

# **ELECTED HAWAIIAN HOMES COMMISSIONERS? WEIGHING THE OPTIONS AFTER *RICE***

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## FOREWORD

This study was generated in response to H.C.R. No. 101, H.D. 1 (2000). This concurrent resolution asked the Legislative Reference Bureau to study issues relating to changing the appointed board of the Hawaiian Homes Commission to an elected board.

The Bureau wishes to extend its appreciation to those who assisted in the study, especially Dwayne Yoshina, Chief Elections Officer and Robin Yokooji, Office of Elections; and Raynard Soon, Chairman, Hawaiian Homes Commission.

Wendell K. Kimura  
Acting Director

November 2000

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# Chapter 1

## BACKGROUND

### Nature of Study

During the Regular Session of 2000, the Legislature adopted H.C.R. No. 101, H.D. 1, entitled “Requesting a Study to Ascertain the Feasibility of Amending the Hawaiian Homes Commission Act to Allow for Direct Election of Members.” A copy of the resolution is contained in Appendix A.

### Objective of the Study

The resolution requested the Legislative Reference Bureau to determine the legal issues involved in amending the Hawaiian Homes Commission Act to allow for direct election of the HHC members by their beneficiaries, while preserving the system of regional representation contained in section 202(a) of the Act. Specific questions that the Bureau was asked to address were:

- (1) Whether such an amendment to the Hawaiian Homes Commission Act would require the consent of Congress;
- (2) Whether such an amendment would require an amendment to the Hawaii Constitution;
- (3) Whether such an amendment would be compatible with the United States Constitution; and
- (4) If such an amendment were enacted, who should be allowed to run, who to vote, how the seats should be apportioned, and how the election should be financed.

### Organization of the Study

The study is organized into seven chapters. The first chapter is this introduction. The second chapter sets forth the background of the resolution and discusses the impact of the Rice v. Cayetano and Arakaki v. State cases. The third chapter addresses procedural issues, including whether congressional consent would be needed for an elected board and whether a state constitutional amendment would be needed. It also discusses whether an elected board amendment complies with the United States Constitution. The fourth chapter analyzes who should be allowed to run, including five voting models. The fifth chapter discusses financing the election and the cost of operations of an elected Hawaiian Homes Commission. The sixth chapter offers

an alternative, an advisory committee to the current appointment process, as a way of including Native Hawaiian input while avoiding problems relating to elections. The seventh chapter contains the findings and recommendations.

## Chapter 2

### **IMPACT OF RICE V. CAYETANO AND ARAKAKI V. STATE**

#### **Background**

The issue of electing, rather than appointing, members of the Hawaiian Homes Commission, has been under considerable discussion in recent years. Most recently, in the 1999 session, House Bill No. 235, H.D. 2, S.D. 2, which provided for an elected Hawaiian Homes Commission, was held in committee. As a result, the President of the Senate and the Speaker of the House of Representatives jointly requested the Legislative Reference Bureau by memorandum dated July 19, 1999 to examine the issues related to an elected Hawaiian Homes Commission. On January 14, 2000, the Bureau responded with a memorandum by research attorneys Susan Jaworowski and Mark Rosen. The President and the Speaker consented to making this memorandum public, and it can be found on the Bureau's website at:

<http://www.state.hi.us/lrb/rpts00/hhcmemo.pdf>.

Several months after the Bureau memorandum was issued, the Rice v. Cayetano decision was handed down by the United States Supreme Court. This case, as will be discussed in chapter 3, had a significant impact on legal issues addressed in the Bureau's memorandum. In House Concurrent Resolution No. 101 (2000), the Legislature asked the Bureau to revisit similar issues. The Senate Ways and Means Committee specifically noted that a review of the issue must take the Rice decision into consideration.<sup>1</sup> This researcher has drawn on the Bureau's preceding memorandum in continuing the discussion of these issues, and wishes to recognize Mark Rosen for his prior research in this area.

The issues specifically requested in H.C.R. No. 101 are:

- Studying the legal issues involved in allowing election of Hawaiian Homes Commission members by the beneficiaries while retaining the same system of regional representation;
- Whether such an amendment would require consent of the United States Congress;
- Whether such an amendment would require a state constitutional amendment;
- Whether such an amendment would be compatible with the United States constitution;



- If an election were allowed:
  - Who should be allowed to run,
  - Who should be permitted to vote,
  - How the seats should be apportioned, and
  - How such an election should be financed.

The answers to many of these questions differ post-Rice.

### **The Impact of Rice v. Cayetano**

The legality and structure of an elected Hawaiian Homes Commission are determined in large part by the case of Rice v. Cayetano.<sup>2</sup> This case challenged the voting scheme for the Office of Hawaiian Affairs in which the OHA voting pool was restricted to those who were of Hawaiian ancestry. The United States Supreme Court handed down its decision in Rice on February 23, 2000. The Court found unconstitutional the then-current system in Hawai'i of allowing only those who claimed Hawaiian blood to vote for trustees of the Office of Hawaiian Affairs (OHA). The Court stated that under the Fifteenth Amendment to the United States Constitution, a state is prohibited from denying or abridging the right to vote on account of race. The Court rejected the State's and amicus' arguments that the Hawaiian-only voting scheme is based on ancestry and not race, as it found that ancestry, in this situation, was a just proxy for race.

The State of Hawaii put forth three grounds for its position that the OHA elections were constitutional. First, the State took the position that exclusion of non-Hawaiians from voting was permitted under the Mancari case that allowed non-Indians to be excluded from Indian tribal elections. The Court rejected this argument, stating that tribal elections are the "internal affairs of a quasi sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii."<sup>3</sup> The Mancari case law thus does not apply to state-sponsored elections such as OHA's.

The State's second argument was that limiting the election to Hawaiians was permissible under the Salyer line of cases, which held that the one person-one vote principle did not apply to certain special purpose districts. In Salyer, the State of California created a water storage district in the Tulare Lake area, and permitted only landowners within the district to vote for the members of the board, and gave more votes to the landowners who owned more property.<sup>4</sup> The Court rejected the applicability of Salyer to the Rice situation on the ground that Salyer applied to a Fourteenth Amendment case, but not to Rice, which is a Fifteenth Amendment case.<sup>5</sup>

The State's third argument was that the voting restriction to Hawaiians did nothing more than ensure an "alignment of interests between the fiduciaries and the

beneficiaries of a trust.”<sup>6</sup> The Court rejected this as it found that it was not clear that the fiduciaries and beneficiaries are in alignment. While the bulk of the funds are earmarked for Native Hawaiians, the voters for OHA are largely composed of Hawaiians.<sup>7</sup>

The Supreme Court's basic concern can be summed up in its finding that it is demeaning to have a system premised on the concept that citizens of a specified race are more qualified than others to vote on certain matters.<sup>8</sup> The United States Supreme Court thoroughly rejected the OHA voter restriction.

How does Rice affect the concept of an elected Hawaiian Homes Commission? In Rice, the Court rejected a scheme by which voters of only one race (Hawaiian) voted for state officials (the OHA trustees); in the proposed Hawaiian Homes Commission election, the Legislature is also contemplating having voters of only one race (Hawaiian) vote for state officials (the Hawaiian Homes Commission members). The situations are extremely close, especially to those outside the State. There are some distinctions between OHA and the Hawaiian Homes Commission that may appear significant to Hawaii residents, the most important of which is that if the trustees were limited to the same class as the beneficiaries (all Native Hawaiians), there would be more congruity between them. The lack of congruity between OHA trustees and beneficiaries was noted negatively in Rice, as stated above.

