



UNIVERSITY OF HAWAII SYSTEM

Legislative Testimony

Testimony Presented Before the
Senate Committee on Higher Education
and

Senate Committee on Judiciary
February 12, 2019 at 3:30 p.m.

by

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University of Hawai'i

SB 44 SD1 – RELATING TO HIGHER EDUCATION

Chairs Kim and Rhoads, Vice Chairs Kidani and Wakai, and members of the committees:

Thank you for the opportunity to testify on SB 44 SD1, which would repeal the authority of the Board of Regents of the University of Hawai'i (BOR or Regents) to appoint or retain attorneys to represent the university who are independent of the attorney general. The university **strongly opposes** this bill.

Notwithstanding the university's constitutional and statutory autonomy for the last twenty years, this bill would shift responsibility for the university's legal matters to a State official who reports to the Governor and has no direct responsibility or accountability to the President or the BOR, who are legally charged with managing and overseeing the university operations.

The bill provides no justification or rationale for this drastic change, which would set back every aspect of the university's mission of service to the people of Hawai'i. Neither from a governance perspective nor an efficiency perspective can the Office of General Counsel's (OGC) service to all ten campuses and System be replaced by the Department of the Attorney General (ATG). The university has functioned for 20 years with OGC as our legal partner. OGC is independent from the ATG and 100 percent focused on advancing the mission of public higher education for Hawai'i. Whatever the unstated benefits intended by this legislation, if any, they will be far outweighed by the costs.

The university's authority to hire counsel accountable to its leadership and focused solely on university legal matters was an important element of the 1998 legislation and the 2000 constitutional amendment. After twenty years of experience with in-house counsel, this capability has become essential to agility of operations with accountability in an environment with increasingly complex compliance requirements.

Autonomy is Intended for the Benefit of the State of Hawai'i

The Legislature authorized the BOR to appoint or contract for its own counsel in Act 115, Session Laws of Hawaii 1998, (codified in what is now Section 304A-1005, Hawaii Revised Statutes). Act 115, which grew out of the work of an economic revitalization task force convened by the governor, president of the senate, and speaker of the house, granted substantial authority to the university to manage its own operations. The task force's conclusion, which the legislature endorsed through its actions, was that autonomy would "materially enhance the university's performance of its constitutional responsibilities and thereby contribute significantly to economic revitalization." Autonomy was then and continues to be an important consideration of the University's accreditors, as it is for public higher education throughout the nation.

The university's authority to hire counsel accountable to its leadership and focused solely on university legal matters was an important element of the 1998 legislation and the subsequent 2000 constitutional amendment that was intended to solidify autonomy and agility of operations for the benefit of the State. And again, notwithstanding the university's constitutional and statutory autonomy for the last twenty years, and with no justification offered, this bill would shift responsibility for the university's legal matters to a State official who reports to the Governor and has no direct responsibility or accountability to the President or the Regents; the Regents and the President are legally responsible for management of the university, an institution responsible for annual expenditures of some \$1.5 billion and over 10,000 professional employees (including through its research enterprise), making it one of the largest and most impactful organizations in the state.

Autonomy Has Worked

Following are just a few highlights of the outcomes UH has been able to achieve for Hawai'i over the past 20 years through the flexibility and efficiency that autonomy has enabled.

- In Fiscal Year (FY) 99, the university's total expenditures were approximately \$730 million, of which over half (\$380 million) were state general funds. In FY19, total expenditures have more than doubled -- far beyond the limited although much appreciated increase of state general funds by less than one third (under \$500 million).
 - UH Economic Research Organization (UHERO) estimated in 2013 that each dollar of state general funds expended translates into \$9.61 of total business sales, \$2.91 of employee earnings, and \$.52 in tax revenues returned to the state.

- In FY01 the total extramural awards to UH totaled \$216 million. For FY18 that number was \$386 million, an increase of approximately 80%. When the State needed the economic stimulus most, UH was able to leverage in FY11 the federal stimulus act (ARRA) to bring over \$488 million in extramural funding into Hawai'i. Many of the most complex contracts have required the specialized assistance of OGC.
- In 2000, UH awarded 7,238 degrees and certificates. In the 2017-18 academic year, UH awarded 11,215 degrees and certificates, an increase of 55% since 2000. On average nationally, a bachelor's degree recipient earns approximately \$1,000,000 more in lifetime earnings than someone with only a high school diploma and an associate degree recipient earns \$600,000 more. It is clear that the impact of these additional degrees to our people, families and communities is substantial, as is the positive tax revenue. Under its own authority, UH has created innovative programs to advance student success including: a degree audit system that works across multiple campuses, the development of multi-campus degree pathways, reverse transfer, automatic admission, and the nationally renowned "15 to Finish" program. And even in the face of declining enrollments across the country, UH Mānoa has now turned around years of declines with two consecutive semesters of year-over-year growth. OGC has substantively assisted in engaging external assistance to effectuate and further accelerate this turnaround.
- Since 2000, UH has undertaken at least two billion dollars in major construction, stimulating economic activity across the state. UH is now pioneering modern construction practices with the support of our general counsel, which involved new kinds of contracts.

The Work of the University Requires Specialized Legal Expertise

Current law (HRS Section 28-8.3) provides expressly for the university to have the ability to retain independent counsel, as do many other departments, offices and commissions, including the Office of Hawaiian affairs, the Hawai'i Health Systems Corporation, and the Division of Financial Institutions. Like UH, the above-named entities have specialized missions and require unique expertise. According to the National Association of College and University Attorneys (NACUA), only 4 out of 50 states (Washington, Ohio, Virginia, and Maryland) use their state AG directly, which is an indication of the specialization required in the higher education sector. And even in those states, there are separate divisions of the AG to support higher education, The Office of the AG in Washington has a Division for the University of Washington (16 attorneys and 10 professional staff) and Washington State University (5 attorneys and 2 professional staff). The Education Section of the Ohio AG coordinates with the work of in-house attorneys and does not fully replace them. The Education Section under the Virginia AG contains 45 attorneys. And in Maryland, like Ohio, higher education institutions have in-house counsel to coordinate with the Educational Affairs Division of the Office of the AG.

