

# **TESTIMONY TO HAWAII REAPPORTIONMENT COMMISSION**

Thursday, September 9, 2021

Bart Dame  
710 West Hind Drive, Honolulu

Testifying as an Individual.

Aloha Chair Mugiishi and members of the Commission,

I will focus my testimony on the proposed extractions of non-permanent residents and the apportionment of legislative seats between the four counties that will result from using different figures for arriving at the constitutionally mandated “Permanent Resident” numbers as the basis for both Apportionment and, later, for redistricting within each Basic Island Unit (county).

**I AM AVAILABLE TO ANSWER QUESTIONS AND EXPLAIN MY DATA AND REASONING.**

## **FIVE CHARTS FOLLOW**

This first chart contrasts the Extraction of non-permanent residents in 2012, after the State Supreme Court rejected the extreme “under-extraction” the Commission had used for drawing up its initial plan.

# CHART 1

## HERE ARE THE POPULATION ADJUSTMENTS MADE BY THE 2011 REAPPORTIONMENT COMMISSION

### NON-PERMANENT RESIDENTS (NPR) EXTRACTED FROM 2010 CENSUS DATA FOR HAWAII

NPR	State	BIU-Oahu	BIU-Hawaii	BIU-Maui	BIU-Kauai
NPR military	95,447	95,007	89	133	218
NPR students	13,320	11,611	1,394	247	68
<b>NPR Total</b>	<b>108,767</b>	<b>106,618</b>	<b>1,483</b>	<b>380</b>	<b>286</b>

## HERE ARE THE ADJUSTMENTS BEING PROPOSED FOR THE 2021 PLAN

### NON-PERMANENT RESIDENTS (NPR) TO BE EXTRACTED FROM 2020 CENSUS DATA FOR HAWAII

NPR	State	BIU-Oahu	BIU-Hawaii	BIU-Maui	BIU-Kauai
NPR military	64,415 67.37%	64,010	40	117	248
NPR students	7,250	6,589	499	109	53
<b>NPR Total</b>	<b>71,665</b>	<b>70,599</b>	<b>539</b>	<b>226</b>	<b>301</b>

#### NOTES:

The Hawaii State Constitution requires the Commission draw up districts based upon a count of "Permanent Residents," which means they must make a Good Faith effort to identify and extract identifiable "Non-Permanent Residents" from the Census population count.

The 2011 Commission initially submitted a Plan based upon a Population from which only 16,458 NPRs had been extracted. The Hawaii Supreme Court quickly rejected the initial Plan, forcing them to make a more serious effort, resulting in the extraction of an additional 92,309 NPRs.

I am not convinced the current Commission has applied the same rigor and determination to the task of extraction as they finally did in 2012, when they were under the close scrutiny of both the Court and the general public. These proposed numbers merit close scrutiny, first by the public and, if that is not sufficient, then by a lawsuit filed with the Supreme Court. Hopefully, we can avoid that.

Next, I tried to find evidence to support the idea that the military presence has dropped dramatically since the last census, thereby justifying a much smaller extraction than that used in 2012.

# CHART 2

## HAS THE MILITARY POPULATION IN HAWAII DECLINED SHARPLY SINCE 2010?

Home » State of Hawaii Data Book » 2020 State of Hawaii Data Book

Data reformatted from

2020 STATE OF HAWAII DATA BOOK

Table 1.03

### RESIDENT POPULATION, BY MILITARY STATUS: 2010 TO 2020

Date	Total resident population	Armed Forces	Military dependents	Total Military population
2010: April 1	1,360,307	40,802	65,063	105,865
July 1	1,363,963	39,375	62,322	104,438
2011: July 1	1,379,329	39,798	59,849	99,647
2012: July 1	1,394,804	43,082	60,271	103,353
2013: July 1	1,408,243	46,145	60,490	106,635
2014: July 1	1,414,538	47,202	63,228	110,430
2015: July 1	1,422,052	48,197	64,493	112,690
2016: July 1	1,427,559	47,581	64,342	111,923
2017: July 1	1,424,393	46,657	58,548	105,205
2018: July 1	1,420,593	45,277	60,383	105,660
2019: July 1	1,415,872	45,283	60,654	105,937
2020: July 1	1,407,006	45,283	55,311	100,594

Source: <http://files.hawaii.gov/dbedt/economic/databook/db2019/>

This data comes from the State of Hawaii Data Book, 2020, maintained by the Department of Business, Economic Development and Tourism. They have developed their estimate of military population in consultation with the Department of Defense.

I have reformatted their chart for clarity by stripping away some civilian data and by adding a column for "Total Military Population."

