

ELEVENTH DAY

Friday, February 2, 2007

The Senate of the Twenty-Fourth Legislature of the State of Hawai'i, Regular Session of 2007, convened at 11:35 o'clock a.m. with the President in the Chair.

The Divine Blessing was invoked by the Honorable Gary L. Hooser, Hawai'i State Senate, after which the Roll was called showing all Senators present with the exception of Senators Bunda and Inouye who were excused.

The President announced that she had read and approved the Journal of the Tenth Day.

At this time, Senators Kim and Sakamoto introduced Tadd Fujikawa in recognition of his outstanding athletic accomplishments and congratulated him on his spectacular play at the 2007 Sony Open. Accompanying Tadd were his parents, Lori and Derrick Fujikawa.

At 11:50 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:57 o'clock a.m.

MESSAGES FROM THE GOVERNOR

The following messages from the Governor (Gov. Msg. Nos. 256 to 260) were read by the Clerk and were placed on file:

Gov. Msg. No. 256, letter dated January 29, 2007, informing the Senate that as of December 1, 2006, the Department of Transportation, Harbors Division, did not expend any funds appropriated by Act 160, SLH 2006, but is currently processing payments relating to the repair and other expenses incurred at Kawaihae Harbor following the October 15, 2006 earthquake.

Gov. Msg. No. 257, dated January 29, 2007, transmitting a Report on the Measure of Effectiveness and Outcomes Achieved by the Temporary Planning Analyst, prepared by the Department of Transportation, Airports Division, pursuant to Act 178, SLH 2005, as amended by Act 160, SLH 2006.

Gov. Msg. No. 258, dated January 30, 2007, transmitting a Report on Flexible Highway Design Guidelines, prepared by the Department of Transportation pursuant to Act 70, SLH 2006.

Gov. Msg. No. 259, letter dated January 26, 2007, reporting on the status of the Emergency and Budget Reserve Fund, pursuant to Act 188, Section 23, SLH 2006.

Gov. Msg. No. 260, dated February 1, 2007, transmitting a Report on the Reinvention of the Vital Statistics System, prepared by the Department of Health, Office of Health Status Monitoring, Vital Statistics System, pursuant to Act 160, Section 36.2, SLH 2006.

DEPARTMENTAL COMMUNICATION

Dept. Com. No. 18, from the State Auditor, dated February 1, 2007, transmitting a report "Sunrise Analysis: Mixed Martial Arts," (Report No. 07-02), was read by the Clerk and was placed on file.

STANDING COMMITTEE REPORTS

Senator Kokubun, for the Committee on Water, Land, Agriculture and Hawaiian Affairs, presented a report (Stand. Com. Rep. No. 6) recommending that S.B. No. 5, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Ige, seconded by Senator Whalen and carried, the report of the Committee was adopted and S.B. No. 5, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO PUBLIC LAND TRUST REVENUES," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Fukunaga, for the Committee on Economic Development and Taxation, presented a report (Stand. Com. Rep. No. 7) recommending that S.B. No. 331, as amended in S.D. 1, pass Second Reading and be recommitted to the Committee on Economic Development and Taxation.

On motion by Senator Ige, seconded by Senator Whalen and carried, the report of the Committee was adopted and S.B. No. 331, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO ELECTRONIC DATA AND INFORMATION," passed Second Reading and was recommitted to the Committee on Economic Development and Taxation.

Senator Kokubun, for the Committee on Water, Land, Agriculture and Hawaiian Affairs, presented a report (Stand. Com. Rep. No. 8) recommending that S.B. No. 842 pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Ige, seconded by Senator Whalen and carried, the report of the Committee was adopted and S.B. No. 842, entitled: "A BILL FOR AN ACT RELATING TO AGRICULTURE," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Kokubun, for the majority of the Committee on Water, Land, Agriculture and Hawaiian Affairs, presented a report (Stand. Com. Rep. No. 9) recommending that S.B. No. 6 pass Second Reading and be placed on the calendar for Third Reading.

