



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:

S.B. NO. 286, S.D. 1, RELATING TO REAPPORTIONMENT.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 12, 2013

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Charleen M. Aina, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Attorney General has strong concerns about this bill.

This bill amends section 25-2(a), Hawaii Revised Statutes, to provide that the reapportionment commission shall reapportion each house of the state legislature using “the total number of permanent residents within the state of Hawaii” (page 1, lines 7-8) and defines “permanent resident” as “any person counted as a usual resident of the state of Hawaii in the last preceding United States census” (page 2, lines 20-22). For purposes of the United States census, “usual residence” is defined as “the place where a person lives and sleeps most of the time”. See www.census.gov/population/www/cen2010/resid_rules/resid_rules.html.

Article IV, sections 4 and 6, of the Hawaii State Constitution provide for the apportionment of the state legislature by using the “permanent resident” population base. The State Constitution does not, however, define the term “permanent resident”.

The Hawaii Supreme Court has recently construed the term and referring to the legislative history of the 1992 amendment of article IV, the court explained that article IV as originally enacted in 1978 provided for reapportionment based on the number of registered voters. See Solomon et al., v. Abercrombie, et al., 126 Haw. 283, 284, 270 P.3d 1013, 1014 (2012). However, the 1991 Reapportionment Commission concluded that the registered voter population base was not constitutionally permissible and decided to use the permanent resident population “identified as the total population derived from the 1990 census, less transients.” Id., 270 P.3d at 1015. Accordingly, the 1991 Commission excluded “from the permanent resident population base, nonresident military personnel and their dependents as constituting ‘the vast

majority of transients included the census counts.’” Id. at 285, 270 P.3d at 1015 (footnote omitted). Further the court explained:

The 1991 Reapportionment Commission’s final reapportionment plan was the basis, in the 1992 legislative session, for House Bill 2327 to amend article IV of the Hawaii Constitution to change the state legislature apportionment base from registered voters to permanent resident population ‘based on the 1991 Reapportionment Commission’s Final Reapportionment Plan’ and ‘the reasons set forth in [the] Plan.’ House Bill 2327 was enacted by the 1992 legislature and article IV of the Hawaii Constitution was amended by Hawaii voters in 1992 to its present form.

Id., 270 P.3d at 1015 Accordingly, the court concluded that article IV, sections 4 and 6, provide for the apportionment of the state legislature using a permanent resident population base and this “‘mandate[s] that only residents having their domiciliary in the State of Hawaii may be counted in the population base for the purpose of reapportioning legislative districts.’” Id. at 292, 270 P.3d at 1022 (citing Citizens for Equit. & Resp. Gov’t v. County, 108 Haw. 318, 322, 120 P.3d 217, 221 (2005))

The amendment proposed by this bill to require the reapportionment commission to use the total “permanent resident” population and define that term to mean the last U.S. census population figure for the state is inconsistent with, and contrary to, the legislature’s intent when it amended article IV, section 4, of the State Constitution in 1992 and the Hawaii Supreme Court’s decision in Solomon. For these reasons, the Attorney General has strong concerns about this bill. See State v. Kahlbaun, 64 Haw. 197, 206, 638 P.2d 309, 317 (1981) (“A legislative construction implementing a constitutional amendment cannot produce an absurd result or be inconsistent with the purposes and policy of the amendment.”). We believe that a constitutional amendment would be necessary in order to amend the definition of “permanent resident” to be other than it has been defined by the Hawaii Supreme Court.

Thank you for the opportunity to present testimony on this bill.

Testimony to The House Committee on Judiciary

Tuesday, March 12, 2013

2:00 PM

Conference Room 325

RE: SENATE BILL NO. 286, SD1, RELATING TO REAPPORTIONMENT

Chair Rhodes, Vice Chair Har and members of the committee:

My name is Charles Ota and I am the Vice President for Military Affairs at The Chamber of Commerce of Hawaii (The Chamber). I offer the following written comments in strong **support of Senate Bill No. 286, SD1**, Relating to Reapportionment.

The measure requires reapportionment to be based in part on population data of the total number of permanent residents in the state. It defines “permanent resident” for legislative reapportionment as any individual counted as a usual resident in the last preceding U.S. census within the state of Hawaii.