According to these DBEDT figures, the military population has remained pretty stable since the 2010 Census. They show the 2020 military population has only declined 5% since 2010.

The figures being proposed for the extraction of non-resident military this year only make sense if the military population in Hawaii has declined 32% since 2010.

# CHART 3

In 2011-12, the Commission came up with four very different estimates of the size of the Non-Permanent Resident Population.

## THE FOUR DIFFERENT EXTRACTION PROPOSALS CONSIDERED IN 2011-12

<u>Extraction A</u>	<u>Extraction B</u>	<u>Extraction C</u>	<u>Court-Ordered Extraction</u>
Oahu 15,660	Oahu 72,609	Oahu 78,524	Oahu 106,618
Hawaii 793	Hawaii 796	Hawaii 921	Hawaii 1,483
Maui 4	Maui 4	Maui 178	Maui 380
Kauai 1	Kauai 143	Kauai 198	Kauai 286
<u>16,458</u>	<u>73,552</u>	<u>79,821</u>	<u>108,767</u>

**REMINDER: during the 2011-2012 deliberations of the Reapportionment Commission, they considered four very different calculations on the number of Non-Permanent Residents present in Hawaii.**

When I see the current proposal to only extract 71,665 Non-Permanent Residents from the Census population, it strikes me that this is very close to what was proposed with Extraction B in 2011. Which was a much smaller extraction than the final extraction that only occurred AFTER after the Hawaii Supreme Court ordered the Commission to make a determined and good faith effort to exclude more NPRs. Lo and behold, once they really applied themselves, they found 34,000 more NPRs to extract. How did that happen?

### **DILEMMA: YOU CANNOT GET ENOUGH DATA FROM THE DOD UNLESS YOU HAVE A “BIGGER CLUB,” MEANING A SUPREME COURT RULING**

Project Manager Rosenbrock during the last meeting, told us the difficulties in getting good data from the military. Here is a direct quote: “They don’t really like to let people know how many people are where.” When asked if we could go back to the DoD to ask for more information, he said, again a direct quote:

“We’ve never done that, except for when the Supreme Court told us to go back and make sure we had numbers and locations for all of the records that we needed to take out. Now, if you look at the numbers back from 2001, that number was about 74, 75 thousand....And then we had the large number in 2011. [I think he means 2012] Now we are back down to the number that is most like the number we had in 2001....

“I know what happened in 2011. They refused to tell us where those records were. So we did have to go back and we did have the club of the Supreme Court decision to say, ‘You have to give us these numbers.’ But other than that, I don’t know how we would not use this particular set of numbers.”

The following chart shows the consequences of using a smaller or larger estimate of non-resident military. Using the under-extraction being proposed by staff, results in Oahu retaining all its House seats. Using a larger estimate, one that accepts the explanation that significant numbers of out-of-state students were not present on April 1, 2020, but NOT accepting the idea that the military population has shrunk 32.5% since 2010, would shift a House seat to the Big Island. I do not know the most accurate numbers, but am DEEPLY skeptical about those being proposed.

## CHART 4

1	<b>"EXTRACTION A" New Census Data, Using Staff Proposed Extraction</b>					
2						
3	<b>Description</b>	<b>Statewide</b>	<b>Honolulu</b>	<b>Big Isle</b>	<b>Maui</b>	<b>Kauai</b>
4	Census Data newly released	1,455,271	1,016,508	200,629	164,754	73,298
5	Proposed NPR Military Extraction	64,415	64,010	40	117	248
6	Proposed NPR Student Extraction	6,747	6,094	496	108	49
7	adjusted	1,384,109	946,404	200,093	164,529	73,001
8	Percent of State population	1.0000	0.6838	0.1446	0.1189	0.0527
9						
10	House seats with fraction	51	34.87	7.37	6.06	2.69
11	<b>House seats whole numbers</b>	<b>51</b>	<b>35</b>	<b>7</b>	<b>6</b>	<b>3</b>
12	Senate seats with fraction	25	17.09	3.61	2.97	1.32
13	<b>Senate seats whole numbers</b>	<b>25</b>	<b>17</b>	<b>4</b>	<b>3</b>	<b>1</b>
14	Pop per House District if O has 35 seats	27,139.39	27,040.11	28,584.71	27,421.50	24,333.67
15	Variance= 5.7		-0.37	5.33		
16						
17	<b>"EXTRACTION B" Using 2012 Military Number and 2021 Proposed Student Number</b>					
18						
19	<b>Description</b>	<b>Statewide</b>	<b>Honolulu</b>	<b>Big Isle</b>	<b>Maui</b>	<b>Kauai</b>
20	Newly Released Census Data	1,455,271	1,016,508	200,629	164,754	73,298
21	Extract 2012 Military Numbers	95,447	95,007	89	133	218
22	Extract Staff's Proposed Student Number	6,747	6,094	496	108	49
23	Adjusted Population	1,353,077	915,407	200,044	164,513	73,031
24	% of State Population	1	0.6765	0.1478	0.1216	0.0540
25						
26	House seats with fraction	51	34.50	7.54	6.20	2.75
27	<b>House seats whole numbers</b>	<b>51</b>	<b>34</b>	<b>8</b>	<b>6</b>	<b>3</b>
28	Senate seats with fraction	25	16.91	3.70	3.04	1.35
29	<b>Senate seats whole numbers</b>	<b>25</b>	<b>17</b>	<b>4</b>	<b>3</b>	<b>1</b>
30	Pop per House seat with O 34 H8	26,530.92	26,923.74	25,005.50	27,418.83	24,343.67
31	<b>Variance: 7.23</b>		1.48	(5.75)		

