

TWELFTH DAY

Monday, February 5, 2007

The Senate of the Twenty-Fourth Legislature of the State of Hawai'i, Regular Session of 2007, convened at 11:37 o'clock a.m. with the President in the Chair.

The Divine Blessing was invoked by the Reverend Ai Hironaka, Aiea Hongwanji, after which the Roll was called showing all Senators present with the exception of Senators Bunda and Ihara who were excused.

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

At this time, Senator Gabbard introduced Joy Lee Lynch, organizer of the USS Arizona Memorial Speech Contest, and congratulated Flora Cross, Rebecca Manahan and Tafia Taimalelagi for winning the 2006 contest.

At 11:47 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:51 o'clock a.m.

MESSAGES FROM THE GOVERNOR

The following messages from the Governor (Gov. Msg. Nos. 261 to 279) were read by the Clerk and were disposed of as follows:

Gov. Msg. No. 261, dated February 2, 2007, transmitting the Report on TANF Funds, prepared by the Department of Human Services pursuant to Act 302, SLH 2006, was placed on file.

Gov. Msg. No. 262, dated January 17, 2007, transmitting the Aloha Tower Development Corporation's 2006 Annual Report, was placed on file.

Gov. Msg. No. 263, dated January 30, 2007, transmitting the Office of Youth Services' Progress Report, prepared by the Office of Youth Services, Hawaii Youth Correctional Facility, pursuant to Act 160, Section 38.4, SLH 2006, was placed on file.

Gov. Msg. No. 264, dated February 1, 2007, transmitting the Annual Report on Solid Waste Management, prepared by the Department of Health, Office of Solid Waste Management, pursuant to Section 342G-15, HRS, was placed on file.

Gov. Msg. No. 265, submitting for consideration and confirmation as Comptroller of the Department of Accounting and General Services, the nomination of RUSS K. SAITO, term to expire December 6, 2010, was referred to the Committee on Tourism and Government Operations.

Gov. Msg. No. 266, submitting for consideration and confirmation as Chairperson of the Board of Agriculture, the nomination of SANDRA LEE KUNIMOTO, term to expire December 31, 2010, was referred to the Committee on Water, Land, Agriculture and Hawaiian Affairs.

Gov. Msg. No. 267, submitting for consideration and confirmation as Attorney General of the State of Hawai'i, the nomination of MARK J. BENNETT, term to expire December 6, 2010, was referred to the Committee on Judiciary and Labor.

Gov. Msg. No. 268, submitting for consideration and confirmation as Director of the Department of Budget and

Finance, the nomination of GEORGINA K. KAWAMURA, term to expire December 6, 2010, was referred to the Committee on Ways and Means.

Gov. Msg. No. 269, submitting for consideration and confirmation as Director of the Department of Business, Economic Development and Tourism, the nomination of THEODORE E. LIU, term to expire December 6, 2010, was referred jointly to the Committee on Economic Development and Taxation and the Committee on Tourism and Government Operations.

Gov. Msg. No. 270, submitting for consideration and confirmation as Director of the Department of Commerce and Consumer Affairs, the nomination of MARK E. RECKTENWALD, term to expire December 6, 2010, was referred to the Committee on Commerce, Consumer Protection and Affordable Housing.

Gov. Msg. No. 271, submitting for consideration and confirmation as Adjutant General and Director of Civil Defense, the nomination of MAJOR GENERAL ROBERT G. F. LEE, term to expire December 6, 2010, was referred to the Committee on Intergovernmental and Military Affairs.

Gov. Msg. No. 272, submitting for consideration and confirmation as Chairperson of the Hawaiian Homes Commission, the nomination of MICAH A. KANE, term to expire December 31, 2010, was referred to the Committee on Water, Land, Agriculture and Hawaiian Affairs.

Gov. Msg. No. 273, submitting for consideration and confirmation as Director of the Department of Health, the nomination of CHIYOME L. FUKINO, M.D., term to expire December 6, 2010, was referred to the Committee on Health.

Gov. Msg. No. 274, submitting for consideration and confirmation as Director of the Department of Human Resources Development, the nomination of MARIE C. LADERTA, term to expire December 6, 2010, was referred to the Committee on Judiciary and Labor.

Gov. Msg. No. 275, submitting for consideration and confirmation as Director of the Department of Human Services, the nomination of LILLIAN B. KOLLER, term to expire December 6, 2010, was referred to the Committee on Human Services and Public Housing.

Gov. Msg. No. 276, submitting for consideration and confirmation as Chairperson of the Board of Land and Natural Resources, the nomination of PETER T. YOUNG, term to expire December 31, 2010, was referred to the Committee on Water, Land, Agriculture and Hawaiian Affairs.

Gov. Msg. No. 277, submitting for consideration and confirmation as Director of the Department of Public Safety, the nomination of IWALANI D. WHITE, term to expire December 6, 2010, was referred to the Committee on Public Safety.