The 1992 amendment to the state Constitution revised the apportionment base to permanent resident population. The proposed definition of permanent resident to include usual individuals in the last preceding US census is consistent with the observations made in the Final Report and Reapportionment Plan submitted by the State of Hawaii’s 1991 Reapportionment Commission to the Sixteenth State Legislature of 1992. The Commission observed that there is a clear distinction between the right to representation and the right to register and vote, and that the focus of apportionment is representation.

The final report states that “Voting is merely one of a number of ways in which a person’s right to be represented is manifested. The right to representation is a broader right of effective participation in, and in relation to, the legislative process, including the right to petition the legislature.”

The 1991 reapportionment commission initially attempted to exclude minors and transients from the population count by the US Census Bureau. After much public outcry against the idea of excluding minors, and in facing difficulty in identifying transients such as college students and other individuals registered to vote in other states, the commission decided to focus attention on the military because they were perceived to be an easier group to identify.

This attempt to exclude only the military from the total transient count is not only improper, it clearly results in denying military members and their families the right to representation in the democratic process as extended to all other individuals in the community.

It is true that most military members are registered to vote in their declared home states. The same is true for thousands of other transients in Hawaii. However, as the reapportionment commission concluded in its report, registering to vote is not synonymous with representation in government and recommended that the apportionment base should be revised from “registered voters” to “permanent residents.”

This should apply to all usual residents counted in the preceding US census, to include all minors and transients. They all live and work in Hawaii; pay general excise, property and other local taxes and fees; use Hawaii’s public roads, parks, and playgrounds; attend Hawaii’s public schools and universities; and otherwise contribute to the betterment of Hawaii. They are part of the community and have the constitutional right to representation.

In light of the above, we strongly recommend the measure be approved.

Thank you for the opportunity to testify.



LATE

Hawaii State Reapportionment Commission
Oahu Apportionment Advisory Council

Michael G. Palcic, Chairman
Glenn Ida, Vice Chairman

Linda L. Smith, Secretary
Nathaniel Kinney

Representative Karl Rhoads, Chairman, and Members
COMMITTEE ON JUDICIARY

March 11, 2013

Re: SB 286, SD1

Aloha,

Thank you for hearing this important bill. I urge you to support passage of SB 286, SD1, regarding Hawaii residency for reapportionment to Hawaii's legislative districts.

The wholesale exclusion of citizens of the United States from apportionment to state legislative districts is clearly wrong and is done in no other state, with the possible exception of a very limited exclusion in the state of Kansas. Other states have long abandoned this practice.

By their exclusion here and since the U.S. Census attributes their residence to the state of Hawaii, these citizens are deprived of apportionment to the state legislatures of any state in the union and have thus have had their citizenship arbitrarily diminished.

Hawaii's own Reapportionment Commission had agreed in open meeting, by 8-1 vote, to include these approximately 108,000 citizens in their apportionment plans. Subsequently, in secret committee, the commission proceeded to do just the opposite, in violation of their publicly proclaimed intention and duly adopted direction.

It is my fervent hope that the legislature corrects this injustice by adopting a definition of "permanent resident" consistent with the residency standard set by the United States Census Bureau to reflect the exact enumeration of its population as determined by the 2010 U. S. Census.

Please do not hesitate to call upon me if I can be of any help to bring this about. I shall return to Hawaii from mainland travel on March 15th and be at your disposal thereafter.

Mahalo hou,

s/ *Michael G. Palcic*

Michael G. Palcic
Chairman, Oahu Apportionment Advisory Council

**Testimony of Thomas Smyth
Military Officers Association of Hawaii, Hawaii Chapter
Before the Committee on Judiciary
Tuesday, March 12, 2013, 200 pm, Room 325
SB 286 SD1, Relating to Reapportionment
Chair Rhoads, Vice Chair HAR and Committee Members**

Our chapter of 500 retired and currently serving officers of the seven Uniformed Services strongly supports SB 286 SD1 clarifying constitutional language about “permanent residents” being in the population data base for state legislative reapportionment. To date there has been no judicial or legislative action clarifying this very important issue.

As you may know there is a current federal lawsuit that was filed to address this issue. A Plaintiff Motion for a Preliminary Injunction was denied, largely due to the lack of time for the Office of Elections to act on the follow-on re-reapportionment. One hearing has been held subsequently but it is not clear when the special three-judge federal court will render a decision. Passage of this bill could make that lawsuit moot and settle the issue.

