Revised Testimony of the Office of the Public Defender, State of Hawaii to the Senate Committee on Judiciary

February 5, 2019

S.B. No. 860: RELATING TO COURT PROCEEDINGS

Chair Rhoads and Members of the Committee:

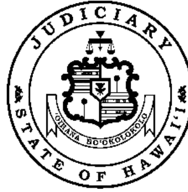
We respectfully oppose passage of S.B. No. 860 which would allow the legislature to intervene in any court proceeding involving a constitutional or statutory claim. We are concerned that this provision would extend to every criminal proceeding in the District, Circuit and appeals courts in the state. Every criminal proceeding alleges a violation of statutes. Many involve the litigation of constitutional provisions such as the right against illegal search and seizure, the right to due process, and the right to equal protection. S.B. No. 860 is far too vague in how intervention by the legislature in every case would operate. The bill is also vague on the reason for such intervention.

The Hawaii Rules of Appellate Procedure, Rule 44 currently provides that when the constitutionality of a Hawaii statute is challenged in cases in which the state is not a party, the Attorney General must be served with notice of such a challenge. Thus the current rules provide for the state to take appropriate action, such as the filing of an amicus brief, when a law is challenged on constitutional grounds.

If the legislature is allowed to routinely intervene in cases, S.B. No. 860 would be subject to a constitutional challenge. For instance, if the legislature were to intervene in a criminal case to argue for a certain interpretation of a sentencing statute, it could be argued that the legislature has violated the separation of powers doctrine by taking on an executive branch function, namely the enforcement of a law through prosecution.

If S.B. No. 860 were to be enacted, an immediate question would be raised as to whether the legislature would have to be served with notice in any case involving a constitutional or statutory claim in order to give it the opportunity to intervene in the case. This would result in the legislature be served thousands of times per year. Such a situation would likely become unwieldy.

Due to the many unanswered questions surrounding this bill, we oppose its passage. Thank you for the opportunity to provide testimony in this matter.



The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Tuesday, February 5, 2019, 9:00 a.m.
State Capitol, Conference Room 016

By

Rodney A. Maile
Administrative Director of the Courts

WRITTEN TESTIMONY ONLY

Bill No. and Title: Senate Bill No. 860, Relating to Court Proceedings.

Purpose: Provides that the Legislature shall have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision.

Judiciary's Position:

The Judiciary respectfully opposes this bill.

Senate Bill No. 860 would provide the Legislature with standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision. Because so many claims implicate statutes or constitutional provisions, this bill would effectively provide the Legislature with unprecedented authority to become a party in most cases being considered by the courts, without regard to the Legislature's interest in the case, the specific nature of the constitutional or statutory claims, or the potential prejudice to the original parties.

It is not clear why this bill is necessary, since the current system provides ample opportunities for the Legislature to present its views in litigation when appropriate. First, the Legislature can seek to become a party to civil cases by filing a motion to intervene. For example, in the circuit courts, Hawai'i Rules of Civil Procedure (HRCP) Rule 24 sets forth standards under which anyone may seek to intervene, including circumstances in which intervention must be

allowed by the court, [1] and other circumstances in which intervention may be allowed in the discretion of the court.[2] Significantly, in exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Second, interested parties, including the Legislature, can seek permission of the court to file written amicus curiae or "friend of the court" briefs to assist the court in resolving particular issues of concern to them.[3] Indeed, the Legislature has intervened or filed amicus briefs in both circuit and appellate court cases in the recent past, and the process appears to be working to ensure that the Legislature is able to participate appropriately in cases of interest.[4]

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1 HRCP Rule 24(a) provides, in relevant part:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

2 HRCP Rule 24(b) provides, in relevant part:

> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute, ordinance or executive order administered by an officer, agency or governmental organization of the State or a county, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute, ordinance or executive order, the officer, agency or governmental organization upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

3 In the circuit courts, the filing of such briefs is within the discretion of the court, while the process for filing amicus briefs on appeal is set forth in the Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(g).

4 The Circuit Court of the First Circuit granted the Legislature's request to intervene on a permissive basis in Hussey v. Say. See Hussey v. Say, 139 Hawai‘i 181, 184-85 (2016). The Hawai‘i Supreme Court also granted the Legislature's request to file an amicus curiae brief in Nelson v. Hawaiian Homes Comm'n, 141 Hawai‘i 411 (2018). In addition, the Circuit Court of the First Circuit recently granted the Legislature's request to file an amicus curiae brief in the League of Women Voters v. State. See Nathan Eagle, Colleen Hanabusa is Now the Legislature's Attorney in Case Against the State, CIVIL BEAT (Nov. 29, 2018), https://www.civilbeat.org/2018/11/colleen-hanabusa-is-now-the-legislatures-attorney-in-case-against-the-state/.

Finally, it is important to note whenever a party draws the constitutionality of a statute into question, the party is required to provide immediate written notice of the issue to the attorney general.[5]

In contrast, this measure would effectively give the Legislature broad standing to intervene in most cases as a matter of right, which no other citizen, agency, or branch of government currently appears to enjoy.[6]

In addition, passage of this measure could result in unintended negative consequences for some of the most vulnerable populations in our community. For example, the Legislature would have standing to intervene in proceedings in family court, which would be particularly problematic for cases involving minors. To protect the best interest of children who find themselves involved in family court proceedings, court records for every case involving a minor, except divorce proceedings, are confidential by law. This includes allegations of child abuse or neglect in Child Welfare Services cases, adoption cases, and juvenile law violation cases to name a few. Confidentiality protects the identity and other personal details about a child's life from being open to public scrutiny. Although the current Legislature may not intend to utilize this measure to participate in family court proceedings, this measure nevertheless opens the door to future intrusion and does not provide necessary discretion to the presiding judge to weigh the Legislature's interest in intervening against the best interest of the child given the facts of each case.