In addition to generalized transactional and litigation practices, the day-to-day work of our UH attorneys centers on issues and areas of the law unique to higher education:

- University faculty matters, such as academic freedom, grievances, faculty governance, and UHPA collective bargaining and contract administration
- University research and innovation, including technology and materials transfer, federal grants and contracts, intellectual property ownership and management, compliance with federal and state laws and regulations affecting research activities, and issues related to unique facilities and operations in astronomy, marine sciences, and agriculture, to name a few
- Intercollegiate athletics, including NCAA compliance, issues relating to student athletes, and contractual and other issues related to athletic venues and contests
- Student matters, including discipline and judicial affairs, FERPA, Title IX compliance, privacy, and housing
- Legal and contract issues arising from the university's medical school, cancer center, and other health sciences programs; includes contractual relationships with hospitals, providers, our clinical practice partner, and our residency program partner, as well as issues concerning federal health care laws, regulations relating to medical education and related facilities.

And while the ATG can assist other departments in issues pertaining to land use development, OGC has hired substantive expertise in the last few years to assist the UH with its unique land development and P3 priorities, which have been urged and supported by the Legislature. This bill would severely cripple those initiatives.

Efficiency in Operations

OGC currently has a total of twelve authorized attorney positions serving the ten campuses and UH System offices, which collectively comprise one of the largest, most complex and most influential enterprises in the State. With an annual operating budget of approximately \$2 million (FY19), the **OGC office expenditures represents approximately 1/8 of one percent (0.13%) of the university's total annual expenditures.**

Comparing OGC to other government law offices:

City and County of Honolulu

Annual Operating Expenditures (FY18): ~\$2.5 billion

Employees: ~10,000 – O'ahu only

Office of Corporation Counsel: 51 attorneys, \$9M budget

Ratio of Budget to Annual Expenditures: 0.36%

State of Hawai'i

Annual Operating Expenditures (FY 18): ~\$6.7B (without UH)

Employees: ~40,000 - Statewide (executive branch without UH)

Department of the Attorney General: 180 attorneys, \$103.65M (FY18 budget)

Ratio of Budget to Annual Expenditures (FY18): 1.55%

University of Hawai'i System

Annual Expenditures: ~\$1.5 billion

Employees: ~10,000 - Statewide

Office of General Counsel: 12 attorney positions, \$2M (FY 18 budget)
Ratio of Budget to Annual Expenditures: 0.13% (0.15% including 2 externally funded attorneys)

The City and County of Honolulu is the most comparable in terms of the size of the institution, and OGC serves the same client base with one-fourth the number of attorneys.

According to a survey done by NACUA, the average number of FTE attorneys in the office of general counsel at institutions with annual budgets \$1 billion or more is 14.1; the average number of FTE attorneys in the office of general counsel at institutions with enrollment of 35,000 or more (like UH) is 14.9. See Attachment 1 with relevant portions of “Results of NACUA’s 2018 Compliance Survey”, at p. 3, showing national trend of increasing numbers of in-house attorneys in university counsel offices.

Use of Outside Counsel

Every public (and private) in-house counsel team also uses outside counsel where need arises, including the ATG, OHA, and all county corporation counsel offices. This provides for even more specialized expertise when specifically required without overstaffing. The university retains outside counsel only when necessary: (1) patent attorneys (none in OGC), (2) complex, high stakes litigation/disputes, (3) highly specialized matters in areas outside the expertise of OGC attorneys, (4) conflict situations, and (5) lack of capacity. In no instance since VP Okinaga started has outside counsel been retained because of “lack of capacity”, as shown below, and OGC attorneys know that although new matters are coming in constantly, the work will be absorbed in-house unless extenuating circumstances exist.

The current staff in OGC has been hired or retained because of their strong work ethic and willingness to “do the cases” themselves, as well as their passion for the University of Hawai‘i and commitment to public service. Since a new lead litigator was hired in July 2016, 26 new lawsuits have been filed against UH, and all are being handled in-house except for conflict counsel and one construction litigation matter. In fact, 4 additional litigation cases were brought back in-house and the outside counsel contracts have been closed. The pay scale for associate attorneys is in line with county deputy corporation counsel pay scales (Maui, City & County, and Hawai‘i).

At the beginning of VP Okinaga’s tenure in 2015, there were 107 open outside counsel contracts; currently, there are 49, broken down as follows:

- 27 are specialized and funded by research revenues
 - 21 patent counsel – UH is working to increase revenue and impact of the intellectual property and filing more patents is the critical first step.
 - 6 other research-related matters requiring specialized expertise and/or complex litigation.
- 22 are funded by the risk management special fund or other special funds
 - 9 litigation matters + 1 conflict counsel
 - 12 specialized matters (Federal Communications Commission, design build and construction agreement templates, P3 development, PUC

and energy contracts, eviction, and graduate medical education matters)

OGC is accountable to the President and BOR for containing the university's outside counsel spend, and the direction is positive.

Request for Assistance from ATG

In October 2015, before asking for funding or positions to rightsize OGC staffing (at that time, 8 attorney positions), VP Okinaga tried to ascertain whether other options existed. UH is authorized under HRS Section 304A-1005(b) to request assistance from the AG, and did so, in three areas: (1) litigation, (2) responding to HRS Chapter 92F requests, and (3) contract review. Then-AG Doug Chin kindly agreed to assist with certain types of litigation, and in fact did provide litigation assistance on one matter, but declined to assist in the other two areas and conveyed his belief that UH attorneys would be best equipped to do this work.