It is somewhat ironic that only 108,767 active duty DOD personnel and their families along with certain college students, were extracted from the legislative population data base. The more than 7,000 Coast Guard, NOAA and NPHS uniformed personnel and their families were not extracted. They are essentially in the same resident population as DOD personnel, but data on them must come from other federal sources and was not requested by the Commission.

We testified at each hearing of the 2011 Reapportionment Commission presenting the issues listed below. The initial vote of the Commission was to not extract any DOD personnel, largely due to the lack of sufficient address data given DOD privacy considerations for family members. A subsequent request was answered by providing ZIP code locations which enabled the Commission to extract personnel and their families living on bases. But that was not enough of an extraction to move a Senate seat from Oahu to the Big Island. That resulted in a State Supreme Court decision saying that extraction was insufficient. A final request for addresses provided the standard ZIP code and the four digit sub-code. This enabled the Commission to determine Census Blocks for these personnel and thus allow extraction of more than 108,000 of our neighbors.

1. ECONOMIC IMPACT OF MILITARY PRESENCE IN HAWAII

- a. Hawaii is unique among states in that all services, including construction and rental income, as well as goods, except those sold to the federal government are taxed through the General Excise Tax. The result is that the DOD presence here results in more revenue going to the state proportionally than in any other state.**

b. A 2011 RAND Corporation Study commissioned by DOD at the request of the Chamber of Commerce of Hawaii and the Hawaii Institute of Public Affairs showed that \$4.074 billion was spent for personnel and \$2.452 billion for procurement. DOD spending is approximately half of total federal spending in Hawaii and overall federal spending is second only to the tourism industry in state revenue.

c. Hawaii is the only state funding its K-12 public school system through general funds, not property taxes. Thus military personnel who make purchases from on-base private vendors, as well as those made off-base, provide moneys to the general fund and thus help pay for the public schools that military children attend. In all other states families living on-base pay no property taxes and do not financially support their schools.

d. Military facilities on Oahu are in urban areas, next to private residential and commercial facilities. Most other states have military bases in rural or isolated areas, often far from commercial businesses. Accordingly, military members and their families spend more here in commercial stores than they would in other states.

2. Community activities supported by military members and their families

a. Military personnel, married and single, and their military commands, as a matter of policy, are very involved in community activity ranging from scouting leadership, coaching youth sports teams, public facility repair and maintenance, and beach and park clean-up events. They also have “adopted” schools and contribute equipment and material for repair and maintenance, read to kids in class and otherwise help the schools.

b. Military personnel and their family members may vote for and serve on Oahu’s Neighborhood Boards, regardless of the state they are registered to vote in. This gives them a unique opportunity to contribute further to their local communities.

c. The Pacific Command has assigned a senior officer as the Military/Public School Liaison. This person sits “with” the Appointed School Board at every meeting. While not a voting member of the board, the liaison officer is able to assist the board in decisions they make that might affect schools with significant military family students. The Department of Education has a staff person to assist military families with adapting previous taken school subjects to the requirements of the Hawaii school system. Federal funds, known as “impact aid,” are based on the total number of military personnel and federal employees in every state. These funds go directly to the state school system.

3. Direct support of state projects and emergency response by military commands

a. As a matter of command policy, local military units and bases often provide heavy equipment needed for repair and maintenance of state and county facilities.

b. When needed, fire and emergency medical equipment are made available to assist local emergency units respond to incidents.

c. Hawaii is the only state that has a formal Memorandum of Understanding with the Federal Emergency Management Agency providing immediate use of military personnel and equipment in the event of a disaster. This MOU obviates the need to get approval from the agency which shortens response time when it is most needed.

4. Hawaii is the only state to have “extracted” so many military personnel and their family members from the population

The only other state with a constitutional provision regarding military personnel in the population data base is Kansas. Title 10 of its constitution specifically requires that military personnel (but not their families), not be counted, unless they are legal Kansas residents. However after the 2010 census, while forms were made available to military personnel to indicate their state of residence, collection of the forms was not made by local military commanders. Consequently, of the more than 25,000 active duty military personnel in Kansas, only 980 were extracted.

5. Related Issues

a. The 2011 City and County of Honolulu Reapportionment Commission used the full federal census population data base and did not exclude military personnel from city council districts.

b. The Oahu Apportionment Advisory Council strongly recommended the full federal data base be used. I believe Maui and Kauai advisory councils were divided; only the Hawaii County Advisory Council recommended extraction of military personnel and families.

