

JON N. IKENAGA
STATE PUBLIC DEFENDER

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817

HONOLULU OFFICE
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817

APPELLATE DIVISION
TEL. No. (808) 586-2080

DISTRICT COURT DIVISION
TEL. No. (808) 586-2100

FAMILY COURT DIVISION
TEL. No. (808) 586-2300

FELONY DIVISION
TEL. No. (808) 586-2200

FACSIMILE
(808) 586-2222



STATE OF HAWAII
OFFICE OF THE PUBLIC DEFENDER

HAYLEY Y.C. CHENG
ASSISTANT PUBLIC DEFENDER

HILO OFFICE
275 PONAHAHAWAI STREET
SUITE 201
HILO, HAWAII 96720
TEL. No. (808) 974-4571
FAX No. (808) 974-4574

KONA OFFICE
75-1000 HENRY STREET
SUITE #209
KAILUA-KONA HI 96740
TEL. No. (808) 327-4650
FAX No. (808) 327-4651

KAUAI OFFICE
3060 EIIWA STREET
SUITE 206
LIHUE, HAWAII 96766
TEL. No. (808) 241-7128
FAX No. (808) 274-3422

MAUI OFFICE
81 N. MARKET STREET
WAILUKU, HAWAII 96793
TEL. No. (808) 984-5018
FAX No. (808) 984-5022

Testimony of the Office of the Public Defender to House Committee on Judiciary and Hawaiian Affairs re:

HB 389 Relating to Uncrewed Aircraft Offenses

Chair: Rep. David A. Tarnas, Vice Chair: Rep. Mahina Poepoe and Members of the Committee:

The Office of the Public Defender respectfully **opposes HB 389** for the following reasons:

HB 389 seeks to amend HRS section 711-1121 (1) by adding subsection (g) to read: “Uses an uncrewed aircraft in furtherance of the commission of a felony” and seeks to strike the exact same language from HRS section 711-1123 (1)(g). This simple change would make the use of an uncrewed aircraft in furtherance of the commission of a felony offense, a class A felony (punishable by 20 years in prison). Currently, the use of an uncrewed aircraft in the furtherance of a felony is a class C felony (punishable by 5 years in prison). The Office of the Public Defender believes this to be a gross deviation from the fair application of the criminal law based on the conduct of an individual defendant.

Currently, if a person commits the offense of using a drone to aid in the furtherance of the commission of a felony, they face, in addition to the felony itself, another class C felony for the use of the drone. Thus, if a person uses a drone to possess a dangerous drug in a small amount (they hide their drug pipe with residue in their drone), they face the possibility of 5 years in prison for the possession of the dangerous drug, and 5 years in prison for the use of the drone to aid in said possession. With the proposed change in the law sought by HB 389, the same person would face a 5-year prison term for possessing the same amount of a dangerous drug,

but then also face a **20-year** prison term for simply using the drone to aid in said possession, without there being any greater harm to the community. This creates a gross unfairness in treatment, merely for using a drone, without any justification in the law, or need to prevent the use of drones in the community. The best analogy would be to state that a person who commits a class C felony while parked in a car, should then also be charged with a class A felony simply because they used a car to aid in the commission of said felony offense.

Testimony by the Honolulu Prosecutor's Office on companion bill SB 282, expressed that the statutory change proposed herein is necessary to alleviate a Modica issue, which references State v. Modica, 567 P.2d 420 (1977). In Modica, Justice Levinson stated that in certain situations a defendant would have to be prosecuted by the more lenient statute as opposed to the more severe statute when all the elements of the offenses are "exactly" the same. Thus, to insure that no Modica issue would arise herein, simply adding language to the current statute would be adequate, instead of creating the possible unjust results proposed by HB 389. By adding the following language to HRS section 711-1123(1)(g) after the word "felony", the possible Modica issue is eliminated: "not otherwise listed, described or enumerated in HRS 711-1121, 711-1122 or 711-1123". This proposed language clearly expresses the legislature's intent to have HRS 711-1123(1)(g) as a catch all for any felony offense not otherwise defined as more serious and punished as such.

