



WAYNE STATE
UNIVERSITY

Center for Urban Studies

Legislative Oversight in Hawaii

Capacity and Usage Assessment

Oversight through Analytic Bureaucracies:	Moderate
Oversight through the Appropriations Process:	Moderate
Oversight through Committees:	High
Oversight through Administrative Rule Review:	Minimal
Oversight through Advice and Consent:	Limited
Oversight through Monitoring Contracts:	Moderate
Judgment of Overall Institutional Capacity for Oversight:	High
Judgment of Overall Use of Institutional Capacity for Oversight:	High

Summary Assessment

Hawaii has multiple analytic support agencies that aid the legislature with its oversight responsibilities. The system stresses transparency and public accessibility of audit reports. Audit reports are used regularly in committee hearings. Sunrise and sunset reviews provide a mechanism for legislators to influence state agencies. Analytic bureaucracies aid in these reviews. Audits also provide a mechanism to oversee contracts despite the fact that the executive branch is primarily empowered¹ to review and monitor contracts.

Major Strengths

Audit reports are well publicized and summaries are prepared with the intent to promote public understanding and accessibility to Hawaii's citizens. The auditor's office provides one-page follow-up reports that describe actions taken in response to its reports. Moreover, the audit reports themselves address whether the legislature and agencies acted on audit recommendations. Audits provide a mechanism that the legislature uses to oversee contracts even though the executive branch is solely empowered to monitor contracts. Audits are used in making budget decisions and standing committees attempt to pass legislation based on audit findings.

Challenges

¹ <http://spo.hawaii.gov/procurement-wizard/manual/contract-management/>, accessed 9/5/18.

The governor has strong appointment powers and can thus exert a lot of control over state government. However, despite ongoing Democratic control of both branches of state government, Hawaii's legislators take their advice and consent responsibilities seriously with the legislature at least occasionally challenging gubernatorial appointees. Additionally, it is not clear how effective the legislature is at passing bills introduced in response to audit findings, which is somewhat surprising given the overwhelming single party control of state government. Also, Hawaii's legislature lacks the authority to participate in the promulgation of administrative rules, which means that it cannot easily assert itself if it feels that agencies are formulating rules that conflict with legislative intent. On balance, however, Hawaii's legislature has the resources it needs to conduct meaningful oversight, and it appears to take this responsibility seriously.

Relevant Institutional Characteristics

The National Conference of State Legislatures (NCSL) (2017) classifies the Hawaii Legislature as a full-time lite legislature, meaning that the job takes 80% or more of a full-time job and the pay typically does not require a second job. The base salary is \$62,604 plus a daily rate of \$225 when the legislature is in session (NCSL, 2018).² This aligns with its Squire Index ranking of being the 7th most professional legislature. This assessment means that the legislature in Hawaii is closer in professionalism to the U.S. Congress than 43 other states (Squire, 2017). The legislature has 707 staff members, 307 of which are permanent (NCSL, 2015). There are no limits on the number of terms, consecutive or otherwise, that a legislator may hold. Hawaii's legislature is constitutionally limited to a 60 day session (NCSL, 2010) with the potential for a 15-day extension either by gubernatorial request or a two-thirds vote by both legislative chambers.³ Similar options exist for the governor or legislature to call a special session, which is limited to 30 days but can also be extended by 15 days.⁴ This means that Hawaii's legislative session could last 120 days, which substantially exceeds the actual session days for states that do not restrict session length (Squire, 2017).

Hawaii has a relatively small legislative body with a total of 76 members, with 51 members in the house and 25 in the senate. Representatives and senators are elected for two-year and four-year terms, respectively, and the members of the legislature are not bound by term limits. The combination of the high level of professionalism and lack of term limits allows legislators to gain substantial experience in their roles.

The power and structure of the executive branch is established in Article V of the Hawaii Constitution (HI art. V). Hawaii is one of a handful of states that does not separately elect any top executive level positions, such as attorney general (Council of State Governments, 2014). The only exception is that Hawaii is one of 17 states that hold separate elections for lieutenant governor.⁵ In these states, the lieutenant governor can be from a different party than the governor. The lieutenant governor in Hawaii is one of three, including Utah and Alaska, whose duties include those typically performed by a secretary of state. Although the governor has the power to appoint the heads of 20 departments, these appointments require the consent of the senate (HI art. V, sec. 6). The governor shares budget making power with the legislature but has

² <http://www.ncsl.org/research/about-state-legislatures/legislator-compensation-2018.aspx>, accessed 6/30/18.

³ https://ballotpedia.org/Hawaii_State_Legislature, accessed 6/30/18.

⁴ https://ballotpedia.org/Hawaii_State_Legislature, accessed 6/30/18.

