



**SB196**

**PROPOSING AN AMENDMENT TO THE HAWAII STATE CONSTITUTION  
TO REQUIRE THE REAPPORTIONMENT COMMISSION TO ESTABLISH  
A REAPPORTIONMENT PLAN TO DRAW DISTRICT LINES FOR  
THE MEMBERS OF THE OFFICE OF HAWAIIAN AFFAIRS BOARD OF TRUSTEES**  
Senate Committee on Hawaiian Affairs

February 2, 2021

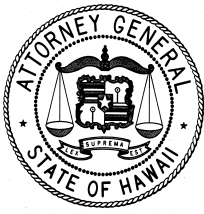
1:00 p.m.

Via Videoconference

The Administration of the Office of Hawaiian Affairs (OHA) will recommend that the OHA Board of Trustees offer **COMMENTS** on SB196, which proposes constitutional amendments that would alter the representative framework of the OHA Board of Trustees, from a statewide board comprised of island-resident and at-large seats, to a board apportioned across the state's four basic island units—Hawai'i; Maui, Moloka'i, and Lāna'i; O'ahu; and Kaua'i.

OHA has concerns over the loss of a dedicated OHA Moloka'i Trustee seat, which currently must be filled by a resident of the Hawaiian cultural kīpuka island of Moloka'i. OHA also notes that constitutional equal representation requirements, combined with the apportionment envisioned under this measure, may require a significant increase in the number of trustees on OHA's board. This would result in potential increases in OHA trust fund spending and impacts to governance from an expanded OHA Board of Trustees. While parallel reapportionment measures this session, namely SB195, would maintain OHA's current Board of Trustee composition at nine trustees, it is unclear how this would be possible given the equal representation requirements of the U.S. Constitution.

Mahalo nui loa for the opportunity to testify on this measure.



**WRITTEN TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTY-FIRST LEGISLATURE, 2021**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 196, PROPOSING AN AMENDMENT TO THE HAWAII STATE CONSTITUTION TO REQUIRE THE REAPPORTIONMENT COMMISSION TO ESTABLISH A REAPPORTIONMENT PLAN TO DRAW DISTRICT LINES FOR THE MEMBERS OF THE OFFICE OF HAWAIIAN AFFAIRS BOARD OF TRUSTEES.

**BEFORE THE:**

SENATE COMMITTEE ON HAWAIIAN AFFAIRS

**DATE:** Tuesday, February 2, 2021 **TIME:** 1:00 p.m.

**LOCATION:** State Capitol, Via Videoconference

**TESTIFIER(S):** **WRITTEN TESTIMONY ONLY.**  
(For more information, contact Lori N. Tanigawa,  
Deputy Attorney General, at 586-0618)

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Chair Shimabukuro and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments.

The purpose of the bill is to amend the Constitution of the State of Hawai'i to require the Reapportionment Commission to establish a reapportionment plan to draw district lines for the total number of members of the Board of Trustees of the Office of Hawaiian Affairs (OHA).

Instead of members being elected during an at-large statewide election in which all registered voters are permitted to vote to fill all of the seats on the OHA ballot, the bill would amend the Constitution of the State of Hawai'i to provide for an election in which only qualified voters of a district within a basic island unit are permitted to elect one of the nine OHA board members. The Department is concerned that the reapportionment of OHA's nine-member board among the four basic island units may fall short of the one-person, one-vote standard established by the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964). While there need not be an identical number of persons in each district, the states must make honest and good faith efforts to construct districts with equal numbers of persons, as practicable. Due to disparities in population sizes

among the basic island units, however, we believe that deviations from population equality in the reapportionment of the OHA Board may be required and, in some instances, be quite significant, potentially resulting in a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

The Department notes that the bill does not address how the current nine-member OHA board will transition to a completely new nine-member OHA board after reapportionment. Nor does it address the staggering of terms. The Department is concerned that, without such wording, there will be uncertainty as to how the current OHA board will transition to the new OHA board and all nine members will serve concurrent four-year terms following reapportionment.

If the Legislature decides to proceed with this bill, the Department recommends that, on page 6, lines 12 to 21, and on page 7, lines 1 to 3, the bill be amended as follows:

**“Section 5.** There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that the members shall be apportioned according to the provisions of Article IV. Regardless of whether or not a member is serving a term that would have extended past the election at which an apportionment plan becomes effective, the term of office of all members shall end at that election. The reapportionment commission shall, as a part of the reapportionment plan, assign two-year terms to half or a simple majority of the seats, whichever is greater, for the election immediately following the adoption of the reapportionment plan. The remaining seats shall be assigned four-year terms. The board shall select a chairperson from its members.”