I am submitting a new chart on the final page. It shows the current proposed estimate of the Non-Permanent Resident military population is a RADICAL DEPARTURE from the practice of the 1991, 2001 and 2011 Commissions. It confounds common sense and I urge commissioners to reject a method of extraction which contrasts so sharply with the very credible data from the Department of Business, Economic Development and Tourism. I do not believe you can, in good faith, vote for an extraction that does not comport with reality. Nor comply with the Solomon ruling.

# CHART 5

(I APOLOGIZE FOR THE CRUDENESS OF THE GRAPHICS OF THIS CHART)

**Table 1.03-- RESIDENT POPULATION, BY MILITARY STATUS:  
1980 TO 2020**

**NOTE: THE DATA IN BLACK WAS LIFTED FROM THE STATE DATA BOOK  
THE DATA IN BLUE WAS ADDED BY ME**

Year	Total resident population	Armed forces	Military dependents	Total Military population	Number Extracted	Percent Extracted
1980: April 1	964,691	57,056	64,023	121,079	N / A	N / A
1990: April 1	1,108,229	55,222	59,935	115,157	114,000 *	99.00%
2000: April 1	1,211,537	39,036	42,533	81,569	74-75,000**	91.95%
2010: April 1	1,360,301	40,796	65,063	105,859	95,447	90.16%
2020: July 1	1,407,006	45,283	55,311	100,594	64,415	64.03%

*Sources:*

- \* The 1991 military extraction of 114,000 figure comes from the "Solomon" ruling.
- \*\* The 2001 extraction figure of 74-75,000 comes from remarks of David Rosenbrock at the August 26th meeting.

**CONCLUSION:**

**THE PROPOSED EXTRACTION IS AN UNPRECEDED UNDER-EXTRACTION OF THE MILITARY POPULATION. IT REPRESENTS A SHARP BREAK WITH PAST COMMISSIONS AND DOES NOT APPEAR TO COMPLY WITH SOLOMON**

testimony for Hawai'i State Reapportionment Commission  
1 PM Thursday, September 9, 2021  
from Cory Harden, Hilo [333cory@gmail.com](mailto:333cory@gmail.com)

Thank you to all Commissioners for your service.

#### PRECEDENT

This is not just about 2021. Everything sets a precedent for future reapportionments—level of transparency and public involvement, methods of determining extraction of certain populations, etc.

#### TRANSPARENCY

How will the technical committee (a permitted interaction group with closed meetings) do its work without “discussions” and “deliberations” that would violate HRS 92?

HRS 92-1 says: “it is the policy of this State that the formation and conduct of public policy – the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible....The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings...”

Civil Beat reports “The technical committee would bear the brunt of the commission’s work in drawing political lines. The technical committee would also set parameters for how districts are drawn — for example, if there should be canoe districts that include parts of more than one island — or if multiple lawmakers should be able to represent a single district.”

*Redrawing Of Hawaii’s Political Boundaries Could Stretch Into Early 2022,*

<https://www.civilbeat.org/2021/05/redrawing-of-hawaiis-political-boundaries-could-stretch-into-early-2022/>

Permitted interaction is being used to expedite decisions. But if HRS 92 concerns lead to a court challenge, that will not expedite anything. And it may influence the outcome of elections by leaving less time to campaign. As you know, the 2011 State commission and 2001 County commissions were challenged.

#### MILITARY

It makes sense to count all family members as military, since military people often move to new locations every few years, and their family often goes with them.

Are the National Guard, reserves, and Coast Guard considered part of the military, for military population reports, and also for Commission reports?

If someone is based in Hawai'i but deployed elsewhere, does the Commission count them as military in Hawai'i and extract them from resident numbers?