⁵ <http://www.nlga.us/lt-governors/office-of-lieutenant-governor/methods-of-election/>, accessed 6/30/18.

the option of a line-item veto for all bills, including the legislative budget. Although the legislature is not required to pass a balanced budget, the governor is required, constitutionally and by statute, to propose and maintain a balanced budget (HI art. VII, sec. 5; HI stat. title 5, sec. 37-74). The governor also has broad authority to use executive orders, including to reorganize government. However, these executive orders are constrained by the state Administrative Procedures Act and are subject to legislative review. Therefore, Hawaii's governor has just an average amount of institutional power overall and is rated 23rd on the power scale by Ferguson (2015).

Hawaii has a higher than average share of local and state government employees as a percentage of the state workforce, 12.0%. The national average is 11.3%, according to the CATO Institute (2006).

Political Context

In the last 50 years, Hawaii's legislature has been controlled by the Democratic Party (NCSL, 2017). During the same period, Hawaii has consistently had a Democratic governor, with the exception of 2002-2010, when a Republican governor served two consecutive terms (NGA, n.d.). In 2011, the Democratic Party gained control of both houses and the governorship (a trifecta), making it one of eight state governments under Democratic Party control.⁶ The Democratic Party has a veto-proof majority or supermajority in the legislature, which means that the Democratic Party in Hawaii has a margin large enough to override a gubernatorial veto without any votes from the Republican Party. In 2017, the state's senate had no Republican members and only six Republicans served in the lower chamber. This long history of Democratic dominance in the state means that intra-party conflict is more important than conflict between the two major political parties (Shor & McCarty, 2015; Haider-Markel, 2008). The progressive culture of the state results in political action that "prioritizes equity, inclusion, and collective action through public institutions" (Haider-Markel, 2008). But given the lack of partisan competition, the party organizations have limited control over candidates and elected officials, who are relatively free to consider their own and their constituents interests rather than accepting party positions (Haider-Markel, 2008).

Dimensions of Oversight

Oversight Through Analytic Bureaucracies

There are several legislative service agencies that provide non-partisan support to Hawaii's legislature. These agencies include the Office of the Auditor (OA), the Legislative Advisory Committee (LAC), the Office of the Legislative Reference Bureau (LRB), the ombudsman, and the Office of the Legislative Analyst (OLA). The OA is the primary legislative analytic bureaucracy that conducts oversight activities. The LAC falls under the auspices of the OA organizationally (HRS BB23-61 to 23-67; Act 165 SLH 1989). Although the LAC does

⁶ https://ballotpedia.org/Party_control_of_Hawaii_state_government, accessed 6/30/18.

analysis and provides advice to the legislature, it does not assist with oversight. It provides information and resources on legislation that allows the legislature to make decisions on technical matters and will not be discussed further. The OLA provides fiscal analysis. The ombudsman provides oversight over executive agencies and will be discussed in this section below. The LRB, discussed further in this section, provides support to the legislature for oversight activities.

The Hawaii State Constitution establishes the position of auditor (HI const. art. VII, sec. 10). The auditor is appointed by a majority vote in a joint session of the house and senate and serves for an eight-year term. The auditor can be removed for cause by a two-thirds vote in a joint session. The duties of the auditor include post-audits of transactions, accounts, programs, and performance of all departments, offices, and agencies of the state and its political subdivisions. The Hawaii State Constitution also authorizes investigations as directed by the legislature including powers to examine all books, records, files, papers, and documents, to summon persons to produce records and answer questions under oath, and to hold working papers confidential.⁷ The auditor helps “eliminate waste and inefficiency in government, provide the legislature with a check against the powers of the executive branch, and ensure that public funds are expended according to legislative intent.”⁸ Staffing of the OA, in addition to the auditor, consists of a deputy auditor, four managers, 13 analysts, and six information technology and office services staff for a total of 25 staff. The auditor often contracts out a majority of the state’s financial statement audits and uses outside consultants. The agency is well funded with a 2017 appropriation of approximately \$6.2 million from a state budget of \$10.7 billion. Audits are required every two years after the close of the fiscal year but also occur as necessary or directed by the legislature. The OA produces annual reports that provide one-page summaries on the performance audits conducted through the year with follow-up reports on previous performance audits. The follow-up reports assess whether any of the audit recommendations were adopted or any improvements found.

From these reports, it is clear the OA spends a considerable amount of time producing performance audits and publicizing their findings in non-technical language for public consumption. For example, in 2012, the OA produced a report on the National Energy Laboratory of Hawaii (NELHA), making 28 audit recommendations such as improving board member training. Audit findings include conflicts of interest that may violate the State Ethics Code and violations of the Sunshine Law, which requires timely public access to minutes.⁹ This report was picked up by various media outlets in Hawaii (Jensen, 2012) within a month of its publication and the stories generally demonstrated a willingness on the part of NELHA to adopt the OA’s recommendations (Cocke, 2012). In 2015, the OA produced a report following up on their 2012 performance review of NELHA, finding that of OA’s 28 recommendations, NELHA had addressed all but five.¹⁰ In 2017, the OA produced 38 reports that include “performance audits of state agencies, studies of the impacts of proposed legislation, and reviews of special, revolving, and trust funds.”¹¹ Of these eight consisted of state agency and program audits or audit follow up reports and five were reports on trust funds or revolving funds or similar funds. It

⁷ <http://auditor.hawaii.gov/about-us/>, accessed 6/30/18.