However, distinctions that may seem significant to Hawaii residents seem to be largely lost on the United States Supreme Court. For example, on page two of the slip opinion, the Court states that Rice, who is Caucasian, is “a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term.” Perhaps this is “well-accepted” on the Mainland, but in Hawaii the only “well-accepted use” of the term Hawaiian is for those with Hawaiian ancestry. With the Supreme Court tone-deaf to nuances that seem crystal-clear and important to the people of Hawai`i, it appears that the thrust of the Court's focus is on the perceived violation of the Fifteenth Amendment and not Hawaiian rights and issues. The Court very strongly iterates its distaste for racially-based voting, stating that it is a “*forbidden* classification ... [as] it *demeans* the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”<sup>9</sup> (Emphasis added.) The Court adds that use of racial classifications is “*corruptive* of the whole legal order democratic elections seek to preserve.”<sup>10</sup> (Emphasis added.)

The Court further explained its rejection of the State's position on the ground that it rests “on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters.”<sup>11</sup> The emotional level of the language used by the Court indicates that it believes that upholding the Constitution requires rejecting a racially-based system for any state election. Therefore, after Rice, an election system for a state office limited to voters who are Hawaiian beneficiaries (or any racial group that did not encompass all voters) will clearly not pass constitutional muster.

### **Arakaki v. State**

In July 2000, on the heels of the Rice decision, a complaint was filed in federal district court, Arakaki et al. v. State of Hawaii et al.,<sup>12</sup> to strike down the requirement that the OHA trustees be of Hawaiian ancestry.<sup>13</sup> This is a different issue than the one in Rice, which concerned the restrictions on voters, not trustees, and was not covered by the Rice decision. The plaintiffs clearly hoped to build on Rice<sup>14</sup> and use it as a means of removing the racial requirement applicable to the trustees. On September 19, 2000, the Hawaii federal district court granted the plaintiffs' motion for summary judgment, permitting non-Hawaiians to run as OHA trustees. At the time this report was written, it was unclear whether the State or OHA, which joined the case as an intervenor, would appeal that decision.

As a result of the Arakaki decision, an elected Hawaiian Homes Commission would probably have to remove the qualification that four of the commission members be Hawaiian. While it may be argued that the majority of the board is open to non-Hawaiians and that the restriction on the qualifications of the four is necessary to the purposes of the trust, the court in Arakaki used broad language in Part I of its analysis that would appear to reject this or any distinction short of open participation for all seats. An elected board would thus be open to candidates of all races, to be voted on by voters of all races.

Given the requirements placed on the State by Rice and Arakaki decisions, the concept of an elected board may be less desirable to the beneficiaries. Hawaiians and Native Hawaiians together comprise less than 21% of the state residents, with Native Hawaiians approximately 8% of the total number of residents.<sup>15</sup> The Native Hawaiians, even if joined by the Hawaiians, could consistently be outvoted as a bloc. The Hawaiian Homes Commission could thus end up being controlled by elected commission members who are indifferent to the Hawaiians' special status, or who are actively opposed to the program because it benefits only Hawaiians, like the self-proclaimed "anti-OHA" candidate in the Arakaki lawsuit.<sup>16</sup> One of the plaintiffs in the Arakaki case, who wants to be an OHA trustee, has already told the media that he wants to disband OHA and that he is the "anti-OHA" candidate. OHA was created in response to concerns that the State was not fully honoring its trust obligations to native Hawaiians under the Admissions Act. To permit the OHA trust to be taken over by trustees who want to disband it would place the State in jeopardy in relation to that agreement.

### **Endnotes**

1. Standing Committee Report No. 3577 on H.C.R. No. 101, H.D. 1 (2000).
2. Rice v. Cayetano, 120 S.Ct. 1044 (2000).
3. Rice, slip opinion at 24.
4. The Salyer voting scheme was found to be constitutional because (1) the district had a special limited purpose that had a disproportionate effect on landowners as a group; (2)

the board did not exercise “normal government” authority; (3) the expenses of the district are funded solely by assessments against landowners, so it is “not irrational” to allow only they who are affected to vote; (4) the interests of lessees differ from that of landowners; and (5) the amount of wealth of the landowner is not the reason for giving large landowners more votes: it is the fact that the more land one owns, the more one is assessed (the higher the expenses) that justifies giving larger landowners more votes.

5. The Court stated: “The question before us is not the one-person one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment.” Rice, slip opinion at 26.
6. Rice, slip opinion at 26.
7. In the OHA statute, “Native Hawaiian” means any person who is at least half Hawaiian by blood. “Hawaiian” means those with any amount of Hawaiian blood, section 10-2, Hawaii Rev. Stat. This is somewhat different from the way the terms are used in the Hawaiian Homes Commission Act. “Native Hawaiians” are those with half or more Hawaiian blood, but the term “Hawaiians,” while not defined in the Act, is used to mean persons who are less than fifty percent Hawaiian by blood. Compare Hawaiian Homes Commission Act, 1920, sections 201 (defining “native Hawaiian”), 208(5) (leases transferable to “a native Hawaiian or Hawaiians”), 209 (permits successor spouse of child who is “at least one-quarter Hawaiian”).
8. Rice, slip opinion at 20.
9. Id.
10. Id.
11. Id. at 27.
12. Arakaki et al. v. State of Hawaii et al. (D. Haw. No. CV00-00514 HG/BMK), filed July 25, 2000.
13. “Lawsuit filed to open OHA seats to all races,” The Honolulu Advertiser, July 26, 2000:  
  
<http://the.honoluluadvertiser.com/2000/Jul/26/localnews13.html>
14. Id. According to the The Honolulu Advertiser, “Honolulu lawyer H. William Burgess, who represents the group, said the high court made it clear that the restriction on the OHA trustees is presumed to be unconstitutional.”
15. Hawaii, Department of Business, Economic Development, and Tourism, State of Hawaii Data Book 1998, Table 1.29 (figure as of 1998).
16. Supra note 13.

## Chapter 3

### PROCEDURAL ISSUES

#### **Is Congressional Consent Necessary for an Elected Commission?**

The Hawaiian Homes Commission is the governing body of the Department of Hawaiian Home Lands, with the chairperson of the Hawaiian Homes Commission serving as the chief executive officer of the department. The resolution asks whether allowing direct election of Hawaiian Homes Commission members would require the consent of Congress. The brief answer is that the consent is probably not required, but notice to Congress is required, and Congress can then decide if it needs to consent.

The Hawaiian Homes Commission Act is not a state statute. At the time it was entered into, it was an Act of Congress.<sup>1</sup> At statehood, the Act became a compact between the federal government and the new state.<sup>2</sup> In 1990, the State enacted a purpose section to the law, section 101, in which the State acknowledged its fiduciary duties to the Native Hawaiian beneficiaries of the Act. That Act is now construed as a state constitutional provision rather than an Act of Congress, but Congress still retains the right to approve of changes to the law pursuant to Article XII, section 3 of the state constitution. That section states that the provisions of the Hawaiian Homes Commission Act are subject to amendment or repeal only with the consent of Congress, except for several specified sections which may be amended constitutionally or statutorily. These sections include section 202, which sets forth the nomination and appointment provisions of the Hawaiian Homes Commission members. This language enables the State to change to an elected system without congressional approval.

At least one study on this issue, the 1998 Bay report prepared for the Department of Hawaiian Home Lands,<sup>3</sup> agrees with the interpretation that the Board can be changed from an appointed board to an elected board without the need for Congressional approval. However, the Bay report also notes that a 1987 agreement between the State and the federal government requires that all amendments to the Hawaiian Homes Commission Act be submitted to the U.S. Secretary of the Interior for review, along with the State's opinion as to whether congressional approval is needed.<sup>4</sup> The Secretary will then transmit the amendment to Congress with the Secretary's own recommendation about whether congressional approval is needed.<sup>5</sup> The end result, pursuant to this agreement, is that the amendment will have to be submitted to the Secretary, and it will be the Secretary's decision whether to send it on to Congress for review or approval.

Thus while under existing law, congressional approval is probably not needed, the U.S. Secretary of the Interior has the authority under the agreement with the State to send it to Congress for its review or approval.

