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Probably not in the mainstream of the Commission's work, yet it impacts so many more decisions that even Gut and Replace.

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손기철

Why The State Legislature is Violating The State Constitution RE UH

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Recent disputes over whether the Hawaii State Legislature has the legal power to overrule UH Board of Regents authority have intensified. Some might characterize this as a confusion over the limits, if any of legislative power.

The Basic issue is not whether the State Legislature should intrude into UH Constitutional autonomy, but whether it can do so without enacting a separate law that defines their intrusions as having statewide importance.

Hawaii's State Constitution states:

STATE CONSTITUTION ARTICLE X UNIVERSITY OF HAWAII Section 5. *The University of Hawaii is hereby established as the state university and constituted a body corporate. It shall have title to all the real and personal property now or hereafter set aside or conveyed to it, which shall be held in public trust for its purposes, to be administered and disposed of as provided by law. [Ren and am Const Con 1978 and election Nov 7, 1978]*

BOARD OF REGENTS; POWERS Section 6. *There shall be a board of regents of the University of Hawaii, the members of which shall be nominated and, by and with the advice and consent of the senate, appointed by the governor from pools of qualified candidates presented to the governor by the candidate advisory council for the board of regents of the University of Hawaii, as provided by law. At least part of the membership of the board shall represent geographic subdivisions of the State. The board shall have the power to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board. The board shall also have exclusive jurisdiction over the internal structure, management, and operation of the university. **This section shall not limit the power of the legislature to enact laws of statewide concern. The legislature shall have the exclusive jurisdiction to identify laws of statewide concern.** [Am HB 253 (1964) and election Nov 3, 1964; ren and am Const Con 1978 and election Nov 7, 1978; am SB 539 (2000) and election Nov 7, 2000; am SB 1256 (2005) and election Nov 7, 2006]*

It should be noted that Hawaii State Law reaffirms the authority of the UH Board of Regents and the role of the President. Specifically:

§304A-105 Powers of regents; official name. (a) The board of regents shall have management and control of the general affairs, and exclusive jurisdiction over the internal structure, management, and operation of the university. The board may:

(1) Appoint a treasurer and other officers as it deems necessary;

(2) Authorize any officer, elected or appointed by it, to approve and sign on its behalf any voucher or other document that the board may approve and sign;

(3) Delegate to the president or the president's designee the authority to render the final decision in contested case proceedings subject to chapter 91, as it deems appropriate;

(4) Purchase or otherwise acquire lands, buildings, appliances, and other property for the purposes of the university; and

(5) Expend any sums of money as, from time to time, may be placed at the disposal of the university from whatever source; provided that notwithstanding any other law to the contrary, all documents regarding expenditures and changes thereto, made by the board shall be disclosed in open meetings for the purpose of public comment; provided further that all expenditure requests, proposals, and any other budgetary documents used by the board at an open meeting shall be made available to the public at least six calendar days before the meeting. All lands, buildings, appliances, and other property so purchased or acquired shall be and remain the property of the university to be used in perpetuity for the benefit of the university. The board, in accordance with this section and other law, shall manage the inventory, equipment, surplus property, and expenditures of the university and, subject to chapter 91, may adopt rules, further controlling and regulating the same.

(b) The board of regents shall develop internal policies and procedures for the procurement of goods, services, and construction, consistent with the powers of the board set forth in section 304A-2672, and the goals of public accountability and public procurement practices, subject to chapter 103D.

(c) The board of regents may enter into concession agreements without regard to chapter 102. (d) The official name of the board shall be the board of regents, University of Hawaii. The board shall adopt and use a common seal by which all official acts shall be authenticated. [L 2006, c 75, pt of §2; am L Sp 2008, c 6, §3; am L 2010, c 82, §§3, 8; am L 2013, c 87, §3

These provisions represent one primary form of legislative expression of the powers of the BOR, and do not contain any definition of or designation of laws of statewide concern that would suggest ties or circumstances to limit the powers of the BOR to exercise “**exclusive jurisdiction over the internal structure, management, and operation of the university.**”

The Basic Legal Issues

The Legislature has reached into the internal operations of the University by removing a Dean, and this year by proposing to cut the salary of a campus provost, who is under contract with the UH through the Board of Regents. “We want to hold them accountable.” With this slim public statement, and a potential provision in the state budget that has not had a public hearing, it appears that many are prepared to accept the legal argument that there are essentially no legal limits as to legislative involvement in the internal management of the University of Hawaii.

Questions Pertinent to UH Autonomy

1. Does the constitutional provision “***This section shall not limit the power of the legislature to enact laws of statewide concern. The legislature shall have the exclusive jurisdiction to identify laws of statewide concern.***” essentially negate the other provisions of the constitution relating to the powers of the Board of Regents? Was it the intent of the electorate to essentially remove the powers of the BOR to manage the UH system?
2. Does this provision essentially negate already enacted state law (**§304A-105**) reaffirming the authority of the BOR?
3. Does the phrase “identify laws of statewide concern” limit the legislature to *identifying* specific laws (such as Gubernatorial emergency powers, or other extraordinary circumstances or emergencies) and does it require the Legislature to create a definition of “statewide concern” and or enact a state law (signed by the governor) that explicitly over rules BOR authority?
4. Are there any legal limits or guard rails on legislative decisions that appear to be in conflict with BOR authority?
5. Does a State Budget provision or proviso represent, by implication, such a state law, even if a particular provision has not received the requisite three readings?
6. Are there any Hawaii Supreme Court cases that relate to the constitutional authority of the BOR vs. the powers of the State Legislature?
7. In the case of a proposed cut in the compensation of an individual UH employee, would this be justifiable under the umbrella of a law of statewide concern? What are the legal and financial implications of legislative attempts to void an administrator’s contract?
8. Would the State Legislature have the power to prohibit the teaching of a particular course or content? If not, what is the legal principle that is different from exerting management of a UH administrator?
9. Given the State Constitutional creation of a BOR with its powers, how can the legislature “hold them accountable” outside of the usual mechanisms of enacting a new state law or the usual powers of the purse?
10. Could or should the Hawaii State Supreme Court clarify the limits, if any, or the legislative involvement in UH management, or at the least identify the appropriate and necessary mechanisms or processes to do so?

As disagreements intensify as to legislative powers vs. constitutional UH autonomy, this short police paper is designed to encourage a more collaborate consensus as to how to address such disagreements.