On motion by Senator Ige, seconded by Senator Whalen and carried, the report of the majority of the Committee was adopted and S.B. No. 6, entitled: "A BILL FOR AN ACT RELATING TO OPIHI," passed Second Reading and was placed on the calendar for Third Reading on Monday, February 5, 2007.

ORDER OF THE DAY

ADVISE AND CONSENT

Stand. Com. Rep. No. 5 (Jud. Com. No. 1):

Senator Hee moved that Stand. Com. Rep. No. 5 be received and placed on file, seconded by Senator Kokubun and carried.

Senator Hee then moved that the Senate consent to the nomination of KEITH E. TANAKA to the office of Judge, District Court of the Second Circuit, for a term of six years, in accordance with the provisions of Article VI, Section 3, of the Hawaii State Constitution, seconded by Senator Kokubun.

Senator Hee rose in support of the nominee and said:

“Madam President, I rise to support the nomination of Keith Tanaka to a position on the District Court of Maui. However, before doing so, I would like to make a few comments with regard to the process and then with regard to Mr. Tanaka himself.

“Members, before you is an action item to advise and consent on Keith Tanaka. It is an action which I will support. However, having said that, I would like to detail for the members what the Committee on Judiciary and Labor went through in reaching its conclusion, and I would like to point out areas that I believe need to be improved so that future nominations before this Body can be done with, frankly, more transparency. It may take a little while, but I would like to detail the effort that the Committee went through.

“Before I begin, let me compliment the members of the Committee who participated.

“Members, it has always been a sensitive area for some of us, and I will speak for me in particular, with the nomination process, particularly with the Judicial Selection Commission. There is a question on the selection questionnaire and I will read it so that you understand what the JSC is asking. Under professional responsibility, section F, question 1 says, ‘Have you ever been admonished or disciplined for a breach of the code of professional responsibilities, professional misconduct, or professional negligence?’ In this particular case, the nominee answered no. Question 5 of the same professional responsibility asks, ‘Has your behavior or conduct ever been criticized or have you been admonished in a written decision by any court?’ In this particular case, the nominee said no.

“These are very important questions, particularly if – and this is not the first time that this has occurred – the nominee says no, because the fact of the matter is, and the Committee in its deliberations asked the question, that is it reasonable that if you had answered in the affirmative, that the Commission may not have recommended you as one of the six to the appointing authority? In this case, the appointing authority is the Chief Justice because it’s a District Court nomination. In the case of the Circuit Court and the Intermediate Court of Appeals and the Supreme Court, the appointing authority, obviously, as it has been, is the Governor. I say this because there is on the Governor’s desk two judicial vacancies – one for the Intermediate Court of Appeals’ Chief Judge James Burns, and one for Circuit Court Judge Waldorf – and there will be four others.

“In this particular case before us, the nominee was selected by the Chief Justice and sent to the Committee on Judiciary and Labor. Unlike in the past, and with the support of the new Senate President, we conferred and we went further and we asked the Office of Disciplinary Counsel for any record involving the nominee. This is important because it sets a standard for all future lawyers who wish to be considered to the Circuit Court or the Intermediate Court of Appeals. And as you know, because the Governor made her list public, there are several lawyers who wish to be considered for the two vacant positions.

“Initially, the Office of Disciplinary Counsel said no, and the nominee, Mr. Tanaka, wrote to the Disciplinary Counsel and asked them to release the information. They declined. He appeared before the Disciplinary Counsel personally, and they declined again. The President was prepared on Opening Day to issue a subpoena. The chief attorney for the Committee on Judiciary and Labor prevailed upon the Chief Justice to

intervene. The Chief Justice sent a letter to the Office of Disciplinary Counsel and they acceded.