The Service Member's Voice in Government
NATIONAL ASSOCIATION FOR UNIFORMED SERVICES
Hawaii Chapter (HI-1)

March 10, 2013

TESTIMONY IN SUPPORT OF SENATE BILL 286SD1
RELATING TO REAPPORTIONMENT.

HOUSE COMMITTEE ON VETERANS, MILITARY, AND INTERNATIONAL
AFFAIRS AND CULTURE AND THE ARTS

HEARING ON WEDNESDAY, MARCH 13TH AT 8:30 PM, IN CONFERENCE
ROOM 312

Aloha Chair Takai and Vice Chair Ito: Thank you for this opportunity to provide testimony regarding SB 286SD1. The National Association for Uniformed Services (NAUS) is honored to be recognized as "The Service Member's Voice in Government." Here, in the great State of Hawaii, NAUS Hawaii Chapter (HI-1) our 519 members serve proudly as a component part of our nation's largest per-capita uniformed service community.

NAUS Hawaii Chapter (HI-1) members applaud your efforts to amend Section 25-2 Hawaii State Revised Statutes directing the commission to base its future reapportionment efforts on the population data of the total number of permanent residents within the state of Hawaii, and define them as any person counted as a usual resident of the State of Hawaii in the last preceding United States census.

NAUS Hawaii Chapter (HI-1) respectfully encourages your committee to consider passing SB 286SD1 as written.

D Egge

Dennis Egge; Chapter President



1298 Kukila Street, Honolulu, Hawaii 96818
Naushawaii1@yahoo.com; 808-382-5833

HOUSE COMMITTEE ON JUDICIARY

SB 286, SD1 RELATING TO REAPPORTIONMENT

Tuesday, March 12, 2013, 10:00 a.m., Conference Room 325

TESTIMONY

Chair Rhoads, Vice-Chair Har and Committee Members,

I am Janet Mason, and I am testifying today on my own behalf. I strongly support the intent of SB 286, SD1 that defines "permanent resident" for legislative reapportionment as any individual counted as a usual resident in the last preceding U.S. census.

The situation that this bill addresses is clear. Currently there is a case pending before the U. S. District Court, *Kostick v. Nago*, which challenges the State's 2012 Reapportionment Plan, so the ultimate outcome of this measure is tied to this case. Should the Court find on behalf of the plaintiff, it's likely that Hawaii would be required to amend our Constitution, Article IV, Sections 4 and 6, that provide for legislative apportionment based on "permanent resident" population. Though a constitutional amendment is apparently required, unfortunately this bill does not propose one, and I don't see how this can be remedied during this session.

The facts that led to SB 286 are well known. The April 2010 U.S. Population census found there were 1,360,301 people living in Hawaii. The 2012 State reapportionment exercise "extracted" 108,767 people from this resident count for reapportionment purposes. So there are more people living in Hawaii than there are people represented in our reapportionment plan. The residents of Hawaii "extracted" from our apportionment base weren't assigned to a district anywhere in the United States for purposes of representation at the State level, because all the other States are relying on the census count to determine representation and these 108 thousand people weren't included in the census count for any state except Hawaii. This isn't fair to these citizens.

Furthermore, those excluded from the reapportionment plan are not evenly distributed throughout our State. This means representation in our State legislature is unequal. Legislative districts need to be divided according to population, so that the “equal protection” clause in the 14th Amendment to the United States Constitution is achieved. Equal protection is already guaranteed for Hawaii’s Federal House districts because those districts use total census population as an apportionment base. But similar protection is not afforded for Hawaii’s state legislative representation because of the apportionment base we have persisted in using.

Hopefully, the state will be granted sufficient leeway by the Court to make the effective date of any Constitutional Amendment prospective, because it would be unfair and impractical to residents and last year’s candidates alike to “redo” the 2012 elections.

Let’s do what’s right and let’s do what’s good for Hawaii and pass this measure as an indication to the Court that Hawaii is resolved to address this problem. Thank you for the opportunity to submit testimony.

HOUSE JUDICIARY COMMITTEE
Rep. Karl Rhoads, Chair
Rep. Sharon Har, Vice Chair

Bart Dame
710 West Hind Drive
Honolulu, HI 96821

Date: Tuesday, March 12, 2013
Time: 2:00 p.m.
Place: Conference room 325

SB 286 RELATING TO REAPPORTIONMENT, in STRONG OPPOSITION

Good morning Chair Rhoads, Vice-Chair Har and members of the committee,

My name is Bart Dame. I would like to point out my testimony closely parallels that submitted by the Attorney General's Office for the Senate hearing on this bill. I strongly recommend you consider their testimony prior to voting on this bill.

