to make to step away from that role and into the role of a judge -- a quite different role.

"I admire and respect this man. I respect the opinions of those who are in opposition to him, but I do believe that in being a judge on this Intermediate Court of Appeals, he will carry out his responsibilities faithfully and passionately and do it well in the defense of the law and the constitution.

"Thank you."

Senator Chun then rose to speak in support and said:

"Mr. President, I stand in favor of the nomination.

"Mr. President, before I proceed with my reasons for supporting this nomination, I must raise the point that I was one of the few Senators who did not sign this petition for a Special Session for the confirmation of judges. As you well know, there was a letter I sent to you and to the others with the reason why I did not want to have a Special Session so early on, especially one of two days. I felt that we needed to have more public comments on these confirmations. I felt that a two day session gives too much of an impression that the Senate is in more of a rush to confirm as opposed to a rush to listen. But Mr. President, be that as it may, a Special Session has been convened and based upon what I've heard, I am willing to make my decision based upon the testimony that has been received to date.

"Mr. President, I do stand in support of the nomination of Dan Foley. I am one of the few people other than the Honorable Senator from Waianae who has also litigated cases both with and against Mr. Foley. I can honestly say that in all my professional dealings with Mr. Foley, he has always conducted, always conducted himself as a professional with honesty and integrity. I cannot say that for all the colleagues I've litigated for and against. Also, he is the one that I can honestly say it's been a pleasure being on cases with him.

"I must admit, however, that some of the positions that Mr. Foley has taken as an advocate concern me. I don't always agree with his arguments regarding the interpretation of our constitution. I've also received many telephone calls and faxes from my constituents in Kauai asking me -- no, begging me -- to vote against this confirmation. And these are faxes and calls from people who I respect, people who I have prayed with, people whose heart and soul for this state and concern for the people of this state are unquestionable. Their concern focuses on one issue, and that is Mr. Foley's advocacy for the same-sex marriage on behalf of his clients.

"I did not agree with the positions argued by Mr. Foley in that case. I was one of the few candidates that felt so strongly about the issue that I personally waived signs in favor of a constitutional amendment banning same-sex marriages. But we are not here to decide whether to allow same-sex marriages or not. The people

have settled that issue. We are here to decide whether Mr. Foley is qualified to serve as a member of the Intermediate Court of Appeals.

"No one -- no one -- disputes Mr. Foley's legal knowledge. Mr. Foley is an extremely good attorney. He knows the law. But being a judge involves more than just knowing the law. As one person who called me adequately put it -- Can Mr. Foley stop being an advocate for his own personal viewpoints as to what is right and apply the law as the people intended it? That is the question. A judge cannot and should not be allowed to replace his own view of what the law should be. A judge should not reform the law to fit his own personal viewpoint. And that is the fear of the people who have called me to voice their concern regarding Mr. Foley's confirmation. This is a legitimate fear. I do not, however, base my decisions on fear, but what I feel is right and fair.

"The issue boils down to this -- If confirmed, can Mr. Foley stop being an advocate for his own personal viewpoints and base his decisions on the law? Mr. Foley, when posed this question at the Committee, stated that he can and will. The question is, Do I trust him to live up to this promise, this commitment? I think I can. As I stated before, I've always known Mr. Foley to be nothing but a professional and a man of his word.

"The people who oppose Mr. Foley's nomination don't trust Mr. Foley. They base their decision on his conduct as an advocate for his clients. While I can see from their perspective that his actions in that capacity are not favorable, that does not address the issue whether he is a man that will live by his word. Whether he is a person who can be trusted to fairly apply the law as it is written to a given situation. The bottom line is fairness. If I were to condemn Mr. Foley for his actions as an advocate because of his work in the same-sex marriage case, it would be unfair. If I were to condemn Mr. Foley for his action as an advocate for any of his clients, it would be unfair.

"I was elected to this office to listen to all sides of an issue and be fair to all sides. It would be hypocritical for me to demand that a judicial nominee look at all sides of the issues and be fair, yet not afford him or her the same standard when voting to confirm.

"I feel Mr. Foley has the qualifications to be a good judge. I feel that Mr. Foley was honest and sincere when he testified in front of the Senate Judiciary Committee that he can stop being an advocate for his personal views and base his decisions only on the law. I have no basis to believe otherwise. And for this reason, I stand in favor of the nominee."