While the university consults frequently with and is grateful for the assistance of the ATG on matters of shared interest, it is not practical nor reasonable for the university to rely on the Attorney General to meet all of the specialized legal needs of an institution that is large, unique, and that employs a substantial portion of the State workforce.

We note that the bill does not address the fiscal impact on the ATG of assuming responsibility for legal matters that are currently handled by the university's attorneys, nor does it address the treatment of current university personnel in attorney and staff positions that would no longer be lawful if this bill were enacted. These fiscal, personnel, and personal impacts would be significant to both UH and the Department of the Attorney General.

For these reasons, the University of Hawai'i **strongly opposes** SB44 SD1.

Thank you for this opportunity to testify.

 **NACUA**

2018 Annual Conference

Hilton Minneapolis · Minneapolis, MN
June 24 – 27, 2018

**09 | The Results of
NACUA's 2018
Compliance Survey**

SUMMARY OF RESULTS OF NACUA'S 2018 COMPLIANCE SURVEY

June 24-27, 2018

Craig A. Alexander

National Association of College and University Attorneys

Leyda L. Benitez

Villanova University

I. Introduction

- A. In the spring of 2018 NACUA conducted its second survey of chief legal officers at NACUA member institutions to gather data on current and planned compliance programs, the structure of those programs, and their perceived effectiveness. More than 200 member institutions responded. The survey also provides useful data on the make-up of offices of the general counsel and their responsibility for compliance matters.
- B. NACUA conducted an initial compliance survey in the spring of 2013. The 2018 survey followed the same format as the initial 2013 survey so the results would be comparable. The 2018 survey results were compiled in an 87-page report distributed to respondents earlier this month. The full report on the 2018 compliance survey is available [here](#). The report on the 2013 compliance survey is available [here](#).
- C. This summary highlights the key findings of the 2018 summary and compares those with the findings from the 2013 survey. One caveat: the universe of respondents in the two surveys was not the same; this should be considered when reviewing the results of the two surveys.

II. Responding Institutions

- A. NACUA invited Chief Legal Officers of 606 member institutions to participate in the 2018 compliance survey and 213 completed the survey, an excellent response rate of 35%. A list of the institutions who responded is on pages 5 and 6 of the survey report. The 2013 survey was completed by 210 institutions.
- B. As was the case with the 2013 survey, the 2018 survey provides data on a disaggregated basis for several discrete subgroups of respondents:
 - 1. Type of entity (single-unit, institution within a multi-campus system, and central office of a system).
 - 2. Public institutions and private institutions.
 - 3. Carnegie classification.
 - 4. Size of institutional annual operating budget (ranging in size from less than \$100 million to \$1 billion or more).

5. The number of full-time-equivalent students enrolled at the institution (from fewer than 5,000 to more than 35,000).

Reporting in this disaggregated way facilitates comparisons by individual institutions with institutions that have similar characteristics.

- C. The make-up of responding institutions in the two surveys across these characteristics are remarkably similar and they represent an excellent cross section of NACUA institutions, as the table below indicates:

<i>Characteristic</i>	<i>Percentage of Respondents</i>	
	<i>2018</i>	<i>2013</i>
Single unit institution	70.0%	67.0%
Institution within a system	19.5%	19.4%
System Office	10.5%	13.6%
Public	51.7%	50.2%
Private	48.3%	49.8%
Doctorate-granting universities	60.2%	56.0%
Master's colleges and universities	19.4%	26.8%
Baccalaureate colleges	9.5%	11.0%
Associate's colleges	8.5%	5.7%
Special focus institutions	1.9%	0.5%
Tribal colleges	0.5%	0.0%
Annual budget less than \$100 million	18.7%	16.5%
Annual budget \$100-200 million	20.6%	23.5%
Annual budget \$200-500 million	24.4%	22.5%
Annual budget \$500 million to \$1 billion	12.0%	15.0%
Annual budget \$1 billion or more	24.5%	22.5%
Enrollment of fewer than 5,000 students	27.4%	26.3%
Enrollment of 5,000 to 9,999 students	17.9%	20.3%
Enrollment of 10,000 to 15,999 students	16.9%	14.7%
Enrollment of 16,000 to 24,999 students	15.9%	14.2%
Enrollment of 25,000 to 34,999 students	8.5%	10.2%
Enrollment of 35,000 or more students	13.4%	14.3%

III. Staffing in the Office of the General Counsel; Responsibility for Compliance

- A. In addition to providing information about institutional compliance programs, the survey also yields interesting information about the composition of offices of general counsel. **In general, there has been an increase in the number of attorneys and of full-time equivalent employees in the office of the general counsel at member institutions over the past five years. Of those institutions reporting an increase in the number of employees in the office of the general counsel, 76.2% said the increase is attributable in whole or in part to additional compliance responsibilities at the institution.** In the 2013 survey, 70.4% of institutions that reported an increase in OGC employees said the increase was attributable in whole or in part to additional compliance responsibilities.
- B. The reported average number of attorneys in the office of the general counsel increased by 1.1 since the time of the 2013 survey (from 4.1 to 5.2). The average, of course, varies by type and size of institution. In general, offices of the general counsel in system offices and at institutions with higher budgets and enrollments showed the most increase in the number of attorneys since 2013.