This measure, if passed, would also give the Legislature the right to intervene as a party in criminal prosecutions, which are all based on statutes, and which often involve application of provisions of the Constitution. There could be many unintended, negative consequences of such participation. For example, the Sixth Amendment to the United States Constitution and article I, section 14 of the Hawai'i Constitution guarantee a defendant in a criminal case the right to a speedy trial in all prosecutions. Given defendants' rights, the proposal in this measure becomes increasingly concerning as the Legislature would have the authority to intervene without consideration of whether the Legislature's participation will unduly delay court proceedings or otherwise disrupt the scheduling of case events.

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5 See HRCP Rule 24(d); HRAP Rule 44.

6 HRCP Rule 24(b) provides a mechanism for an officer, agency or governmental organization of the State or a county to permissively intervene in a case, but with limitations. In addition, for all cases on appeal, HRAP Rule 28(g) provides that the attorney general may file an *amicus curiae* brief without order of the court where the constitutionality of any statute of the State of Hawai'i is drawn into question.

In sum, the current system strikes a careful balance between giving non-parties an avenue to participate in cases in which they have an interest, while also ensuring that the court has the discretion necessary to manage the litigation process and prevent unintended negative consequences. This measure would not only impede the administration of justice in Hawaiʻi and undermine judges' abilities to effectively manage their cases at various stages of litigation, but it will also add an additional layer of uncertainty to the legal process for attorneys and the parties that they represent.

For these reasons, the Judiciary respectfully opposes Senate Bill No. 860. Thank you for the opportunity to testify on this matter.

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MAILING ADDRESS
P.O. Box 23404
Honolulu
Hawai'i
96823

Feb. 1 , 2018

TO: Honorable Chair Rhoads & JDS Committee Members

RE: SB 860 Relating to Court Proceedings

Opposition for hearing on Feb. 5

Americans for Democratic Action is an organization founded in the 1950s by leading supporters of the New Deal and led by Patsy Mink in the 1970s. We are devoted to the promotion of progressive public policies.

We oppose SB 860 as it would compromise the independence of the judiciary. The legislature would automatically have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision regardless of judicial ruling.

Thank you for your favorable consideration.

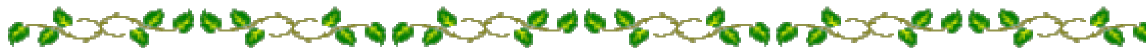
Sincerely,

John Bickel President

COMMUNITY ALLIANCE ON PRISONS

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

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



COMMITTEE ON JUDICIARY
Sen. Karl Rhoads, Chair
Sen. Glenn Wakai Vice Chair
Tuesday, February 5, 2019
9:00 am
Room 016

STRONG OPPOSITION TO SB 860 – LEGISALTIVE STANDING IN COURT PROCEEDINGS

Aloha Chair Rhoads, Vice Chair Wakai and Members of the Committee!

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

SB 860 provides that the legislature shall have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision.

Community Alliance on Prisons strongly objects to this measure. The system of checks and balances is intended to make sure that no branch or department of the federal government be allowed to exceed its bounds, to guard against fraud, and to allow for the timely correction of errors or omissions.

The system of checks and balances is intended to make sure that no branch or department of the federal government be allowed to exceed its bounds, to guard against fraud, and to allow for the timely correction of errors or omissions. Indeed, the system of checks and balances is intended to act as a sort of sentry over the separation of powers, balancing the authorities of the separate branches of government. In practical use, the authority to take a given action rests with one department, while the responsibility to verify the appropriateness and legality of that action rests with another.

Founding Fathers like James Madison knew all too well from hard experience the dangers of unchecked power in government. Or as Madison himself put it, "The truth is that all men having power ought to be mistrusted."

The French philosopher Baron de Montesquieu, "[t]he oracle…the celebrated Montesquieu," as James Madison referred to him, advocated three distinct and separate branches in which the general powers of government should be lodged. While John Locke made the case for separating the legislative and executive powers, Montesquieu provided the Founders with a convincing defense for an independent judiciary:

> ***"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty… Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator.*** *Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals" (Baron de Montesquieu, Spirit of Laws, 1748).*

It was Montesquieu's vision of a truly separated, tripartite system that the Founding Fathers would come to adopt at the Constitutional Convention. Article I, Section 1 of the U.S. Constitution vests legislative powers in a Congress of the United States, itself separated into a House of Representatives and a Senate. Article II, Section 1 vests executive authority in a President of the United States. Article III, Section 1 vests judicial authority in a single Supreme Court of the United States and "in such inferior Courts as the Congress may from time to time ordain and establish."

Community Alliance on Prisons respectfully asks the committee to remember the oath of office they took to protect and defend the Constitution and to hold this anti-democratic measure.

Mahalo for this opportunity to testify.

HAWAII STATE TRIAL JUDGES ASSOCIATION

Testimony of Kenneth S. Robbins, on behalf of the Hawaii Chapter of the American Board of Trial Advocates (ABOTA)

Regarding Senate Bill 860
COMMITTEE ON JUDICIARY
Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Fax 586-6131
SB 860 - Testimony from Kenneth S. Robbins
Tel. 524-5644

Tuesday, February 5, 2018, 9:00 a.m.
Conference Room 016, State Capitol
415 South Beretania Street

Dear Senators Rhoads and Wakai:

The members of the Hawaii Chapter of the American Board of Trial Attorneys (ABOTA), a national honorary organization of trial attorneys, whose members represent both plaintiffs and defendants and have participated in more jury trials per member than any other legal organization, opposes S.B. No. 860 for a number of reasons, each one of which is compelling.

1. S.B. 860 violates the separation of powers mandate of the Constitution of the State of Hawaii.

The State of Hawaii constitutional mandate of separation of powers has been sacrosanct since 1864 when the Constitution of the Hawaiian Kingdom included the imperative of checks and balances within the three branches of government:

The Supreme Power of the Kingdom in it's exercise, is divided into the Executive, Legislative and Judicial; these shall always be preserved distinct ...