I am testifying today as an individual in strong opposition to SB286.

While I am in some sympathy with what I believe may be some of the motives behind the bill, I am opposed to the aim of the bill to change the population base to be used for reapportionment and strongly opposed to what amounts to an attempt to amend the state constitution through legislation rather than taking the issue to the voters and allowing us a forthright public debate on what is clearly a constitutional question.

In January 2012, the Hawaii State Supreme Court struck down the first Redistricting Plan of the 2011 Hawaii Reapportionment Commission because it did not exclude non-permanent residents. The Court's ruling did not depend upon coming up with its own definition of "permanent resident." It found the term was defined in the legislative history of the 1992 Constitutional Amendment, which inserted the requirement into the Constitution.

From the Hawaii Supreme Court January 2012 ruling, Matsukawa v. Hawaii:

"The 1991 Reapportionment Commission's final reapportionment plan was the basis, in the 1992 legislative session, for House Bill 2327 to amend article IV of the Hawai`i Constitution to change the state legislature apportionment base from registered voters to permanent resident population "based on the 1991 Reapportionment Commission's Final Reapportionment Plan" and "the reasons set forth in [the] Plan." House Bill 2327 was enacted by the 1992 legislature and article IV of the Hawai`i Constitution was amended by Hawai`i voters in 1992 to its present form."

As the 1991 Reapportionment Commission was finishing its work, it worked closely with the Senate Judiciary Committee chair of the time, Senator Russell Blair. Senator Blair attended many of the later meetings of the Commission, helped draft a proposed constitutional amendment which was included as an appendix to the official report as a recommendation of the Commission. In the 1992, that proposed amendment was approved by legislature and, in the fall,

adopted by the voters.

Attached is a photocopy of Chapter III of the 1991 Reapportionment Commission's Final Report. It contains the reasoning for adopting the "permanent resident" population base for Hawaii reapportionment and was the rationale for the constitutional amendment.

Should the current legislature want to switch to a different population base and overrule the 1991 legislature or the constitutional amendment passed by the voters in 1992, the proper way to do this is transparently, openly and properly, through a proposed constitutional amendment. Not through an attempt to impose a different meaning upon the phrase "permanent resident" from that used by the 1992 legislature, the 1992 voters and every Reapportionment Commission since then.

It is clear some legislators are hoping the passage of this legislation will create conditions conducive to an out-of-court settlement with the plaintiffs who have filed suit in Federal Court challenging the 2012 Reapportionment Plan. I urge you to resist the temptation to allow considerations of that sort to affect your vote on this. The approach taken by this bill is, on its face, unconstitutional, as the correct way to amend the constitution is through a proposed constitutional amendment. While it is unclear that passage of this bill might (or may not) result in a settlement for now, it will undoubtedly provoke another lawsuit next reapportionment cycle.

I have lifted this quote from the AG's testimony:

See State v. Kahlbaun. 64 Haw. 197,206.638 P.2d 309, 3 17 (1981) "A legislative construction implementing a constitutional amendment cannot produce an absurd result or be inconsistent with the purposes and policy of the amendment."

I believe the best way of resolving the legal questions is either by allowing the Federal lawsuit to advance to a ruling or to submit a proposal to amend the constitution, subject to approval by the voters. If you recognize this bill is not truly a "clarification," consistent with the intention behind the 1992 constitutional amendment, but is an attempt to CHANGE the meaning of the constitution, then I suggest you cannot, in good conscience, vote to advance this bill. This matter should not be settled in conference committee, but in an open hearing, in full scrutiny of the public.

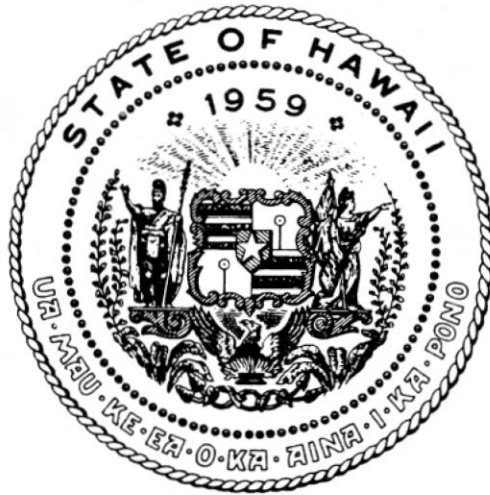
If the intention is to truly CLARIFY the language of the State Constitution, I have suggestions on how to do that.