<i>Characteristic</i>	<i>Average number of full-time equivalent attorneys in the office of the general counsel</i>	
	<i>2018</i>	<i>2013</i>
All Institutions	5.2	4.1
Single unit institution	4.1	3.3
Institution within a system	5.2	5.0
System Office	13.6	7.5
Doctorate-granting universities	7.2	6.0
Master's colleges and universities	2.4	2.2
Baccalaureate colleges	1.6	1.3
Associate's colleges	2.0	1.4
Annual budget less than \$100 million	1.7	1.1
Annual budget \$100-200 million	1.6	1.6
Annual budget \$200-500 million	2.9	2.7
Annual budget \$500 million to \$1 billion	3.9	4.7
Annual budget \$1 billion or more	14.1	10.2
Enrollment of fewer than 5,000 students	1.6	1.5
Enrollment of 5,000 to 9,999 students	2.1	2.6
Enrollment of 10,000 to 15,999 students	4.8	4.9
Enrollment of 16,000 to 24,999 students	5.1	4.2
Enrollment of 25,000 to 34,999 students	9.4	5.1
Enrollment of 35,000 or more students	14.9	9.5

- C. Just under half of the respondents said the number of full-time equivalent employees in their office of the general counsel increased during the past five years; the average increase for those offices was two employees.
- D. **Offices of general counsel at institutions of higher education are all involved in institutional compliance efforts, some more directly than others:**
1. 99.3% of all Chief Legal Officers in both surveys responded that they provide support for their institution's compliance program.
 2. Just over 31% (in both 2018 and 2013) of Chief Legal Officers indicated they have responsibility for or oversight of a formal compliance program at their institution.
 3. For those institutions without a Chief Compliance Officer, 34.4% of respondents indicate that the general counsel has primary responsibility for compliance, up from 25% in 2013. Among institutions with a budget of less than \$100 million annually having no Chief Compliance Officer, 54.8% report that the general counsel has primary responsibility for the institution's compliance program.
 4. Those indicating that an attorney in the office of general counsel is assigned formal responsibilities for compliance increased from 29.1% of respondents in 2013 to 36.5% of respondents in 2018.
 5. Nearly 98% of Chief Legal Officers rated compliance as "the most challenging issue" (4.4%) their offices face, "among the top three most challenging issues" (67.6%), or "just as challenging as any other legal issue" (25.6%). This is essentially unchanged since 2013.



UNIVERSITY
of HAWAII®
SYSTEM

**Senate Committee on Higher Education
Senate Committee on Judiciary
Tuesday, February 12, 2019, 3:30 p.m.**

Testimony by:

Lee Putnam, Chair, Board of Regents

Jeff Portnoy, First Vice Chair, Board of Regents

SB 44, SD 1 – RELATING TO THE UNIVERSITY OF HAWAII

Chairs Kim and Rhoads, Vice Chairs Kidani and Wakai, and Members of the Committees:

Thank you for the opportunity to testify on SB 44, SD 1. We submit this testimony as the Chair and First Vice Chair of the Board of Regents (“Board”) in **strong opposition** of this bill. The Board did not have the opportunity to consider this bill as a body. However, the members of the Board have been notified of this bill and feedback was received by several other members, including Vice Chair Higaki, and Regents Acoba, McEnerney, Moore, Wilson, and Yuen, who concur with this testimony. The bill repeals the Board’s authority to appoint or retain attorneys to represent the University of Hawai’i (“University”) who are independent of the State of Hawai’i Attorney General (“AG”). Essentially, the bill eliminates the University’s independent Office of General Counsel (“OGC”).

Elimination of OGC would severely and negatively impact the internal structure, management, and operations of the University. Such an action is inconsistent with Article X, Section 6 of the Constitution of the State of Hawai’i, which provides that the Board “shall have exclusive jurisdiction over the internal structure, management, and operation of the University,” and that the Legislature retains the power to enact laws of statewide concern.

Since OGC was created in parallel with University autonomy, it has come to serve an important role for the University. Among other things, OGC and its attorneys provide institutional memory; are easily accessible and available on campus; have a specialized familiarity with higher education legal issues; provide a cost savings as compared to outside legal fees; and are readily available to provide insight and counsel which encourages client interaction that prevents issues from metastasizing into legal risk. The Board takes its role in mitigating risk very seriously, and OGC plays a critical role in managing legal risk and keeping the Board informed. The Board consults with OGC on a regular basis on various issues, including to seek legal guidance related to issues being considered by the Board.

OGC’s role is not easily replaced by the AG who reports to the Governor, and whose fiduciary and professional obligations are to State government as a whole. The AG and deputy AGs assigned to the University and reporting to someone other than the president and the Board will pose difficult ethical and practical issues, because of the University’s autonomy.

As early as 1961, the AG recognized that “[i]t is our view . . . that the University of Hawai‘i is not an executive or administrative department or instrumentality of the State government under Article IV, section 6.”¹ The Attorney General went on to state that,

By reason of these constitutional provisions there is created a constitutional corporation of independent authority. The establishment by the Constitution of a state university as a body corporate with power to govern itself through a board of regents results in the creation of a separate entity independent of the executive branch of the government.²

The Legislature also recognized the need to allow the University its own counsel, separate from the AG. In 1998, after considerable deliberation, Act 115 was signed into law.³ Act 115 grew out of the work of the economic revitalization task force convened by the governor, president of the senate, and speaker of the house. It granted substantial authority to the University to manage its own operations. The Legislature found that,

(4) One of the task force’s principal recommendations was to provide greater “autonomy” to the University of Hawai‘i, meaning the devolution to the board of regents and the university community of substantially increased decision-making authority and responsibility with respect to fulfillment of the university’s constitutional role and administration of its constitutionally-designated assets and public trust undertakings.

(5) The task force’s conclusion, which this legislature endorses and this Act implements, was that autonomy for the university would materially enhance the university’s performance of its constitutional responsibilities and thereby contribute significantly to economic revitalization;

(6) Under this Act, the university board of regents and administration are delegated substantially increased authority and decision making power over . . . and the management of the human resources and programs of the university, including but not limited to the ability to: . . . (C) Retain legal counsel and resolve disputes using university assets[.]