⁸ <http://files.hawaii.gov/auditor/Reports/2018/2017AnnualReport.pdf>, accessed 6/30/18.

⁹ <http://files.hawaii.gov/auditor/Reports/2012/12-03.pdf>, accessed 6/30/18.

¹⁰ <http://files.hawaii.gov/auditor/Reports/2015/15-04.pdf>, accessed 6/30/18.

¹¹ <http://files.hawaii.gov/auditor/Reports/2018/2017AnnualReport.pdf>, accessed 6/30/18.

also contracted with CPA firms for 19 financial audits of 2016 spending. Two of these were the Comprehensive Annual Financial Reports and the state’s Single Audit Report.

The Office of the Legislative Analyst (OLA) and the Joint Legislative Budget Committee (JLBC) were established in Act 347, Session Laws of Hawaii 1990, for the purpose of expanding the technical capabilities of the legislature to analyze fiscal data for the state (also HRS 21F). The JLBC is composed of five members of each chamber of the legislature and members from the majority and minority parties selected by the senate president and the house speaker. JLBC is co-chaired by the chairs of the Senate Ways and Means Committee and House Finance Committee. The legislative analyst is appointed by the JLBC for a four-year term and the OLA reports to the JLBC. The OLA provides research and analysis of the state budget, revenues and expenditures, organizations, and functions to the JLBC. The JLBC then transmits this information to the entire legislature.

The Legislative Reference Bureau (LRB) was initially established as a research organization at the University of Hawaii. In 1972, authority for the LRB was transferred to the legislature (HRS BB23G-1 to 23G-20). The director of the agency is appointed to a six-year term by the majority vote of each house of the legislature in a joint session. Removal of the director must be for neglect, misconduct, or disability and requires a two-thirds vote of the legislature. The agency functions full-time and has professional staff including legal, research, library, computer, and clerical personnel (Hawaii Legislators’ Handbook chap. 10).¹² Their purpose is to “provide impartial research, consultation, and document drafting services, maintaining a research library, statutes revision, and publication, operating a computerized legislative information system, and providing resources to enhance public participation in the legislative process.”¹³ The LRB assists in facilitating the work of the aforementioned agencies.

Hawaii has an ombudsman. The position “accepts and investigates complaints by the public about any action or inaction by any officer or employee of an executive agency or the state or county government.”¹⁴ The ombudsman is appointed by the legislature to perform the following duties (section 96-8, HRS):

[investigate] administrative acts that might be: (1) contrary to law; (2) unreasonable, unfair, oppressive, or unnecessarily discriminatory, even though in accordance with law; (3) based on a mistake of fact; (4) based on improper or irrelevant grounds; (5) unaccompanied by an adequate statement of reasons; (6) performed in an inefficient manner; or (7) otherwise erroneous.

The ombudsman is not empowered to make any administrative change. From the *Guide to Government in Hawaii*, “central to the classical principle of the ombudsman institution is that the office has no actual power to change administrative decisions or actions; instead it must rely on reasoned persuasion to convince agencies to resolve justified complaints.”

There are other analytic bureaucracies in the state that operate outside of the auspices of legislative authority. One such entity is the Department of Accounting and General Services, which conducts audits of the various state agencies and operates at the direction of the state

¹² <http://lrbhawaii.org/hndbook/hbk10.html>, accessed 6/30/18.

¹³ <http://lrbhawaii.org/hndbook/hbk10.html>, accessed 6/30/18.

¹⁴ <http://lrbhawaii.org/gd/gdgothi.pdf>, accessed 5/17/18.

comptroller. The state comptroller is appointed by the governor as an executive branch oversight mechanism.

Oversight Through the Appropriations Process

As stated earlier, the governor and the legislature have shared budget powers. The governor is responsible for preparing the budget, and the legislature is responsible for approving the budget and appropriating the funds. There are several agencies that are controlled in whole or part by the legislature that have mechanisms for oversight over the budget and appropriation process. One mechanism that constrains the governor and the legislature in the budget process is the Council on Revenues (HRS chap. 37 Part VI; Act 278 SLH 1980). The Council on Revenues is comprised of seven members, three of which are appointed by the governor for a four-year term with two each appointed for two-year terms by the president of the senate and the speaker of the house. The council prepares revenue estimates for use by the governor and the legislature to prepare and approve the budget. Both branches are constrained by the estimates. If either approves expenditures above the revenue estimates, it must be publicly disclosed with an explanation.