The separation of powers/checks and balances mandate has been the fundamental construct of governance in Hawaii ever since. The same separation of powers underlies the very foundation of the U.S. Constitution. Challenges have been asserted and attempts to weaken this pillar of our democracy have been made, but never successfully. The framers of the 1864 Constitution were prophetic when the document they drafted said: "... these (3 branches of government) shall always be preserved distinct ...".

Therefore, if enacted, this bill would certainly be stricken as unconstitutional. The legal challenge would be mounted by the Executive Branch, led by the Office of the Attorney General, and decided summarily by

the Judicial Branch. Thus, the very process of challenging and killing this potential legislation would, itself, constitute the fundamental dynamic of separation of powers and checks and balances among the three branches of government.

2. The Attorney General is the legal representative of the people of the State of Hawaii. In the event S.B. No. 860 is enacted there could be a conflict between the State A.G., acting on behalf of the Executive Branch and the attorney representing the Legislative Branch. If enacted and not stricken, S.B. 860 would create a monumental constitutional crisis.

3. Intervention is statutorily guaranteed to anyone or any entity with standing to file a motion to intervene. The State AG has standing to assert the right in appropriate cases, on behalf of the people of the State of Hawaii, and is not precluded from consultations with any stripe of person or entity in exercising that right, including members of the legislature.

4. Expanding standing to the legislature as proposed, would clutter lawsuits with additional unnecessary parties, thereby adding to an already costly system and creating further delay to a process which is already criticized for its delays.

For the foregoing reasons, ABOTA's **OPPOSES** S.B. 860.

Respectfully submitted,

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

HAWAII FILIPINO LAWYERS ASSOCIATION

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Date: February 4, 2019

To: Sen. Karl Rhoads, Chair
Sen. Glen Wakai, Vice Chair
Senate Committee on Judiciary

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

Re: Testimony on **S.B. 860/H.B. 369** – Relating to Court Proceedings

SB 860: 2/5/19 at 9:00 a.m.-Conference Room 16
HB 369: 2/5/19 at 2:05 p.m.-Conference Room 325

The Hawaii Filipino Lawyers Association (HFLA) appreciates the opportunity to submit this testimony in **OPPPOSITION** to **S.B. 860** and **H.B. 369**, which provide that the legislature shall have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision.

First, HFLA believes **this proposal is overbroad.** The right to intervene is a procedure wherein the court allows a third party, who is not an original party in a legal action, to join the plaintiff or defendant as a party in the litigation. As currently drafted, this proposal will enable the legislature to intervene in virtually *any* case – as most lawsuits will involve a claim based upon a constitutional or statutory provision. If the legislature is so enabled, its influence in the courts will be disproportionately expanded in unprecedented and dangerous ways.

Moreover, Rule 24(a) of the Hawaii Rules of Civil Procedure makes clear the legislature has the power to give itself the right to intervene on specific matters, regarding specific statutes, if it so chooses to enact a provision conferring that right:

> *"Upon timely application anyone shall be permitted to intervene in an action . . . when a statute confers an unconditional right to intervene[.]"*

Thus, if there is any specific statute that has prompted this proposal, the legislature can pass a law giving it the ability to intervene in that statute or constitutional provision. Doing so will avoid the unnecessary and unintended risk that a future legislature will adversely influence the interpretation of *any* law – in matters which this measure is not meant to address.

Second, **it is within the province of the executive branch - not the legislature - to *litigate* statutory and constitutional questions through the attorney general's (AG) office**. It is the executive branch's duty, not the legislature's, to implement and administer the laws and public policies enacted and funded by the legislative branch. The AG's office – an essential arm of the state's executive branch - has the requisite resources, skills, and subject matter expertise to intervene in a lawsuit on behalf of the state. Should a decision by our courts offend notions of fairness, justice, and/or specific laws and policies our legislators wish to advance, our lawmakers can then engage in the structured and deliberative legislative process it is constitutionally charged to conduct. This process enables the legislature to clarify, amend, repeal, and/or reinforce a statutory or constitutional provision. The legislature is also empowered to engage in various investigative processes, and does so, through public hearings or measures calling on entities like the auditor's office, the legislative reference bureau, the ethics commission, and others to do so. The legislative process necessarily involves important and relevant public and stakeholder input – which could be circumvented if the legislature is given the ability to intervene in most litigation. We are concerned that giving the legislature this additional power - especially in the broad and unchecked terms that are outlined in this measure - will invite dire results.

Third, **this measure is duplicative on questions of constitutionality** as the relevant rules of civil procedure already allow the state to seek intervention through the attorney general's office. This process is triggered under Rule 24 (d) of the Hawaii Rules of Civil Procedure:

> "*A party who draws into question the constitutionality of a Hawai'i statute, in any proceeding to which the State of Hawai'i, or any agency thereof, or any officer or employee thereof in an official capacity is not a party, shall provide immediate written notice of the constitutional issue to the Attorney General of the State of Hawai'i."*

Similarly, Rule 44 of the Hawaii Rules of Appellate Procedure provides that questions on the constitutionality of a statute shall be brought to the attention of the attorney general on appeal:

> *"It shall be the duty of a party who draws in question the constitutionality of any statute of the State of Hawai'i in any proceeding in any Hawai'i appellate court to which the State of Hawai'i, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of the State of Hawai'i of the existence of said questio ."*

Fourth, the intervention of the legislature in a lawsuit, especially if it does not have the resources and subject matter expertise to proceed with speed and competence, **will present unnecessary delay and distraction to the parties and the courts. This may delay the timely adjudication and administration of justice to the original parties.** In essence, this negatively impinges upon citizens' and businesses' access to justice.

Fifth, **the bicameral nature of our legislature will make it difficult for its representation in the courts to fairly and equally represent the interests of both the house and senate.** This measure does

not make clear which chamber is authorized to speak on behalf of both. Similarly, such representation cannot adequately defend the work product of either chamber if their respective interests and positions are at odds.