The Department further recommends that, on page 7, lines 6 to 13 the bill be amended as follows:

“Shall the reapportionment commission be required to establish a reapportionment plan ~~[to draw district lines for the total number of]~~ that: (1) allocates the members of the board of trustees of the Office of Hawaiian Affairs ~~[to be reapportioned]~~

basic island units using the total number of permanent residents in each basic island unit and computed by the method of equal proportions, with no less than one member for each basic island unit[?]; and (2) establishes districts within each basic island unit in such manner that the average number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable?”

Even with the amendments, the Department is concerned that the reapportionment of the OHA board will fall short of the one person, one vote standard, and the Department respectfully asks the Committee to hold this bill.

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Unity, Equality, Aloha for all



To: SENATE COMMITTEE ON HAWAIIAN AFFAIRS  
For hearing Tuesday, February 2, 2021

Re: SB195 RELATING TO THE ELECTION OF MEMBERS TO THE BOARD OF TRUSTEES OF THE OFFICE OF HAWAIIAN AFFAIRS.

Amends the process for electing members to the Office of Hawaiian Affairs Board of Trustees. Requires the Reapportionment Commission to establish a reapportionment plan based on basic island units for the members of the Board of Trustees of the Office of Hawaiian Affairs so that they are elected according to their respective districts, rather than an at-large statewide election for each seat.

AND

SB196 PROPOSING AN AMENDMENT TO THE HAWAII STATE CONSTITUTION TO REQUIRE THE REAPPORTIONMENT COMMISSION TO ESTABLISH A REAPPORTIONMENT PLAN TO DRAW DISTRICT LINES FOR THE MEMBERS OF THE OFFICE OF HAWAIIAN AFFAIRS BOARD OF TRUSTEES. Amends the State Constitution to require the Reapportionment Commission to establish a reapportionment plan to draw district lines for the total number of members of the Board of Trustees of the Office of Hawaiian Affairs.

## TESTIMONY IN OPPOSITION

This testimony is in regard to both SB195 and SB196, concerning concepts which both bills have in common. No doubt the bills will be consolidated after more careful reflection which should have already been done.

The main topics addressed in this testimony:

1. Both SB195 and SB196 contain requirements that are blatantly unconstitutional under widely publicized federal court decisions from two decades ago. The writers and introducers of these bills are either woefully ignorant of the legal history or else willfully trying to stage an insurgency that violates the oath they swore, to support and defend the Constitution of the United States.
2. The obvious motive for redistricting OHA elections is to stop a 40-year history whereby the voters on O'ahu decide who will represent all the neighbor-island constituencies, due to the fact that O'ahu voters vastly outnumber the voters on any other island or even the total of all neighbor-island voters.
3. Under the 1-person 1-vote federal requirement, the number of voters must be roughly equal across all districts, and excessive gerrymandering to ensure particular racial outcomes will elicit intervention by the U.S. Attorney followed by federal court injunctions to force a more equitable redistricting. Several Southern states with long histories of racial discrimination remain under federal injunctions that they cannot engage in redistricting without approval from the Department of Justice under terms of the Voting Rights Act of 1965 which has been repeatedly extended.
4. Staggering: Institutional memory, and continuity of policy, could be lost if all 9 board members leave office at the same time. Currently either 4 or 5 of the 9 members remain in office for two more years after an election for the other 5 or 4 seats.

Further explanations of each topic.

1. Both SB195 and SB196 are unconstitutional under widely publicized federal court decisions from two decades ago. The writers and introducers of these bills are either woefully ignorant of the legal history or else willfully trying to stage an insurgency that violates the oath they swore, to support and defend the Constitution of the United States.

SB195 Section 2 says "No person shall be eligible for election or appointment to the board unless the person is Hawaiian and ..."

SB196, Section 5 says "There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians."

Rice v. Cayetano, 528 U.S. 495 (2000) was decided in a 7-2 decision by the U.S. Supreme Court in February 2000, which ruled that the right to vote for OHA board members cannot be racially restricted to Native Hawaiians.

Arakaki v. State of Hawaii was decided by Judge Helen Gillmor, U.S. District Court in Honolulu, No. 00-17213 and her decision was upheld by a 3-judge panel of the 9th Circuit Court of Appeals in San Francisco on December 31, 2002. The right to run as a candidate for the OHA board cannot be racially restricted to Native Hawaiians.

SB195 is unconstitutional under Arakaki.

SB196 is doubly unconstitutional under both Rice and Arakaki.

It is shocking to see a resurgence of desire to impose outright racist restrictions on who can vote for or stand as a candidate for the OHA board which is an agency of the State government, not an Indian tribe. Both the right to vote and the right to run as a candidate were litigated and decided two decades ago. I am angry to see such racism rear its ugly head again, and am shocked that the writers of these two bills and the legislators who introduced them and scheduled hearings on them are either woefully ignorant of the legal history or else willfully

trying to stage an insurgency that violates the oath they swore, to support and defend the Constitution of the United States.