Why does the Department of Business, Economic Development, and Tourism give different numbers for military residents than the military does? What is the basis each agency is using for their numbers?

113,473 MILITARY PERSONNEL AND DEPENDENTS, JULY 2019

*based on Table 1.22, PDF p. 52*

[https://files.hawaii.gov/dbedt/economic/databook/db2019/DB2019\\_final\\_rev09-2020.pdf](https://files.hawaii.gov/dbedt/economic/databook/db2019/DB2019_final_rev09-2020.pdf)

105,937 TOTAL MILITARY AND DEPENDENTS, JULY 2019

*armed forces...45,283 military dependents...60,654, based on Table 1.03 PDF p. 17*

[https://files.hawaii.gov/dbedt/economic/databook/db2019/DB2019\\_final\\_rev09-2020.pdf](https://files.hawaii.gov/dbedt/economic/databook/db2019/DB2019_final_rev09-2020.pdf)

64,415...NON-RESIDENT MILITARY (2020 CENSUS)

<https://elections.hawaii.gov/wp-content/uploads/Meeting-Materials-20210826-v1.pdf>,  
PDF p. 37

#### INCARCERATED PEOPLE

Incarcerated people should be counted at their home address—not ignored because our prisons were full and they were shipped off to Arizona.

#### PUBLIC INVOLVEMENT

Meeting information should be accessible to people without computers.

Board packets should be available at least 24 hours before written testimony is due so people can contribute meaningful testimony.

Meeting dates and times should be set in advance to make it easier for the public to testify.



September 8, 2021

2021 Reapportionment Commission  
c/o Scott Nago, Secretary  
802 Lehua Avenue  
Pearl City, Hawai'i 96782

(Via Email Only)

RE: Testimony for the Hawai'i State Reapportionment Commission's September 9, 2021 Meeting

Dear Hawai'i State Reapportionment Commission:

Common Cause Hawai'i is a nonpartisan, nonprofit, grassroots organization dedicated to upholding the core values of American democracy and ensuring a fair and transparent reapportionment and redistricting process.

Common Cause Hawai'i commends the Commission staff for developing and presenting a proposed working timeline and schedule of meetings at the August 26th Commission meeting. Consistent with our testimony from that meeting, however, we ask the Commission, once approved, to immediately list its schedule of meetings publicly on its website to ensure greater public access and participation in Commission meetings. The [Honolulu Reapportionment Commission](#) has listed its future meetings on its site without agendas or commission materials.

Common Cause Hawai'i requests the opportunity to testify after each agenda item. The policy and intent of the Sunshine Law is clear: "the discussions, deliberations, decisions, and action of governmental agencies – shall be conducted as openly as possible". Hawai'i Revised Statutes (HRS) § 92-1. Therefore, given the consequential matters that will be discussed during the meeting after public testimony is taken, especially for agenda items V-IX, the public should be allowed additional opportunity to testify after each agenda item and not be limited to giving testimony at the beginning of the meeting. "Periodic testimony may be especially appropriate in situations where a controversial or significant issue that was not anticipated develops during the board's discussions and decision-making." Kanahele v. Maui Cty. Council, 130 Hawai'i 228, 248, 307 P.3d 1174, 1194 (2013). Limiting the public to testifying at the beginning of a meeting will decrease the effectiveness and meaningfulness of testimony.

Common Cause Hawai'i also reiterates its request for this Commission to count incarcerated people at their home addresses as of April 1, 2020, the official Census Date, for the purposes of drawing legislative district lines. Including incarcerated persons in the population count for the district in which their facility is located alters representational proportions and, as a result, the voting power of residents. Counting Hawai'i's incarcerated population according to their home addresses will eliminate this issue and ensure an accurate and true reapportionment of Hawai'i's political districts. Attached is information on how to count incarcerated people at their home addresses.

In terms of Item VI. Discussion and Action Regarding the Use of “Canoe Districts,” Common Cause highlights for the Commission the relevant parts of Article IV, Section 6 of the Hawai‘i State Constitution which states that, “no district shall extend beyond the boundaries of any basic island unit.” Section 6 also reads, “Except in the case of districts encompassing more than one island, districts shall be contiguous.” Common Cause Hawai‘i encourages the Commission to adhere to the Constitution as it considers the use of “Canoe Districts” to execute its work.