Sixth, **the legislature may elect to represent its interests in litigation through it's own relationships and administrative processes of engaging the attorney general's office**, by seeking its legal opinion or requesting it to draft and file relevant *amici curiae* briefs or other relevant statements and pleadings. This power is conferred under various provisions in Hawaii Revised Statutes (HRS) chapter 28. For example, HRS sec. 28-1 provides:

> *"The attorney general shall appear for the State personally or by deputy, in all the courts of record, in all cases criminal or civil in which the State may be a party, or be interested, and may in like manner appear in the district courts in such case[;]"*

HRS section 28-3, which states:

> *"The attorney general shall, when requested, give opinions upon questions of law submitted by the governor, the legislature, or its members, or the head of any department[;]"*

HRS section 28-4, providing:

> *"The attorney general shall, without charge, at all times when called upon, give advice and counsel to the heads of departments, district judges, and other public officers, in all matters connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully[;]*

and HRS section 28-8.3, stating:

> "No department of the State other than the attorney general may employ or retain any attorney, by contract or otherwise, for the purpose of representing the State or the department in any litigation, rendering legal counsel to the department, or drafting legal documents for the department[.]"

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

We are concerned this measure will invite improper influence on the decision-making of our third branch – the Judiciary. Disgruntled legislators and/or the special interest groups or large donors that back them may engage in unfair and politically motivated sway or retribution in the courts. This measure threatens to undermine the Rule of Law and our Judiciary's informed, reasoned analyses and learned interpretations of it. Passing it would be a step backward, unnecessarily subjecting the judicial process to the whims of political influence.

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

Thank you for this opportunity to testify on these measures in opposition.

The purposes of the HFLA are: to promote participation in the legal community by Filipino lawyers; to represent and to advocate the interests of Filipino lawyers and their communities; to foster the exchange of ideas and information among and between HFLA members and other members of the legal profession, the Judiciary and the legal community; to encourage and promote the professional growth of the HFLA membership; to facilitate client referrals and to broaden professional opportunities for Filipino lawyers and law students.

Testimony of Kenneth S. Robbins, on behalf of the Hawaii Chapter of the American Board of Trial Advocates (ABOTA)

LATE

Regarding Senate Bill 860
COMMITTEE ON JUDICIARY
Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Tuesday, February 5, 2018, 9:00 a.m.
Conference Room 016, State Capitol
415 South Beretania Street

Dear Senators Rhoads and Wakai:

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The State of Hawaii constitutional mandate of separation of powers has been sacrosanct since 1864 when the Constitution of the Hawaiian Kingdom included the imperative of checks and balances within the three branches of government:

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Therefore, if enacted, this bill would certainly be stricken as unconstitutional. The legal challenge would be mounted by the Executive Branch, led by the Office of the Attorney General, and decided summarily by the Judicial Branch. Thus, the very process of challenging and killing this potential legislation would, itself, constitute the fundamental dynamic of

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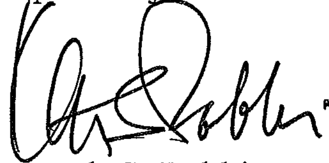
4. Expanding standing to the legislature as proposed, would clutter lawsuits with additional unnecessary parties, thereby adding to an already costly system and creating further delay to a process which is already criticized for its delays.

For the foregoing reasons, ABOTA's **OPPOSES** S.B. 860.

Respectfully submitted,



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

FAMILY LAW SECTION
OF THE
HAWAII STATE BAR ASSOCIATION

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

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February 4, 2019

TO: Senator Karl Rhoads, Chair
Senator Glen Wakai, Vice-Chair
Senate Committee on Judiciary

FROM: Dyan K. Mitsuyama, Chair
Family Law Section of the Hawaii State Bar Association
E-mail: dyan@mitsuyamaandrebman.com
Phone: (808)545-7035

HEARING DATE: February 5, 2019 at 9 a.m.

RE: TESTIMONY IN OPPOSITION OF SB 860 Relating to Court Proceedings

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Dear Chair Rhoads & Vice Chair Wakai and the Judiciary Committee:

I am Dyan K. Mitsuyama, partner in Mitsuyama & Rebman, LLLC which is a law firm concentrating in family law matters. I have been a licensed attorney here in the State of Hawaii for twenty (20) years.

I submit testimony in opposition of SB 860 on behalf of the Family Law Section of the Hawaii State Bar Association, which is comprised of approximately 145 licensed attorneys state-wide practicing or expressing an interest in practicing family law. I am unable to attend in person but am available for questions by phone or e-mail at any time.

First, the proposal is extremely vague and overbroad. Every cause of action that results in a court proceeding has to be based upon a constitutional or statutory provision otherwise there would be no standing for the Judiciary to oversee or intervene in the matter.

Second, the Judiciary already has a means to "intervene" set up in the establishment of the Intermediate Court of Appeals (ICA) and the Supreme Court (SC). It is unclear what "intervene" means in the proposed measure. Does it mean that the Legislature would replace the ICA and/or the SC? Does it mean that it would be a higher power than the Judiciary's SC and it could "intervene" at any time? What would trigger the Legislature's intervention? What would be the process to "intervene"? This is unclear.

Lastly, most importantly, the "intervention" of the Legislature essentially would cross-contaminate the separation of powers and particularly judicial independence. The State of Hawaii followed our country's founding fathers in creating and preserving three distinct branches of government.

In short, this measure seeks to muddy the waters of our branches of government without any specifics as to the "how" and the "why".

For the reasons state above, the Family Law Section opposes SB 860.

Thank you for your time.

