



SB195
RELATING TO THE ELECTION OF MEMBERS TO THE BOARD OF TRUSTEES OF
THE OFFICE OF HAWAIIAN AFFAIRS
Senate Committee on Hawaiian Affairs

February 2, 2021

1:00 p.m.

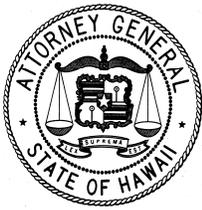
Via Videoconference

The Administration of the Office of Hawaiian Affairs (OHA) will recommend that the OHA Board of Trustees offer **COMMENTS** on SB195, which would alter the representative framework of the OHA Board of Trustees, from a statewide board comprised of island-resident and at-large seats, to a board apportioned across the state's four basic island units—Hawai'i; Maui, Moloka'i, and Lāna'i; O'ahu; and Kaua'i—provided that a separate constitutional amendment is adopted by the Legislature and approved by Hawai'i voters.

OHA has concerns over the proposed loss of the OHA Moloka'i Trustee seat, which currently must be filled by a resident of the Hawaiian cultural kīpuka island of Moloka'i.

OHA notes that under this measure, each Hawai'i voter would only be able to vote for the OHA trustee that represents that voter's district and, based on island unit populations, six of the nine trustee seats would likely be apportioned to O'ahu under an OHA reapportionment plan, with one trustee seat for each of the remaining island units. OHA also notes that even with such an apportionment, there may still be constitutional concerns regarding equal representation for voters for OHA Trustees, given the significant population differences between the island units. OHA further notes that HRS 13D-4(f), which currently provides the procedures used for an election with three available trustee seats, would likely need to be further amended following the filing of the final OHA Board of Trustees reapportionment plan envisioned under this measure.

Mahalo nui loa for the opportunity to testify on this measure.



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURES, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 195, RELATING TO THE ELECTION OF MEMBERS TO THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS.

BEFORE THE:

SENATE COMMITTEE ON HAWAIIAN AFFAIRS

DATE: Tuesday, February 2, 2021 **TIME:** 1:00 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Lori N. Tanigawa,
Deputy Attorney General, at 586-0618)

Chair Shimabukuro and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purposes of the bill are to amend the process for electing members to the Board of Trustees of the Office of Hawaiian Affairs (OHA Board) and require the Reapportionment Commission to establish a reapportionment plan based on basic island units for the OHA Board so that they are selected according to their respective districts rather than an at-large statewide election for each seat.

Instead of members being elected during an at-large statewide election in which all registered voters are permitted to vote to fill all of the seats on the OHA ballot, the bill provides for an election in which only qualified voters of a district within a basic island unit are permitted to elect one of the nine OHA Board members. We are concerned that the reapportionment of OHA's nine-member Board among the four basic island units may fall short of the one-person, one-vote standard established by the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964). While there need not be an identical number of persons in each district, the states must make honest and good faith efforts to construct districts with equal numbers of persons, as practicable. Due to disparities in population sizes among the basic island units, however, we believe that deviations from population equality in the reapportionment of the OHA Board may be required and,

in some instances, be quite significant, potentially resulting in a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

If the Legislature decides to proceed with this bill, the Department recommends that the bill be amended to clarify the ballot to be provided to voters. We recommend that subsection (c) of section 13D-4, Hawaii Revised Statutes (HRS), on page 3, lines 3 to 9, of the bill be deleted in its entirety and subsection (d) of section 13D-4, HRS, on page 3, lines 10 to 13, of the bill be amended as follows:

“~~[(d)]~~ (c) Each voter registered to vote in the general election shall be entitled to receive ~~[the]~~ an office of Hawaiian affairs ballot ~~[and to vote for the number of seats available]~~ containing the names of all candidates seeking election to the board within the voter’s respective district[s].”

We further recommend that subsection (e) of section 13D-4, HRS, on page 3, lines 14 to 16, of the bill be amended as follows:

“~~[(e)]~~ (d) ~~[Any]~~ each election ~~[with only one]~~ to fill an available seat shall be conducted as follows:”

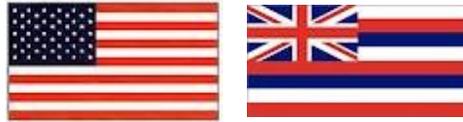
Inasmuch as the bill eliminates an at-large statewide election, we recommend that subsection (f) of section 13D-4, HRS, on page 5, lines 1 to 21, and on page 6, lines 1 to 12, of the bill be deleted in its entirety.

The bill states that the reapportionment plan “shall govern the election of members of the next five years.” Because reapportionment occurs every ten years, we recommend that page 11, lines 10 to 16, of the bill be amended as follows:

“Within fourteen days after the filing of the final reapportionment plan, the chief election officer shall cause public notice to be given of the final office of Hawaiian affairs board of trustees reapportionment plan which, upon public notice, shall become effective as of the date of filing and govern the election of members ~~[of the next five years]~~ until the next reapportionment plan becomes effective.”