Lastly, with regard to Item VIII. Discussion and Action Regarding the Commission’s Interaction with the Advisory Councils, Common Cause Hawai‘i restates its strong concerns with improperly formed Permitted Interaction Groups (PIGs) if this is intended to be a PIG. We note again that current PIG Rules require, “The scope of the investigation and the scope of each member’s authority are defined at a meeting of the board . . . .” HRS § 92-2.5(b)(1)(A). To ensure sustained public confidence in the work of this commission, it is critical that any and all PIGs are properly, legally formed. Common Cause Hawai‘i again states that PIGs should not be used as a shield to prevent public participation in the reapportionment and redistricting process. Common Cause Hawai‘i encourages the Commission to permit the public to be allowed to observe the PIGs’ work, once properly formed.

If you have any questions or concerns, I am available to discuss further at 808-275-6275 or [sma@commoncause.org](mailto:sma@commoncause.org).

Very respectfully yours,

*Sandy Ma*

Sandy Ma  
Executive Director  
Common Cause Hawai‘i

Attachment: How to Count Incarcerated People at Home



# Step by Step Guide: How to count incarcerated people at home

*An overview of the steps involved in adjusting state redistricting data to create equitable solutions to prison gerrymandering*

## STEP 1

### Get state prison data from the state's correctional agency

- Work with the state's correctional agency to get data for people incarcerated on Census Day, including: address where person is incarcerated, last known address prior to incarceration, age, race, and Hispanic origin, if available.
  - To anonymize the data, a unique identifier should be assigned to each record.
  - In most cases, the data on race is incomplete or the categories used by the correctional agency do not line up with census categories, and states will have to take a best-fit approach to matching the corrections data to the census data.
  - If the state maintains alternative addresses (address provided at arrest or expected address on release, etc.) those should be included as well.
- Ensure address data is as specific and accurate as possible, including street, city, zip code, and state.

States can start Steps 1 & 2 immediately after Census Day or as soon as address data for people incarcerated on April 1 is obtained from corrections agencies.

## STEP 2

### Geocode individual address data

- Remove all addresses that list another state.
- Geocode all remaining addresses - geocoding can be done using geocoding software (i.e. ESRI, MapMarker) or the Census Bureau's batch geocoder, available to states specifically for this purpose.
  - Some states contract with a vendor to do the geocoding.
  - The geocoding process will likely identify additional addresses in need of correction (problems such as "street" instead of "avenue" that look like a complete and accurate address on first glance but fail to match to a mappable address).
- For any addresses that fail to geocode, establish a protocol for correcting addresses and recording any edits made.
  - In 2011, New York established a set of alphabetical codes to note the source of supplemental information used to clean up addresses.
  - Some corrections will be easy, like misspellings or incorrect abbreviations for cities or street names.
  - Other addresses may take more research such as looking at additional address data provided by the state's corrections agency (i.e. booking address) or looking at maps of municipal boundaries, zip codes, or online mapping sites like Google Maps.

- After corrections are made, run all the corrected addresses through the geocoder again, and repeat this process for as many iterations as practicable.
- States handle unusable addresses differently – some require those individuals be counted where they are incarcerated; others, like California, assign the individual to a randomly determined census block within the smallest geographical area that can be determined from the information provided.
- NOTE: Do not let the perfect be the enemy of good! Every person counted at home is one that is not counted in the wrong place. States should make their best effort to correct and geocode as many of the addresses provided, but no state will get 100% accuracy. As a rough guide, a 70% success rate would be considered a good outcome in most states going through the process for the first time.

### STEP 3

#### Subtract the relevant prison populations from census blocks where prisons are located

- Subtract the correctional population reported by the census in the group quarters tables of the redistricting data.
- Some states may require or have discretion to subtract federal prison populations.
- Some states, like Maryland, require that individuals without an address be counted at the facility address. In that case, take any unmatched addresses from Step Two, above, and add those populations back into the census block containing the facility.

### STEP 4

#### Use adjusted data for redistricting

- The state will have the data set that best counts incarcerated people at home and minimizes padding of districts with prisons once it completes Steps 1 thru 3: people with geocodable addresses have been counted in their home census blocks; correctional group quarters counts have been subtracted from the census blocks where prisons are located; and people without a last known, unusable or out-of-state address have either been subtracted or placed back in the census block where they are incarcerated, depending on what is permitted or required under state law.



#### Additional resources:

- Quick reference chart for state-specific legislation: <https://www.prisonersofthecensus.org/models/chart.html>
- Quick reference on state options for addressing prison gerrymandering: [https://www.prisonersofthecensus.org/factsheets/national/state\\_solutions.pdf](https://www.prisonersofthecensus.org/factsheets/national/state_solutions.pdf)
- A detailed overview of the reallocation process used by New York and Maryland in 2010: <https://www.demos.org/policy-briefs/implementing-reform-how-maryland-new-york-ended-prison-gerrymandering>

For questions and more information on prison gerrymandering, visit <https://www.prisonersofthecensus.org>

For questions and more information about redistricting, visit <https://www.commoncause.org/our-work/gerrymandering-and-representation/gerrymandering-redistricting/>

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September 8, 2021

Hawaii Reapportionment Commission  
c/o Scott Nago, Secretary  
802 Lehua Avenue  
Pearl City, Hawaii 96782

Dear Commission Members,

Thank you for the opportunity to testify.