The legislature has control over expenditures; no public money shall be expended except as appropriated by law (HI Const. art. VII sec. 7). Although the governor does initiate the budget process by submitting his budget, it is the legislature who must approve or amend the budget prior to any funds being appropriated. The governor can veto the budget bill. The governor has line-item veto power for most expenditures but must veto the legislative or judicial budgets as a whole (HRS chap. 37). If the governor fails to sign or return an appropriations bill within 10 days, it will become law. Only unanticipated federal and trust funds and certain special and revolving funds may be expended without legislative authority. These funds are monitored by the auditor, who is required to analyze all bills proposing to establish new special or revolving funds, report to the legislature on these funds, and make recommendations for legislative action on any funds that are not necessary or fulfilling the intended purpose (HRS 23-11). As we noted earlier, during 2017 the auditor reported on five of these funds.

The Hawaii State Senate Ways and Means Committee provides oversight through the appropriations process. An example of this is the recent committee passage of the bailout of the rail project in Honolulu by a vote of six to five. The bill would generate \$2.37 billion from a 1% increase in the statewide hotel room tax for 13 years and extend the half-percent general excise tax surcharge on the island of Oahu for another three years. During the five-hour public hearing on the bill, senators on the Ways and Means Committee ask officials why the costs were so high (Kalani, 2017). The website for the Senate Ways and Means Committee showed the committee was active in publicizing such hearings and taking action to address problems. The House Finance Committee performs the same role in the house as the Ways and Means Committee does for the senate.

The demise of two appropriations bills, HB 1883 and SB 3087, shows how a carrot and stick approach to oversight backfired. A pilot program to stop agriculture theft had been going well by all accounts, but a cash-strapped Department of Agriculture was worried about whether it could continue the pilot program without cutting other operations. Therefore, the department

sought additional funds from the legislature.¹⁵ Another program through the Agribusiness Development Corporation (ADC) was trying to develop a papaya that could be exported. This program also needed funding from the legislature.¹⁶ A legislative maneuver tied additional financing for both programs to an audit. In the end, legislators who wanted to appropriate the money but did not want the audit killed the bill (Dible, 2018a). One of these legislators cited the difficulty involved in auditing such a large and complicated agency. Other legislators commented that the substance of the bill was good for Hawaii, but the Committees on Finance and on Ways and Means would not provide the funding, because the papaya research included an audit of ADC (Dible, 2018b).

Oversight Through Committees

Hawaii's Office of the Auditor (OA), discussed above, is, by design, directed by its appointed head and is not under direct control of any one committee, which generally insulates auditors from pressure from individual legislators. The House Finance Committee and Senate Ways and Means Committee are both standing committees with special oversight responsibility. Any of the committees in the house and senate, 36 in total, may request the OA to conduct investigations or studies. We are told that the OA audit schedule is determined by the Office of the State Auditor and that while committees, concurrent resolutions, or single-chamber resolutions often make requests for audits, it is ultimately the OA that determines which audits to conduct (interview notes, 2018). Due to the close relationship between the OA and the legislature, performance audits can be requested by legislators. Therefore, committees initiate the oversight process and audits focus on topics that legislators want to pursue.

Vignette: Standing Committee on Oversight of the Hawaii Emergency Management Agency

On January 13, 2018, the Hawaii Emergency Management Agency alerted the public to an incoming missile attack including a push alert consisting of the following message (all caps in original alert):

BALLISTIC MISSILE THREAT INBOUND TO HAWAII. SEEK IMMEDIATE SHELTER. THIS IS NOT A DRILL (Peterkin, 2018).

The false missile alert occurred on the heels of North Korea missile tests and saber rattling. The alert sent citizens for cover and was a focusing event for legislative oversight of executive branch agencies responsible for emergency management. Several issues became the focus of legislative oversight: the cause of the false alarm, citizens being refused shelter immediately following the false alarm, and the lack of disaster planning/preparedness by state agencies charged with emergency management. Oversight consisted of an initial information briefing in a joint hearing which was followed by bill drafting including a series of hearings featuring emergency management staff. While none of the legislation has passed, there has been

¹⁵ https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=1883, accessed 5/17/18.

¹⁶ https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=3087, accessed 5/17/18.

a change in leadership at the agency responsible for the false alert. Legislative oversight in this case is best described as legislators performing a cop-on-the-beat policing of executive agencies.

On January 19, six days after the false alert, in a joint session of the legislature, the House Committee on Public Safety, House Committee on Veterans, Military, and International Affairs, and Culture and the Arts, Senate Committee on Public Safety, Intergovernmental, and Military Affairs, and the Senate Committee and Governmental Operations held a joint informational briefing into the false missile alert. The video is available for the informational briefing¹⁷ and the hearing we feature below.¹⁸The Chair of the House Public Safety Committee, Representative Gregg Takayama, chaired the informational briefing. The meeting lasted two hours and 21 minutes. At the introduction of the meeting, Representative Gregg Takayama stated the purpose of the meeting:

Six days ago, Hawaii came face-to-face with the prospect of a nuclear catastrophe. People reacted with panic and prayers followed after too many minutes with relief and anger. I hope this briefing will help answer any remaining questions over how this huge error occurred, why it took so long for state officials to announce it was a false alarm, why some cell phones never received any alerts, and what's changed to make sure this never happens again. And I hope we will take positive steps to enact the many lessons learned. For our part as legislators, I myself believe we should hold ourselves accountable to make sure . . . when we send people to government buildings to seek refuge that these safe shelters really do provide safe shelter from catastrophe from anywhere from a nuclear attack to a hurricane.