## Would an Elected Hawaiian Homes Commission Require an Amendment to the Hawaii State Constitution?

Yes, it would. The Hawaiian Homes Commission portion of the state constitution itself gives no guidance in this area: it permits changes to the Hawaiian Homes Commission Act to be made “in the constitution, or in the manner required for state legislation.” It does not specify one or the other. However, other language in the state constitution requires the heads of principal departments to be nominated and appointed by the governor with the advice and consent of the Senate.<sup>6</sup>

This conflict is clearly explained in the Bay Report:<sup>7</sup>

...Article XII, Section 3, of the State Constitution provides that §202 of the Hawaiian Homes Commission Act and other provisions relating to administration can be amended in the Constitution or in the manner required for State legislation.

Article V, Section 6, of the State Constitution, however, provides:

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor.... Such board, commission or other body may appoint a principal executive officer who... may be removed by a majority vote of the members appointed by the governor. (Emphasis added.)

At a joint committee hearing on H.B. No. 3919, H.D. 3, before the Senate Committees on Hawaiian Affairs and on the Judiciary, on March 19, 1996, the State Attorney General's office testified that an elected Hawaiian Homes Commission would violate the provisions of Article V, Section 6, of the State Constitution. Therefore, a constitutional amendment would be required to authorize the election of the Hawaiian Homes Commission.

Other commentators disagree. These commentators cite §§4 and 7 of the Admission Act, which required that the provisions of §4 be automatically adopted as part of the State Constitution upon approval of Statehood by the electorate. Statehood was approved and Article XII, Section 3, of the State Constitution is, in fact, the provisions of §4 of the Admission Act. Therefore, it is argued: Article XII, Section 3, which specifically allows the amendment of Section 202 of the Hawaiian Homes Commission Act in the manner required for State legislation, supersedes the more general requirements of Article V, Section 6.

In addition to the statutory construction argument noted above, commentators have noted that the fundamental issue involved is the right of self-determination of indigenous peoples. This right has been acknowledged by both

the United States and the international community. Therefore, despite an arguable conflict between the Admission Act and Article XII, Section 3, on the one hand, and the provisions of Article V, Section 6, on the other; the Article V, Section 6 [provisions], should not be allowed to impede the implementation of an elected Hawaiian Homes Commission as an element of self-determination. Indeed, these commentators believe the State has an affirmative duty to take an active role in assisting indigenous people's realization of self-governance.

The Hawaiian Homes Commission and the Department of Hawaiian Home Lands are unique in U.S. government. The obligations under the Hawaiian Homes Commission Act were accepted by the State of Hawaii as a condition of statehood and do involve the status of an indigenous people. There is no clearly established legal precedent to settle this issue. Thus, it could be strongly contested and require resolution by a court of law.

Although there are strong arguments on both sides of this issue, while there is no legal precedent in Hawai'i, there is procedural precedent. When the board of education was changed from an appointed to an elected board, a constitutional amendment was found necessary to avoid conflict with this provision.<sup>8</sup> In addition, the state Attorney General, as noted in the Bay Report, has testified that an elected Hawaiian Homes Commission may violate the provisions of Article V, Section 6, of the Constitution (see Appendix B). Accordingly, the Bureau recommends that prior practice and the Attorney General's opinion be followed, and a state constitutional amendment be used as the vehicle for making this change. This approach is preferable to assuming that an amendment is not needed and running the risk of litigation.

### **Would Such Amendment “Be Compatible” with the United States Constitution?**

The intent behind this question, which was asked before the Supreme Court issued the Rice opinion, was whether an election by voters who were limited to those of Hawaiian ancestry would be constitutional. Post-Rice, it is clear that such amendment would not be compatible with the U.S. Constitution. The election format discussed in this memo will avoid the Rice issue by considering only an election that is open to all voters of the State.

### **Endnotes**

1. Hawaii Const., Art. XII, sec. 1 et seq.
2. An Act to Provide for the Admission of the State of Hawaii into the Union (Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4), section 4.
3. Maile and John Bay, Report of the Hawaiian Homes Commission in Response to H.C.R. No. 135 (1998), prepared for the Department of Hawaiian Home Lands (Honolulu: December 1998).

PROCEDURAL ISSUES

4. United States Department of the Interior, Memorandum to the Secretary, from Emily S. DeRocco, Assistant to the Secretary and Director of External Affairs, "Proposed Procedure for Obtaining the Consent of the United States to Amendments to the Hawaiian Homes Commission Act," dated August 21, 1987. See also letter of Governor John Waihee to Emily S. DeRocco, Assistant to the Secretary and Director of External Affairs, dated July 22, 1987.
5. See Appendix C, containing the 1987 correspondence between the United States Department of the Interior and Hawaii Governor John Waihee setting forth this agreement, particularly the memorandum from Emily DeRocco, Assistant to the Secretary and Director of External Affairs to the Secretary, dated August 21, 1987.
6. Hawaii Const., art. V, sec. 6.
7. Supra note 3, at 38-39.
8. Testimony of the Attorney General on H.B. No. 3919, H.D. 3 (1996), an earlier bill that sought to change the Hawaiian Homes Commission board from an appointed to an elected one.



## Chapter 4

### APPORTIONMENT AND AT-LARGE VOTING SYSTEMS

#### How Should Representatives be Chosen?

The resolution requests the Bureau to study an election system that “preserv[es] the system of regional representation embodied in the Hawaiian Homes Commission Act[.]” That system provides for nine members, three who are residents of the City and County of Honolulu, two who are residents of the County of Hawai`i (one from east Hawai`i and one from west Hawai`i), two who are residents of the County of Maui (with one of those a resident of Moloka`i), one from the County of Kaua`i, and the last who has no county designation but is the chairperson of the commission. Following this directive for an appointed board is easy: following it for an elected board can be difficult due to the one person-one vote principle.

The one person-one vote principle is derived from the Fourteenth Amendment, and means that in an election for a specified number of representatives, all representatives shall have approximately the same number of voters in their respective voter pools.<sup>1</sup> This is why OHA voting, for example, is set up with members who are designated to represent specified counties but who are voted on by all eligible voters. By allowing each representative to have the same pool of voters, the one person-one vote criterion is preserved.

The 1998 Bay Report<sup>2</sup> puts forth the interesting proposition that the one person-one vote requirement possibly would not apply to an elected HHC, as:

- (1) The process may be viewed as an internal state government selection to run a department;
- (2) The Hawaiian Home Land’s land base is arguably the equivalent of a “special district” for which the strict applicability of the principle may not apply; or
- (3) As a trust for the benefit of an indigenous people, the courts might be willing to be more flexible.<sup>3</sup>

These grounds appear shaky post-Rice. The first and third arguments would also apply to OHA, and the U.S. Supreme Court in Rice did not view that case as a mere internal selection process and also was not swayed by any consideration of trust principles applying to indigenous people. The second ground was brought up and disposed of briefly in Rice, with the Supreme Court saying that it was “far from clear” that the Salyer line of cases pertaining to voting in a special purpose district such as an irrigation district “would be at all applicable” to statewide elections, and that even if it

did, compliance with the Fourteenth Amendment’s one person-one vote requirement did not excuse non-compliance with the Fifteenth Amendment.<sup>4</sup>

The grounds proposed by the Bay Report are by no means certain to persuade a court, and as they apparently run counter to the one person-one vote principle adopted by the United States Supreme Court, disregarding them would be sure to invite a lawsuit. It would be the safer course to meet the one person-one vote standard.

**1. Model A: Each County Elects Its Own Representatives Using Current Regional Representation**

If a system is desired in which each county or major island elects its own representatives, the one person-one vote requirement will be violated using the current structure. Given the population disparities between the counties, a commission with members designated as they are in current law -- three from Honolulu, two from Hawai`i, one from Maui, one from Moloka`i, and one from Kaua`i -- will under-represent the Honolulu voters and over-represent those of Moloka`i and Kaua`i. Using the number of residents on each of the major islands<sup>5</sup> and the current Hawaiian Homes Commission representational scheme for an election, the one-person one-vote rule is clearly violated, as the representation would range from 1 to 6,838 voters per board member to over 1 to 280,857 voters per board member. Even if the ninth member of the board is designated to represent O`ahu, the range of voters per representative still runs from 1 to 6,838 to 1 to 216,143, an obvious disparity.