NOTE: ***The comments and recommendations submitted reflect the position/viewpoint of the Family Law Section of the HSBA. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors, and is not being endorsed by the Hawaii State Bar Association.***

LATE

SB-860
Submitted on: 2/4/2019 6:54:15 PM
Testimony for JDC on 2/5/2019 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Marilyn Yamamoto	Testifying for Hawaii Family Advocacy Team	Support	No

Comments:

As an advocate for families in the child welfare system, I have serious concern for lack of due process and the checks and balances that are supposed to exist in the family court. I strongly support this bill.

SB-860
Submitted on: 2/5/2019 9:07:58 AM
Testimony for JDC on 2/5/2019 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
De MONT R. D. CONNER	Testifying for Ho'omanapono Political Action Committee (HPAC)	Oppose	Yes

Comments:

WE STRONGLY OPPOSE THIS CLEAR VIOLATION OF THE SEPRATION OF POWERS DOCTRINE! IT APPEARS THAT RUSSIAN INFLUENCE INTO OUR HAWAII POLITICS IS REAL!

BASIC CIVICS CLASS INFORMS US THAT THERE ARE THREE BRANCHES OF GOVERNMENT: EXECUTIVE, LEGISLATIVE & JUDICIAL. WE KNOW THAT IT IS THE LEGISLATURES KULEANA TO DRAFTS LAWS, THE EXECUTIVE BRANCH APPROVES THE LAWS & IT IS THE JUDICIARY THAT INTERPRETS THE LAWS.

HERE, THE LEGISLATURE IS ATTEMPTING TO IMPOSE ITSELF INTO THE JUDICIARY DUTIES AND THE OVVIOUS CONFLICT OF INTEREST MAY EXISTS. PLEASE DEFER THIS BILL.

SB-860
Submitted on: 2/5/2019 9:08:44 AM
Testimony for JDC on 2/5/2019 9:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Rachel L. Kailianu	Testifying for Ho`omana Pono, LLC	Oppose	Yes

Comments:

Strongly oppose this bill. Why are there speration of government if the legislatures are also going to be the judge and jury?

SB-860
Submitted on: 1/31/2019 6:36:43 PM
Testimony for JDC on 2/5/2019 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Leimomi Khan	Individual	Oppose	No

Comments:

This bill seems to work against the balance of power between the legislature and the judiciary.

&FARRELL PERRAULT
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TESTIMONY OF THOMAS D. FARRELL
Regarding SB 860, Relating to Court Proceedings
Committee on Judiciary
Senator Karl Rhoads, Chair/Senator Glen Wakai, Vice Chair
Monday, February 5, 2019 9:00 a.m.
Conference Room 016, State Capitol

Good morning Senator Rhoads and Members of the Committee:

I oppose SB 860, which would allow the legislature to intervene as a party in any state court proceeding.

The drafter of this measure might complain that I am overstating the breadth of the bill, but I am not. Virtually any civil or criminal action is "based upon a constitutional or statutory provision." So, SB 860 gives the legislature the power to stick its nose into any case, in any court, for any reason and without having to meet the legal tests that any other intervenor would have to meet under existing law.

Frankly, I think you all have enough to do, and we don't need you in one of my divorce cases, weighing in on the side of one spouse or the other, perhaps advocating your considered legislative view of what custodial arrangements would be in the best interest of the parties' children or how the marital estate should be divided. Of course, my cases probably aren't important enough to warrant your attention, but how about legislative intervention in the case of the thug who ran over and killed three people last week? Now, I don't have much sympathy for Alins Sumang, but every defendant is entitled to a fair trial. How do you think it would look if the legislature decided to participate in his trial? What impact do you think that would that have on the jury? You can scream for his head in the press---and I'll join you---but I don't think you get to do that in a courtroom. That's the prosecutor's job.

The problem here is that we have a member of this body who just doesn't like the concepts of judicial independence and separation of powers. This bill is one of many that keep coming back and are designed to punish the judicial branch for an unpopular decision some years ago that resulted in an unfunded liability for the state. This member, and those who support his initiatives, want the judicial process to be a lot more political, and they think that you're the folks who ought to control it.

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*Certified by the National Board of Trial Advocacy. The Supreme Court of Hawaii grants Hawaii certification only to lawyers in good standing who have successfully completed a specialty program accredited by the American Bar Association.

Now, I understand that there are times that the legislature feels a need to weigh in on one subject or another. However, you have the ability to do that in ways that do not require intervention as a party in an ongoing case. You can pass resolutions. I'm not sure that you necessarily <u>should</u>, but you can. You can participate in the appellate process---where most important public issues are eventually decided---by filing amicus briefs, with leave of court. Of course, I don't know how you figure out what position to advocate in situations where different legislators have different views, but I leave you to figure that one out. And I remind you that in cases where the constitutionality of a state statute is drawn into question, the law requires that the Attorney General be provided notice and an opportunity to be heard on that issue.

In short, SB 860 is a very bad bill, and this committee would be performing a real public service by killing it in its cradle.

Thank you for the opportunity to testify this morning.

David Kimo Frankel
1638-A Mikahala Way
Honolulu, HI 96816

February 5, 2019

TESTIMONY IN OPPOSITION TO SB 860

Senator Rhoads and members of the Committee on Judiciary,

I assume that others will discuss the separation of powers implications raised by SB 860. Suffice it to say, SB 860, like many other bills that have been introduced this session and recent sessions, threatens to undermine the independence of the judiciary. It also raises budgetary issues and could jeopardize the legislature's relationship with the Attorney General. Ironically, SB 860 actually disempowers you.

First, it is unclear how the legislature will decide in which cases (and on which side) the legislature will intervene. A few years ago, the Senate President decided unilaterally that the Senate should join the House in filing an amicus brief in the *Nelson* case. There was no debate on the Senate floor. There was no committee hearing. There was no opportunity for the public to comment. There was no vote by State Senators. The Senate President made his decision unilaterally. Do you want to give the Senate President more power – and give up your right to vote on issues? Are legislative decisions better when they are made behind closed doors without any opportunity for public comment?