In the 1999 and 2000 legislative sessions, the Legislature proposed amending Article X, section 6 of the Constitution of the State of Hawai‘i, to give the University autonomy in Senate Bill 539.⁴ The measure was intended to provide “. . .that all organizational and management decisions internal to the University are clearly the responsibility of the Board of Regents.”⁵

¹ Att. Gen. Op. 61-84.

² *Id.*

³ 1998 Haw. Sess. Laws Act 115.

⁴ S. Stand. Comm. Rep. No. 287 (1999) (re S.B. 539 S.D. 1).

⁵ H. Stand. Comm. Rep. No. 877 (2000) (re S.B. 539 S.D. 1).

Senate Bill 539 states that, “the purpose of this Act is to propose an amendment to article X, section 6, of the Constitution of the State of Hawai‘i to give the University of Hawai‘i autonomy in matters involving only the internal structure, management, and operation of the University.” General election results showed that the 72.4% of the vote was in favor of the constitutional amendment.⁶

The elimination of independent counsel is a threat to the autonomy afforded to the University by the Constitution of the State of Hawai‘i. For these reasons, the aforementioned individual Regents **strongly oppose** SB 44, SD 1.

Thank you for the opportunity to testify.

⁶ *General Election - State of Hawai‘i– Statewide, Final Report, Number 3*, Haw. Office of Elections, Nov. 7, 2000, available at <http://files.Hawai‘i.gov/elections/files/results/2000/general/histatewide.pdf>.



The Committee on Higher Education/Judiciary
Tuesday, February 12, 2019
3:30 pm, Conference Room 229

RE: SB 44, SD1 RELATING TO HIGHER EDUCATION

Attention: Chairs: Donna Mercado Kim and Karl Rhoads, Vice Chairs: Michelle Kidani
and Glenn Wakai and Members of the Committee

The University of Hawaii Professional Assembly (UHPA) **strongly opposes SB 44, SD1**. The proposed legislation captures the past trying to revisit the present over the authority of the University to conduct its' legal affairs as an autonomous state agency. When concerns arise about the conduct of University business it has become commonplace to attach challenges to the autonomy of the institution. In part, it is an unfortunate result of the University not advancing its own interests and rising tensions over the management of the institution.

The proposed legislation is brought forth without the requisite understanding of what problem this is designed to fix. There lacks a proper assessment of the consequences of the transfer of authority to the Attorney General which goes well beyond a mere reassignment of function and personnel.

For historical reference, in the late 1990's the UH legal section was administered through the attorney general's office. The lack of UH responsibility and authority for conducting its legal affairs was the cause of an accreditation crisis whereby the institution was placed at risk. The creation of the UH Office of General Counsel established the autonomy expected by the accreditation agency. It further clarified the meaning of autonomy found in the State Constitution as UH took responsibility for its risk, liabilities, and conduct of legal matters. Today, UHPA does not see a parallel set of circumstances that would result in the proposed SB 44 SD1 being necessary.

Should the University of Hawai'i be deprived of their own counsel this would impede the Board of Regents and the administration in their role to advance or defend the interests of the state's only public higher education institution.

UHPA respectfully opposes SB 44 SD1.

Respectfully submitted

Kristeen Hanselman
Executive Director



Office of Intercollegiate Athletics • 1337 Lower Campus Road • Honolulu, Hawai'i 96822-2370

Testimony Presented Before the
Senate Committee on Higher Education
Senate Committee on Judiciary
February 12, 2019, 3:30 PM

by
David A. K. Matlin, Athletic Director
University of Hawai'i at Mānoa

SB 44– RELATING TO HIGHER EDUCATION

Chairs Kim and Rhoads, Vice Chairs Kidani and Wakai, and members of the committees:

Thank you for the opportunity to submit testimony on SB 44 on behalf of the University of Hawai'i. This bill specifies that the attorney general shall represent the University of Hawai'i in any litigation, render legal counsel to the University, and draft documents for the University.

I respectfully request that this bill not advance.

As Director of Athletics, I work closely with the University of Hawai'i General Counsel's Office. The General Counsel's Office provides me and my colleagues in athletics with outstanding support, legal advice, and expertise. Additionally, the General Counsel's Office facilitates our work by providing us with templates for frequently used agreements, reviews contracts that are presented in a timely manner, and ensures that contracts that are entered into are aligned with State law and university policy as well as the best interests of the university.

The University of Hawai'i at Mānoa Athletics Program regularly enters into a variety of contracts.

- Employment (template available)
- Home and away athletic contests (template available)
- Apparel
- University Facility Rental to Outside User (template available)
- Television
- Radio
- Concessions
- Travel Agency (Air, hotel, ground, etc.)
- Insurance (student-athlete, venue, H-Zone, campers, etc.)
- Hotel (template available)

- Ticketing Services (template available)
- Corporate Partner (template available)
- Aloha Stadium Use
- Facility Lease (retail space, event hosting, etc.)
- Misc. Services (retail point of sale, website, copiers, etc.)

It is our practice to initiate legal service reviews with the Office of the General Counsel for all contracts unless a template agreement exists and we are only filling in the business terms or contracts that are aligned with policy and practice and have minimal or no risk to the University (ex., contracts with no exchange of funds, hotel contracts, etc.).

Under the leadership of Ms. Carrie Okinaga each contract is reviewed by two members of the General Counsel's Office. Members of our staff meet weekly with two members of the General Counsel's staff to review contracts that are pending and work through issues and challenges related to the agreements. This has proven to be highly effective in producing the best possible contract.