**Table 1**  
**VOTERS PER CURRENT NUMBER OF**  
**HAWAIIAN HOMES COMMISSIONERS**  
**(by Island)**

<b>Island</b>	<b>Resident Population (1999 State Data Book Figures)</b>	<b>Number of Members</b>	<b>Number of Voters per Representative</b>
Hawai`i	142,390	2	71,195
Maui	115,157 <sup>6</sup>	1	115,157
Moloka`i	6,838 <sup>7</sup>	1	6,838
Honolulu	864,571	3 (or 4) <sup>8</sup>	280,857 (216,143)
Kaua`i	56,539	1	56,539

**2. Model B: Each County Elects Its Own Representatives In Compliance with the One Person-One Vote Rule**

In this model, each county would elect its own representatives, but in compliance with the one person-one vote requirement. The drawback to this model is that because Honolulu is so populous, the majority of representatives would have to be from

Honolulu, giving those representatives the opportunity to always overrule the rest of the islands. If the size of the commission was expanded to allow representatives to be selected by island, given the ethnicity breakdowns by county in 1998, the most recent date for which we have the statistics,<sup>9</sup> the breakdown would be one representative for Kaua`i, two for Maui county (the Moloka`i representative would have to be rolled into the Maui representatives as Moloka`i by itself is too small to qualify for a representative), two for Hawai`i and thirteen for Honolulu. But under this scenario, even if all the neighbor island representatives banded together to vote, they would still be outnumbered 5 to 13 by Honolulu. This may be considered undesirable and unfair, given that the majority of home lands are on the neighbor islands.

### **3. Model C: Equally Districted Representatives (Legislative Model)**

A third option would be to redistrict the Hawaiian Homes Commission, eliminating the nine person commission size restriction, and substituting a scheme similar to that used by the state legislature. Legislators already represent districts that comply with the one person-one vote rule, so the Hawaiian Homes Commission could use those districts, expanding the board to 25 (one for each Senatorial district) or 17 (one for every three House districts). The disadvantages to this scheme is two-fold: first, the size of the board would be greatly expanded, significantly increasing the costs of the board; and second, the fact that the districts are spread throughout the State would lead to some districts in which the native Hawaiian population is a tiny or perhaps even nonexistent percentage so that the representatives from that district would have no particular loyalty to the beneficiaries' interests. Redistricting in any other format would be even less attractive as the costs of districting and subsequent redistricting would be significant.

### **4. Model D: Representatives are Assigned to Districts but Voted on At-large (OHA/BOE Model)**

A constitutionally safer model would be an at-large election such as that of OHA or the Board of Education. In the OHA model, four members are elected at large by all voters, and five others are elected by all voters but have to reside on one of the five major islands. Members of the latter group are often referred to as "the Maui representative", "the Kauai representative", and so on, although this designation refers only to where the representative resides, not the voters who vote for them. Similarly, the thirteen Board of Education members represent two at-large districts, with certain members required to be residents of specified school districts. See chapters 13 and 13D, Hawaii Revised Statutes. This method conforms to one person-one vote standards, and could be used to provide the same regional representation that the Hawaiian Homes Commission uses today, with three commissioners who are residents of the City and County of Honolulu, two who are residents of the County of Hawai`i (one from east Hawai`i and one from west Hawai`i), two who are residents of the County of

Maui (with one of those a resident of Moloka`i), and one from the County of Kaua`i, and the last an at-large member.

However, one drawback of the OHA/BOE model is that minority groups have difficulty in electing their desired representatives. This can be cured in part by use, as discussed in the next model, of cumulative voting.

## **5. Model E: At-large Voting with Cumulative Voting**

Yet another voting option is that of multi-member at-large districts with cumulative voting. Cumulative voting is a system by which voters in a multi-member district have a specified number of votes which they can cast separately or together for an individual candidate. For example, in a three-member district, each voter has three votes, but can chose any of the following options: to give three candidates one vote each, give one candidate one vote and another two votes, or give one candidate all three votes. This system has been alleged to help minority voters elect more members than a traditional at-large, winner take all voting scheme.<sup>10</sup> Problems in using that system in Hawai`i is that some kind of districting would have to be done and maintained, which can be costly and must be redone every ten years or so. Additionally, the size of the board would have to be expanded and districts made sufficiently large to realistically give the Native Hawaiians a chance to elect a representative.<sup>11</sup>

The decision to have at-large members is a policy decision. The advantage of at-large members is that, at least theoretically, they can see the big picture, and not feel restricted to promoting just their particular constituency. However, with large districts, the drawback is that the at-large representatives can end up coming from the population center -- Honolulu. This could lead to a bunching-up of candidates from one particular island, or even one particular district within an island. For instance, in 1968, when the City and County of Honolulu City Council included six at-large members, five of the six lived in the same house of representatives district.<sup>12</sup> Due to the issues that have an impact on their ability to select representatives responsive to their needs, this is an area where input from the Native Hawaiian community would be appropriate.

## **Conclusion**

Which model should be used? The Native Hawaiian community should be consulted as to its preference. It may be more important to the Native Hawaiian community that the representatives be voted on only by the people from their island, even if it means expanding the board and giving the majority of seats to residents of Honolulu. On the other hand, if that community's preference is for a smaller board with more neighbor island representation, the OHA/BOE model should be followed, perhaps with the addition of cumulative voting. If no firm direction is given by the community, the OHA/BOE system is preferable as it retains the current number of commissioners while still allowing some type of representation by island. It will also result in fewer O`ahu

members and more neighbor island members, and as the vast majority of Hawaiian home lands are on the neighbor islands,<sup>13</sup> it may be more fair to let representatives from the neighbor islands have more impact by using this voting structure. The OHA model would also be a definitive one that would not need to be reapportioned over time as the population centers shift.

### Endnotes

1. See Reynolds v. Sims, 377 U.S. 533, 568 (1964): “Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”
2. Maile and John Bay, Report of the Hawaiian Homes Commission in Response to H.C.R. No. 135 (1998), prepared for the Department of Hawaiian Home Lands (Honolulu: December 1998). The Bay Report puts forth another interesting analysis: The 1998 Hawaiian Homes Commission deviate up to 15-16% and still be considered to comply with one person-one vote standards. The report looked at *Hawaiian* voter populations and, tweaking the deviation figures, came up with figures that favor Honolulu by only a 6 to 5 margin. However, those figures relate to Hawaiian, not all, voters. The 15-16% margin would still not make a significant dent in the Honolulu-centric apportionment in a pool consisting of voters of every ethnicity.
3. Id. at 42.
4. Rice, slip opinion at 26.
5. Hawaii, Department of Business, Economic Development, and Tourism, 1999 State Data Book (Preliminary), Table 1.06:  
  

<http://www.hawaii.gov/dbedt/db99/index.html>
6. This figure is derived from the 1999 Maui figure minus the 1995 Moloka`i figure, the latest population figure for that island available from the 1999 State Data Book (Preliminary).
7. See footnote 6. The Moloka`i population comes from Table 1.08, resident population figure.
8. O`ahu presently has three members. The fourth member would include the current unspecified member, if slated to represent O`ahu, the island with the highest voter/representative ratio.
9. Hawaii, Department of Business, Economic Development, and Tourism, 1998 State Data Book, Table 1.29.
10. See Lani Guinier, Tyranny of the Majority, Fundamental Fairness in Representative Democracy, 1994, and Robert R. Brischetto and Richard L. Engstrom, “Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities,” University of Texas at San Antonio Hispanic Research Center Working Papers:

<http://hrcweb.utsa.edu/test/publication/09/09wpwebpub.htm>

11. The Brischetto and Engstrom article, supra note 10, states that a minority group must be close to the “threshold of exclusion” to increase its chances of electing a representative of its choice. That threshold is defined as a percentage equal to 1 divided by the number of positions plus 1, multiplied by 100. For example, if the multi-member district elects two representatives, the threshold of exclusion would be 1 divided by 3, times 100, or 33%. A three-member district would have a threshold of 25%.
12. Honolulu Star-Bulletin, “City Council awaits changed resulting from court ruling,” April 1, 1968, p. 1.
13. According to the Office of Hawaiian Affairs' 1998 Native Hawaiian Data Book, table 3.7, 58% of the lands are on Hawai`i, 15% are on Maui, 12% are on Moloka`i, and 10% are on Kaua`i. Only a little over 3% of all the Hawaiian home lands are on O`ahu, which means that, even if more native Hawaiians presently reside on O`ahu, they may eventually reside on the neighbor islands if they receive home lands lots there.