Second, currently you have the power to clearly identify the legislature's intent in your committee report. Do you want to give up that influence to a future President of the Senate to intervene in a proceeding to tell the judiciary how to interpret a statute?

Aloha,

David Kimo Frankel

Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair
Committee on Judiciary
Senate of the State of Hawai'i

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

Tuesday, February 5, 2019
Opposition to Senate Bill No. 860, Relating to Court Proceedings

I strongly oppose this bill. Whatever the intent of this bill may be, it is a naked violation of the separation of powers between the legislative and the executive and judicial branches. It also likely would deprive a criminal defendant of his or her right to a fair trial. For example, the legislature would be permitted to intervene in every criminal case, petty misdemeanor to felony, where the defendant claims an affirmative defense founded upon a statute or the constitution.

While separation of powers does not require an absolute barrier between the branches of government, it seeks to limit the dangers of usurpation by one branch of another's functions. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)

"When any branch acts, it is presumptively exercising the power the Constitution has delegated to it... [A]n exercise of legislative power depends not on their form, but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *INS v. Chadha*, 462 U.S. 919 (1982)

"[O]nce [legislature] makes its choice in enacting legislation, its participation ends. [Legislature] can thereafter control the execution of its enactment only indirectly -- by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714 (1986) HRS 28-1 empowers the Attorney General to appear for the State and HRS 28-2 and 661-10, among others, empowers the Attorney General to prosecute actions by the state. These functions are executive in nature. By allowing the legislature to intervene in any case, such intervention would act as an execution of the laws and intrude into the executive function. "The Constitution does not permit such an intrusion." *Bowsher.*

Finally, mandating courts to permit the legislature to intervene in any case whenever it wants also infringes upon separation of powers with respect to the judicial branch.

"The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others has often been stressed, and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution, and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." *Humphrey's Executor v. United States*, 295 US 602 (1935)

Finally, mandatory intervention of the legislature in criminal cases may likely violate the right to fair trial both because it would draw a criminal prosecution into a public, political debate as well as improperly influence the jury by boosting the position of the prosecution on improper grounds. *Breiner v. Takao*, 73 Haw. 499 (1992) ("As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice."); also *State v. Hashimoto*, 47 Haw. 185 (1963) ("any pressure or influence … exercised or intended to be exercised upon the jury" violates defendant's right to fair trial).

Thank you for this opportunity to testify.

HARRISON & MATSUOKA

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February 3, 2019

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

COMMITTEE ON THE JUDICIARY
Chair: Sen. Karl Rhodes
Vice Chair: Sen. Glenn Wakai

DATE: Tuesday, February 5, 2019
TIME: 9:00 am
PLACE: Conference Room 016
State Capitol
415 Beretania Street
Honolulu, Hawai'i 96813

BILL NO.: **OPPOSE SB 860**

Honorable Senators: Karl Rhodes, Glenn Wakai and members of the Committee on Judiciary.

Thank you for providing me this opportunity to offer written testimony **in strident opposition to Senate Bill 860.**

The Hawai'i Constitution sets forth the rudimentary concept that the powers of government are divided into three co-equal branches of government. This concept of "separation of powers" is very important to insure fairness in our three branches of government, which through our system of checks and balances, helps to ensure no one branch wields excessive influence. The passage of HB 860 will clearly erode the foundation of that model.

The authority to litigate is clearly not a legislative function. That function belongs to the Executive Branch. The Attorney General is Hawai'i's chief legal officer and is given the authority to represent the legislature in legal matters, which includes the power to intervene in court proceedings. The AG is therefore notified when the constitutionality of a law is challenged. Moreover, pursuant to existing law, the legislature already has the power to request intervention and the right to file an amicus on cases of interest. Giving the legislature the individual power to intervene on its own behalf in litigation may create an untenable situation where the House and Senate could seek to intervene on opposite ends of an issue.

Furthermore, the bill would also create a situation where the government could intrude or impose on a citizen's private interest. It could open up confidential family court cases and theoretically impact speedy trial and other criminal rights. In doing so this bill undermines the rule of law and puts the legislature in a position to impose undue governmental burdens on private parties.

HB 860 is an extraordinary expansion of the power of the legislative branch of government and its passage would surely invite litigation as to its purported constitutionality. In short, this is bad law that is not beneficial for Hawai'i and the people you represent. I therefore stridently oppose the passage of this bill!

Sincerely,

William A. Harrison

Coates Frey Tanimoto & Gibson

ATTORNEYS AT LAW • LLLC

P. Gregory Frey
Senior Attorney
Noah H. Gibson
Managing Attorney
Tom S. Tanimoto 谷本定男
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Asian Languages Practice
Scott M. Y. LaFountaine
Domestic Abuse Practice
Micky Yamatani 山谷美季
Asian Languages Practice
Robert S. N. Young 羅伯特新年楊
Paternity Practice

February 4, 2019

LATE

Senator Karl Rhodes, Chair
Senator Glenn Wakai, Vice Chair
Committee on Judiciary

RE: Testimony of Tom S. Tanimoto in Strong Opposition to SB 860

Dear Senator Rhodes, Senator Wakai, and Members of the Committee,

I have been an attorney licensed to practice law here in the State of Hawaii for 14 years, have served as chair of the HSBA Family Law Section and am currently practicing family law as a partner and litigation supervisor at Coates Frey Tanimoto & Gibson, AAL, LLLC. **Please accept this letter as testimony in respectful and strong opposition of SB 860.**

Senate Bill 860 is patently vague and overbroad, can lead to legislative overreaching and portends a host of implications, some perhaps unintended (and undesirable) including, the clogging up the already overburdened court system and increasing costs of litigation. The bill also begs the question as to *why* the legislature should have standing to intervene as a matter of right, and this unknown facet of the bill alone, warrants that it not move out of committee.