Even with the amendments, the Department is concerned that the reapportionment of the OHA board will fall short of the one person, one vote standard, and Department respectfully asks the Committee to hold this bill.

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Unity, Equality, Aloha for all



To: SENATE COMMITTEE ON HAWAIIAN AFFAIRS
For hearing Tuesday, February 2, 2021

Re: SB195 RELATING TO THE ELECTION OF MEMBERS TO THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS.

Amends the process for electing members to the Office of Hawaiian Affairs Board of Trustees. Requires the Reapportionment Commission to establish a reapportionment plan based on basic island units for the members of the Board of Trustees of the Office of Hawaiian Affairs so that they are elected according to their respective districts, rather than an at-large statewide election for each seat.

AND

SB196 PROPOSING AN AMENDMENT TO THE HAWAII STATE CONSTITUTION TO REQUIRE THE REAPPORTIONMENT COMMISSION TO ESTABLISH A REAPPORTIONMENT PLAN TO DRAW DISTRICT LINES FOR THE MEMBERS OF THE OFFICE OF HAWAIIAN AFFAIRS BOARD OF TRUSTEES. Amends the State Constitution to require the Reapportionment Commission to establish a reapportionment plan to draw district lines for the total number of members of the Board of Trustees of the Office of Hawaiian Affairs.

TESTIMONY IN OPPOSITION

This testimony is in regard to both SB195 and SB196, concerning concepts which both bills have in common. No doubt the bills will be consolidated after more careful reflection which should have already been done.

The main topics addressed in this testimony:

1. Both SB195 and SB196 contain requirements that are blatantly unconstitutional under widely publicized federal court decisions from two decades ago. The writers and introducers of these bills are either woefully ignorant of the legal history or else willfully trying to stage an insurgency that violates the oath they swore, to support and defend the Constitution of the United States.
2. The obvious motive for redistricting OHA elections is to stop a 40-year history whereby the voters on O'ahu decide who will represent all the neighbor-island constituencies, due to the fact that O'ahu voters vastly outnumber the voters on any other island or even the total of all neighbor-island voters.
3. Under the 1-person 1-vote federal requirement, the number of voters must be roughly equal across all districts, and excessive gerrymandering to ensure particular racial outcomes will elicit intervention by the U.S. Attorney followed by federal court injunctions to force a more equitable redistricting. Several Southern states with long histories of racial discrimination remain under federal injunctions that they cannot engage in redistricting without approval from the Department of Justice under terms of the Voting Rights Act of 1965 which has been repeatedly extended.
4. Staggering: Institutional memory, and continuity of policy, could be lost if all 9 board members leave office at the same time. Currently either 4 or 5 of the 9 members remain in office for two more years after an election for the other 5 or 4 seats.

Further explanations of each topic.

1. Both SB195 and SB196 are unconstitutional under widely publicized federal court decisions from two decades ago. The writers and introducers of these bills are either woefully ignorant of the legal history or else willfully trying to stage an insurgency that violates the oath they swore, to support and defend the Constitution of the United States.

SB195 Section 2 says "No person shall be eligible for election or appointment to the board unless the person is Hawaiian and ..."

SB196, Section 5 says "There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians."

Rice v. Cayetano, 528 U.S. 495 (2000) was decided in a 7-2 decision by the U.S. Supreme Court in February 2000, which ruled that the right to vote for OHA board members cannot be racially restricted to Native Hawaiians.

Arakaki v. State of Hawaii was decided by Judge Helen Gillmor, U.S. District Court in Honolulu, No. 00-17213 and her decision was upheld by a 3-judge panel of the 9th Circuit Court of Appeals in San Francisco on December 31, 2002. The right to run as a candidate for the OHA board cannot be racially restricted to Native Hawaiians.

SB195 is unconstitutional under Arakaki.

SB196 is doubly unconstitutional under both Rice and Arakaki.

It is shocking to see a resurgence of desire to impose outright racist restrictions on who can vote for or stand as a candidate for the OHA board which is an agency of the State government, not an Indian tribe. Both the right to vote and the right to run as a candidate were litigated and decided two decades ago. I am angry to see such racism rear its ugly head again, and am shocked that the writers of these two bills and the legislators who introduced them and scheduled hearings on them are either woefully ignorant of the legal history or else willfully

trying to stage an insurgency that violates the oath they swore, to support and defend the Constitution of the United States.

2. The obvious motive for redistricting OHA elections is to stop a 40-year history whereby the voters on O'ahu decide who will represent all the neighbor-island constituencies. This happens because all registered voters vote for all the OHA seats. Five seats are reserved for candidates who must be residents of five specific islands: the 4 counties plus Moloka'i. But all voters regardless of where they live get to vote for all the candidates including the ones who must be residents of specific islands; and O'ahu voters vastly outnumber the voters on any other island or even the total of all neighbor-island voters.