## Chapter 5

### FINANCING AN ELECTED HAWAIIAN HOMES COMMISSION

Three issues play a prominent role in this discussion: what the costs of a Hawaiian Homes Commission election would be; what the costs of operating an elected Hawaiian Homes Commission board would be; and how these costs would be financed.

#### Election Costs for an Elected Hawaiian Homes Commission

The Office of Elections has prepared some tentative figures for the Bureau on the cost of adding a Hawaiian Homes Commission election. The figures are estimates only, and are based on the following assumptions:

- (1) The election involves all registered voters;
- (2) An optical mark vote and vote counting system are used;
- (3) The election is set concurrently with a regularly scheduled election;
- (4) The district boundaries are the same as with OHA (i.e., all voters vote for all candidates, who represent different parts of the state but are not districted like the state legislature); and
- (5) Each voter receives a separate ballot card (because at this time it is not clear whether the candidates would be able to be placed on existing ballot cards).

**Table 2**  
**ELECTION COSTS FOR AN**  
**ELECTED HAWAIIAN HOMES COMMISSION**

Description	Amount
<b>Ballots</b> (for primary and general elections: precinct, absentee walk and mail, reserve, test, at 49 cents per card x 900,000)	\$441,000
<b>Freight and delivery</b>	7,500
<b>Ballot packing</b>	7,000
<b>Printing</b> (nominating forms, certificates of election, poster and signs)	1,800
<b>Hawaiian translation</b>	500
<b>Voter education</b>	100,000
<b>Estimated Total</b>	<b>\$557,800</b>

## Operating Costs for an Elected Hawaiian Homes Commission

While the resolution only asked about election financing, it is good policy to also consider the long-lasting fiscal impact of an elected board. We therefore considered the operating costs for an elected Hawaiian Homes Commission. At present, the board is unpaid.<sup>1</sup> However, no elected office in the state is unpaid. While it is not mandatory to pay an elected official, it is the norm. The Bureau looked at two alternatives, the elected Board of Education and the elected Office of Hawaiian Affairs. The BOE members are paid \$100 per meeting plus travel costs and personal expenses.<sup>2</sup> No individual breakdown for members' compensation was available, due to the varied meeting schedules. The Bureau was able to obtain the amount that the BOE allocated for member compensation in the 2000 budget -- \$125,917. The commission members already receive actual expenses involved in their duties,<sup>3</sup> so each meeting would thus cost approximately \$900 more to cover the meeting fees. The annual cost would depend on the number of meetings held.

The other existing model of compensation for an elected board is that of OHA. The Bureau requested such an estimate from the Department of Hawaiian Homes Lands for its 1999 memo.<sup>4</sup> The Department developed two estimates based upon the following assumptions: (a) an elected Hawaiian Homes Commission will continue to serve as the planning and policy-making body for the Department of Hawaiian Home Lands; and (b) pursuant to Department rules, the Commission will continue to meet at least once a month, and at least once a year on the islands of Kaua`i, Hawai`i, Moloka`i, and Maui, as well as at various homestead communities on each island as practicable. A copy of the Department's September 23, 1999, letter and exhibit to the Bureau containing these budget figures and comments is attached as Appendix D.

The low-budget figure that encompassed salaries for the commission, one secretary, office space, and transportation (assuming that the board will continue to meet once a year on Kaua`i, Moloka`i, Maui, and Hawai`i). The high budget figure included those costs and added secretarial and clerical support. Those figures are as follows:

- Low Budget Scenario (minimum interpretation): Estimated annual cost is **\$447,395**, based on the following:
  1. Commissioner salaries -- \$380,900.
  2. Transportation and per diem to attend regular public meetings, community meetings, special Hawaiian Homes Commission meetings, and one out-of-state travel for the chairperson -- \$17,680.
  3. Office space at \$1.75 per square foot (current rate at present location) -- \$4,725.



4. Hawaiian Homes Commission secretary's salary, transportation and per diem cost, and office space -- \$44,090.
- High Budget Scenario (based on OHA current structure): Estimated annual cost is **\$1,093,210**, based on the following:
    1. Commissioner salaries -- \$380,900.
    2. Transportation and per diem to attend regular public meetings, community meetings, special Hawaiian Homes Commission meetings, and one out-of-state travel cost -- \$24,720.
    3. Salaries for individual commissioners' secretaries -- estimated \$386,100.
    4. Salaries for individual commissioners' aides -- estimated \$257,400.
    5. Office space at \$1.75 per square foot for commissioners and staff -- \$7,008.75.
    6. Hawaiian Homes Commission secretary's salary, transportation and per diem cost, and office space -- \$44,090.

It is noteworthy that under these budgets, the elected board would be paid a salary for the exact same duties that the appointed board members currently provide for free. It may be the case that a more appropriate funding mechanism would be the same as for the Board of Education (\$100 per meeting day).<sup>5</sup> This would help reduce the budgets further.

## **What are the Funding Options for an Hawaiian Homes Commission Election?**

### **1. Election Expenses**

The Hawaiian Homes Commission administers a number of funds within the state treasury. Most of them are for specific purposes that cannot be interpreted to include election funding, such as the Hawaiian Home Loan Fund,<sup>6</sup> the Hawaiian Home General Loan Fund,<sup>7</sup> the Hawaiian Home Operating Fund,<sup>8</sup> and the Hawaiian Home Receipts Fund.<sup>9</sup> Other funds available to the department include:

- Hawaiian Home Trust Fund (section 213(h)): Moneys in this trust fund are available for transfers into any other fund or account authorized by the Hawaiian Homes Commission Act or for any other "public purpose", including the formation of an account as a reserve for loans insured or

guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or other federal agency.

- Native Hawaiian Rehabilitation Fund (section 213(i)): This trust fund receives thirty percent of state receipts derived from lands previously cultivated as sugarcane lands and from water licenses pursuant to Article XII, Section 1 of the Hawaii Constitution; moneys may be expended “solely for the rehabilitation of native Hawaiians”.
- Hawaiian Home Lands Trust Fund (section 213.6): This trust fund, which receives legislative appropriations, is to be used for “capital improvements and other purposes undertaken in furtherance of the Act”.
- Hawaiian Home Administration Account (section 213(f)): Moneys in this special fund “shall be expended by the department for salaries and other administration expenses of the department in conformity with general law applicable to all departments of the State, and no sums shall be expended for structures and other permanent improvements.”

While the scope of these last four funds is broader, the only fund administered by the Hawaiian Homes Commission that is arguably applicable to the payment of election and related expenses is the Hawaiian Home Administration Account established under section 213(f) of the Hawaiian Homes Commission Act. However, a review of state law and policy leads to the conclusion that the more appropriate source for funding is the state general fund. The State has contemplated this issue and established policy already: the state elections law currently requires all election expenses for state elections that do not involve elections for county offices to be paid for by the State from appropriations made for that purpose.