The governor and the Hawaii Emergency Management Agency Administrator and various military officials participated in the informational briefing. No public testimony was taken at this informational briefing. The governor made a brief statement and took questions for approximately 30 minutes. After the governor answered questions, he left and officials from the Hawaii Emergency Management Agency and some military officials made a brief statement and answered questions. Legislators sought answers from officials with several key themes emerging: official timeline and cause of the false alert; who or what was to blame and what sort of punishment has been meted out to this point and guardrails put in place to prevent a future occurrence; past efforts at preparedness, the gaps in preparedness exposed by the false alert, and what kinds of plans are being prepared to increase preparedness; failures in the alert system, such as areas that lack sirens, areas with poor cell reception, and the lack of a universally understood alert (hearing impaired, non-native language speaker, etc.); legal exposure to the state for any harm done by the false alert, and; there were questions focused on the internal operations of the Emergency Management Agency, such as staffing, civil service exempt staff, and budget needs. A complaint echoed by many legislators was that the governor left the briefing early and the lack of accountability for the Emergency Management Agency's poor performance, both for the false alert and the lack of preparedness or policy recommendations moving forward. The governor and officials asked for time to let an investigation proceed. Legislators were prepared with follow-up questions or rephrasing

¹⁷ http://olelo.granicus.com/MediaPlayer.php?view_id=13&clip_id=64582#, accessed 10/11/18.

¹⁸ http://olelo.granicus.com/MediaPlayer.php?view_id=31&clip_id=64879, accessed 10/11/18.

questions to get at issues. Legislators often cited constituents and local news broadcasts when asking questions or making a statement.

On January 30, 2018, the administrative head of the Emergency Management Agency and official present for questions at the informational briefing resigned (Star-Advertiser, 2018). Bills were drafted and would go through the legislative process following the incident. Although none would go on to become law, bill drafting and hearings did include Emergency Management Agency officials. The first such hearing would occur on February 1, 19 days after the false alert, in a joint hearing by the House Committee on Public Safety and House Committee on Veterans Military International Affairs Culture and Arts. Four bills were considered and voted out of committee: HB¹⁹2645, HB²⁰2673,²¹ HB²²2693,²³ and HB²⁴2675.²⁵ Collectively, the bills dealt with preparedness, reporting of emergency plans by the Emergency Management Agency to the legislature, liability for business and homeowners who gave shelter during a disaster, provided penalties for private establishments for turning people away during disasters, price gouging during disasters, and providing closed captioning for televised disaster alerts. Emergency Management Agency officials opposed legislation that included penalties, stating they would not enforce it. Rather, they argued most people are good and would let shelter-seekers in, and rather than focusing on penalties, the legislature should look to eliminating barriers to taking in shelter-seekers, such as liability. Legislators would often point to the problem of expectations, specifically, the Emergency Management Agencies failure to adequately communicate those expectations to the public. The business community's representatives echoed this concern, stating that Hawaii's stores are not designed for a war-zone but want to be good members of the community and are willing to work with the Emergency Management Agency on developing training and protocols. Emergency Management Agency staff acknowledged the challenges they continue to face while they attempt to educate the public on what to do during a disaster.

Tracing the movement of HB 2693, which requires the Emergency Management Agency to produce a plan and legislative report, shows a process typical for all the bills discussed. It was introduced January 24 and referred to House Committee on Public Safety, House Committee on Veterans, Military, and International Affairs, and Culture and the Arts, House Committee on the Judiciary, and House Committee on Finance, where they were passed with amendment and referred to the Senate Committee on Public Safety, Intergovernmental and

¹⁹ Clarifies that a civil liability exemption for providing emergency access during a disaster applies to facilities receiving compensation and to owners who sell commodities to people seeking emergency access shelter on the owner's property; provided that the owner does not engage in price gouging.

²⁰ Prohibits places of public accommodation from denying shelter to any person when the State, or any portion thereof, is the subject of an emergency alert that advises the public to immediately seek shelter. Provides for an unspecified civil penalty for each violation. Provides immunity from civil liability, with certain exceptions.

²¹ https://www.capitol.hawaii.gov/session2018/hearingnotices/HEARING_PBS-VMI_02-01-18_.HTM, accessed 9/14/18.

²² Requires businesses and homeowners to provide shelter upon missile threat alert. Provides immunity to businesses and homeowners. Requires the Hawaii Advisory Council on Emergency management to develop a plan for emergency and disaster response. Requires legislative report. Appropriates moneys.

²³ https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2693&year=2018, accessed 9/14/18.

²⁴ https://www.capitol.hawaii.gov/session2018/bills/HB2675_.HTM, accessed 10/11/18.

²⁵ Requires the Hawaii Emergency Management Agency to amend the state emergency alert system and state emergency management plans as necessary to conform to all current federal laws and regulations that ensure the accessibility of video programming that provides emergency information.