3. Under the 1-person 1-vote federal requirement, the number of voters must be roughly equal across all districts, and excessive gerrymandering to ensure particular racial outcomes will elicit intervention by the U.S. Attorney followed by federal court injunctions to force a more equitable redistricting. Several Southern states with long histories of racial discrimination remain under federal injunctions that they cannot engage in redistricting without approval from the Department of Justice under terms of the Voting Rights Act of 1965 which has been repeatedly extended.

On March 31, 2020 the U.S. Census Bureau released a table displaying population numbers for each county for each year from 2010 through 2019.

<https://census.hawaii.gov/whats-new-releases/2019-county-population-estimates/>

Total State population in 2019 was 1,415,872. There are 9 OHA board members. Thus if the 1-person 1-vote principle is upheld, each board member should represent approximately 157,319 residents. Kaua'i County (including Kaua'i and Ni'ihau) had only 72,293 residents. So if Kaua'i gets to elect one OHA board member, it would have more than double the representation it should have under 1-person 1-vote. That would clearly be contrary to federal law. And under the districting rules proposed in SB195 and SB196, the problem could not be fixed by

extending Kaua'i's district boundary to include a portion of O'ahu or any other "basic island unit."

Another difficulty is that Maui had 167,503 residents, only slightly above 1/9 of the State's population, and would therefore be entitled to elect only one OHA board member. Moloka'i has only about 7400 residents, and is part of the Maui "basic island unit"; therefore Moloka'i, dearly beloved by Native Hawaiians as being "the most Native Hawaiian" island, would lose its own OHA board member which Moloka'i has unfairly had for 40 years. The people of Maui would now decide who will speak for Moloka'i on the OHA board. Walter Ritte might stage a protest riot over the "injustice" of having upper-class haoles from the mainland deciding what's best for the Native Hawaiians of Moloka'i!

There will be a strong temptation to count only "Native Hawaiians" for purposes of apportionment when redistricting. Don't try it! For evidence that this is a bad idea and probably unconstitutional, look at discussions during 2019 and 2020 regarding whether the federal decennial census could choose to count only U.S. citizens for reapportionment because only they have the right to vote; or whether to include permanent residents with "green cards", or whether all residents including illegal aliens must be counted for purposes of reapportionment and redistricting. Reread topic #1 in this testimony and be reminded that all registered voters in Hawaii, regardless of race, have the right to run as candidates, and vote, for OHA board members.

4. Staggering: Institutional memory, and continuity of policy, could be lost if all 9 OHA board members leave office at the same time. For 40 years either 4 or 5 of the 9 members remain in office for two more years after an election for the other 5 or 4 seats.

SB195 and SB196 ignore the issue of staggering, the issue of term length, and the issue of what to do with the 4 current "at large" board members during the redistricting transition period. The U.S. House of Representatives (435 members), and the Hawaii House of Representatives (51 members), have terms of two years; and all the representatives are up for election at the same time every two years.

Thus the "lower house" feels much more accountable and quickly subject to the changing desires of the voters. But when terms are longer, and members are fewer, there is staggering to ensure some measure of continuity. The Hawaii Senate (25 members) has terms of 4-years, staggered so that half the members are up for election in each even-numbered year. The U.S. Senate (100 members) serve terms of 6 years, and are staggered into three groups so that every two years all 33-34 members of just one group are up for election. The U.S. Supreme Court has lifetime terms, thus ensuring continuity and institutional memory, while turnover is slow but guaranteed by the fact that sooner or later each life will come to an end or each Justice will get too sick or weary to continue. O'ahu, with a 2019 population of 974,563, can expect to have 6 board members out of the 9. And unlike under the present system the O'ahu board members will owe their loyalty entirely to the residents of O'ahu who elected them instead of to all the people of Hawaii. There could be some nasty geographical turf battles not only between O'ahu and the neighbor islands but also infighting among the 6 regions of O'ahu (where will be their boundaries?).

For 40 years half of the OHA board members have faced re-election in every even-numbered year. The reapportionment committee envisioned in these bills must pay attention to the issue of staggering and designate which seats will be up for election in each 2-year general election cycle, because the current 4 "at large" members will no longer be elected by all Hawaii residents and must somehow be allocated to specific voting districts where some of them might currently not be residing.

SB-195

Submitted on: 1/31/2021 11:42:38 AM

Testimony for HWN on 2/2/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Support	No

Comments:

KÄ• ko'o!

SB-195

Submitted on: 2/1/2021 12:45:29 PM

Testimony for HWN on 2/2/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Kamuela Werner MPH	Individual	Support	No

Comments:

Aloha:

I strongly support the intent of SB195 which would amend the process for electing members to the Office of Hawaiian Affairs Board (OHA) of Trustees and requires the Reapportionment Commission to establish a reapportionment plan based on basic island units for the members of the Board of Trustees of the Office of Hawaiian Affairs so that they are elected according to their respective districts, rather than an at-large statewide election for each seat.

OHA Trustees should more accurately reflect the beneficiaries they represent. Passing SB195 would better embody the views, needs, and aspirations specific to each island unit within future elected OHA Trustees. Therefore, I urge the committee to pass SB195.

Me ke aloha,

Kamuela Werner