“I am confident, with the support of the President, that had the ODC continued to decline the effort, this matter would have been adjudicated in a court of law. Unfortunately, such adjudication may have exceeded the 30 days in which the Legislature is mandated to act, and although he may have been automatically approved, he may have been approved under a cloud, and no one wants to be approved under those circumstances. And to that extent, I wish to advise the members here that one of the issues the Committee will take is a con amendment that there is no automatic approval. It would be an automatic disapproval to light the fire under all of us here and those outside of these Chambers to move quickly and with full transparency.

“Members, this here is the record of Mr. Tanaka by the Office of Disciplinary Counsel. Let me state unequivocally that whatever matters were brought before the ODC involving Mr. Tanaka were dismissed, but it is important for this Body to understand what those matters may have been. They were not circulated to anyone and if you wish a copy, we will redact the names involved and we will provide you a copy.

“Under the professional code of responsibility in the Hawaii Rules of Court, it says under Rule 1.7, ‘Conflict of Interest. This problem arises when a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant. A lawyer should never represent in litigation, multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation, multiple clients. For this reason, it is preferable that he refuse the employment initially.’ I read this because Mr. Tanaka was put in a very difficult situation before Judge Raffetto.

“In this particular case, on July 28, 2003, 17 people associated with a cockfighting organization were indicted for racketeering, promoting gambling in the first degree, and cruelty to animals. On August 14, 2003, Judge Raffetto appointed Mr. Tanaka to represent the defendant and 10 others. Judge Raffetto, in my opinion, was incorrect in asking Mr. Tanaka to represent more than one client for the reasons I just read from the code of professional responsibility. In fairness to Mr. Tanaka, he said quite candidly to me privately in my office, ‘How could I tell a judge no? I make my living in front of the judge. How could I tell him no?’ That is a sad reality because in fact it’s a reasonable question, and one wonders how many other lawyers are put to the same question?

“So, Mr. Tanaka was asked to represent the defendant and 10 others. On July 12 to July 14, 2004, a jury trial for the first defendant was held. The defendant, whom Mr. Tanaka represented, was found guilty by a jury. On July 23rd, the defendant changed lawyers and filed a motion for a new trial. So, the defendant was found guilty. He was found guilty for racketeering, promoting gambling in the first degree and cruelty to animals. In fact, the defendant was the person who weighed a chicken and was not involved in the cockfight itself.

“A new trial was denied on December 9th, and on December 14th the defendant was sentenced to ten years for racketeering, five years for promoting gambling, and one year for cruelty to animals, of which the sentences were to be concurrently served. However, on May 17th, represented by a new lawyer, the Intermediate Court of Appeals reversed the conviction of the defendant, and in its ruling it said, ‘Defendant argues that the circuit court abused its discretion in denying his motion for a new trial,’ and the ICA says, ‘We agree. Trial counsel failed to

investigate a number of defense witnesses, reflecting counsel's lack of skill, judgment, or diligence. Trial counsel's joint representation of codefendants was a relationship giving rise to a conflict of interest between defense counsel and his clients.' And finally, 'The relationship adversely affected defense counsel's performance. The client did not consent to the relationship and all or a combination of the foregoing reasons is sufficient for a new trial.'

"This is important for the Senate to know. This is more important for the Judicial Selection Commission to know. So the question arises, Why didn't the Selection Commission know? Because from my point of view, it's a breach of duty conducted by the Judicial Selection Commission. If the Commission knew and decided to move forward, that's another matter. The fact is the Commission did not know and did not make an effort to find out. That is unforgivable.

"The defendant was granted a new trial and engaged the services of a third lawyer. The defendant pled to the same charges that he was found guilty of – racketeering, promoting gambling, and cruelty to animals. He pled, evidently, as far as I'm concerned, with the consent of the prosecutor, because upon pleading to the same counts that he was convicted of, the judge, the same judge who gave him ten years, gave him probation. The judge, an honorable man he may be, is part of the problem, and the judge should be held accountable to the problem.

"As such, next week Tuesday, February 6, your Committee will have two matters before the Committee in a hearing – one is that judges, S.B. No. 945, financially disclose their interest as federal judges are required; and secondly, S.B. No. 1954, that a full disclosure of the discipline of judges be made public. I believe, in this particular case, Judge Raffetto was never brought before the Commission on Judicial Conduct. We will never know until such laws become mandated.

"Let me say, members, that in your committee report on page two, I encourage you to read paragraph two, because to the extent that we may have differing opinions on each subsequent nominee, in particular, and let me be frank, with the Governor's choices, I want the record to show that the Committee on Judiciary and Labor has laid out standards which it intends to follow so any comment to the extent that no one knew, I hope, is minimized.

"In the case of Mr. Tanaka, let me say this, everyone who testified, testified in his favor. This is important to me because most of those who testified were public defenders. Others who testified included criminal defense attorneys and a prosecutor, and that's important. It was also important, in my opinion, that former Speaker of the House, Joe Souki, wanted to allow his testimony in support of the nominee as well.

"Mr. Tanaka has spent his career representing indigent criminal defendants. After graduating from law school, he was a public defender on Maui. In his own words he says, quote, 'My life has been dedicated to helping people. I have always dealt with the disadvantaged. As a public defender for six years, I represented indigent criminal defendants in all courts on O'ahu and Maui, Moloka'i and Lana'i.'

"Mr. Tanaka also says about the Dutro case, and this is the case that I've been referring to, 'I want to say this, with 20/20 hindsight, I now see things as I should have done differently. In agreeing to the court's request that I represent multiple defendants in the case, I should have gone beyond assuring just myself that there was no conflict and that the defendants were fine with my representation of all of them. I should have gotten written waivers of any potential conflict and made them part of

the record.' Mr. Tanaka is absolutely correct, because if he had gotten written waivers and if he had filed a motion for separate trials instead of asking by an oral request, which was granted by Raffetto, when the case went to the Intermediate Court of Appeals on appeal, the written record would have followed the case regardless of the fact that he was discharged as the attorney for the defendant. The Intermediate Court of Appeals would have known that Mr. Tanaka, in writing, asked for a waiver. The Intermediate Court of Appeals would have known that Mr. Tanaka filed a motion for separate trials. In fact, he did that, but he did that by oral request. The Intermediate Court of Appeals not having the benefit of knowing in writing what had transpired, had no other choice to make the conclusions it did and remand it for retrial, thereby casting a cloud on the professional conduct of Mr. Tanaka.

"I think all of us, as we move forward, learn by this experience. It's my hope that the Senate will hold these standards to anyone and everyone as they come before us so that a standard of expectation is fully understood by all of us here.

"The Hawaii State Bar Association rated Mr. Tanaka highly qualified. I disagree. He is qualified, but a highly qualified lawyer would have done as he said – he would have gotten it in writing. A highly qualified lawyer would have done as he said, filed a written motion for separate trials. That is what a highly qualified lawyer would have done, in my opinion. I believe the Bar Association in rating him highly qualified has done a disservice to the members of the Bar.

"The Bar Association also sent out, by electronic survey to its members, input on Mr. Tanaka. In deference to the Bar, I believe that does a disservice to the nominee, because how could it reasonably be expected that every member of the Bar would know what I have disclosed on this Floor this morning? By polling the members of the Bar without the benefit of knowing this kind of information makes the nominee a popularity contest as opposed to one who seeks the integrity of the nominee's credentials.

"The District Court is the people's court. It is where most of the cases are adjudicated. It is the court where people, as opposed to criminals who commit offenses of felonies A, B and C are conducted. In that regard, Mr. Tanaka will do an absolute superb job as a man of the people.

"Mr. Tanaka said in response to a question that I posed to him, that if you became judge, how would you change things for the better? And without blinking an eye, he said to me, 'I would never put an attorney in the situation that I was placed in.' He is thinking as a judge because of the experience. Having heard that from Mr. Tanaka, I am absolutely certain that had he disclosed the information, he is certainly someone who is qualified to serve on any court because he recognizes the difficulties that lawyers are placed upon, particularly in representing indigent clients. That is why I believe Mr. Tanaka merits the vote of confidence by all of us here on the Floor.