Overreaching

The Legislature does just that, it legislates. It should not intervene in order to argue a position with respect to statutes or constitutional provisions, nor should it, since statutory interpretation is historically within the exclusive purview of the judiciary. Furthermore, there are sufficient materials available to the court to aid in any interpretative analysis, such as the House and Senate's record, testimony, floor speeches and committee reports.

Effects on Litigation

Most lawsuits involve two (2) parties, a plaintiff and a defendant. Intervention is already accorded by Court Rule to those parties who have some right that is affected by a lawsuit – it is clearly not intended for any person or entity to simply join in a lawsuit for the purpose of "armchair quarterbacking." Should the legislature indeed have some rights that are affected in a given scenario, it is not precluded from initiating its own case, which right off the top of my head, could only be in very rare and narrow circumstances, as limited by the political question doctrine. Allowing broad scoping intervention for cases based on statutory or constitutional provisions could encompass so many types of cases in this state, thereby leading to an

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exponentially costly scenario where we assume that tax-payers would pay for the legislature's counsel.

Unintended Consequences

By seeking to become a party to a given case by way of this bill, is the legislature willing to be cross-examined, subject to discovery or deposed like any other party, and if so, would every legislator be a potential witness? Nothing more need be said about how unwieldy all of this can end up being. If something needs to be said, participation in a case as an amicus is always a possibility. SB 860 is not workable on its face. Thank you for your consideration.

TST:gls
S:\HOME\TST\FLS\SB860 Testimony

LATE

SB-860
Submitted on: 2/4/2019 12:32:43 PM
Testimony for JDC on 2/5/2019 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

Comments:

Please PLEASE SUPPORT this measure!!!

THE LAW OFFICE OF RICHARD H.S. SING

DAVIES PACIFIC CENTER
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February 4, 2019

LATE

S.B. No. 860: RELATING TO COURT PROCEEDINGS

Dear Chair Rhoades and Members of the Committee,

I respectfully submit the following testimony in opposition to S.B. No 860: RELATING TO COURT PROCEEDINGS.

I am a solo practitioner concentrating in criminal defense who has appeared in the District, Family, and Circuit Courts on a regular basis over the past 20 years. I am currently the Vice President of the Hawaii Association of Criminal Defense Attorneys.

I oppose this legislation as I am concerned that this Bill, as written, would permit our legislature to intervene in any criminal case in the State of Hawaii, and any level of proceeding. I am concerned that legislative intervention at the pretrial motions level, the trial level, and at the appellate level, would only serve to politicize and compromise the criminal justice process.

In addition, I have concerns as to the constitutionality of this Bill in that the regular intervention of the legislature in criminal cases raises the spectre of a violation of separation of powers doctrine. This would seem to be a questionable and ill advised practice.

Finally, I also am concerned about the practical consequences of this Bill. As all criminal proceedings have their origins in Statute, the legislature could intervene in any case. How would the legislature be notified of pending cases? Would the legislature intervene in all cases or just high publicity cases?

For the reasons stated above, I respectfully oppose the passage of this Bill. Thank you for the opportunity to provide testimony in this matter.

Very Truly Yours,

Richard H.S. Sing

LATE

SB-860
Submitted on: 2/4/2019 2:03:51 PM
Testimony for JDC on 2/5/2019 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Janis Fenton	Individual	Oppose	No

Comments:

LATE

Susan L Arnett
1019 Maunaih`i Place
Honolulu, Hawaii 96822

Testimony to the Senate Committee on Judiciary

February 4, 2019

S.B. NO. 860: RELATING TO COURT PROCEEDINGS.

Senator Rhoads and Members of the Committee:

I offer testimony as a private citizen in opposition to S.B. 860 which provides for a constitutional amendment that would allow the legislature "standing to intervene in any court proceeding involving a claim that is based upon a constitutional or statutory provision.".

There is no explanation of what current situation this proposed constitutional amendment is designed to address. But it certainly gives rise to many complex questions, among them:

1. What is meant by "any court proceeding"? Civil and/or criminal? Trial level and/or appellate? District, family and circuit courts? Constitutional issues may be raised at trial and/or appellate proceedings of all of our courts. In some of those instances, such as criminal matters where a defendant has constitutionally protected speedy trial rights, or in family court, where custody decisions have a time constraint based upon movement out of the state by a military parent, for example, time is of the essence. The convening of a legislative body, hearings, requirements for multiple readings, crossover between the houses, etc., do not lend themselves to the quick response time that may apply in a given case.

2. What exactly is meant by "statutory provision"? Every criminal charge is based upon a statutory provision. The legislature would have standing to intervene in every criminal case, even misdemeanors and petty misdemeanors? While I don't practice civil law, I am aware that certain areas of employment, business, tax and estate law, for example, may have a basis in statutory law. Again, what is the purpose that seeks to be addressed here?

3. For appellate purposes, the record on appeal is created at the trial level. New **facts** may not be introduced for the first time on appeal. However, **arguments** based upon the constitution may be raise for the first time on appeal. What would be the point in allowing intervention by the legislature at the appellate level, if the factual information the legislature needed to argue their position was not in the record?

4. What is meant by “the legislature”? Will the body have to meet and vote on a position that it wishes to take in the “proceeding”? If the legislature is not in regular session, will a special session need to be called? How expensive a proposition for taxpayers will that be?

5. What would be the effect on the timeline for appellate decisions? These currently take years from the filing of an appeal. I see no way that legislative intervention, as cumbersome as the process would necessarily be, would not add significantly to that timeline.

There are more questions that I could list but I believe these illustrate the complex nature of the court process and the significant and possibly unintended ramifications of this proposal.

I note that Rule 44 of the Hawai`i Rules of Appellate Procedure provides for notification of the Attorney General when the constitutionality of any statute is drawn into question in an appeal in which the State is not a party. In other words, our current rules provide that the Attorney General shall be aware of EVERY appellate case in which our constitution is at issue.