Thank you for this opportunity to testify.

ATTACHED: CHAPTER III, 1991 REAPPORTIONMENT COMMISSION REPORT

STATE OF HAWAII
1991 REAPPORTIONMENT COMMISSION

FINAL REPORT AND REAPPORTIONMENT PLAN



Submitted to
The Sixteenth Legislature
Regular Session of 1992

CHAPTER III

THE LEGISLATIVE APPORTIONMENT BASE: PERMANENT RESIDENTS

A. DESCRIPTION OF THE BASE

The Commission decided upon a final legislative plan which was based upon a permanent resident population base. The population base was derived by using the April 1, 1991 census figures (from the 1990 census), with an adjustment to subtract the number of nonresident military personnel and dependents. The number of nonresident military personnel and their dependents was supplied by the Social Science Research Institute (SSRI) of the University of Hawaii. The Institute researched military personnel and financial records and conducted surveys, where necessary, to determine the residency of military personnel. Because the definition of "residency" varied from one military service to another, the Institute separated the residents from the nonresidents by determining in which state the military personnel paid state taxes. Dependents were assumed to claim the same residency as the military member of the family, based upon information supplied by military officials that this was the case in 98% of the families. The SSRI report submitted to the Commission is hereby incorporated in this report by reference.

See Chapter VI for a discussion on the congressional apportionment base and districting plan.

B. REASONS FOR CHOOSING PERMANENT RESIDENTS AS A POPULATION BASE

1. The Decision to Change Population Bases. The initial legislative district plan was based upon a population base of adult permanent residents, derived by subtracting minors and nonresident military and their dependents from the total population figures provided in the 1990 Census.

After hearing the oral testimony and reviewing the multitude of written testimony against the exclusion of minors from the population base, the Commission voted on July 3, 1991 to redraft the legislative plan to include minors. With Richard Clifton and Dr. Philip Hellreich dissenting, the Commission voted to redraw the maps based upon a permanent resident population base. The rationale for this change is discussed in detail below.

2. Final Population Base: Permanent Residents. There were several reasons that the Commission chose this population base for legislative reapportionment. The Commission considered three possible bases: Total population, based upon census figures; total population less transients (i.e., permanent residents) and total population less transients and minors (i.e., permanent residents less minors). The initial plan was based upon permanent residents less minors. However, the majority of the public testimony was against the exclusion of minors. Persuasive reasons given by the public for inclusion of minors in the population base included the fact a great part of the state government budget involves education so youth should be represented in government. In addition, several young persons testified against the exclusion of minors, arguing that it relegated minors to "second class" citizenship status, while other adults encouraged youth to participate in the political process and become actively involved in the community.

With the response of the public in favor of a permanent resident base which included minors, the Commission reconsidered its choice of population bases on July 3, 1991 and the majority voted to add resident minors to the permanent resident base and redraw the legislative district maps. Other reasons given by the Commissioners in favor of the new base include:

a. Permanent residents is the base used in the last legislative reapportionment so there is historical support for the base and the public is comfortable with it.

b. The concept of family, "ohana", is very important in Hawaii. Exclusion of children from the population base is contrary to Hawaiian tradition.

c. The legislative base first chosen reduced the number of canoe districts. The Commissioners were optimistic that the permanent resident base could result in even fewer canoe districts, or canoe districts which better met some of the other criteria, such as preservation of communities and linking areas with similar socio-economic interests.

d. The Proceedings of the Constitutional Convention of Hawaii of 1968, Vol. I, p. 241, indicate that the drafters of Hawaii's constitution found resident population to be an acceptable base.

e. The focus of reapportionment is representation. Voting is merely one of a number of ways in which a person's right to be represented is manifested. The right to representation is a broader right of effective participation in, and relation to, the legislative process, including the right to petition the legislature, the right to bring one's needs to the attention of a particular legislator who has been elected in that district, and the right to be weighed in the composition of the legislature.