Senator Slom rose at this time and said:

"Mr. President, I'd like to request a Roll Call vote."

The Chair so ordered.

At 3:37 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 3:38 o'clock p.m.

Senator Chumbley requested the following remarks be inserted into the Journal:

"Mr. President and members, as Senator Matsunaga indicated, we believe Daniel R. Foley is an excellent candidate for this position in the Intermediate Court of Appeals. His credentials are top-notch. Mr. Foley has 26 years of legal experience. He earned both his B.A. and J.D. from the University of San Francisco. He served as legal counsel to various government bodies in Micronesia, and has also served as legal director for the ACLU of Hawaii, an adjunct

law professor at the University of Hawaii, and a partner in private practice.

"Testimony supporting Mr. Foley's nomination was submitted by the State Department of Public Safety; four members of the Office of the Public Defender; the Hawaii Civil Rights Commission; the Hawaii State Commission on the Status of Women; the former mayor of the City and County of Honolulu; two professors from the Richardson School of Law; the Native Hawaiian Legal Corporation; 21 members of the legal community; the Waimea United Church of Christ; and five private citizens.

"Supporters noted Mr. Foley's character, integrity, and courage; they indicated he had a great passion for the law and an even greater passion for justice. In addition, they indicated he was patient, even-tempered and compassionate. The Hawaii State Bar Association rated Mr. Foley as 'highly qualified' for the position of Judge of the Intermediate Court of Appeals.

"Individuals and groups testifying in opposition to Mr. Foley's appointment included the Prosecuting Attorney of the City and County of Honolulu; the Hawaii Christian Coalition; the Christian Voice of Hawaii; the Messianic Jewish Community; six members of the legal community; and 31 private citizens. Those who spoke against his appointment expressed concerns regarding his ability to be fair and non-biased in cases involving civil rights, in light of his involvement in the widely publicized same-sex marriage case.

"The Senate Judiciary Committee diligently questioned Mr. Foley about the concerns voiced by those who opposed him, and about his views on the attributes of a good judge. In addition, Committee members discussed with him his qualifications and plans for improving the function of the Intermediate Court of Appeals. They also asked Mr. Foley if he felt his lack of experience as a judge in a lower court might be a drawback to his success.

"Mr. Foley shared his belief that everyone should have equal access to the judicial system and assured Committee members that he is prepared to make a successful transition from advocate to jurist. He also affirmed his commitment to the rule of law, due process, and the principles of fairness and impartiality.

"After full consideration of Mr. Foley's background, character, qualifications, and experience, we believe he is an excellent candidate to serve as Judge in the Intermediate Court of Appeals. Without reservation, we recommend that the Senate consent to the nomination."

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

Ayes, 14. Noes, 8 (Anderson, Bunda, M. Ige, Kanno, Kawamoto, Menor, Sakamoto, Slom). Excused, 3 (Buen, Inouye, Matsuura).

At 3:40 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 3:43 o'clock p.m.

#### SENATE RESOLUTION

The following resolution (S.R. No. 1) was read by the Clerk and was disposed of as follows:

Senate Resolution

No. 1 "SENATE RESOLUTION AUTHORIZING THE PRESIDENT TO APPROVE THE JOURNAL OF THE SENATE FOR THE SECOND DAY."

Offered by: Senators Ihara, Anderson.

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On motion by Senator Chun, seconded by Senator Slom and carried, S.R. No. 1 was adopted.

**ADJOURNMENT**

Senator Chun moved that the Senate of the Twentieth Legislature of the State of Hawaii, Special Session of 2000, adjourn Sine Die, seconded by Senator Slom and carried.

At 3:45 o'clock p.m., the President rapped his gavel and declared the Senate of the Twentieth Legislature of the State of Hawaii, Special Session of 2000, adjourned Sine Die.

## STANDING COMMITTEE REPORTS

**SCRep. 1            Judiciary on Jud. Com. No. 1**

Recommending that the Senate consent to the nomination of the following:

DAVID W. LO, judicial nominee to the District Court of the First Circuit.