It is a bit perplexing to understand the impetus behind this proposed bill. As noted, the executive branch through the attorney general has a specific protected role which may be used in any case involving our constitution. The executive branch is led, of course, by our governor who is elected by our citizens.

The judiciary has the most direct role in legal matters where our constitution and statutes are challenged. The judiciary, including our trial and appellate courts, are made up of judges appointed by either our governor or our chief justice **with the advice and consent of the state senate.**

It is hard to understand why it would be necessary to have the provisions of this bill unless there was wholesale distrust of the two other co-equal branches of government, one headed by someone directly elected by our voters, and the other made up of persons appointed with a direct role by our state senate, also persons directly elected by our voters.

Is this bill based upon a mistrust of those voters? Those people who elected both the governor and our legislators? It is hard to imagine that it is, but it is equally difficult to see this bill in any light that does not mistrust the other two branches of government, and the voters who either put them there, or who voted in the persons whose advise and consent is part of the existing process.

For the reasons stated, I oppose this bill. Thank you for the opportunity to comment.

LATE

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

February 4, 2019

Representative Karl A. Rhoads, Chair
Representative Glenn S. Wakai, Vice Chair
Senate Committee on Judiciary

Hearing: February 5, 2019

Re: Opposition to S.B. No. 860, Relating to Court Proceedings

Dear Chair Rhoads, Vice Chair Wakai, and fellow Members of the Senate Committee on Judiciary,

I herewith respectfully submit my opposition to S.B. No. 860, ("Relating to Court Proceedings"), set for Hearing on February 5, 2019.

I have been licensed to practice law in the State of Hawai'i for over 41 years. At various times, I have been an attorney employed by the State (as a Fair Hearing Officer), the United States District Court (for the Commonwealth of the Northern Mariana Islands), the City and County of Honolulu (as a deputy prosecuting attorney), and with a private law firm (Schutter and Glickstein). For the past thirty years I have had my own private law practice, with an emphasis on state and federal criminal defense and pro bono involvement in the legal community. In 2018, I was the President of the Hawai'i State Bar Association, but I am now writing in my own capacity and not as a member or representative of any other legal organization or entity.

My strong objection to S.B. No. 860 is based on the language of the bill, which, according its description, "[p]rovides that the legislature shall have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision." While the summary description is "for informational purposes only and is not legislation or evidence of legislative intent," it nonetheless raises numerous issues that serve to abrogate the separation of powers doctrine. Moreover, the bill purports to provide automatic standing without a showing of any basis upon which a predicate of standing might be based.

Admittedly, my research of this issue has been limited due to the time constraints for a response to your committee. Having said this, I have found no legal support for the broad scope of the intended bill, and I know of no other authority that would grant such authority.

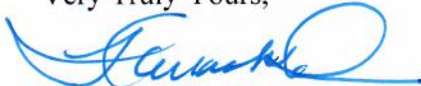
It should be noted that in virtually every criminal case filed on behalf of the government, at least one, and more often several, legal statutes are implicated. Additionally, virtually all pleadings and/or other proceedings in criminal cases involve "constitutional provisions." To allow the legislative branch of our government to have automatic standing in such cases would encroach upon the time-honored principle that criminal cases involve the sovereign (the executive branch

of the government through delegation to the prosecuting authority [the Department of the Prosecuting Attorney or the Attorney General]) as plaintiff, versus the defendant or defendants identified in the charging instrument. Neither persons nor entities aggrieved as alleged victims, nor persons directly or indirectly affected by the prosecution of the defendant(s), are identified as parties to the criminal proceedings. To allow the legislature to automatically intervene, without requiring any showing of the legal basis upon which standing to intervene may be reviewed, would violate the separation of powers doctrine that is firmly rooted in the United States Constitution and the Constitution of the State of Hawai'i.

For these reasons, I oppose S.B. No. 860 and advise against its enactment.

Thank you for taking the time to review this testimony. If it is proper, please do not hesitate to contact me if you have any questions.

Very Truly Yours,



Howard K. K. Luke

SB-860
Submitted on: 2/4/2019 4:10:22 PM
Testimony for JDC on 2/5/2019 9:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Dr. Guy Yatsushiro	Individual	Support	No

Comments:

LATE

SB-860
Submitted on: 2/4/2019 5:19:08 PM
Testimony for JDC on 2/5/2019 9:00:00 AM

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

Comments:

I am an attorney who has been practicing law in the State of Hawaii for 21 years and a former President of the Hawaii State Bar Association. I am strongly opposed to SB 860 as it contemplates an unprecendented and unacceptable encroachment by the legislature into the judicial process in violation of the doctrine of separation of powers. My strong objection to SB 860 is based on the language of the bill, which, according its description, "[p]rovides that the legislature shall have standing to intervene in any court proceeding involving a claim based upon a constitutional or statutory provision." It is not the perrogative, nor the right of the legislature to intervene in judicial proceedings, and while I cannot understand the true motivations of the senators proposing this bill, I have a strong feeling this is intended more as a political statement than a well-reasoned and considered proposal for legislation. As far as I can tell, SB 860 does nothing to further the cause of justice, but would constitute a serious erosion of the rule of law. This is not something to be taken lightly and I urge all of our elected representatives to carefully consider this and vote in oppostion to SB 860. Thank you.

Dear Mr. Chairman,

It seems to me this bill is unnecessary and overly broad.

Legislators can intervene in appropriate cases pursuant to Hawaii Rules of Civil Procedure Rule 24. My experience as an attorney and former judge is that this rule works fairly well. Any time a party intervenes in a case the cost and complexity of that case increases for the judge and the parties. Rule 24 weighs and balances these interests. If this rule has not proven adquate for legislators, it can certainly be amended.

Legislators may also move to file amicus curiae briefs in appropriate cases.

The bill as written would apply to hundreds, if not thousands of cases. Claims are routinely based on statutes and constitutional provisions, if not made on common law.

Respectfully submitted,

Daniel Foley