SENATE CONCURRENT RESOLUTION

REQUESTING THE OFFICE OF HAWAIIAN AFFAIRS TO CONVENE A TASK FORCE OF HAWAIIAN LEADERS, LEGAL SCHOLARS, AND A BROAD REPRESENTATION OF MEMBERS OF THE HAWAIIAN COMMUNITY TO REVIEW AND CONSIDER WHETHER ITS FIDUCIARY DUTY TO BETTER THE CONDITIONS OF HAWAIIANS AND MANAGE ITS RESOURCES TO MEET THE NEEDS OF HAWAIIAN BENEFICIARIES WOULD BE BETTER SERVED BY HAVING TRUSTEES APPOINTED RATHER THAN ELECTED.

WHEREAS, article XII, section 5, of the Hawaii State Constitution created the Office of Hawaiian Affairs (OHA), to be governed by not less than a nine member board of trustees who shall be Hawaiian and elected by qualified voters who are Hawaiian, as provided by law; and

WHEREAS, the 1978 Constitutional Convention created a number of committees, including a Hawaiian Affairs Committee that proposed the creation of OHA to manage and administer resources held for the benefit of people of Hawaiian ancestry; and

WHEREAS, these proposed amendments were approved by the Convention as a whole and were then ratified by Hawaii voters in November of 1978; and

WHEREAS, Standing Committee Report No. 59 from the Convention's Hawaiian Affairs Committee articulates the primary principle which committee members wanted to ensure through its creation of OHA: the right of Hawaiians to elect their Hawaiian leaders and Hawaiian control of Hawaiian trust assets as a seeming response to the overthrow of the lawful government of Hawaii in 1893 by the United States; and

WHEREAS, the committee wrote:

"Your committee is unanimously and strongly of the opinion that people to who assets belong should have
control over them. In order to insure accountability, it was felt that the board should be composed of elected members. The election of the board will enhance representative governance and decision-making accountability, and, as result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary. Finally, the committee agreed that the board should be elected by all the beneficiaries. Certainly, they would best protect their own rights"; and

WHEREAS, the Hawaiian Affairs Committee's recommendations were included in and strongly endorsed by the written report of the Convention's Committee of the Whole which focused on the need for Hawaiians to be able to realize a sense of self-determination and self-government through creation of OHA, stating:

"Members were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race.

... If one looks to the precedent of other native peoples, one finds that they have traditionally enjoyed self-determination and self-government. They have power to make their own substantive rules in internal matters. Although no longer possessed of the full attributes of sovereignty, they remain a separate people with the power of regulation over their internal and social problems. The establishment of the Office of Hawaiian Affairs is intended to grant similar rights to Hawaiians."; and

WHEREAS, this history was confirmed by the Hawaii Supreme Court in 1987 in Trustees v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987); and

WHEREAS, in February of 2000, the United States Supreme Court in Rice v. Cayetano struck down the State's provisions
restricting OHA elections to those of Hawaiian ancestry only on the grounds that it violated the Fifteenth Amendment to the United States Constitution, which provides that, "[t]he right to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"; and

WHEREAS, in Rice v. Cayetano, a divided United States Supreme Court held that the State violated the express provisions of the Fifteenth Amendment by limiting the right to elect OHA trustees in an official state election where only voters of Hawaiian ancestry were entitled to vote for potential OHA trustees; and

WHEREAS, Justice Kennedy, writing for the majority, opined that "[a]ncestry can be a proxy for race. It is that proxy here"; and

WHEREAS, after the decision in Rice, all qualified voters in Hawaii were empowered to elect the OHA trustees; and

WHEREAS, a subsequent challenge was filed in 2002 against the State's constitutional and statutory provisions requiring that only individuals of Hawaiian ancestry could be elected as OHA trustees; and

WHEREAS, in Arakaki v. State, the Ninth Circuit Court of Appeals struck the statutory and constitutional provisions limiting who could run for and be elected to OHA solely to those of Hawaiian ancestry; and

WHEREAS, the Ninth Circuit held that disqualifying those who were not of Hawaiian ancestry from running for a position as an OHA trustee compromised potential voter's Fifteenth Amendment rights and therefore was unconstitutional; and

WHEREAS, since the decision in Arakaki, non-Hawaiians are now eligible to run for and be elected as OHA trustees; and

WHEREAS, the ability for Hawaiians to exercise their right to self-determination through the election of OHA trustees has been substantially diminished because non-Hawaiians are now
entitled to vote for and run for a position as an OHA trustee;
and

WHEREAS, OHA trustees are presently elected and primarily
function as political office holders and less as trustees who
are charged with exercising the highest fiduciary duty at law to
their Hawaiian beneficiaries; and

WHEREAS, there are well-qualified individuals with strong
ties and stellar records of service to the Hawaiian community,
who meet the exacting legal and fiduciary requirements of
serving as a trustee, and who would consent to serving as an OHA
trustee if they were appointed rather than elected; and

WHEREAS, the requirements to be appointed as a trustee by
the court rather than being elected to political office requires
a level of skill, expertise, maturity, and judgement that is the
highest at law because trustees have a fiduciary obligation to
prudently serve the interests of beneficiaries above their own
interests; and

WHEREAS, in the most recent OHA election in 2016, where two
OHA trustee positions were on the ballot, there were 100,464
(twenty-three percent) blank votes recorded in the Hawaii island
resident trustee election and 117,600 (26.9 percent) blank votes
were recorded in the at-large trustee race, which indicates that
a substantial group of voters who show up to vote choose not to
vote in OHA elections; and

WHEREAS, it is in the best interests of Hawaiian
beneficiaries that the most competent, skillful, mature, and
trustworthy individuals serve as trustees over the resources and
policies developed and implemented to better the conditions of
Hawaiian beneficiaries; and

WHEREAS, there is a need to review the question of whether
the manner of selecting OHA trustees may be improved upon
through an appointment process, to consider the appropriate
appointing authority, and how to develop a list of the best
qualified potential trustees for submittal to the appointing
authority; now, therefore,
BE IT RESOLVED by the Senate of the Twenty-ninth Legislature of the State of Hawaii, Regular Session of 2017, the House of Representatives concurring, that the Office of Hawaiian Affairs is requested to convene a group of Hawaiian leaders, legal scholars, and Hawaiian community members to review whether the manner of selecting and seating OHA trustees could be improved upon through an appointment process rather than by election, consider the appropriate appointing authority, and consider how to develop a list of the best qualified potential trustees for submittal to the appointing authority; and

BE IT FURTHER RESOLVED that the Office of Hawaiian Affairs report to the legislature no later than twenty days prior to the convening of the Regular Session of 2018 on findings and recommendations, including any proposed legislation; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Chairperson of the Board of Trustees of the Office of Hawaiian Affairs and the Chief Executive Officer of the Office of Hawaiian Affairs.

OFFERED BY: