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# OHA should allow trustee to speak out

By Walter Heen and Randall Roth  
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Eight members of the Office of Hawaiian Affairs' governing board are currently pitted against the ninth member, as the Star-Advertiser's Timothy Hurley evenhandedly reported ("[Office of Hawaiian Affairs Trustee Keli'i Akina is target of complaints](#)," June 22).

The eight say they are dutybound as trustees to investigate complaints that Keli'i Akina violated an OHA rule prohibiting a dissenting board member from publicly criticizing measures approved by the majority.

The complaints reportedly stem from Akina's public criticism of an 8-1 board decision to delay an independent forensic audit of OHA. In both a press release and monthly column, Akina described that decision as "a step away from transparency and accountability."

As noted in a Star-Advertiser editorial, OHA's no-public-dissent rule arguably violates Akina's constitutionally protected right of free speech ("[Office of Hawaiian Affairs censors itself](#)," June 15). It also prevents his effective representation of constituents and further reduces transparency and accountability at OHA.

Upon learning that the other eight board members intended to discuss the complaints against him in a closed-door executive session, Akina waived his privacy rights and requested that all proceedings related to his alleged transgressions be held in public.

The board declined Akina's request and excluded him from the closed-door session, which Akina has since described as a clear violation of the open-meetings law.

The majority board members seem to view themselves more like trustees of an alii trust, such as Kamehameha Schools or Queen Liliuokalani Trust, as opposed to elected officials in charge of a state agency.



STAR-ADVERTISER / 2016    *Office of Hawaiian Affairs trustee Keli'i Akina attended his first meeting as an OHA board member in December 2016.*

In their defense, such thinking probably reflects an original conception of OHA as a quasi-autonomous trust, governed by conventional trustees. But that conception runs counter to a subsequent U.S. Supreme Court determination that OHA is a state agency. It also runs counter to a federal District Court decision invalidating the Hawaii State Constitution requirement that OHA trustees be Hawaiian.

In that same lawsuit, OHA questioned one of the named plaintiff's qualifications to be an OHA trustee because of things he had written about OHA. The court described that argument as having serious First Amendment implications, and added, "Barring a candidate from the ballot as a result of that candidate's public comments would strike a blow to one of our system's most fundamental principles — the right to robust public debate on matters of self-government."

The court went on to describe OHA as a state agency that is not quasi-sovereign.

Despite such court rulings, OHA trustees continue to present themselves as trustees of a trust with a high degree of autonomy, presumably with a well-intentioned goal of carrying out the original conception of OHA. And while subsequent court decisions have declared key aspects of that conception invalid, some questions remain unanswered.

OHA is not just any state agency — but what, exactly, are the differences? There presumably are things OHA and its board members can do that other agencies and their managers cannot do, but no one can predict with certainty where future courts might draw all the relevant lines. The current controversy at OHA is just the latest. It won't be the last.

This commentary cannot resolve the legal confusion. Courts can do so, but usually one issue at a time. The state Legislature could also help to draw some brighter lines. Meanwhile money intended for OHA beneficiaries will go to lawyers on opposite sides of each controversy.

Some of these controversies are unnecessary. OHA's no-public-dissent rule would be a terrible policy even if it did not violate any laws or Akina's constitutionally protected rights, though we believe it clearly does.



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