"Madam President, I would urge all members to vote 'aye' in confirming Mr. Keith Tanaka as a District Court Judge for the Second Circuit. Thank you."

Senator Baker rose in support of the nominee and said:

"Madam President, I rise to speak in support of the nominee.

"Madam President, I believe I speak also for my two Maui colleagues when I offer our unequivocal support for the confirmation of Keith Tanaka to the District Court, Second Circuit, which is the court in Maui.

“Keith is not a native son of Maui but he chose to move there after he came to teach in Hana and in East Maui and fell in love with our island. He returned after his law school graduation to be a public defender there to take up the cause for indigent individuals who may have transgressed and needed a voice before the law, and he’s done it admirably. He also brings that set of skills to the bench, and too often, I think, we don’t have that perspective in the judicial ranks. It’s usually the prosecutor’s end.

“I know that because of his family background, the work that he’s done with his exceptional son who is a student at Baldwin High School, that he’s going to have the compassion, the judicial temperament, and the concern of any defendant that comes before him. He’s ably suited, I believe, to be a judge in the people’s court and I urge all my colleagues to support this nomination.

“Thank you.”

Senator Gabbard rose in support of the nominee as follows:

“Madam President, I rise to speak in favor of the nominee on behalf of the Minority.

“Mr. Tanaka has had a distinguished career as a defense attorney and is known for his integrity and upstanding character, and I’m confident that he will make an outstanding District Court Judge.

“Thank you, Madam President.”

The motion was put by the Chair and carried on the following showing of Ayes and Noes:

Ayes, 23. Noes, none. Excused, 2 (Bunda, Inouye).

At this time, Senator Hee introduced Judge Tanaka and his family to the members of the Senate.

At 12:25 o’clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 12:29 o’clock p.m.

RE-REFERRAL OF SENATE BILLS

The Chair re-referred the following Senate bills that were introduced:

Senate Bill Referred to:

No. 331, S.D. 1 Committee on Economic Development and Taxation, then to the Committee on Ways and Means

No. 1353 Jointly to the Committee on Intergovernmental and Military Affairs, the Committee on Energy and Environment and the Committee on Commerce, Consumer Protection and Affordable Housing, then to the Committee on Ways and Means

No. 1397 Committee on Commerce, Consumer Protection and Affordable Housing, then to the Committee on Judiciary and Labor

No. 1398 Committee on Commerce, Consumer Protection and Affordable Housing, then to the Committee on Judiciary and Labor

No. 1399 Committee on Commerce, Consumer Protection and Affordable Housing, then to the Committee on Judiciary and Labor

No. 1625 Committee on Intergovernmental and Military Affairs, then jointly to the Committee on Commerce, Consumer Protection and Affordable Housing and the Committee on Transportation and International Affairs, then jointly to the Committee on Economic Development and Taxation and the Committee on Ways and Means

No. 1788 Jointly to the Committee on Tourism and Government Operations and the Committee on Judiciary and Labor

No. 1789 Committee on Commerce, Consumer Protection and Affordable Housing, then to the Committee on Ways and Means

No. 1832 Jointly to the Committee on Commerce, Consumer Protection and Affordable Housing and the Committee on Water, Land, Agriculture and Hawaiian Affairs, then to the Committee on Ways and Means

No. 1847 Jointly to the Committee on Tourism and Government Operations and the Committee on Commerce, Consumer Protection and Affordable Housing, then to the Committee on Judiciary and Labor

No. 1966 Committee on Intergovernmental and Military Affairs, then to the Committee on Judiciary and Labor, then to the Committee on Ways and Means

No. 1967 Jointly to the Committee on Public Safety and the Committee on Intergovernmental and Military Affairs, then to the Committee on Judiciary and Labor

ADJOURNMENT

At 12:31 o’clock p.m., on motion by Senator Ige, seconded by Senator Gabbard and carried, the Senate adjourned until 11:30 o’clock a.m., Monday, February 5, 2007.