Gov. Msg. No. 278, submitting for consideration and confirmation as Director of the Department of Taxation, the nomination of KURT K. KAWAFUCHI, term to expire December 6, 2010, was referred jointly to the Committee on Economic Development and Taxation and the Committee on Ways and Means.

Gov. Msg. No. 279, submitting for consideration and confirmation as Director of the Department of Transportation,

the nomination of BARRY A. FUKUNAGA, term to expire December 6, 2010, was referred to the Committee on Transportation and International Affairs.

STANDING COMMITTEE REPORT

Senator Baker, for the Committee on Ways and Means, presented a report (Stand. Com. Rep. No. 10) recommending that S.B. No. 139, S.D. 1, pass Third Reading.

By unanimous consent, action on Stand. Com. Rep. No. 10 and S.B. No. 139, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO CIGARETTE TAX," was deferred until Wednesday, February 7, 2007.

ORDER OF THE DAY

THIRD READING

S.B. No. 6:

Senator Kokubun moved that S.B. No. 6, having been read throughout, pass Third Reading, seconded by Senator Tokuda.

Senator Hee rose in support of the measure as follows:

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

"Briefly, I want to thank the Chairman of the Water, Land, Agriculture and Hawaiian Affairs Committee for not only introducing the bill but moving it quickly. Although it's not as I personally would like to see it – frankly, I would like to see a ten-year moratorium on all opihi consumption, retail and otherwise – I think it strikes a good balance of – what was that word – sustainability.

"Thank you."

Senator English rose in support of the measure and said:

"Madam President, I rise in support of the bill.

"I want to thank the Water, Land, Agriculture and Hawaiian Affairs Committee for trying to address the issue of Ni'ihau. In the committee report on page two, they're trying to fold it under the protections of PASH, and I think that may work.

"If you remember last year, we had an exemption for Ni'ihau and I think that the Committee is trying to address it in here. That's why I can support the bill.

"Thank you."

Senator Slom rose in opposition to the measure and said:

"Madam President, I rise in opposition to the bill.

"I sat through the hearings and also remember the debate last year and my concerns are basically threefold. One is that we really don't have a handle on the inventory and that's been asked for. It's been testified to that there is an inventory ongoing but I think it's premature until we have actual data because we're kind of flying blind on this issue. Secondly, there was talk about the exemption for Ni'ihau last year and I thought that was very clear. Putting the discussion about the PASH decision in the committee report this year I don't think really supports the exemption or the clarity that we need in a bill. Thirdly, there was an attempt to amend the bill by changing the size of the opihi and that was not adopted in this measure, so there still is significant economic impact, particularly for small businesses in this state.

"So, for those reasons, I'll be voting against the bill at this time. Thank you, Madam President."

The motion was put by the Chair and carried, S.B. No. 6, entitled: "A BILL FOR AN ACT RELATING TO OPIHI," having been read throughout, passed Third Reading on the following showing of Ayes and Noes:

Ayes, 22. Noes, 1 (Slom). Excused, 2 (Bunda, Ihara).

RE-REFERRAL OF SENATE BILLS

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

Senate Bill	Referred to:
No. 1100	Jointly to the Committee on Human Services and Public Housing, the Committee on Health and the Committee on Commerce, Consumer Protection and Affordable Housing, then to the Committee on Ways and Means
No. 1569	Committee on Transportation and International Affairs, then to the Committee on Judiciary and Labor
No. 1800	Jointly to the Committee on Transportation and International Affairs and the Committee on Judiciary and Labor, then to the Committee on Ways and Means

Senator Kokubun, Chair of the Committee on Water, Land, Agriculture and Hawaiian Affairs, requested a waiver of the notice requirement pursuant to Senate Rule 21 for the following Senate Bills:

- S.B. No. 1219;
- S.B. No. 1532;
- S.B. No. 1544;
- S.B. No. 1596; and
- S.B. No. 1603,

and the Chair granted the waiver.

Senator Hee rose on a point of personal privilege as follows:

"May I rise on a point of personal privilege with your permission, Madam President?"

"Let me say that when you read this morning's lead editorial in the Star-Bulletin, 'Nominees to bench should fully disclose,' it is a follow-up, I guess, of Friday's lead editorial 'Full disclosure expected of judicial nominees.' I want to make a few comments and observations on the editorial.

"The first is that, and it really isn't the most important comment but I suppose we should correct the error, and that is that the editors of the Star-Bulletin in error had said that Mr. Tanaka had been reversed after he had been victorious at trial. In fact what happened is his client was found guilty of racketeering, gambling, and cruelty to animals and that his client discharged him and hired Peter Van Esser on an appeal after Judge Raffetto sentenced him to ten years. Van Esser successfully argued before the Intermediate Court of Appeals, which then remanded the case back to Circuit Court where Mr. Dutro discharged Peter Van Esser and hired Myles Breiner, at which time Mr. Dutro pled to the same counts and was given probation. So, this is just a matter of correcting an inadvertent error by the editors.