It has been our experience related to Athletic contracts and legal needs, that the General Counsel's Office under the leadership of Ms. Okinaga, has been instrumental to our success. One of our goals in athletics is to enhance revenue. The following are a few examples of specific revenue generation activities where the General Counsel's Office contract and legal expertise has instrumental to our success:

- Facilities:** UHM Athletics has been creating revenue opportunities and gaining exposure for Hawai'i by hosting events at its venues. Examples of events hosted by UHM Athletics include Los Angeles Lakers training and preseason games; Los Angeles Clippers training and preseason games; Armed Service Classic, and Flight Center Travel Meeting. These types of events create revenue opportunities for UHM Athletics through venue lease, shared concession revenues and ticket system utilization.
- Sponsorships:** UHM Athletics entered into a ten-year agreement that transfers its corporate partner program as well as other multimedia rights, to Learfield IMG College. The agreement provides guaranteed minimum payments from Learfield IMG College that are higher than what UHM Athletics historically realized from managing the corporate partner program, plus the opportunity to mutually share in upside potential. In a comparison to its peers, at the time the agreement was signed, UHM Athletics' agreement with Learfield IMG College ranked best among its peers in the Big West and Mountain West Conferences and in the top five among all the schools in the Group of 5.

Apparel: Recently, UHM Athletics entered into a five-year, "All Sport", agreement which resulted in Under Armour becoming the official outfitter for all of the department's sports. Under the agreement, Under Armour provides UHM Athletics with rights and other fees, and an allowance for uniforms and other apparel, that exceed the total previously realized for all apparel companies combined. In a comparison to its peers, at the time the agreement was signed, UHM Athletics' agreement with Under Armour ranked best among its peers in the Big West and Mountain West Conferences and in the top three among all of the schools in the Group of 5.

Travel Costs: For all collegiate athletic programs, travel costs represent a significant portion of their expense budget. This is even more so for UHM Athletics since the geographic isolation of Hawai'i results in travel costs being significantly higher than what is typically incurred by other collegiate programs. To address the higher travel costs for Hawai'i, UHM Athletics recently negotiated and implemented an arrangement with Hawaiian Airlines that provides a fixed-price per seat for travel to different locations. The fixed-price arrangement results in significant cost savings over the prior arrangement of using market rates that could vary by time of year and other conditions.

As complicated as the legal setting in higher education and intercollegiate athletics has become, our opportunity to succeed depends on continuing to have direct access to the professionals that serve our General Counsel's Office.



Testimony presented for Hearing for
Senate Committee(s) for Higher Education and Judiciary

Tuesday, Feb. 12, 2019 at 3:30 pm, Rm 229

Testimony submitted by

Carolyn Ma, PharmD
Dean
The Daniel K. Inouye College of Pharmacy
UH Hilo

To the Honorable Kim (Chair), Kidani (Vice Chair) and members of the Higher Education Committee

To The Honorable Rhoads (Chair), Wakai (Vice Chair) and members of the Judiciary Committee

SB 44 SD 1 Relating to Higher Education

My name is Carolyn Ma, and I am the Dean for the UH Hilo Daniel K. Inouye College of Pharmacy (DKICP). The DKICP respectfully opposes this bill that repeals the general counsel (OGC) of the University of Hawaii and specifies that the attorney general shall represent the University of Hawaii in any litigation, render legal counsel to the university, and draft legal documents for the university.

As a professional health care education program, the DKICP places high value and trust in the Office of the General Counsel (OGC). In order to fulfill the accreditation and education requirements for our flagship degree, Doctor of Pharmacy, Pharmacy Practice (Registered Pharmacists) faculty perform patient care duties to teach and mentor students in healthcare institutions that include hospitals, clinics and community pharmacy businesses. These activities require OGC to approve numerous contracts and memorandums of understanding with

all health care institutions across the state, U.S. mainland, as well as in international sites.

The college also utilizes OGC to assure legal compliance in our policies and procedures that govern student admissions, recruitment and other matters related to student affairs, student misconduct as well as issues related to the American Disabilities Act.

In regards to our faculty and staff employment, we often require counsel and expertise to comply with the University collective bargaining agreement, labor and employment laws.

Our issues are often highly complex, time consuming and require timely resolution. OGC's attorneys, with their highest level of expertise, allow us to function with confidence that we have complied with all legal aspects pertinent to our operations.

Thank you for the opportunity to submit testimony.



UNIVERSITY
of HAWAII®
MĀNOA

Testimony Presented before the
Senate Committees
Higher Education and Judiciary
Tuesday, February 12, 2019 at 3:30 pm

SB 44 SD 1- Relating to Higher Education

Chairs Kim and Rhoads, Vice Chairs Kidani and Wakai, and members of the committees:

My name is Denise Konan, Dean of the College of Social Sciences at the University of Hawai'i at Mānoa. I respectfully **oppose** SB 44, SD 1. Our College relies upon the expertise of the Office of General Consul to assist us in our educational and research mission.

Our College encompasses the academic disciplines of economics, political science, communications, urban and regional planning, public administration, geography & environment, psychology, sociology, and anthropology. We advance interdisciplinary knowledge in women's and ethnic studies, and peace.

We have approximately 150 faculty who provide instruction and offer over 800 courses per year to thousands of UH students. We have approximately 1,600 undergraduates who have declared majors in the several College disciplines, and in academic year 2018, we awarded over 600 undergraduate degrees. The College has approximately 450 graduate students currently pursuing advanced degrees and engaged in research. In academic year 2018, we graduated approximately 100 students with advanced degrees, 34 with Doctorates.

This variety of undertakings requires advice from the Office of General Consul on issues as varied as Affiliation Agreements with local health care facilities to enable our students to acquire real-world experience, and Memoranda of Agreement with universities and governments abroad to support faculty and student research and field experiences. OGC has developed specialized expertise in the types of legal issues confronted by members of a top tier research university. We rely upon their review of legal documents for compliance issues, but also on advice and counsel when contemplating arrangements that will necessitate legal agreements.