By way of background, I am an attorney. I retired from my position as Chief of the Civil Division of the US Attorney's Office here in Hawaii in September 2018, after 27 years with the Department of Justice, because I could no longer in good conscience represent the positions of the Trump Administration in federal court. I served for two years as Director of Litigation for Lawyers for Equal Justice, part of the Hawaii Appleseed Center for Law and Economic Justice, an organization committed to serving Hawaii's poor and marginalized communities. I have been active in Democratic Party affairs both here and in my original home state in Ohio, in particular in voter protection efforts in Ohio. I am the husband and son-in-law respectively of recently retired politicians Laura Thielen (SD 25) and Cynthia Thielen (HD 50) (neither of whom played in role or indeed has any apparent interest in my testimony). From all these experiences, I know how important the reapportionment process in our political system.

I write simply as a concerned citizen. While I applaud the Commission's diligence in its very challenging work, I believe the Commission has been troublingly opaque in its recent work on determining how to extract nonresident military members and dependents from the Census population count to determine the permanent resident population. The Commission has failed to answer three questions:

- Why has the Commission chosen to use numbers from the federal Department of Defense rather than at least supplementing its analysis with data from the state Department of Business, Economic Development and Tourism?
- What exactly did the Commission request from the Department of Defense? Did it simply ask for a count of the military population in each basic island unit, or did it phrase its request in some other way? The Commission should make its correspondence with DoD public in its entirety.
- How does the Commission explain a decline of more than 30% in the military and dependent population since the last reapportionment process?

I believe the Commission is obligated under the law to provide full information on these questions. If it fails to do so, the reapportionment plan will be vulnerable to legal challenge, through the Hawaii Uniform Information Practices Act or through a challenge in state or federal court. Better to be transparent now.

Very truly yours,

A handwritten signature in black ink, appearing to read "TH AM". The letters are stylized and connected.

Thomas A. Helper  
(808) 824-2874  
tomrepleh@gmail.com

September 9, 2021

Policy Matters

An LLC Company



Re: Public Testimony on Reapportionment Commission Meeting September 9, 2021

Aloha, Commissioners:

My name is Becky Gardner and I am submitting this testimony on behalf of myself as Principal and Founder of Policy Matters LLC. My comments today are focused on item V. of today's agenda: "Discussion and Action to Establish the Permanent Resident Population Base" and the relevance of the Hawaii State Supreme Court decision in *Solomon v. Abercrombie*, 270 P. 3d 1013 (Haw. 2012).

Two very significant points that are clearly iterated in the Solomon decision are:

- (1) *Reapportionment is a 2-step **process**. The Reapportionment Commission must **first** in **Step 1** extract Non Permanent Residents (NPRs) to apportion "AMONG" the Basic Island Units; and then **second**, in **Step 2**. 2011 RC did not properly separate these two processes; and*
- (2) *Census Block-specific information was **NOT needed for Step 1**.*

Here are key excerpts from Solomon which elaborate on these points (emphasis added) (available at this link [https://scholar.google.com/scholar\\_case?case=4978340749206894654&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholarr](https://scholar.google.com/scholar_case?case=4978340749206894654&hl=en&as_sdt=6&as_vis=1&oi=scholarr))

- *"Article IV, sections 4 and 6 provide a **two-step process** for apportionment of the state legislature: apportionment **among** the four counties, **followed by** apportionment within the four counties. Article IV, section 4 **first requires** the Commission to "allocate the total number of members of each house of the state legislature being apportioned **among** the four basic island units, . . . using the total number of permanent residents in each of the basic units and computed by the method known as the method of equal proportions[.]" **Upon such allocation**, article IV, section 6 **then** requires the Commission to "apportion the members among the districts therein" and "redraw district lines where necessary in such manner that for each house the average number of permanent residents per member of each district is as nearly equal to the average for the basic island unit as practicable."*
- *"As explained at the constitutional convention proceeding on apportionment of the state legislature, "[a]pportionment [under article III, section 4, now article IV, section 4] is the **process** of allocating numbers of representatives or senators to various districts within the State. Districting [under article III, section 4, now article IV, section 6] is the process of making those districts. **These are quite different activities.**"*
- *"Determining the total number of permanent residents in the state and in each county required the Commission, **in step one, to extract non-permanent military residents and non-permanent university student residents from the state's and the counties' 2010 Census population.** Apportioning the senate and house members among nearly equal numbers of permanent residents required the Commission, **in step two, to identify the specific locations** of non-permanent military residents and non-permanent university student residents."*
- *" **Identification of the residence addresses** for the non-permanent residents was necessary for apportionment of the senate and house members within the county districts **under step two**, but was **not necessary** for allocation of the senate and house members among the four counties under **step one.** "*