*Military Affairs and the Senate Committee on the Judiciary on March 8, 2018, where it currently sits.*²⁶

The committee information briefing and the hearing demonstrates that Hawaii has the legislative capacity to hold executive branch agencies accountable for performance. Even though no bills became law at this time, the legislature has the capacity to take input from citizens and news sources and use it to hold agencies accountable for their performance.

Oversight Through the Administrative Rules Process

According to Tharp, the governor - not the legislature - has the power to review rules, and the governor may only review with the power to veto proposed rules (2001). Therefore, legislative action in the rule making process must occur through normal, statutory means. The Legislative Reference Bureau (LRB) helps agencies with the formatting of rules, but in no way does this challenge or alter the status of a rule (Schwartz, 2010). All other review is done by the executive branch either by the Department of Budget and Finance or the Small Business Regulatory Review Board.

Oversight Through Advice and Consent

As noted earlier, Hawaii's governor has extraordinary appointment powers, but the senate can block some key gubernatorial appointments, such as attorney general, treasurer, adjutant general, comptroller, and the head of the Department of Agriculture. As recently as 2014, senators challenged two appointments. Although both nominees "sailed" through confirmation hearings in committee, other senators raised questions prior to the floor vote. The Chair of the Senate Agriculture Committee questioned the honesty of the appointee to lead the Office of Environmental Quality Control. He also disagreed with her position on genetically modified organisms. At the time, this appointee was the sitting Chair of the House Agriculture Committee (Blair, 2014). Another appointee did not receive a unanimous vote during committee confirmation hearings due to potential conflicts of interest. He was appointed to the Hawaii Community Development Authority, but senators said that being a developer, he did not adequately represent small business. These challenges are surprising for a couple of reasons. First, it is very rare for the senate to reject gubernatorial nominees because the executive and legislative branches are controlled by Democrats. Second, one of the challenged appointees was a sitting Democratic senator. It is not unheard of, however, for the governor to withdraw a nominee when senators express reservations. This occurred with the previous gubernatorial choice for the Environmental Quality Commission, after environmental groups objected to a nominee (Blair, 2014).

There are formal provisions for the executive branch to implement reorganization plans and agency creation (Council of State Governments, 2014). Interviewees said that some reorganizations require statutes while others do not. We were told that some statutory changes result in an office moving from one department to another and empowering a board (interview

²⁶ <https://legiscan.com/HI/bill/HB2693/2018>, accessed 9/14/18.

notes, 2018). Also, that section 26-4 of the HRS²⁷ lists the various departments and this list could only be changed by legislative action. Furthermore, that HRS 26-41 grants the executive the authority to establish temporary boards and commissions and HRS 127 and 128 allow for executive orders for emergency provisions. Regarding legislative review of unilateral agency reorganization, while the *Book of the States* indicates the existence of review, our sources say they are not familiar with any sort of general legislative review of executive orders (interview notes, 2018). Nonetheless, there is indication of limited review authority for a very specific kind of order, discussed more below.

Hawaii's governor has three sources of authority for making executive orders: constitutional, statutory, and common practice (Council of State Governments, 2014). These executive orders must, however, follow filing and publication procedures and comply with the Administrative Procedures Act. These are additionally subject to legislative review (Council of State Governments, 2014), however, as mentioned before, our sources could not verify the existence of actual legislative review of executive orders.

In 2017, there were a total of 24 executive orders: 13 dealt with the setting aside of public lands for a specific purpose (five were for agriculture, two were for an armory, one was for elderly affordable housing, one was for the Division of Forestry, one was for the Housing Finance and Development Corporation, and three were for public purposes), four dealt with the withdrawal or cancellation of lands that were set aside, five dealt with the wages, hours, and working conditions of certain, non-collective bargaining employees, including those who are appointed or elected, one dealt with certain administrative matters in the Department of Transportation,²⁸ including a special designation to receive federal funds, and one dealt with connected autonomous vehicles (CAV) by creating a contact in the governor's office and directing several departments to work with companies seeking to test CAVs.²⁹ In reading the executive orders, all orders dealing with lands include the following plank explicitly referring to legislative review:

SUBJECT to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by majority vote of both, in any regular or special session next following the date of this executive order.³⁰

No examples could be found of the legislature exercising this form of legislative review and none of our sources mentioned it. We are told by one source that they are not aware of the legislature having used their authority to block an order, but they are fairly certain that it has probably been used at some point (interview notes, 2018).

Oversight Through Monitoring of State Contracts

The Department of Accounting and General Services (DAGS) is an important executive branch agency involved in the monitoring of state contracts. The head of DAGS is the state

²⁷ https://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0026/HRS_0026-0004.htm, accessed 9/20/18.

²⁸ https://governor.hawaii.gov/wp-content/uploads/2017/08/EO_17-04.pdf, accessed 10/11/18.

²⁹ <https://governor.hawaii.gov/wp-content/uploads/2017/11/EO-17-07.pdf>, accessed 10/11/18.