As examples, the outreach to local high school students through Mānoa Academy is made possible through agreements with public and private high schools, facilitated by OGC. Our International Programs hosts students and faculty from institutions abroad who wish to learn about Hawai'i culture, arranged through Memoranda of Agreement facilitated by OGC. This is in addition to more routine review of contracts for technology to support research and clinics that serve students, faculty, and members of the community.

For these reasons, I respectfully **oppose** SB 44, SD1.

A handwritten signature in black ink, appearing to read 'Denise Eby Konan', written over a horizontal line.

Dean Denise Eby Konan



Testimony Presented to the
Senate Higher Education and Judiciary Committees

Tuesday, February 12, 2019 at 3:30 pm
by

Chaminade University of Honolulu President
Dr. Lynn Babington.

**SB 44 SD1
Relating to Higher Education**

Chairs Donna Mercado Kim and Karl Rhoads, Vice Chairs Michelle Kidani and Glenn Wakai,
and members of the Committees:

Thank you for the opportunity to provide **comments** on SB 44 SD1 relating to the repeal of the authority of the Board of Regents of the University of Hawaii to appoint or retain general counsel independent of the Attorney General.

Autonomy for any university is critical for long term planning strategies and for accreditation. The ability to have an independent General Counsel render legal opinions separate from the State Attorney General is advisable, as it is for the other 20 organizations able to employ or retain attorneys under this statute. Repealing the ability of the Board of Regents to obtain legal counsel separate from the Attorney General in litigation, for indemnification purposes, or for obtaining legal opinions may be detrimental for university leadership planning.

Thank you for allowing us to submit this testimony.

A handwritten signature in black ink, appearing to read "Lynn Babington".

President Lynn Babington, PhD

Chaminade University of Honolulu
Office of the President Clarence T.C. Ching Hall 210
3140 Waialae Avenue, Honolulu, Hawaii 96816

(808) 735-4741 | president@chaminade.edu | chaminade.edu

SB-44-SD-1

Submitted on: 2/9/2019 10:38:29 AM

Testimony for HRE on 2/12/2019 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jerris Hedges	Individual	Oppose	No

Comments:

The amendment to the Section 26-35.5, Hawaii Revised Statutes is unnecessary and counter-productive. The specialized programs at UH System, require attorneys with expertise in research and other academic matters. Depending upon the Attorney General to represent UH will lead to delays in time-sensitive matters and increased risks to UH and its operations. The cost to the State of Hawaii and those served by UH could be considerably greater than any perceived anticipated savings by supporters of this legislation.

SB-44-SD-1

Submitted on: 2/10/2019 9:50:33 AM

Testimony for HRE on 2/12/2019 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
WalterS. Kirimitsu	Individual	Oppose	No

Comments:

I am in strong opposition to SB 44 SD 1. I served as the first General Counsel for UH from 1999 to 2006. Based on my actual experiences, UH needs independent general counsel, separate from being a part of the State AG's office. The sole and critical reason for the 1998 statute and the 2000 constitutional amendment was for the UH to have its own independent general counsel to advise on its unique legal issues in an efficient manner. This is absolutely necessary for our UH to excel and achieve its goals in an efficient, professional manner. It will be terrible to pass this Bill; if this Bill passes, we as a State will be going backwards and sending a message that our only state university doesn't really matter. PLEASE DO NOT PASS THIS BILL. RESPECTFULLY, Walter S. Kirimitsu

SB-44-SD-1

Submitted on: 2/11/2019 11:29:11 AM

Testimony for HRE on 2/12/2019 3:30:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jesse K. Souki	Individual	Oppose	Yes

Comments:

Aloha Chairs Kim and Rhoads, Vice Chairs Kidani and Wakai, and Members of the Senate Committees on Higher Education and Judiciary:

Thank you for considering this testimony regarding SB 44, SD1, which would effectively abolish the Office of General Counsel (“OGC”) at the University of Hawai‘i. I have ***strong concerns*** about this measure.

I am confident that others will provide logical arguments on why OGC should remain at the University—I will not make those arguments here. My plea to you is personal. I do not know why this bill has come to pass based on my research of why the legislature chose to allow the University to be autonomous and how OGC came about. However, if it has anything to do with the perception that the folks here at OGC do not work hard or in the interest of the University, I hope that this testimony will help allay those concerns.

There is a myth about public service, especially in Hawai‘i and particularly when it comes to professional service positions. I can speak with knowledge on this point, because I have served in a few leadership capacities with the State and the counties. In my experience, the folks I met and worked with were passionate about public service and making a difference in their communities, as is the case here at OGC.

In the private sector, clients paid about two and a half times more for my billable hours than the University does. I work an average of 10-hours a day at the University, not counting the time I respond to emails and answer phone calls off the clock and on weekends. Working for the State of Hawai‘i, I do not get full medical coverage or free parking—these premiums and costs come out of my check. I do get more holidays and leave than in the private sector, but I, like many of my colleagues, are rarely able to use all our accumulated leave given the demands of the job. This is not a complaint—I knew the sacrifice. I know many have similar experiences.

So if not for the benefits or the pay, why does anyone take an attorney position with the State and in particular the University? Next to my desk is President John F. Kennedy’s January 20, 1961 inaugural address, where he called on the Nation to “ask not what your country can do for you—ask what you can do for your country.” Public service to many is a higher calling—a way to give back to our communities. For those who heed

the call, there is great satisfaction in knowing the public interest was served at the end of a long week. The greatest threat to a sustainable, hard-working public workforce is uncertainty and threats to morale. Some would say the State never fully recovered from the reduction in force actions and furloughs from the 1990s and early 2000s. Similarly, there is no telling what damage the recent and threatened government shutdown will have on federal workers. These actions lead to losses of expertise, institutional knowledge, and internal and external relationship networks that get the public's business done.