Specifically, section 11-182, Hawaii Revised Statutes (“election expenses when no county elections”), provides: “All expenses, including expenses attributable to registration of voters by the county clerk, for state elections conducted in any county which do not involve elections for county offices shall be borne by the State and paid out of such appropriations as may be made by the legislature for election purposes.” Section 11-181 (“capital equipment”) further requires the State to pay “for all voting system capital equipment” including such items as “voting machines, voting devices, and initial computer programs.”

As a result, the election expenses for the two other elected boards in state government that are administered by elected bodies, the Board of Education and the Office of Hawaiian Affairs,<sup>10</sup> are paid for out of general funds. The Board of Education elections are included on the same ballot as with other elections, allowing it to “piggyback” on state election costs. In the past, additional general fund expenditures were required for Office of Hawaiian Affairs Board of Trustees elections for the separate costs for ballots.<sup>11</sup>

Since both OHA and the BOE election expenses are paid from general fund revenues,<sup>12</sup> the Bureau believes that election expenses for the Hawaiian Homes Commission should also be paid from general fund revenues.

## 2. Operating Expenses

To the extent that operating expenses are attributable to the administration of the Commission *other than* election-related expenses, the Bureau recommends that these expenses should be paid for out of a combination of state general funds and funds available from the Hawaiian Home Administration Account, since moneys in that account are intended to be used “for salaries and other administration expenses of the department”.

While all administrative services apparently used to be paid from Department of Hawaiian Home Lands revenues, the State has terminated that system. A January 1992 progress report on the implementation of the Federal-State Task Force on the Hawaiian Homes Commission Act noted that the State had “substantially completed” its original recommendation made in 1983 that “[a]dministrative services for the DHHL should be paid from State general funds, as are other State departments, rather than paid from revenues from Hawaiian home lands that could be used directly for beneficiary programs.”<sup>13</sup> The progress report noted that in 1991, the Hawaii State Legislature “approved DHHL’s request as incorporated in the executive budget and appropriated \$8.38 million in general funds for all permanent staff and other operating costs for Fiscal Biennium 1991-1993. General Fund support now provides for about 46% of administrative and operating costs.”

A 1994 report by the Department of Hawaiian Home Lands noted that moneys in the Hawaiian Home Administration Account, which was established in 1941, “are to be expended by the department for salaries and all other administrative expenses of the department, excluding capital improvements, in the absence of general fund appropriation for operating and administrative cost.”<sup>14</sup> That report further noted that funds of that account “must be incorporated in the Executive Budget and appropriated by the legislature before they can be used for salaries and operating costs. In the absence of any appropriation, other special funds were used in past years to finance temporary exempt positions. Fifty-five permanent positions are financed by the Administration Account.”<sup>15</sup>

The 1997-1998 annual report of the Department of Hawaiian Home Lands noted that the General Appropriations Act of 1998<sup>16</sup> funded thirty-five permanent positions through the general fund and eighty-three permanent positions through special funds. The amount of expenditures for these positions from the general fund totaled \$1,347,684, while the expenditures from the special fund totaled \$5,617,529, for a combined total of \$6,965,213 for fiscal year 1998-1999.<sup>17</sup> Thus, the percentage of Hawaiian Homes Commission special funds amounted to approximately 81% of the total funds spent on positions for that fiscal year.

It is unclear whether *all* Hawaiian Homes Commission administrative expenses should be paid from the state general fund, as noted in the 1992 progress report on the implementation of the Federal-State Task Force on the Hawaiian Homes Commission Act or whether administrative expenses should be paid for out of a combination of the general fund and funds from the Hawaiian Home Administration Account, which is apparently the current practice. While, ideally, administrative expenses should be paid for out of the general fund to allow revenues from Hawaiian home lands to be used directly for beneficiary programs, this may be difficult as a practical matter, given the stagnant or at best uncertain economic projections for the State's economy.

### Endnotes

1. Hawaiian Homes Commission Act, 1920, section 202.
2. Hawaii Rev. Stat., sec. 302A-1105.
3. Hawaiian Homes Commission Act, 1920, section 202.
4. See chapter 2 for description of prior memo.
5. Hawaii Rev. Stat., sec. 302A-1105.
6. See sections 213(b) and 214 of the Hawaiian Homes Commission Act: Moneys in this revolving fund may be used, among other purposes, for the repair or purchase of dwellings, purchase of livestock and farm equipment, development of tracts, and cultivation of land.
7. See id., section 213(c): Moneys in this revolving fund may be used, among other things, for loans for the construction of homes, home repairs or additions, and the development and operation of a farm, ranch, or aquaculture operation.
8. See id., section 213(e): Moneys in this trust fund may be used for "construction and reconstruction of revenue-producing improvements intended to serve principally occupants of Hawaiian home lands", including acquisition or lease of real property, water rights, and other interests; operation and maintenance of improvements; and purchase of water or other utilities, goods, or commodities needed for services.
9. See id., section 213(g): This trust fund receives interest moneys from loans or investments received by the Department of Hawaiian Home Lands from any fund except as otherwise provided, which may be transferred at the end of each quarter to the Hawaiian Home Operating Fund, the Hawaiian Home Administration Account, the Hawaiian Home Trust Fund, and any loan fund in accordance with the Department's rules.
10. The Soil and Water Conservation Districts are not included in this discussion since they are administered under the auspices of the Department of Land and Natural Resources under chapter 180, Hawaii Revised Statutes, by a combination of both elected and appointed directors. See 1998 Hawaiian Homes Commission Report at 20-21.

11. Telephone interview with Robin Yokooji, Office of Elections, September 20, 1999, by Mark Rosen, Legislative Reference Bureau.
12. The Board of Trustees of the Office of Hawaiian Affairs and the Board of Education are each authorized to establish revolving and trust funds under statutory authority. These funds were reviewed in 1996 by the Hawaii State Auditor in its report to the Governor and Legislature. See Auditor, State of Hawaii, Review of Revolving and Trust Funds of the Office of the Governor, Office of Hawaiian Affairs, and the Department of Education, Report No. 96-21 (Honolulu: December 1996). Presumably, the BOE and OHA could each be statutorily authorized to establish special funds in addition to their trust and revolving funds to pay for the administrative expenses of those boards, similar to the Hawaiian Home Administration Account.
13. Federal-State Task Force on the Hawaiian Homes Commission Act, "Progress Report on the Implementation of Recommendations of the Federal-State Task Force", submitted to the Committee on Energy and Natural Resources, U. S. Senate, January 1992, p. I-14, reprinted in Hearing Before the Committee on Energy and Natural Resources, United States Senate, One Hundred Second Congress, Second Session, on the Hawaiian Homes Commission Act (Washington: U. S. Government Printing Office, February 6, 1992), p. 68.
14. Hawaii, Department of Hawaiian Home Lands, Report of the Department of Hawaiian Home Lands to the Seventeenth Legislature, State of Hawaii, on House Concurrent Resolution No. 125, H.D. 1, S.D. 1, Requesting the Department of Hawaiian Home Lands to Submit an Annual Report on its Special, Trust, or Revolving Funds and Fund Transactions Carried Out Over the Previous Fiscal Year (Honolulu: February, 1994), p. 3.
15. Id.
16. 1998 Haw. Sess. Laws, Act 116.
17. Hawaii, Department of Hawaiian Home Lands, FY 1997-1998 Annual Report (Honolulu: 1998), p. 24.

## Chapter 6

### ALTERNATE PROPOSAL: APPOINTMENT WITH AN ADVISORY COMMITTEE

After the Rice and Arakaki decisions, the concept of an elected Hawaiian Homes Commission has several legal obstacles and shortcomings, as outlined in previous chapters. The Bureau believes that an alternative way to accomplish the same goals while avoiding the problems inherent in an elected commission should be examined.