³⁰ https://governor.hawaii.gov/wp-content/uploads/2017/11/LEO_4540.pdf, accessed 10/11/18.

comptroller, an appointee of the governor that requires senatorial confirmation.³¹ The State Procurement Office (SPO) is attached to DAGS for administrative purposes. The SPO is responsible for both assisting agencies with procurement and overseeing agency procurement to ensure compliance with procurement rules. The SPO acts to assist, advise, and guide agencies statewide regarding procurement, including ensuring compliance with procurement rules and oversight³² “of the purchase of health and human services by state agencies.”³³³⁴ The chief procurement officer, who heads the SPO, is appointed by the governor with advice and consent from the senate. The Procurement Policy Board (PPB) is also attached to DAGS for administrative purposes. The PPB is in place to “adopt, amend, or repeal administrative rules to carry out and effectuate the purpose and provisions” for state purchasing (Procurement Policy Board).³⁵ The PPB has seven members, each appointed by the governor with advice and consent from the senate. Both the state comptroller who heads DAGS and the OA have oversight capacity through the audit function. As described earlier, the audit process³⁶ is the only input Hawaii’s legislature has in contract oversight. The Accounting Division and Audit Division are organizational units of DAGS and together provide the capacity to generate reports and conduct audits.³⁷

Vignette: Committee on Finance Overseeing Both Department of Taxation and \$60 Million IT Contract to AdvanTech

AdvanTech has a \$60 million contract for IT modernization of Hawaii’s tax system. AdvanTech claims officials from the Department of Taxation told them to make changes to a monitoring report that is meant to keep the public and the legislature abreast of the project’s development. The previous six reports indicated the project was on schedule, but the most recent report in October 2017 identified problems. It is alleged that officials from the Department of Taxation told AdvanTech to make changes that would suggest the project was doing better than it was. In December 2017, the Chair of the House Committee on Finance seized on the alleged impropriety, saying publicly that the credibility of past reports produced by AdvanTech and the Department of Taxation were called into question (U.S. News, 2017). Following the revelations, the head of the Department of Taxation resigned, although she stated that her resignation had nothing to do with the IT modernization contract with AdvanTech (Dayton, 2017b; Dayton, 2017a). In January 2018, the Department of Taxation terminated its contract with AdvanTech (Dayton, 2018). The Department of Taxation has a history of mismanagement that the IT contract was expected to address, but the recent scandal has department officials worried the additional \$16 million needed from the legislature to finish the IT modernization might be in jeopardy (Richardson, 2017). On April 3, A joint hearing of the Senate Committee on Government Operations and Senate Committee on Ways and Means was held on Senate Concurrent Resolution 62, directing the Office of the Auditor to conduct an audit of the Department of Taxation contract in question, and officials from both the Department of Taxation

³¹ <https://governor.hawaii.gov/newsroom/governors-office-news-release-governor-ige-appoints-roderick-becker-to-head-department-of-accounting-and-general-services/>, accessed 9/5/18.

³² <http://spo.hawaii.gov/wp-content/uploads/2013/12/2003-06-amend-2.pdf>, accessed 9/5/18.

³³ <http://lrbhawaii.org/gd/dags.pdf>, accessed 9/5/18.

³⁴ <http://spo.hawaii.gov/procurement-wizard/manual/contract-management/>, accessed 9/5/18.

³⁵ <http://spo.hawaii.gov/procurement-policy-board/>, accessed 6/30/18.

³⁶ <http://files.hawaii.gov/auditor/Reports/2015/15-09.pdf>, accessed 9/5/18.

³⁷ <http://lrbhawaii.org/gd/dags.pdf>, accessed 9/5/18.

and Office of the Auditor were questioned (Richardson, 2018). Video of the hearing is available.³⁸ The hearing itself involved repeated questioning by the chair of the new head of the Department of Taxation, who had a tremendous familiarity with both the history and details of the issues. The chair would frequently ask a series of probing questions and then follow-up with detailed questions that would contradict the answers given to the probing questions. The following example is a typical exchange:

Department of Taxation official: The practices of the past are not necessarily what we are using going forward. It's a very different culture and a different protocol that we are employing at the department these days . . .

Chair: I'm sorry I can't necessarily rest everything on that because as long as I've been here with CGI with the tax department and then CGI with health connector and the problems there and the same problems I raised two years ago when we launched this whole project and yet we seem to have similar concerns. The project changed over in July 2017, and this report came out after that, and this report reflects the new changes.

This exchange proceeded and included very detailed personnel issues, including the naming of individuals, field grievances, title changes, FTE allocations, qualifications, etc. The chair would often cite reports and prior audits in her questioning. Occasionally, the Department of Taxation official would indicate discomfort in going on record, stating, "we should have that conversation off-line." The chair raised questions about contracting with vendors that the state has historically had issues, stating:

Chair: can we disqualify a contract based on performance like this?

Department of Taxation Official: Yes.