- " The Commission **had sufficient data** to determine the non-permanent military resident populations of each of the counties. The Commission also had data to determine—by the site of Hawaii's universities—the non-permanent student resident populations of each of the counties. "
- " The Commission contends that it apportioned the state legislature in accordance with article IV, section 4 because it excluded, from the counties' permanent resident populations, only non-permanent residents identifiable to particular census blocks. However, HRS § 25-2(a) requires the Commission to apportion the state legislature on the "basis, method and criteria" prescribed by article IV, which provides, in section 4, for apportionment "using the total number of permanent residents in each of the basic island units." **Nothing in article IV, section 4 requires apportionment based on the total number of permanent residents identified by census block.** The 1991 Reapportionment Commission used census blocks to identify, count and locate non-permanent residents, but such method of determining the permanent resident population base was not incorporated in article IV, section 4."
- "The Commission's method of apportioning the state legislature did not properly **separate the step one process of allocating the legislative members among the four counties from the step two process of apportioning the members within county districts.** Identifying the non-permanent resident population for step one and identifying the non-permanent resident population for step two were **separate processes.**"
- "The Commission undertook its reapportionment task by **focusing solely on identification of non-permanent residents for step two and using the results for step two to identify the non-permanent resident population for step one.**"

Also helpful in understanding the process and constitutional mandate is the federal court case, Kostick v. Nago, 960 F. Supp. 2d 1074 - Dist. Court, D. Hawaii 2013;

[https://scholar.google.com/scholar\\_case?case=2994657226643299668&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=2994657226643299668&hl=en&as_sdt=6&as_vis=1&oi=scholar) ;  
 And the State of Hawaii 2011 Reapportionment Commission Final Report and Reapportionment Plan  
 ([https://elections.hawaii.gov/wp-content/uploads/2015/03/2012ReapportionmentFinalReport\\_2012\\_03\\_30.pdf](https://elections.hawaii.gov/wp-content/uploads/2015/03/2012ReapportionmentFinalReport_2012_03_30.pdf))

The Legal Opinion from the Attorney General's office addressed to Senator Laura Acasio (below), which you reviewed in earlier meetings, harmonizes with all of this.

Thank you for the opportunity to provide this testimony.

Sincerely,



Rebecca (Becky) Gardner, Esq.





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July 1, 2021

The Honorable Laura Acasio  
State Capitol, Room 203  
415 South Beretania Street  
Honolulu, Hawai'i 96813

Dear Senator Acasio:

Re: Legal Opinion Relating to Reapportionment

This is in response to your letter dated June 9, 2021, in which you requested that our office provide a legal opinion relating to the upcoming reapportionment and possible interpretations of Act 14, Session Laws of Hawaii 2021 ("Act 14"). Specifically, you asked the following questions:

1. Under an analysis of Article IV, Sections 4 and 6 of the Hawaii State Constitution; HRS Chapter 25; Solomon v. Abercrombie, 126 Haw. 283, 270 P.3d 1013 (2012); Citizens for Equit. & Respon. Gov't v. County, 108 Haw. 318, 120 P.3d 217 (2005); and any other relevant law – and despite the absence of a definition of "domiciliary" in the amended language of HRS § 25-2 that will take effect on July 1 pursuant to Act 14, what can the term "domiciliary" be interpreted to mean other than the residence of a "permanent resident" of Hawaii as clarified by the Hawaii Supreme Court decision in Solomon?; and
2. Notwithstanding the answer to Question 1 above and given the "two-step" process of reapportionment outlined in Solomon, can the amended language of HRS § 25-2, provided in Act 14 "[i]n determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year" (underlining added), be interpreted to mean that the extraction of non-permanent residents, as clarified by Solomon, will be applied "only" to "step one" – "Apportionment Among Basic Island Units" [underlining added] made pursuant to Article IV, Section 4 of the Hawaii State Constitution; and not to "step two" – "Apportionment Within Basic Island Units" made pursuant to Article IV, Section 6?

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Pursuant to Act 14, HRS § 25-2(a)<sup>1</sup> provides in relevant part:

For purposes of legislative reapportionment, a 'permanent resident' means a person having the person's domiciliary in the State. In determining the total number of permanent residents for purposes of apportionment among the four basic island units, the commission shall only extract non-permanent residents from the total population of the State counted by the United States Census Bureau for the respective reapportionment year.