“The heart of the opinion, which I would like to comment really has not so much to do with the nominee, who I believe will be a good judge, but really with the process, which is what the editorial on Friday and the editorial this afternoon speaks to.

“Jeff Portnoy has been referred to and quoted in both Friday and today’s editorial as saying that Tanaka had disclosed the indiscretion that he left off originally with the Judicial Selection Commission, and that in Portnoy’s own words, Tanaka was involved in a, quote, ‘Very complicated scenario,’ end quote. This scenario wasn’t complicated at all – the guy was found guilty, his lawyer was discharged, another lawyer was hired, and so on and so forth. That is not complicated. What became complicated is that the lawyer did not secure written waivers by each client waiving their conflict of interest, and the lawyer did not file a motion before the judge for separate trials. As a result, when the case went up before the Intermediate Court of Appeals, there was no written record that in fact what Mr. Tanaka had done orally could not be confirmed in writing. That is not complicated. That’s fundamental law 101.

“Portnoy makes it complicated and therein lies the problem, because Portnoy is correct. Mr. Tanaka, for whatever reason, disclosed the indiscretion before the Hawaii State Bar Association. The problem to me is the Hawaii State Bar Association, being notified of the indiscretion, continued to rank him highly qualified. And as I said on Friday, I disagree. A highly qualified lawyer would have secured a written waiver of conflict from multiple clients, and a highly qualified lawyer would have filed a motion before Judge Raffetto as opposed to an oral request. That is what a highly qualified lawyer would have done.

“The Bar, by insisting that the standard of conduct by Mr. Tanaka merits highly qualified, in fact lowers the standard for all lawyers, and all lawyers should be offended because it is reasonable for laypeople, like most of us on the Floor, to expect that a highly qualified lawyer would behave in a manner dictated by the preamble of the Hawaii Rules of Court and the Canons of Ethics prescribed to each lawyer before that lawyer becomes a professional.

“The other part that troubles me about the editorial this afternoon is this, and I’ll read it so that there’s no misunderstanding, ‘Hee says he wants people “to understand that the notice has been given and the expectation has been established” that disclosure of past adversity is expected of judicial nominees.’ That is accurate. And in fact, earlier in the editorial they say that ‘Senate Judiciary Chairman Clayton Hee is right in warning judicial nominees to disclose their past problems in the confirmation process. Failure to make such disclosures should result in extra scrutiny before candidates are confirmed.’ So I agree, and frankly, I thank the Star-Bulletin for recognizing that.

“This part I find a bit troublesome, they say that, ‘That policy can expect to continue for as long as Hee is judiciary chairman and a Republican resides in Washington Place.’ In 1988, as the Chairman of Judiciary, the Senate, which this opinion correctly articulates, was involved in a very difficult nomination. The nomination involved someone who failed to report contempt of court proceedings, content of court admonishments and criticisms against him, and more seriously, a Rule 11 against him by a federal judge. He did not disclose that and he was taken to task. The Governor was a Democrat. That should not be lost in the discussion here. Mr. Tanaka was appointed by the Chief Justice. The Chief Justice has a history as a member of the Republican Party, who was appointed Chief Justice by a Democrat Governor. It had nothing to do with seeing which political party or affiliation the appointing authority was then and is at this time.

“I hope, and I will rely on the members of the Judiciary Committee and indeed all of you here, that if the criticism or the process as we go about with subsequent nominees may appear to be unfair, that you will call it to my attention or the members of the Committee. But clearly, the fact that this Governor is a Republican is not new to the fact that I have criticized appointments made by Democrat Governors in the past. While I would hope that I could be better about it now than I was 20 years ago, I would hope that the standard would remain the same and that disclosure would be fully made before the Senate.

“Thank you.”

Senator Hemmings rose on a point of personal privilege and said:

“Madam President, I rise on a point of personal privilege.

“I’d like to remind this Body that in recent years, the last four most specifically, I believe a number of laws and a number of appointment processes, including the nomination of the Board of Regents, have been changed for the sole purpose of partisan politics. Things that were done for 30 or 40 years by Democrats all of a sudden became out of style and needed to be changed. So I beg to differ with the previous speaker.

“Thank you.”

Senator Hee rose again on a point of personal privilege and said:

“Madam President, I rise to agree with the previous speaker.

“I want to agree to the extent that he is right – some policies have changed. And in the case of a constitutional amendment that was put before the people, the people spoke loud and clear and decided that a new method of appointing board of regents was overwhelmingly, despite the odds, passed.

“Thank you.”

ADJOURNMENT

At 12:06 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., Tuesday, February 6, 2007.