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

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

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

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.
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

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

**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

<table>
<thead>
<tr>
<th>Description</th>
<th>Statewide</th>
<th>Honolulu</th>
<th>Big Isle</th>
<th>Maui</th>
<th>Kauai</th>
</tr>
</thead>
<tbody>
<tr>
<td>Census Data newly released</td>
<td>1,455,271</td>
<td>1,016,508</td>
<td>200,629</td>
<td>164,754</td>
<td>73,298</td>
</tr>
<tr>
<td>Proposed NPR Military Extraction</td>
<td>64,415</td>
<td>64,010</td>
<td>40</td>
<td>117</td>
<td>248</td>
</tr>
<tr>
<td>Proposed NPR Student Extraction</td>
<td>6,747</td>
<td>6,094</td>
<td>496</td>
<td>108</td>
<td>49</td>
</tr>
<tr>
<td>adjusted</td>
<td>1,384,109</td>
<td>946,404</td>
<td>200,093</td>
<td>164,529</td>
<td>73,001</td>
</tr>
<tr>
<td>Percent of State population</td>
<td>1.0000</td>
<td>0.6838</td>
<td>0.1446</td>
<td>0.1189</td>
<td>0.0527</td>
</tr>
<tr>
<td>House seats with fraction</td>
<td>51</td>
<td>34.87</td>
<td>7.37</td>
<td>6.06</td>
<td>2.69</td>
</tr>
<tr>
<td>House seats whole numbers</td>
<td>51</td>
<td>35</td>
<td>7</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Senate seats with fraction</td>
<td>25</td>
<td>17.09</td>
<td>3.61</td>
<td>2.97</td>
<td>1.32</td>
</tr>
<tr>
<td>Senate seats whole numbers</td>
<td>25</td>
<td>17</td>
<td>4</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Pop per House District if O has 35 seats</td>
<td>27,139.39</td>
<td>27,040.11</td>
<td>28,584.71</td>
<td>27,421.50</td>
<td>24,333.67</td>
</tr>
<tr>
<td>Variance = 5.7</td>
<td>-0.37</td>
<td>5.33</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description</th>
<th>Statewide</th>
<th>Honolulu</th>
<th>Big Isle</th>
<th>Maui</th>
<th>Kauai</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newly Released Census Data</td>
<td>1,455,271</td>
<td>1,016,508</td>
<td>200,629</td>
<td>164,754</td>
<td>73,298</td>
</tr>
<tr>
<td>Extract 2012 Military Numbers</td>
<td>95,447</td>
<td>95,007</td>
<td>89</td>
<td>133</td>
<td>218</td>
</tr>
<tr>
<td>Extract Staff’s Proposed Student Number</td>
<td>6,747</td>
<td>6,094</td>
<td>496</td>
<td>108</td>
<td>49</td>
</tr>
<tr>
<td>Adjusted Population</td>
<td>1,353,077</td>
<td>915,407</td>
<td>200,044</td>
<td>164,513</td>
<td>73,031</td>
</tr>
<tr>
<td>% of State Population</td>
<td>1</td>
<td>0.6765</td>
<td>0.1478</td>
<td>0.1216</td>
<td>0.0540</td>
</tr>
<tr>
<td>House seats with fraction</td>
<td>51</td>
<td>34.50</td>
<td>7.54</td>
<td>6.20</td>
<td>2.75</td>
</tr>
<tr>
<td>House seats whole numbers</td>
<td>51</td>
<td>34</td>
<td>8</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>Senate seats with fraction</td>
<td>25</td>
<td>16.91</td>
<td>3.70</td>
<td>3.04</td>
<td>1.35</td>
</tr>
<tr>
<td>Senate seats whole numbers</td>
<td>25</td>
<td>17</td>
<td>4</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Pop per House seat with O 34 H8</td>
<td>26,530.92</td>
<td>26,923.74</td>
<td>25,005.50</td>
<td>27,418.83</td>
<td>24,343.67</td>
</tr>
<tr>
<td>Variance: 7.23</td>
<td>1.48</td>
<td>(5.75)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

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

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 28th meeting.

CONCLUSION:

THE PROPOSED EXTRACTION IS AN UNPRECEDENTED 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

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
105,937 TOTAL MILITARY AND DEPENDENTS, JULY 2019
armed forces...45,283 military dependents...60,654, based on Table 1.03 PDF p. 17

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

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 (Via Email Only)
c/o Scott Nago, Secretary
802 Lehua Avenue
Pearl City, Hawaii 96782

RE: Testimony for the Hawaii State Reapportionment Commission’s September 9, 2021 Meeting

Dear Hawaii State Reapportionment Commission:

Common Cause Hawaii 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 Hawaii 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 Hawaii 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”. Hawaii 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 Hawaii 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 Hawaii 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 Hawaii’s incarcerated population according to their home addresses will eliminate this issue and ensure an accurate and true reapportionment of Hawaii’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.

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](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:  

For questions and more information on prison gerrymandering, visit  
[https://www.prisonersofthecensus.org](https://www.prisonersofthecensus.org)

For questions and more information about redistricting, visit  
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 a 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,

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

- “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=scholarr;

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.
The Honorable Laura Acasio  
State Capitol, Room 203  
415 South Beretania Street  
Honolulu, Hawaiʻi 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. & Respons. 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?

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?
Pursuant to Act 14, HRS § 25-2(a)\(^1\) 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 Haw. 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 Haw. 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.

\(^1\) Section 5 of Act 14 took effect upon approval by the Governor on May 17, 2021.
The Honorable Laura Acasio  
July 1, 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
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,

[Signature]

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