With respect to question number 1, we understand your inquiry to be related to the interpretation of the term "domiciliary" as it is used in the definition of "permanent resident" in HRS § 25-2. It is well-established that,

[d]omicile is proved by evidence of two facts: physical presence at a particular place *and intention of the party to reside there permanently*; or, as is sometimes said, *to make the place his home with no present intent to leave at any foreseeable future time.*

*Matter of Estate of Marcos*, 88 Hawai'i 148, 154, 963 P.2d 1124, 1130 (1998) (emphasis in original). Residence, alone, is insufficient to establish Hawaii as one's domicile; there must also be an intent to make Hawaii the person's home with no present intent to leave in the foreseeable future. *Id.* Thus, for purposes of legislative reapportionment, a "permanent resident" is one who physically resides in the State *and* intends to make the State his home with no present intent to leave in the foreseeable future.

With respect to question number 2, we understand you to be asking whether non-permanent residents may also be extracted for purposes of completing "step two" of the reapportionment process. To the extent that there is sufficient data to identify non-permanent residents, we answer in the affirmative. Reapportionment is a two-step process: first, apportionment among the four basic island units, and second, apportionment within the four basic island units. Haw. Const. art. IV, §§ 4 and 6; *see also Solomon v. Abercrombie*, 126 Hawai'i 283, 292, 270 P.3d 1013, 1022 (2012). In step one, the Commission is required to "allocate the total number of members of each house of the state legislature being reapportioned among the basic island units, . . . using the total number of *permanent residents* in each basic island unit[.]" Haw. Const. art. IV, § 4 (emphasis added). In step two:

[u]pon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of *permanent residents* per member in each district is as nearly equal to the average for the basic island unit as practicable.

<sup>1</sup> Section 5 of Act 14 took effect upon approval by the Governor on May 17, 2021.

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Haw. Const. art. IV, § 6 (emphasis added). Although separate processes, both steps require the Commission to identify a “permanent resident” population. *Solomon*, 126 Hawai‘i at 293, 270 P.3d at 1023. Inasmuch as only permanent residents “may be counted in the population base for the purpose of reapportioning legislative districts,” the Commission is required to extract non-permanent residents where it has sufficient data to identify such residents, notwithstanding the fact that HRS § 25-2 does not expressly prescribe such conduct. *Id.* at 292,-293, 270 P.3d at 1022-23.

We hope this adequately addresses your questions. Please feel free to contact us should you have any further questions.

Very Truly Yours,

/s/ Lori N. Tanigawa

Lori N. Tanigawa  
Deputy Attorney General

APPROVED:



Clare E. Connors  
Attorney General



## The Senate

STATE CAPITOL  
HONOLULU, HAWAII 96813

September 8, 2021

To: Hawaii Reapportionment Commission  
c/o Scott Nago, Chief Elections Officer  
Office of Elections  
802 Lehua Avenue  
Pearl City, HI 96782

RE: Accuracy and Transparency in Determining Non-permanent Resident Numbers for the Purpose of Apportionment

Aloha e Chair Mugiishi and Reapportionment Commission Members,

During the August 26, 2021 Reapportionment Commission Meeting, Chair Mugiishi offered reassurance that the concerns I raised regarding accuracy in non-permanent resident population numbers would be answered during the staff presentation. I am testifying today that these concerns were neither addressed nor assuaged by any of the statements made that day.

This leaves me to ask, once again, for the sake of transparency and accuracy, how the commission can justify using military NPR numbers for extraction that are nearly one-third lower than Department of Business Economic Development and Tourism's data for the same population. As an authoritative body, DBEDT is charged with providing state agencies reliable data regarding a wide range of matters, including population counts. DBEDT cites a 5% decline in military NPR from 2010 to 2020. The significant difference between this data and the data the commission plans to use for the first step of apportionment cannot be dismissed or ignored. This is the lesson learned from *Solomon v. Abercrombie*. The commission must disclose the methodology it used to arrive at the NPR count it intends to use and provide evidence that the military NPR has declined to the extent that it is claiming.

If the commission cannot justify the count it intends to use through the production of such evidence, then the commission is compelled to use the data DBEDT has provided.

Respectfully,

A handwritten signature in black ink, appearing to read "Laura Acasio". The signature is written in a cursive style with a long, sweeping underline.

Senator Laura Acasio  
Senate District 1 – Hilo  
Hawaii State Senate  
415 S. Beretania Street, Suite 203  
Honolulu, Hawaii 96813  
Phone: (808) 586-6821