#### Meeting the Goals of an Elected Commission

The goal of having an elected commission, as it was initially considered by the Legislature before the Rice decision, was to require greater accountability from the Hawaiian Homes Commission by allowing its beneficiaries to select their commissioners. After Rice, that goal could not be legally met because the voting pool would have to consist of all voters, not just the beneficiaries. The Native Hawaiian beneficiaries would have some say in the selection of commissioners, but their collective voice could be drowned by the vast majority of non-Native Hawaiian beneficiary voters.<sup>1</sup> Given this reality, the advantages at this point in time of an elected commission to the beneficiaries seem slim at best, and potentially negative at worst, if the elected commissioners are as anti-Hawaiian Homes Commission as some of the potential candidates in Arakaki are anti-OHA.

The Bureau believes that an alternative exists to assist in fulfilling the goal of beneficiary participation in the selection of the Hawaiian Homes Commission members without the restrictions of Rice. The Bureau recommends that the appointed format for the commission be retained, and that an advisory committee be statutorily created, composed of beneficiaries, to make recommendations to the governor for appointment to the commission. The advisory committee would provide a large measure of input by the beneficiaries, while avoiding the Rice Fifteenth Amendment issues.

The concept of advisory committees is a very well-established one in this State, with well over 150 advisory committees<sup>2</sup> in many different areas, such as the public libraries,<sup>3</sup> teacher education,<sup>4</sup> children,<sup>5</sup> accountants,<sup>6</sup> health care professionals,<sup>7</sup> the correctional facilities,<sup>8</sup> emergency medical facilities,<sup>9</sup> helicopter safety,<sup>10</sup> pesticides,<sup>11</sup> cable television,<sup>12</sup> and tourism.<sup>13</sup> These committees perform a myriad of functions, including advising on disbursement of money,<sup>14</sup> proposing legislation,<sup>15</sup> developing and revising laws,<sup>16</sup> soliciting public and private funds,<sup>17</sup> serving as experts for investigatory purposes,<sup>18</sup> consulting for disciplinary action,<sup>19</sup> reviewing and assessing programs and assisting in formulating a master plan,<sup>20</sup> advising on contract changes,<sup>21</sup> and advising on loan applications.<sup>22</sup> An advisory committee for the purpose of submitting names for the Hawaiian Homes Commission does not appear to expand unduly this wide-ranging list of advisory committee abilities.

As far as the responsibilities of this advisory commission, the Judicial Selection Commission<sup>23</sup> is a useful model to consider. Seven of the Judicial Selection Commission members are appointed by the governor, the chief justice, the president of the senate, and the speaker of the house, and the remaining two are elected by the state bar. The Judicial Selection Commission members are responsible for gathering, evaluation, and submitting lists of names to the governor for each judicial opening. The governor selects new judges and justices from these lists. A Hawaiian Homes Commission advisory committee could similarly be structured to provide names to the governor for appointment to the Hawaiian Homes Commission.

The appointment process to the advisory committee itself could be structured several ways. There are several models for appointment to these advisory committees: some advisory committees have members appointed by the governor,<sup>24</sup> some have members freely appointed by department heads,<sup>25</sup> and some have members appointed by a department head from a list submitted by persons affected by the committee.<sup>26</sup> One workable model would be for the governor to appoint advisory committee members from the Hawaiian Homes waitlist and the State Council of Hawaiian Homestead Associations and the Hui Kako`o `Aina Ho`opulapula. The latter two are umbrella groups for all of the Hawaiian Homes Commission homestead associations. The members of these associations are beneficiaries of the Hawaiian Homes Commission Act and would be an appropriate group to do the selection. The first group is appropriate as its members are also intended beneficiaries of the Hawaiian Homes Commission Act, yet they bring a different perspective to the Hawaiian Homes Commission in terms of its actions and policies.

The advisory committee would then submit to the governor a list of specified number of names for each slot on the commission itself. For the slots that are Hawaiian only, only names of those of Hawaiian ancestry could be submitted. For the other five slots, any names could be submitted.

The advantages of this modified appointment system are manifold. It is superior to the current system, which provides no input by the beneficiaries at all. The appointment system will allow beneficiary representatives to choose the pool of candidates. It is superior to the post-Rice election concept as it will prevent the beneficiary votes (a small fraction of the Hawaiian voting population) from being overwhelmed by the votes of others (non-beneficiaries and non-Hawaiians) who may be indifferent or even hostile to the Hawaiian Home Lands program. The representative structure that allows the neighbor islands their proportionately larger number of commissioners can be maintained under the appointment system without any one person-one vote issues. Most significantly to the beneficiary community, the modified appointment system can continue to require four of the nine commissioners to be of Hawaiian ancestry. As a similar Hawaiian-only representative policy for elected OHA officials was recently defeated in federal court (see the Arakaki case discussion in chapter 2), that type of challenge can be avoided.

The idea of this advisory committee arrangement was presented to the Department of Hawaiian Homes Lands by the Bureau, to present to the beneficiaries for their feelings on this issue. The department stated that it has informal discussions with two key Hawaiian home lands beneficiary groups, the State Council of Hawaiian Homestead Associations and the Hui Kako`o `Aina Ho`opulapula. According to the department, the feelings of those organizations is that the "Rice decision notwithstanding, both ... support changing to an election format *but strongly oppose opening up the election to all voters in the State*. Their preference is to limit the election to Hawaiian home lands beneficiaries or to persons of Hawaiian ancestry."<sup>27</sup> (Emphasis added.) Unfortunately for these groups, at this time that type of election is not legally possible. Realistically, after the Rice decision, if there is an election for Hawaiian Home Lands commissioners, then that election cannot be restricted to voters of Hawaiian ancestry only, and must be opened to all voters in the State. The department, realizing this, added that "in view of the efforts currently underway to seek federal recognition and establish a sovereign entity, the prudent course of action may be to do nothing at this time."

As the concerns of the beneficiaries appear to be driving this issue, the choice should be presented to them and their preference ascertained. Those choices, however, do not at this time include an election limited to Hawaiians. The available options are:

- (1) Keep the status quo (appointed commission);
- (2) Create an open election (open to all voters in the State, and all candidates from all racial groups); or
- (3) Keep the appointed board but create an advisory committee of Native Hawaiians to submit candidates for the commission to the governor for appointment.

If a consensus for one of these options from the Native Hawaiian community arises, the Legislature should respect those wishes. If the community wishes to wait for potential federal recognition of a sovereign Hawaiian entity and then see if its options differ, that wish to wait should be respected also.

### Endnotes

1. Hawaiians as a group comprise only approximately 21% of the population. While there are no current figures as to the number of Native Hawaiians, a 1984 blood quantum study showed Native Hawaiians were outnumbered by Hawaiians at a ratio of approximately 2:3. If these proportions still hold true today, the percentage of Native Hawaiian voters would be approximately 8%, and that of Native Hawaiian beneficiaries of the Hawaiian Homes Commission, even smaller still. Office of Hawaiian Affairs, Native Hawaiian Data Book 1998, tables 1.4 and 1.18.



2. Telephone conversation with Celia Suzuki, Boards/Commissions Coordinator, Office of the Governor, on September 1, 2000.
3. Hawaii Rev. Stat., sec. 312-3.6, library advisory committee.
4. Hawaii Rev. Stat., sec. 304-20, teacher education coordinating committee.
5. Hawaii Rev. Stat., sec. 350B-5, Hawaii children's trust fund coalition advisory committee.
6. Hawaii Rev. Stat., sec. 466-15, advisory committee to the board of public accountancy.
7. Hawaii Rev. Stat., sec. 451D-4, advisory committees to the various health care boards.
8. Hawaii Rev. Stat., sec. 354D-5, correctional industries advisory committee.
9. Hawaii Rev. Stat., sec. 321-255, state emergency medical services advisory committee.
10. Hawaii Rev. Stat., sec. 261-13.6, helicopter master plan advisory committee.
11. Hawaii Rev. Stat., sec. 149A-51, advisory committee on pesticides.
12. Hawaii Rev. Stat., sec. 440G-13, cable advisory committee.
13. County advisory committees to the Department of Business, Economic Development, and Tourism.
14. See, e.g., library advisory committee, supra note 3.
15. See, e.g., teacher education coordinating committee, supra note 4.
16. See, e.g., advisory committee on pesticides, supra note 11.
17. See, e.g., children's trust fund committee, supra note 5.
18. See, e.g., advisory committee to the board of public accountancy, supra note 6.
19. Id.
20. See, e.g., state emergency medical services advisory committee, supra note 9.
21. See, e.g., county advisory committees to Department of Business, Economic Development, and Tourism, supra note 13.
22. Hawaii Rev. Stat., sec. 211E-4, advisory committee to the Hawaii invention development fund.
23. Hawaii Const. art. I, sec. 4.
24. See, e.g., correctional industries advisory committee, supra note 8.