Furthermore, HB 389 would give to the prosecution an unfair bargaining chip in plea negotiations, wherein a defendant would have to be concerned about a 20-year sentence if they chose to have a trial for a simple Class C felony, simply because a drone was involved.

Thank you for the opportunity to comment upon this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
KA 'OIHANA O KA LOIO HO'OPI'I
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 768-7400 • FAX: (808) 768-7515 • WEBSITE: www.honoluluprosecutor.org

STEVEN S. ALM
PROSECUTING ATTORNEY
LOIO HO'OPI'I



THOMAS J. BRADY
FIRST DEPUTY PROSECUTING ATTORNEY
HOPE MUA LOIO HO'OPI'I

THE HONORABLE DAVID A. TARNAS, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-Third State Legislature
Regular Session of 2025
State of Hawai'i

February 18, 2025

RE: H.B. 389; RELATING TO UNCREWED AIRCRAFT OFFENSES.

Chair Tarnas, Vice Chair Poepoe, and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney for the City and County of Honolulu submits the following testimony in **strong support** of H.B. 389. This bill is part of the Department's 2025 legislative package, and we thank you for hearing it.

H.B. 389 increases the penalty for the use of a drone to commit a felony from a Class C offense to a Class A offense. Drones are highly accessible, lightly regulated, and permit remote operations at long distances.¹ Across the United States, creative and malicious criminals have already employed drones to further a wide range of felonies. Hawai'i cannot be caught by flat-footed by this emerging technology.

RAND recently warned of the increasing use of drones to deliver dangerous contraband into prisons.² In California, drones have reportedly been used to case homes before burglaries.³ In North Carolina, a registered sex offender used a drone to evade legal restrictions on his access

¹ See Vanessa Swales, *Drones Used in Crime Fly Under the Law's Reach*, N.Y. TIMES (online), Nov. 3, 2019, available at <https://www.nytimes.com/2019/11/03/us/drones-crime.html> ("Drones pose novel and difficult problems for law enforcement. They are widely available, lightly regulated and can be flown remotely by an operator far away from the crime scene. They have already been put to a host of nefarious uses, from smuggling contraband into prisons to swarming F.B.I. agents who were preparing for a raid.").

² See Joe Russo, Dulani Woods, Michael J.D. Vermeer, & Brian A. Jackson, *Countering the Emerging Drone Threat to Correctional Security*, RAND CORPORATION, Mar. 13, 2024, available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR100/RR108-21/RAND_RRA108-21.pdf

³ Aila Slisco, *California Burglars May Be Using a Drone in Recent Crime Spree: Sheriff*, Newsweek (online), Nov. 26, 2024, available at <https://www.newsweek.com/california-burglars-may-using-drone-recent-crime-spree-sheriff-1992085>

to children.⁴ And in Pennsylvania last summer, Thomas Crooks used a drone to scout the fairgrounds before he shot President Trump.⁵

HRS § 711-1123(1)(g) currently provides that the use of a drone to commit a felony is a Class C offense. Under the *Modica* rule, where two crimes have exactly the same elements, but different sentences, the more lenient penalty applies.⁶ So by grading the use of a drone to commit a felony as a Class C offense, *all* felonies aggravated by the use of a drone receive a Class C sentence.

That means lighter sentencing even where the Legislature has specifically authorized stiffer penalties. For example, HRS § 711-1122(1)(c) makes it a Class B felony offense to commit second-degree assault with the use of a drone. But because second-degree assault is a felony and the use of a drone to commit a felony is a Class C offense, the lesser penalty control.

H.B. 389 fixes this problem. By reclassifying the use of a drone in the commission of a felony as a Class A offense, it first provides a strong deterrent to criminal innovation with drones. And under the *Modica* rule, the Legislature could still designate a lighter sentence for specific felonies where it found a Class A sentence too harsh. To take the earlier example, if H.B. 389 passed, then HRS § 711-1122(1)(c) would become a Class B felony again—exactly as the statute says.

The Department strongly encourages this Committee to pass H.B. 389.

Thank you for the opportunity to testify.

⁴ Peter N. Borden, *The Peering Predator: Drone Technology Leaves Children Unprotected from Registered Sex Offenders*, 39 CAMPBELL L. REV. 167, 168-69 (2017).

