

MAR 10 2017

SENATE RESOLUTION

REQUESTING THE OFFICE OF HAWAIIAN AFFAIRS TO CONVENE A TASK FORCE OF HAWAIIAN LEADERS, LEGAL SCHOLARS, AND A BROAD REPRESENTATION OF MEMBERS OF THE HAWAIIAN COMMUNITY TO REVIEW AND CONSIDER WHETHER ITS FIDUCIARY DUTY TO BETTER THE CONDITIONS OF HAWAIIANS AND MANAGE ITS RESOURCES TO MEET THE NEEDS OF HAWAIIAN BENEFICIARIES WOULD BE BETTER SERVED BY HAVING TRUSTEES APPOINTED RATHER THAN ELECTED.

1 WHEREAS, article XII, section 5, of the Hawaii State
2 Constitution created the Office of Hawaiian Affairs (OHA), to be
3 governed by not less than a nine member board of trustees who
4 shall be Hawaiian and elected by qualified voters who are
5 Hawaiian, as provided by law; and

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7 WHEREAS, the 1978 Constitutional Convention created a
8 number of committees, including a Hawaiian Affairs Committee
9 that proposed the creation of OHA to manage and administer
10 resources held for the benefit of people of Hawaiian ancestry;
11 and

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13 WHEREAS, these proposed amendments were approved by the
14 Convention as a whole and were then ratified by Hawaii voters in
15 November of 1978; and

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17 WHEREAS, Standing Committee Report No. 59 from the
18 Convention's Hawaiian Affairs Committee articulates the primary
19 principle which committee members wanted to ensure through its
20 creation of OHA: the right of Hawaiians to elect their Hawaiian
21 leaders and Hawaiian control of Hawaiian trust assets as a
22 seeming response to the overthrow of the lawful government of
23 Hawaii in 1893 by the United States; and

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25 WHEREAS, the committee wrote:

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27 "Your committee is unanimously and strongly of the
28 opinion that people to who assets belong should have
29 control over them. In order to insure accountability, it
30 was felt that the board should be composed of elected
31 members. The election of the board will enhance



1 representative governance and decision-making
 2 accountability, and, as result, strengthen the fiduciary
 3 relationship between the board member, as trustee, and the
 4 native Hawaiian, as beneficiary. Finally, the committee
 5 agreed that the board should be elected by all the
 6 beneficiaries. Certainly, they would best protect their
 7 own rights"; and

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 9 WHEREAS, the Hawaiian Affairs Committee's recommendations
 10 were included in and strongly endorsed by the written report of
 11 the Convention's Committee of the Whole which focused on the
 12 need for Hawaiians to be able to realize a sense of self-
 13 determination and self-government through creation of OHA,
 14 stating:

15
 16 "Members were impressed by the concept of the Office of
 17 Hawaiian Affairs which establishes a public trust entity
 18 for the benefit of the people of Hawaiian ancestry.
 19 Members foresaw that it will provide Hawaiians the right to
 20 determine the priorities which will effectuate the
 21 betterment of their condition and welfare and promote the
 22 protection and preservation of the Hawaiian race.

23 . . .
 24 If one looks to the precedent of other native peoples, one
 25 finds that they have traditionally enjoyed self-
 26 determination and self-government. They have power to make
 27 their own substantive rules in internal matters. Although
 28 no longer possessed of the full attributes of sovereignty,
 29 they remain a separate people with the power of regulation
 30 over their internal and social problems. The establishment
 31 of the Office of Hawaiian Affairs is intended to grant
 32 similar rights to Hawaiians."; and

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 34 WHEREAS, this history was confirmed by the Hawaii Supreme
 35 Court in 1987 in *Trustees v. Yamasaki*, 69 Haw. 154, 737 P.2d 446
 36 (1987); and

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 38 WHEREAS, in February of 2000, the United States Supreme
 39 Court in *Rice v. Cayetano* struck down the State's provisions
 40 restricting OHA elections to those of Hawaiian ancestry only on
 41 the grounds that it violated the Fifteenth Amendment to the
 42 United States Constitution, which provides that, "[t]he right to