25. See supra note 22.
26. See supra note 6.
27. Letter from Raynard Soon, Chairperson, Hawaiian Homes Commission, to researcher on September 18, 2000.

## Chapter 7

### FINDINGS AND RECOMMENDATIONS

#### Findings

1. After the Rice v. Cayetano decision, an elected Hawaiian Homes Commission would have to be elected by all voters in the State, not just Hawaiians.
2. In Arakaki v. State, the Hawaii federal district court expanded the pool of OHA candidates to non-Hawaiians. This will probably require that all of the seats on an elected Hawaiian Homes Commission also be open to all races, instead of reserving four of the nine member positions for Hawaiians. Unlike Rice v. Cayetano, which was a decision of the United States Supreme Court, the Arakaki decision is a federal district (trial level) court. Its decision may be appealed.
3. Consent of Congress is probably not required for an elected Hawaiian Homes Commission, but an agreement between the State and the federal government requires all amendments to the Hawaiian Homes Commission Act to be submitted to the Secretary of the Interior for review, who will present it to Congress.
4. While the legal arguments on whether an amendment to the Hawaiian Homes Commission Act to change the appointed board to an elected board would have to be done by state constitutional amendment or just by statute are split, procedural precedent with the board of education indicates that an amendment to the Hawaii State Constitution would be appropriate.
5. One person-one vote principles prevent an elected board from keeping the same representation as an appointed board if each representative is chosen only by the voters on that island. Under those principles, instead of a nine-member board, with three members from Honolulu, two from Hawai`i, and one each from Maui, Moloka`i, and Kaua`i, there would have to be one representative from Kaua`i, two from Maui, two from Hawai`i, and thirteen from Honolulu. If OHA-style voting is chosen instead, in which members represent different islands but are voted on by all voters, that would comply with the one person-one vote principle and allow the board to have a balance that is less focused on Honolulu.
6. A voting pool of all voters in the State will easily overwhelm the minority of Native Hawaiian voters, and even all Hawaiian voters, and commissioners may be elected who may not have the best interest of the Hawaiian Homes Commission at heart.

## FINDINGS AND RECOMMENDATIONS

7. The decision as to whether to have at-large members is a policy decision that should be left up to the Native Hawaiian community.
8. Operating costs for an elected board should be taken into consideration in determining whether to change to an elected board. At present, the board serves without compensation. The Department of Hawaiian Homes Lands ran two models of the additional costs involved in an elected board, based on an OHA model. Those costs ranged from \$447,395 to \$1,093,210 per year.
9. If an election format is chosen, the election should be funded with general funds, like the Board of Education and Office of Hawaiian Affairs elections.
10. The operating costs for an elected board should either be shared between the general fund and the Hawaiian Homes Administration account, or, if the economy permits, be paid solely from general funds.
11. The goal of having an elected, rather than an appointed, Hawaiian Homes Commission is to give the beneficiaries more input into the choice of their fiduciaries. There is no pressing need to change the board structure other than that.
12. Maintaining an appointed board and adding an advisory committee composed of representatives of the Native Hawaiian Community would go a long way towards meeting the goal of giving the Native Hawaiians more control over who becomes a commissioner while avoiding the several problems of an elected commission.

## Recommendations

1. Native Hawaiians should be consulted as to which of the three viable options for the Hawaiian Homes Commission board they prefer: (1) keep the status quo; (2) create an elected board open to all voters in the State and all candidates of any ancestry; or (3) keep an appointed board, but add an advisory committee composed of Native Hawaiians who will nominate members to be appointed.
2. If an elected board is still considered desirable, then the OHA/BOE model should be considered, as well as the concept of cumulative voting, to increase input from the Native Hawaiian community.
3. No action on an elected commission should be taken unless a consensus arises from the Native Hawaiian community: if they prefer to wait and decide after a Hawaiian sovereign entity may be formed, that wish should be respected.

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HOUSE CONCURRENT  
RESOLUTION

REQUESTING A STUDY TO ASCERTAIN THE FEASIBILITY OF AMENDING THE  
HAWAIIAN HOMES COMMISSION ACT TO ALLOW FOR DIRECT ELECTION  
OF MEMBERS.

1           WHEREAS, the Hawaiian community desires greater  
2    accountability from the public institutions of special  
3    relevance to them; and

4  
5           WHEREAS, Hawaii is an island State where ensuring and  
6    preserving representation from each geographical region is  
7    desirable and necessary; and

8  
9           WHEREAS, the members of the Hawaiian Homes Commission are  
10   at present not elected but nominated and appointed by the  
11   Governor with the advice and consent of the Senate in  
12   accordance with the Hawaiian Homes Commission Act, Section 202  
13   and Hawaii Revised Statutes Section 26-34; now, therefore,

14  
15           BE IT RESOLVED by the House of Representatives of the  
16   Twentieth Legislature of the State of Hawaii, Regular Session  
17   of 2000, the Senate concurring, that the Legislative Reference  
18   Bureau shall undertake a study to determine the legal issues  
19   involved in amending the Hawaiian Homes Commission Act to allow  
20   for direct election of the members of the Hawaiian Homes  
21   Commission by their beneficiaries while preserving the system  
22   of regional representation embodied in the Hawaiian Homes  
23   Commission Act, Section 202 subsection(a); and

24  
25           BE IT FURTHER RESOLVED that, among other things, the  
26   Legislative Reference Bureau shall address the following points  
27   in its study:

- 28  
29           (1) Whether such amendment to the Hawaiian Homes  
30           Commission Act would require the consent of the United  
31           States Congress;  
32  
33           (2) Whether such amendment would require a further  
34           amendment to the Hawaii State Constitution;

1           (3) Whether such amendment would be compatible with the  
2           United States Constitution; and  
3

4           (4) In the event such an amendment were enacted, who  
5           should be allowed to run, who should be permitted to  
6           vote, how the seats should be apportioned, and how  
7           such an election should be financed; and  
8

9           BE IT FURTHER RESOLVED that a report of the findings  
10          pursuant to this request be submitted to the Legislature no  
11          later than twenty days before the convening of the Regular  
12          Session of 2001; and  
13

14          BE IT FURTHER RESOLVED that a certified copy of this  
15          Concurrent Resolution be transmitted to the Legislative  
16          Reference Bureau.

## Appendix B

### EXECUTIVE AND ADMINISTRATIVE OFFICES AND DEPARTMENTS

**Section 6.** All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and related functions. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. That person shall hold office for a term to expire at the end of the term for which the governor was elected, unless sooner removed by the governor; except that the removal of the chief legal officer of the State shall be subject to the advice and consent of the senate.

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as provided by law. Such board, commission or other body may appoint a principal executive officer who, when authorized by law, may be an ex officio, voting member thereof, and who may be removed by a majority vote of the members appointed by the governor.

The governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law. If the manner or removal of an officer is not prescribed in this constitution, removal shall be as provided by law.

When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session of the senate. The person so appointed shall not be eligible for another interim appointment to such office if the appointment failed to be confirmed by the senate.

No person who has been nominated for appointment to any office and whose appointment has not received the consent of the senate shall be eligible to an interim appointment thereafter to such office.

Every officer appointed under the provisions of this section shall be a citizen of the United States and shall have been a resident of this State for at least one year immediately preceding that person's appointment, except that this residency requirement shall not apply to the president of the University of Hawaii. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]