2. The obvious motive for redistricting OHA elections is to stop a 40-year history whereby the voters on O'ahu decide who will represent all the neighbor-island constituencies. This happens because all registered voters vote for all the OHA seats. Five seats are reserved for candidates who must be residents of five specific islands: the 4 counties plus Moloka'i. But all voters regardless of where they live get to vote for all the candidates including the ones who must be residents of specific islands; and O'ahu voters vastly outnumber the voters on any other island or even the total of all neighbor-island voters.

3. Under the 1-person 1-vote federal requirement, the number of voters must be roughly equal across all districts, and excessive gerrymandering to ensure particular racial outcomes will elicit intervention by the U.S. Attorney followed by federal court injunctions to force a more equitable redistricting. Several Southern states with long histories of racial discrimination remain under federal injunctions that they cannot engage in redistricting without approval from the Department of Justice under terms of the Voting Rights Act of 1965 which has been repeatedly extended.

On March 31, 2020 the U.S. Census Bureau released a table displaying population numbers for each county for each year from 2010 through 2019.

<https://census.hawaii.gov/whats-new-releases/2019-county-population-estimates/>

Total State population in 2019 was 1,415,872. There are 9 OHA board members. Thus if the 1-person 1-vote principle is upheld, each board member should represent approximately 157,319 residents. Kaua'i County (including Kaua'i and Ni'ihau) had only 72,293 residents. So if Kaua'i gets to elect one OHA board member, it would have more than double the representation it should have under 1-person 1-vote. That would clearly be contrary to federal law. And under the districting rules proposed in SB195 and SB196, the problem could not be fixed by



extending Kaua'i's district boundary to include a portion of O'ahu or any other "basic island unit."

Another difficulty is that Maui had 167,503 residents, only slightly above 1/9 of the State's population, and would therefore be entitled to elect only one OHA board member. Moloka'i has only about 7400 residents, and is part of the Maui "basic island unit"; therefore Moloka'i, dearly beloved by Native Hawaiians as being "the most Native Hawaiian" island, would lose its own OHA board member which Moloka'i has unfairly had for 40 years. The people of Maui would now decide who will speak for Moloka'i on the OHA board. Walter Ritte might stage a protest riot over the "injustice" of having upper-class haoles from the mainland deciding what's best for the Native Hawaiians of Moloka'i!

There will be a strong temptation to count only "Native Hawaiians" for purposes of apportionment when redistricting. Don't try it! For evidence that this is a bad idea and probably unconstitutional, look at discussions during 2019 and 2020 regarding whether the federal decennial census could choose to count only U.S. citizens for reapportionment because only they have the right to vote; or whether to include permanent residents with "green cards", or whether all residents including illegal aliens must be counted for purposes of reapportionment and redistricting. Reread topic #1 in this testimony and be reminded that all registered voters in Hawaii, regardless of race, have the right to run as candidates, and vote, for OHA board members.

4. Staggering: Institutional memory, and continuity of policy, could be lost if all 9 OHA board members leave office at the same time. For 40 years either 4 or 5 of the 9 members remain in office for two more years after an election for the other 5 or 4 seats.

SB195 and SB196 ignore the issue of staggering, the issue of term length, and the issue of what to do with the 4 current "at large" board members during the redistricting transition period. The U.S. House of Representatives (435 members), and the Hawaii House of Representatives (51 members), have terms of two years; and all the representatives are up for election at the same time every two years.

Thus the "lower house" feels much more accountable and quickly subject to the changing desires of the voters. But when terms are longer, and members are fewer, there is staggering to ensure some measure of continuity. The Hawaii Senate (25 members) has terms of 4-years, staggered so that half the members are up for election in each even-numbered year. The U.S. Senate (100 members) serve terms of 6 years, and are staggered into three groups so that every two years all 33-34 members of just one group are up for election. The U.S. Supreme Court has lifetime terms, thus ensuring continuity and institutional memory, while turnover is slow but guaranteed by the fact that sooner or later each life will come to an end or each Justice will get too sick or weary to continue. O'ahu, with a 2019 population of 974,563, can expect to have 6 board members out of the 9. And unlike under the present system the O'ahu board members will owe their loyalty entirely to the residents of O'ahu who elected them instead of to all the people of Hawaii. There could be some nasty geographical turf battles not only between O'ahu and the neighbor islands but also infighting among the 6 regions of O'ahu (where will be their boundaries?).

For 40 years half of the OHA board members have faced re-election in every even-numbered year. The reapportionment committee envisioned in these bills must pay attention to the issue of staggering and designate which seats will be up for election in each 2-year general election cycle, because the current 4 "at large" members will no longer be elected by all Hawaii residents and must somehow be allocated to specific voting districts where some of them might currently not be residing.