Despite the above, the rare honor to work for my alma mater was an opportunity I could not pass. My education at Mānoa led to opportunities for which I am grateful. It led me to Washington, D.C., law school in Seattle, and allowed me to return home to Hawai'i for a successful career in law and public service. I like to believe that being the first in my household to graduate from college also paved the way for my younger brothers—one graduated from the University of Hawai'i at Hilo. I want to play a part in ensuring that others in the State have similar opportunities through the University of Hawai'i. Please allow OGC to continue its service to the University—there is so much work left to do.

Thank you again for considering my testimony and for your service to the State of Hawai'i.

Mahalo,

Jesse K. Souki, Esq.

Association of Emeritus Regents

University of Hawaii

James Lee, Chair
Andres Albano, Jr. Vice-Chair
J. F. Blanco, Secretary-Treasurer

LEGISLATIVE TESTIMONY IN OPPOSITION OF SB44 RELATING TO THE HIGHER EDUCATION



Submitted to the:
COMMITTEE ON HIGHER EDUCATION
and
COMMITTEE ON JUDICIARY

Hearing Date:
3:30 pm, Tuesday, February 12, 2018
Conference Room 229

Submitted by:
ASSOCIATION OF EMERITUS REGENTS
UNIVERSITY OF HAWAII

Chair Kim, Vice Chair Kidani, and members of the Senate Committee on Higher Education; and Chair Rhoads, and Vice Chair Wakai, and members of the Committee on Judiciary:

The Association of Emeritus Regents (“AER”) of the University of Hawai‘i submits testimony in opposition to Senate Bill 44.

In order for the University of Hawai‘i to properly perform its constitutional responsibility of being the institution of higher education for the citizens of Hawai‘i and contribute to the economic vitality of the State, the University of Hawai‘i needs to have its own legal team who is accountable to the leadership of the University of Hawai‘i and who is focused solely on university legal matters.

The work of the University requires specialized legal expertise. The Office of the General Counsel (“OGC”) has fulfilled its role more than adequately and has been efficient in its operations. Shifting the University’s legal matters to the State Attorney General is a step backwards and would disrupt the University’s mission.

As former regents, our members have worked with the OGC as well as attorneys from the Attorney General’s office. From experience, we can opine without hesitation that the Office of the General Counsel has been much more timely in providing the legal responses necessary to make decisions than the Attorney General’s office.

The OGC handles transactional matters, litigation matters and areas of law which are unique to higher education including research and innovation, intercollegiate athletics, student matters, legal and contract issues and university faculty matters efficiently. In comparing the cost of legal services to their operating budgets, only .13% of the University’s annual operating budget of \$1.5 billion is spent on legal services while the State of Hawai‘i spends 1.55% of its annual operating budget of \$6.7 billion is spent on legal services and the City and County of Honolulu spends .36% of its annual operating budget of \$2.5 billion. Clearly, the University of Hawai‘i has been more efficient.

Given the performance and the efficiency of the OGC at the University, eliminating the OGC would be a tremendous mistake. Not only will it probably cost the AG office more than what the University spends to provide the legal services required by the University, it probably will not be able to do it as timely. The University needs to make decisions “at the turn of a dime” on many matters and without its own dedicated legal team, it will not be able to do so. More importantly, the AG’s office will not be accountable to the University, the client which it will serve. Its accountability will be to the Governor.

There is no justifiable reason for eliminating the OGC. The AER strongly opposes SB 44 and respectfully ask the Senate Committee on Higher Education, and the Senate Committee on Judiciary to withhold the passage of SB44 in their respective committees.

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A LAW CORPORATION

February 11, 2019

LATE

The Honorable Donna Mercado Kim
& Members of the Senate Committee on
Higher Education; and
The Honorable Karl Rhoads
& Members of the Senate Committee on
Judiciary
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Senate Bill 44, SD1, Relating to Higher Education

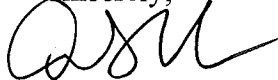
Dear Chair Kim, Chair Rhoads and Committee Members:

I write in respectful opposition to Senate Bill 44, Senate Draft 1, for these reasons. First, S.B. 44, S.D.1, lacks any preamble language stating why passage of the bill is necessary. Standing Committee Report No. 69 regarding this bill is also silent as to the intent. Unfortunately, the effect is that it leaves the public and affected state employees to guess why this action is being taken. To avoid the accusation that the Legislature is acting arbitrarily and capriciously, I respectfully encourage the Committees to articulate their reasons in a report or by inserting preamble language into the bill.

Second, the proposed action will, without question, radically restructure the legal agencies serving the State of Hawaii, and it does so by re-integrating the largest entity, the University of Hawaii, that has operated independently from the Department of the Attorney General for decades. Once it is made clear what the purpose and intent of this bill, there are probably less drastic alternatives than what is being proposed. Out of the 21 exceptions granted by prior Legislatures to obtain independent counsel apart from the Department of the Attorney General, 20 are smaller than UH. From purely a practical perspective, the proposed bill impacts the human resources and budget departments, as well impacted labor unions.

Finally, the bill creates the appearance of a conflict of interest between UH and the State of Hawaii administrative agencies on important matters in which it was previously recognized that UH's independence was needed. As one example, if the Department of the Attorney General had represented both the Department of Land and Natural Resources and UH when the conditional permit was presented regarding the astronomy precinct on Maunakea, then, despite any ethical walls designed to eliminate conflict, the public perception of conflict would have been negatively impacted. Thank you for the opportunity to testify.

Sincerely,



Doug Chin