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1 vote shall not be denied or abridged by the United States or by
2 any State on account of race, color, or previous condition of
3 servitude"; and
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5 WHEREAS, in *Rice v. Cayetano*, a divided United States
6 Supreme Court held that the State violated the express
7 provisions of the Fifteenth Amendment by limiting the right to
8 elect OHA trustees in an official state election where only
9 voters of Hawaiian ancestry were entitled to vote for potential
10 OHA trustees; and
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12 WHEREAS, Justice Kennedy, writing for the majority, opined
13 that "[a]ncesty can be a proxy for race. It is that proxy
14 here"; and
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16 WHEREAS, after the decision in *Rice*, all qualified voters
17 in Hawaii were empowered to elect the OHA trustees; and
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19 WHEREAS, a subsequent challenge was filed in 2002 against
20 the State's constitutional and statutory provisions requiring
21 that only individuals of Hawaiian ancestry could be elected as
22 OHA trustees; and
23

24 WHEREAS, in *Arakaki v. State*, the Ninth Circuit Court of
25 Appeals struck the statutory and constitutional provisions
26 limiting who could run for and be elected to OHA solely to those
27 of Hawaiian ancestry; and
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29 WHEREAS, the Ninth Circuit held that disqualifying those
30 who were not of Hawaiian ancestry from running for a position as
31 an OHA trustee compromised potential voter's Fifteenth Amendment
32 rights and therefore was unconstitutional; and
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34 WHEREAS, since the decision in *Arakaki*, non-Hawaiians are
35 now eligible to run for and be elected as OHA trustees; and
36

37 WHEREAS, the ability for Hawaiians to exercise their right
38 to self-determination through the election of OHA trustees has
39 been substantially diminished because non-Hawaiians are now
40 entitled to vote for and run for a position as an OHA trustee;
41 and
42



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1 WHEREAS, OHA trustees are presently elected and primarily
2 function as political office holders and less as trustees who
3 are charged with exercising the highest fiduciary duty at law to
4 their Hawaiian beneficiaries; and

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6 WHEREAS, there are well-qualified individuals with strong
7 ties and stellar records of service to the Hawaiian community,
8 who meet the exacting legal and fiduciary requirements of
9 serving as a trustee, and who would consent to serving as an OHA
10 trustee if they were appointed rather than elected; and

11
12 WHEREAS, the requirements to be appointed as a trustee by
13 the court rather than being elected to political office requires
14 a level of skill, expertise, maturity, and judgement that is the
15 highest at law because trustees have a fiduciary obligation to
16 prudently serve the interests of beneficiaries above their own
17 interests; and

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19 WHEREAS, in the most recent OHA election in 2016, where two
20 OHA trustee positions were on the ballot, there were 100,464
21 (twenty-three percent) blank votes recorded in the Hawaii island
22 resident trustee election and 117,600 (26.9 percent) blank votes
23 were recorded in the at-large trustee race, which indicates that
24 a substantial group of voters who show up to vote choose not to
25 vote in OHA elections; and

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27 WHEREAS, it is in the best interests of Hawaiian
28 beneficiaries that the most competent, skillful, mature, and
29 trustworthy individuals serve as trustees over the resources and
30 policies developed and implemented to better the conditions of
31 Hawaiian beneficiaries; and

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33 WHEREAS, there is a need to review the question of whether
34 the manner of selecting OHA trustees may be improved upon
35 through an appointment process, to consider the appropriate
36 appointing authority, and how to develop a list of the best
37 qualified potential trustees for submittal to the appointing
38 authority; now, therefore,

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40 BE IT RESOLVED by the Senate of the Twenty-ninth
41 Legislature of the State of Hawaii, Regular Session of 2017,
42 that the Office of Hawaiian Affairs is requested to convene a



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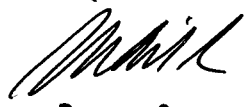

1 group of Hawaiian leaders, legal scholars, and Hawaiian
 2 community members to review whether the manner of selecting and
 3 seating OHA trustees could be improved upon through an
 4 appointment process rather than by election, consider the
 5 appropriate appointing authority, and consider how to develop a
 6 list of the best qualified potential trustees for submittal to
 7 the appointing authority; and

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 9 BE IT FURTHER RESOLVED that the Office of Hawaiian Affairs
 10 report to the legislature no later than twenty days prior to the
 11 convening of the Regular Session of 2018 on findings and
 12 recommendations, including any proposed legislation; and

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 14 BE IT FURTHER RESOLVED that certified copies of this
 15 Resolution be transmitted to the Chairperson of the Board of
 16 Trustees of the Office of Hawaiian Affairs and the Chief
 17 Executive Officer of the Office of Hawaiian Affairs.

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OFFERED BY: _____




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 Clarence A. Muihikawa
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