Chair: This feels like Déjà vu, why does this keep happening? Same poor performer keeps getting contracts . . . We want a singular audit [of this contract] and we want to get this done before we enter into any other contracts to make sure that this project is moving along because we keep hearing, every time a new entity comes on board, that it's moving along just fine and then it turns out it's not.

In addition to the audit request, the chair made frequent information requests of the Department of Taxation in the hearing, which the officials agreed to and took notes on the details of the requests, promising to provide the information in the future.

There were occasions where the Office of the Auditor staff went on record at the same hearing, stating it would be very unusual to conduct an audit of a project that is ongoing. The Chair of the Senate Committee on Government Operations responded that previous audits have been conducted on specific contracts, citing a CGI contract. The official from the OA agreed that they could help with this, but the State Procurement Office might help them more quickly. The Senate Concurrent Resolution (SCR) 62³⁹ made it out of committee with the addition that the Office of the Auditor work with the State Procurement Office on the audit, and it is currently in

³⁸ http://olelo.granicus.com/MediaPlayer.php?view_id=13&clip_id=65927, accessed 9/20/18.

³⁹ <https://legiscan.com/HI/bill/SCR62/2018>, accessed 9/5/18.

the House Committee on Finance.⁴⁰ The resolution is requesting that the state auditor work with the State Procurement Office to conduct a financial and performance audit of the tax system modernization project with a special emphasis on the project's contracts.⁴¹ SCR 62 has not been passed,⁴² but the hearing, the information generated at the hearing, the reports cited at the hearing, and the reports that triggered the hearing in the first place demonstrate that reporting is an important feature of oversight in Hawaii. This example of oversight shows the Hawaii Legislature has the capacity to generate useful oversight state contracts and use it to hold agencies accountable.

Oversight Through Automatic Mechanisms

Hawaii has sunset review (regulatory) and sunrise review. According to Baugus and Bose, "A regulatory review state requires only licensing and regulatory boards to undergo sunset reviews" (2015). The Hawaii Regulatory Licensing Reform (HRS chap. 26 H), commonly known as the sunset law, grants the authority to sunset boards and commissions.⁴³ The Hawaii Regulatory Licensing Act (HRLA) granted authority to regulate occupational licensing of 38 professions. In 1979, the OA was given the authority to evaluate these licensing programs. Through sunset review of these regulations, the HRLA now regulates only two professions: athletic trainers and behavior analysts.

Subsequent sunset provisions for other boards, commissions, and regulations have been put into place. The most recent provisions came in the form of two laws enacted in 2016 that require the OA to periodically review several tax exemptions, deductions, and benefits to determine if they should be retained without modification, amended, or repealed (Act 245; Act 261; *Department*).⁴⁴ Hawaii has sunset provisions that empower the legislature to establish the period an agency may exist before a sunset review.

The OA performs sunrise and sunset analyses in statute and of regulations (interview notes, 2018) that the relevant committee is responsible for reviewing (Baugus & Bose, 2015). The OA performs both sunrise and sunset analyses to determine whether proposed or existing regulations are necessary, their probable effect(s), and whether they should be promulgated or terminated, and the OA provides recommendations for modifications, if necessary (*State of Hawaii Office of the Auditor 2015 Annual Report*). These OA analyses are considered a preliminary evaluation and form the basis for further action by the senate and house, which are empowered to review rules and executive orders.

Proposed new regulatory measures regarding professions must be referred to the OA for sunrise analysis. The purpose of this analysis is to assess whether the legislature needs to "regulate an as yet unregulated profession or occupation in order to protect the health, safety, or welfare of the public."⁴⁵ Despite having this authority, sunrise reviews are rare. The OA conducted one sunrise review in each of 2018 and 2017.⁴⁶

⁴⁰ <https://legiscan.com/HI/bill/SCR62/2018>, accessed 5/17/18.

⁴¹ https://www.capitol.hawaii.gov/session2010/Bills/SCR62_.pdf, accessed 5/17/18.

⁴² <https://legiscan.com/HI/bill/SCR62/2018> accessed 9/20/18.

⁴³ <http://lrbhawaii.org/hndbook/hbk10.html>, accessed 9/5/18.

⁴⁴ <http://files.hawaii.gov/tax/news/announce/ann16-07.pdf>, accessed 6/30/18.

⁴⁵ <http://lrbhawaii.org/reports/legrpts/lrb/rpts02/sunview.pdf>, accessed 6/30/18.

⁴⁶ <http://auditor.hawaii.gov/reports/>, accessed 6/30/18.

Methods and Limitations

Six people were interviewed out of the 11 people that were contacted for Hawaii. Hawaii's house and senate have agendas available online, although, they do not have meeting minutes (however, there is a separate report made whenever a bill is passed out of committee) (interview notes, 2018). For the house, archived video exists for some hearings that were broadcasted on television. This is also true of the senate, although, recently, the senate has been additionally piloting a project to upload more hearings. An interviewee said that, although the senate does not post all hearings, they post most hearings. There are no transcripts for either chamber (interview notes, 2018).

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