⁵ Edward Helmore, *Gunman at Trump Rally Flew Drone Over Fairgrounds Earlier on Day of Shootings*, THE GUARDIAN (online), July 20, 2024, available at <https://www.theguardian.com/us-news/article/2024/jul/20/thomas-matthew-crooks-drone-trump>

⁶ *State v. Sasai*, 143 Hawai‘i 285, 295, 429 P.3d 1214, 1224 (2018) (“A defendant may not be convicted of an offense that carries a harsher penalty than another offense containing the same elements[.]”); *State v. Modica*, 58 Haw. 249, 250-51, 567 P.2d 420, 421-22 (1977).

Testimony of Danny de Gracia, II
in **SUPPORT** of
HB 389 Relating to Uncrewed Aircraft Offenses

to be heard before the
House Committee on Judiciary & Hawaiian Affairs
Wednesday, February 19, 2025
2:00 p.m., Conference Room 325

Chair Tarnas, Vice Chair Poepoe, Honorable Members:

The purpose of HB 389 is to prevent the use of “uncrewed aircraft” for the commission of a felony.

I strongly support this measure because of the dangerous implications that rapid advancements in remotely piloted vehicles and artificial intelligence have posed for public safety. However, I would like the Committee to know that there are several problematic issues that need to be addressed by the legislature, and potentially Congress as we attempt to regulate this area.

1. Surveillance and Enforcement

- The immediate problem that emerges when we enact a law like this is, how do we determine who owns and who operates an “uncrewed aircraft” that is used in the commission of a felony? The assumption, though not stated, seems to be that police would be able to observe, and then catch or interdict a suspect in the act of controlling an uncrewed aircraft for illegal purposes. However, because these aircraft may operate autonomously under artificial intelligence or at long ranges, the possibility of catching someone standing a few feet away from the site of a crime holding a remote control is unlikely.
- There would need to be some kind of surveillance system in place that either tracks the aircraft to its origin or is able to identify, through some kind of signals interception process, the individual who is controlling it. This raises a number of questions of how police would be able to prove who the operator was. How would a court be able to prosecute someone charged with this crime?

2. Current Legal Framework

- While it is admirable that we are creating a law to deter individuals from misuse of remotely piloted or autonomous aircraft, there are currently very thin legal provisions that would allow local police to respond to an armed drone, for example, that were observed flying towards a target. Federal Aviation Administration (FAA) regulations currently allow *some* federal law enforcement the authority to disable or destroy uncrewed aircraft but provisions are extremely limited in scope.

The “Preventing Emerging Threats Act of 2018” (Pub.L. 115-254) primarily empowers the U.S. Department of Homeland Security to disrupt, seize, or use reasonable force against unmanned aircraft systems for national security special events, mass state gatherings, or active federal law enforcement responses. But state and local law enforcement are not empowered under this framework.

My recommendation is that while this committee should pass HB 389, it should also consider making amendments that establish a working group or task force to study what the State of Hawaii and our local counties would need to be able to enforce this law, including, but not limited to changes in federal law or federal regulations; technological systems; and even training and hiring of special personnel or procurement of special platforms to enforce this.

Thank you for the opportunity to testify.

HB-389

Submitted on: 2/14/2025 9:20:20 PM

Testimony for JHA on 2/19/2025 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
B.A. McClintock	Individual	Support	Written Testimony Only

Comments:

Please support this common sense bill. Mahalo.

HB-389

Submitted on: 2/16/2025 8:44:46 PM

Testimony for JHA on 2/19/2025 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Ruth Love	Individual	Support	Written Testimony Only

Comments:

I also would like an addendum that says operating an unmanned aircraft over private property without the owners consent is illegal. They use this to shop when they are thieves and everyone is aware of it. We need new laws to protect property owners from this new kind of invasion of privacy.

Thank you

Mrs Ruth Love

HB-389

Submitted on: 2/18/2025 4:19:59 PM

Testimony for JHA on 2/19/2025 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Dara Carlin, M.A.	Individual	Support	Written Testimony Only

Comments:

Stand in Support