Those entitled to vote and those entitled to representation are not necessarily the same. The law recognizes both rights in examining the constitutionality of reapportionment plans. Thus, the Commission determined that there are groups of residents who should be counted, even though they cannot vote. Minors fall within this category.

f. Aliens cannot be excluded from the census block figures at this time so they must remain counted. OmniTrak Group Inc. analyzed the available data and determined that it would not be possible to determine the number of nonresident aliens in specific census voter blocks. In addition to the fact the data is not available, it would be illogical and unfair to count aliens, yet not count minors, when both groups of permanent residents need representation.

g. Legal counsel advised the Commission that there was no precedent holding that a permanent resident base could not be used for legislative reapportionment.

h. Some organizations testified that the exclusion of minors tended to underrepresent rural areas and certain ethnic groups, such as native Hawaiians. It was stated in testimony that certain ethnic groups and rural families tend to have more children and that

the use of a base which excluded children would be unfair to those areas and groups. Although the Commission did not have the data available to verify these observations, the Commission did not wish to submerge any ethnic lifestyle groups in choosing a particular base.

i. The permanent resident base was the best alternative available. In choosing the permanent resident base, the Commission made the decision to not use a total population base and to exclude transients. The decision to subtract the number of nonresidents from the legislative population base remained unchanged from the time the first proposal was drafted until the final plan was submitted to the Lieutenant Governor. The Commission finds that exclusion of transients is desirable, for the following reasons:

(I) The 1968 Constitutional Convention reasoned that total population as a legislative apportionment base is disfavored in Hawaii because it is a distorted reflection of Hawaii's residents, citizens, or eligible voters. Those same considerations still apply: The presence of large numbers of transients, primarily nonresident military, presents special population problems for legislative apportionment in Hawaii.

(II) If nonresidents are included, voters in certain districts which have a large transient population would have their votes "overweighed" beyond fairness and beyond the "one person, one vote" principle. It is not clear that the use of total population, while normally a favored base by federal courts, is legal in Hawaii where such large numbers of nonvoters are concentrated in certain areas.

(III) A large number of transients were counted in the census (estimated at at least 16%) and this large number could distort the size of certain districts, where the framers of our constitution desired a resident or citizen population base.

3. Computation of the permanent resident base: Exclusion of the large nonresident military population.

Having decided to eliminate transients from the legislative population base, experts were hired to determine which transients were counted in the census, how many there were and whether or not they could be located in specific census blocks.

OmniTrak Group Inc., a research firm, was consulted. It reported that the nonresident military is the only large, census-block-identifiable group of nonresidents included in the census. Other groups, such as nonresident students, are statistically insignificant and cannot be easily placed in specific census blocks. Therefore, the Commission decided to eliminate those transients which could be identified to a particular census block and which constituted the vast majority of transients included in the census counts: nonresident military.

The Commission finds that there are persuasive reasons to exclude nonresident military, as transients, from the population base for purposes of legislative reapportionment, in addition to the reasons already stated. Nonresident military constitute about 14% of the population of Hawaii. About 114,000 nonresident military and their families reside in this state, primarily on the Island of Oahu.

Military personnel have the choice of becoming Hawaii residents. H.R.S. 11-13 sets forth the law governing residency in this State for purposes of voting. The mere presence or absence of a serviceman in this State does not establish residency so the military are given the same opportunity to register to vote as any other person living in this State. Registration is simple and is accomplished by filling out a form stating one's permanent address is in Hawaii. Yet, historically, the overwhelming majority of the military population in Hawaii has demonstrated that they have no intention of becoming residents of this state. Only about 3% of the military stationed here choose to become Hawaii citizens. Some of the remaining military personnel are stationed onboard ships which happen to be in port on the census date, or live on base. While the military is an important and welcomed part of the Hawaiian community, most consider Hawaii a temporary home.

These factors, as well as the information gained from experts, leads the Commission to conclude that exclusion of nonresident military from the census data will come as close as possible to the desired permanent resident base for legislative reapportionment.

DAMON KEY LEONG KUPCHAK HASTERT
A LAW CORPORATION

March 11, 2013

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Charles W. Key
(1929-2008)

Hawaii State House of Representatives
Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Sharon E. Har, Vice Chair

Tuesday, March 12, 2013
2:00 p.m.
State Capitol Room 325

Testimony IN SUPPORT of S.B. 286 SD1 (SSCR636).