Upon review of the background information submitted by the nominee, your Committee finds that David W. Lo holds a B.A. degree from the University of Hawaii and a J.D. degree from the University of the Pacific's McGeorge School of Law. Mr. Lo has served as a district court per diem judge since 1997, and has been the proprietor of his own private law practice since 1986. His professional and community activities include the Court Annexed Arbitration Program, the American Arbitration Association, the Medical Claims Conciliation Panel, and the Mayor's Advisory Committee on Law Enforcement Planning.

Testimony in support of the nominee was submitted to your Committee by: nine members of the District Court of the First Circuit; the Hawaii State Bar Association; two members of the Office of the Public Defender; the Prosecuting Attorney of the City & County of Honolulu; twelve members of the legal community; and one private citizen. All testimony unanimously supported the nomination of Mr. Lo by indicating that he is an individual of impeccable character, compassionate and empathetic. He also possesses a commitment to educating the public about our judicial process that extends beyond the courtroom and into the community. Further, testifiers indicated that he is intelligent, articulate, and has an excellent judicial temperament which highly qualifies him for the position of District Court Judge in the First Circuit.

Your Committee members diligently questioned the nominee regarding his commitment to educating the community about the judicial process, his thoughts on judicial restraint, and his view of how the motor vehicle insurance statutes should be changed. Your Committee believes that the nominee adequately responded to the Committee's inquiries.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee, after full consideration of the background, character, experience, and qualifications of the nominee, has found the nominee to be qualified for the position to which nominated and recommends that the Senate consent to the nomination.

Signed by the Co-Chairs on behalf of the Committee.  
Ayes, 7. Noes, none. Excused, none.

**SCRep. 2            Judiciary on Gov. Msg. No. 1**

Recommending that the Senate consent to the nomination of the following:

CLIFFORD L. NAKEA, gubernatorial nominee to the Circuit Court of the Fifth Circuit, for a term of Ten Years.

Upon review of the background information submitted by the nominee, your Committee finds that Clifford L. Nakea holds a B.A. degree from St. Mary's College, and a J.D. degree from the University of San Francisco School of Law. Mr. Nakea has served as a District Court Judge in the Fifth Circuit since 1980. His professional and community activities include the Hawaii State Bar Association; the American Juricature Society; St. Catherine School Parish Council; the YMCA, Kauai; and trustee of the Kauai Museum.

Testimony in support of the nominee was submitted to your Committee by: three members of the District Court of the Fifth Circuit; the Hawaii State Bar Association; three members of the Office of the Public Defender; the Prosecuting Attorney of the County of Kauai; the Contractors Association of Kauai; and two members of the legal community. Testimony supported the nomination of Mr. Nakea by indicating that he is a gentleman of high moral character, a caring and compassionate person that is highly qualified to serve as a circuit court judge. Further, testifiers acknowledged that Mr. Nakea's integrity and sense of fairness has always been beyond reproach and is well deserving of this nomination. One individual gave oral testimony in opposition.

Your Committee members diligently questioned the nominee regarding his leadership skills that he may use to help improve the Judiciary, his thoughts on providing immunity from liability to Counties that administer beach parks, and his views on how to improve the juvenile justice system on Kauai. The Committee also discussed with him his view on confidentiality of juvenile records, and judicial restraint. Your Committee believes that the nominee adequately responded to the Committee's inquiries.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee, after full consideration of the background, character, experience, and qualifications of the nominee, has found the nominee to be qualified for the position to which nominated and recommends that the Senate consent to the nomination.

Signed by the Co-Chairs on behalf of the Committee.  
Ayes, 7. Noes, none. Excused, none.

**SCRep. 3            Judiciary on Gov. Msg. No. 2**

Recommending that the Senate consent to the nomination of the following:

DERRICK H. M. CHAN, gubernatorial nominee to the Circuit Court of the First Circuit, for a term of Ten Years.

Upon review of the background information submitted by the nominee, your Committee finds that Derrick H.M. Chan holds a B.A. degree from the University of Hawaii and a J.D. degree from the California Western School of Law. Mr. Chan has served in the Department of the



Attorney General, the Office of the Public Defender, and the Office of the Prosecuting Attorney of the County of Kauai. His professional and community activities include AYSO, the Iolani Ohana Organization, Moana Girls' Athletic Club, and Danceworks Kids.

