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TESTIMONY OF THE
CHIEF ELECTION OFFICER, OFFICE OF ELECTIONS
TO THE HOUSE COMMITTEE ON JUDICIARY
ON HOUSE BILL NO. 1646
RELATING TO MEMBERS OF CONGRESS

January 25, 2018

Chair Nishimoto and members of the House Committee on Judiciary, thank you for the opportunity to provide comments on House Bill No. 1646. The purpose of this bill is to provide that when a candidate other than the incumbent is elected to Congress, and the incumbent vacates the office prior to the expiration of the incumbent's term, the Governor shall appoint the member-elect to immediately fill the vacancy.

Section 3 of this bill as currently drafted, appears to conflict with Article 1 Section 2, Clause 4 of the United States Constitution, which states, "[w]hen vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." Vacancies in the United States House of Representatives may not be filled by appointment. As such, we recommend Section 3 of this bill be amended.

Thank you for the opportunity to provide comments on House Bill No. 1646.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018**

ON THE FOLLOWING MEASURE:

H.B. NO. 1646, RELATING TO MEMBERS OF CONGRESS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, January 25, 2018 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, First Deputy Attorney General, or
Valri Lei Kunimoto, Deputy Attorney General

Chair Nishimoto and Members of the Committee:

The Department of the Attorney General has serious concerns regarding section 3 of this bill and provides the following comments.

The purpose of this bill is to ensure that Hawaii's newly elected congressional members assume office earlier than the newly elected members from other states who must wait for the incumbent's term to expire, resulting in their ability to build their seniority to maximize their ability to represent this State. That purpose is accomplished by providing for an automatic procedure requiring the Governor to immediately appoint a candidate, other than the incumbent, who is elected to Congress, where the incumbent vacates the office after the general election but prior to the expiration of the incumbent's term on January 3.

The Department has concerns regarding section 3 of this bill, which provides for the Governor to fill a vacancy caused by an incumbent's resignation prior to the expiration of the incumbent's term. We believe that such an appointment conflicts with Article I, section 2, clause 4 of the U.S. Constitution, which requires members of the House of Representatives to be replaced only by an election.

Article I, section 2, clause 4 of the U.S. Constitution provides as follows:

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

Accordingly, section 17-2, Hawaii Revised Statutes (HRS), consistent with the U.S. Constitution, presently only provides for a special election to fill a vacancy in the U.S. House of Representatives. Based on the foregoing, the Department believes that section 3 of this bill is inconsistent with the U.S. Constitution, and recommends that section 3 be deleted. See Att. Gen. Op. 83-5 (In that opinion we advised that section 17-2, HRS, which, like this bill, provided the Governor to fill a congressional vacancy, was inconsistent with the U.S. Constitution. In 1986, Act 305 was enacted to remove that provision from the statute.)

Section 2 of this bill refers to vacancies in the U.S. Senate. The Seventeenth Amendment to the U.S. Constitution pertains to the composition of the U.S. Senate and provides in part:

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

Thus, while the foregoing constitutional amendment also provides for an election to fill the vacancy in the U.S. Senate, the Seventeenth Amendment provides that the state legislature has the authority to permit the executive to make a temporary appointment until the people fill the vacancy by election as the legislature may direct.

Section 17-1, HRS, presently provides that a vacancy in the office of U.S. senator shall be filled for the unexpired term at the following state general election provided that the vacancy occurs not later than 4:30 p.m. on the sixtieth day prior to the primary for nominating candidates, otherwise at the next following general election. The section presently requires the Governor to make a temporary appointment to fill the vacancy pending the election from a list of three prospective appointees submitted by the same political party as the prior incumbent, or if the incumbent was not a member of any political party, the Governor shall appoint a person who is not and has not been for at least six months prior to the appointment, a member of any political party. The law is silent and does not address a situation where a vacancy occurs after a general election when a candidate other than the incumbent has already been elected to assume office

at the expiration of the incumbent's term. Thus, section 2 of this bill, which provides a procedure for the Governor to temporarily appoint the candidate who has been duly elected to the U.S. Senate to fill the unexpired term of the incumbent where a vacancy occurs after the general election, is consistent with the U.S. Constitution. However, in order to more closely align with the wording of the U.S. Constitution, the Department suggests that the bill be amended to clarify that the Governor is making a temporary appointment to the Senate incumbent's unexpired term.

Thank you for the opportunity to testify on this bill. We respectfully request that you pass this bill with the recommended amendments.

HB-1646

Submitted on: 1/23/2018 10:28:56 PM

Testimony for JUD on 1/25/2018 2:00:00 PM

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

Comments:

Aloha Ke Kaua! We support this bill, as we need a consistent flow of representation in the United States Senate & House of Representatives. Seniority is vital & the best interest of the people of Hawai`i, in our humbled opinion, will best be served by the additional language in the law. Mahalo!