Chair Rhoads, Vice Chair Har, and members of the Judiciary Committee:

We are testifying in strong support of S.B. 286 SD1, which amends Hawaii Revised Statutes § 25-2 to define “permanent resident” for purposes of state reapportionment and redistricting as any person counted as a “usual resident” of Hawaii by the U.S. Census. We support an immediate effective date for the bill.

We represent the plaintiffs in *Kostick v. Nago*, Civ. No. 12-00184, a case now pending before a three-judge U.S. District Court challenging the State of Hawaii’s 2012 Reapportionment Plan as unconstitutional because it “extracted” 108,767 military servicemembers, their families, and university students who do not qualify to pay in-state tuition, from the population because they were determined by the Reapportionment Commission to not qualify as “permanent residents” because the Commission concluded they do not have an intent to remain permanently in Hawaii.

We testified earlier in support in the Senate that the bill should be adopted for the following reasons: (1) Equal Protection requires that all persons are counted; (2) “Domicile” (physical presence plus an intent to remain) is impossible to determine for a class of people, and the way in which the definition is applied currently invites legal challenges; (3) Hawaii is the sole state that does not use Census population (with the exception of Kansas, which conducts its own survey of servicemembers’ residence); and (4) federal and county districting use Census population, and doing so for statewide reapportionment would be more cost-effective and efficient.

To supplement those reasons, we submit this testimony to make two additional points: (1) the Legislature has the ability to define terms in the Hawaii Constitution, and (2) the Census already excludes transients and

¹Admitted in Hawaii and California

²Admitted in District of Columbia



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includes only those persons who are in Hawaii physically, and who have “an element of allegiance or enduring tie” to Hawaii. *Franklin v. Massachusetts*, 505 U.S. 788 (1992). Thus, there is nothing inconsistent between the definition in SB 286 SD1 and the Hawaii Supreme Court’s definition of “domiciliary.”

I. The Legislature Has Authority to Define Constitutional Terms

There are questions whether the Legislature can define “permanent resident” by statute, or whether an amendment to the Constitution is the only means to define the term. The “legislature has a broad power to define terms for a particular legislative purpose, and the courts, as a general rule of construction, are bound to follow legislative definitions of terms rather than commonly accepted dictionary, judicial or scientific terms.” *In re Appeal of Hawaiian Tel. Co.*, 61 Haw. 572, 579, 608 P.2d 383, 388 (1980). This power includes defining terms in the Hawaii Constitution. *See, e.g., Hoohuli v. Ariyoshi*, 631 F.Supp. 1153 (D. Haw. 1986). The Legislature has the power to adopt statutes modifying or changing common law as may have been established by decisions of courts. *Bissen v. Fujii*, 466 P.2d 429, 431, 51 Haw. 636, 638 (1970).

The main point raised in opposition is that the Hawaii Supreme Court decision in *Solomon v. Abercrombie*, 126 Haw. 283, 270 P.3d 1013 (2012) deprived the Legislature of this power because the court defined “permanent resident” as “domiciliary” (those who are physically present in Hawaii, *and* who also have an intent to remain permanently), and this definition cannot be further defined except by Constitutional amendment. This argument, however, ignores the limited scope of *Solomon*. Critically, the court did not rely upon either the plain meaning of the constitutional text or the legislative history of the 1992 amendment that adopted “permanent resident.” Rather, in determining that “permanent resident” means “domiciliary,” the court merely cited its own earlier decision in *Citizens for Equitable and Responsible Gov’t v. County of Hawaii*, 108 Haw. 318, 120 P.3d 217 (2005), a case holding that the term “resident” in a *county charter* means “domiciliary,” which requires a demonstrated intent to remain in Hawaii. *Solomon* simply transported that definition from the county charter without further citation or support. This did not “constitutionalize” the court’s definition, leaving the Legislature free to further define the term.

II. The Census Already Excludes Transients

We also note that there is nothing inconsistent between the *Solomon* definition (presence plus intent to remain) and the Census population count,

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and if the concern is counting only those persons who are in Hawaii “permanently,” the Census already excludes transients. The Census counts “usual residents”—people who are physically present in Hawaii on Census Day and have “an element of allegiance or enduring tie” to the state. *Franklin*, 505 U.S. at 789. The Census defines “usual residence” as the “the place where a person lives and sleeps most of the time. It is not the same as the person’s voting residence or legal residence.” For military personnel stationed within the United States, they are counted as “usual residents” of the state in which they are stationed.

In sum, we respectfully urge this Committee to adopt SB 286 as presently drafted.

Very truly yours,

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