Testimony in support of the nominee was submitted to your Committee by: the Federal Social Security Administration; a Deputy Attorney General; eighteen members of the Office of the Public Defender; four members of the Prosecuting Attorney of the Counties of Hawaii, Kauai and Maui; the Hawaii State Bar Association; the Hawaii Carpenters Union; thirty members of the legal community; five private businesses; and eight private citizens. All testimony unanimously supported the nomination of Mr. Chan by indicating that he is honest, even-tempered, fair, and diligent. Further, testifiers acknowledged that Mr. Chan possesses a strong work ethic, intelligence, and the dedication that makes him highly qualified to serve as a Circuit Court Judge in the First Circuit.

Your Committee members diligently questioned the nominee regarding the qualities he will bring to the circuit court, including his experience with criminal court cases, and his lack of experience with civil cases. In addition, the Committee discussed with Mr. Chan his views of alternatives to trials, such as Drug Court, and the importance of drug treatment. Your Committee believes that the nominee adequately responded to the Committee's inquiries.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee, after full consideration of the background, character, experience, and qualifications of the nominee, has found the nominee to be qualified for the position to which nominated and recommends that the Senate consent to the nomination.

Signed by the Co-Chairs on behalf of the Committee.  
Ayes, 7. Noes, none. Excused, none.

**SCRep. 4                      Judiciary on Gov. Msg. No. 3**

Recommending that the Senate consent to the nomination of the following:

**DANIEL R. FOLEY**, gubernatorial nominee to the Intermediate Court of Appeals, for a term of Ten Years.

Upon review of the background information submitted by the nominee, your Committee finds that Daniel R. Foley holds B.A. and J.D. degrees from the University of San Francisco. Mr. Foley has 26 years of law experience. He has served as the legal counsel to various Micronesian government bodies, the legal director for the ACLU of Hawaii, an adjunct professor at the University of Hawaii, and a partner in a private law practice. He has also served as a board member for the Seagull Schools, Inc.

Testimony in support of the nominee was submitted to your Committee by: the State Department of Public Safety; four members of the Office of the Public Defender; the Hawaii Civil Rights Commission; the Hawaii State Commission on the Status of Women; the former mayor of the City & County of Honolulu; two professors from the Richardson School of Law; the Native Hawaiian Legal Corporation; twenty-one members of the legal community; the Waimea United Church of Christ; and five private citizens. The testimony in support of the nominee indicated that Mr. Foley is a man of character, integrity, and courage with a great passion for the law, and greater passion for justice. Further, testifiers acknowledged that he is patient, even-tempered, and compassionate. The Hawaii State Bar Association indicated that Mr. Foley is highly qualified for the position of Judge of the Intermediate Court of Appeals.

Testimony in opposition of the nominee was submitted by: the Prosecuting Attorney of the City and County of Honolulu; the Hawaii Christian Coalition; the Christian Voice of Hawaii; the Messianic Jewish Community; six members of the legal community; and thirty-one private citizens. The testimony in opposition questioned Mr. Foley's ability to be fair and non-biased in cases involving civil rights. The primary concern voiced was of his involvement in the same sex marriage case.

Your Committee members diligently questioned Mr. Foley about the concerns voiced over his nomination and his views on the attributes of a good judge. In addition, your Committee discussed with Mr. Foley the qualities he will bring to the Intermediate Court of Appeals, whether his lack of experience as a judge in a lower court would hinder his success, and how he plans to improve the functioning of the Intermediate Court of Appeals. Mr. Foley shared his belief that everyone should have equal access to the judicial system, and assured your Committee that he is prepared to make the transition successfully from advocate to jurist. He also affirmed his commitment to the rule of law, due process and being fair and impartial.

As affirmed by the record of votes of the members of your Committee on Judiciary that is attached to this report, your Committee, after full consideration of the background, character, experience, and qualifications of the nominee, has found the nominee to be qualified for the position to which nominated and recommends that the Senate consent to the nomination.

Signed by the Co-Chairs on behalf of the Committee.  
Ayes, 6. Noes, 1 (Sakamoto). Excused, none.

NUMBER AND TITLE	Offered	Referred	Report of Committee	Adoption
S.R. 1 AUTHORIZING THE PRESIDENT TO APPROVE THE JOURNAL OF THE SENATE FOR THE SECOND DAY	12			12