

THIRTEENTH DAY

Wednesday, February 5, 2014

The Senate of the Twenty-Seventh Legislature of the State of Hawai'i, Regular Session of 2014, convened at 11:37 a.m. with the President in the Chair.

The Roll was called showing all Senators present.

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

At this time, Senator Slom welcomed a group of fifth-grade students from Kaimuki Christian School who were accompanied by teachers Chau Sachs and Jane McClair, and chaperones Jonalee Yuen and Connie Hall.

Senator Galuteria introduced a delegation of Māori artists and educators who were visiting O'ahu to launch the contemporary Māori art exhibit at the Gallery 'Iolani at Windward Community College. The delegation was hosted by Emalia Keohokalole and Kumu Kalani Meinecke. Led by the delegation's spokesperson, Reverend Tamati Kaiwai, the group shared a Māori greeting with the members of the Senate.

Senator Kouchi introduced Sherry Menor-McNamara, president and CEO of Chamber of Commerce Hawaii.

Senator Kidani, on behalf of Senate President Kim, congratulated Dennis Francis on his well-deserved selection as "Publisher of the Year" by *Editor & Publisher* magazine, and presented the following remarks:

"Thank you, Madam President and honored colleagues. I am pleased to have been asked to introduce a special guest – someone who, for the most part, manages to remain behind the scenes in one of the most visible professions in our community. With us today is Dennis Francis, president and publisher of the *Honolulu Star-Advertiser* and *Midweek* and numerous other publications that arrive on our doorsteps or in our mailboxes with great regularity.

"A few years ago, Dennis led the initiative to merge the *Honolulu Star-Bulletin* and *The Honolulu Advertiser*. Since then, the financial base for the surviving *Honolulu Star-Advertiser* has stabilized, revenues have increased, and the scope of the company's publications has expanded to serve new audiences. The company's publishing arm now also includes the Kaua'i newspaper *The Garden Island*, several specialty magazines, and numerous newspaper special sections for targeted audiences. The *Star-Advertiser* has moved aggressively onto the web, serving its subscribers with breaking news through the day with a firm commitment to keeping Hawai'i informed.

"Today we recognize Dennis for his energetic leadership in the business of communicating that caught the attention of *Editor & Publisher* magazine. *Editor & Publisher* is the industry's authoritative journal, covering all aspects of the newspaper industry worldwide; and from a pool of nearly five dozen nominated publishers from around the globe, *E&P* named Dennis Francis 'Publisher of the Year.'

"Madam President, I should also note that in addition to his accomplishments as a publisher, Dennis is personally and passionately involved in our community. His investment of time and talent on behalf of numerous charitable organizations is well-known. He serves as chair of the Hawai'i chapter of the Boy Scouts of America and the Chamber of Commerce of Hawai'i. He maintains membership on boards of the American Red Cross, the United Way, and others. In 2012, he received the Franklin Delano Roosevelt Award for Distinguished Community Service from the March of Dimes, Hawai'i chapter.

"For all of these reasons – and because he's also a good guy – it is my pleasure to introduce Dennis Francis, *Editor & Publisher* magazine's 'Publisher of the Year.'

"Madam President, the Senate has prepared a congratulatory certificate to recognize Dennis and his accomplishments. I would like to request a short recess at the appropriate time so that we can present this certificate to our honoree and extend our personal congratulations. Congratulations, Dennis."

At 11:46 a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:51 a.m.

SENATE CONCURRENT RESOLUTION

The following concurrent resolution (S.C.R. No. 34) was read by the Clerk and was deferred:

S.C.R. No. 34 "SENATE CONCURRENT RESOLUTION REQUESTING THE AUDITOR TO ASSESS THE SOCIAL AND FINANCIAL IMPACTS OF REQUIRING HEALTH INSURERS TO OFFER COVERAGE FOR HEARING AIDS."

Offered by: Senators Chun Oakland, Green, Baker, Ihara, Taniguchi.

STANDING COMMITTEE REPORTS

Senators Nishihara and Taniguchi, for the Committee on Agriculture and the Committee on Higher Education, presented a joint report (Stand. Com. Rep. No. 2063) recommending that S.B. No. 2455 pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the joint report of the Committees was adopted and S.B. No. 2455, entitled: "A BILL FOR AN ACT RELATING TO AGRICULTURE," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Espero, for the Committee on Public Safety, Intergovernmental and Military Affairs, presented a report (Stand. Com. Rep. No. 2064) recommending that S.B. No. 2021 pass Second Reading and be referred to the Committee on Judiciary and Labor.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2021, entitled: "A BILL FOR AN ACT RELATING TO RESISTING ARREST," passed Second Reading and was referred to the Committee on Judiciary and Labor.

Senator Espero, for the Committee on Public Safety, Intergovernmental and Military Affairs, presented a report (Stand. Com. Rep. No. 2065) recommending that S.B. No. 2258 pass Second Reading and be referred to the Committee on Judiciary and Labor.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2258, entitled: "A BILL FOR AN ACT RELATING TO THE PENAL CODE," passed Second Reading and was referred to the Committee on Judiciary and Labor.

Senator Espero, for the Committee on Public Safety, Intergovernmental and Military Affairs, presented a report (Stand. Com. Rep. No. 2066) recommending that S.B. No. 2309, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2309, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO PUBLIC SAFETY," passed Second Reading and was referred to the Committee on Ways and Means.

Senators Espero and Chun Oakland, for the Committee on Public Safety, Intergovernmental and Military Affairs and the Committee on Human Services, presented a joint report (Stand. Com. Rep. No. 2067) recommending that S.B. No. 2310, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the joint report of the Committees was adopted and S.B. No. 2310, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO VICTIMS' RIGHTS," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Espero, for the Committee on Public Safety, Intergovernmental and Military Affairs, presented a report (Stand. Com. Rep. No. 2068) recommending that S.B. No. 2367, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Judiciary and Labor.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2367, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO PRODUCTION OF RECORDS," passed Second Reading and was referred to the Committee on Judiciary and Labor.

Senator Espero, for the Committee on Public Safety, Intergovernmental and Military Affairs, presented a report (Stand. Com. Rep. No. 2069) recommending that S.B. No. 2592 pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2592, entitled: "A BILL FOR AN ACT RELATING TO PUBLIC SAFETY," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Espero, for the Committee on Public Safety, Intergovernmental and Military Affairs, presented a report (Stand. Com. Rep. No. 2070) recommending that S.B. No. 2884, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2884, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO PAROLE," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Chun Oakland, for the Committee on Human Services, presented a report (Stand. Com. Rep. No. 2071) recommending that S.B. No. 2265 pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2265, entitled: "A BILL FOR AN ACT RELATING TO HOUSING," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Chun Oakland, for the Committee on Human Services, presented a report (Stand. Com. Rep. No. 2072) recommending that S.B. No. 2840 pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2840, entitled: "A BILL FOR AN ACT RELATING TO

THE GENERAL ASSISTANCE PROGRAM," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Chun Oakland, for the Committee on Human Services, presented a report (Stand. Com. Rep. No. 2073) recommending that S.B. No. 2841 pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2841, entitled: "A BILL FOR AN ACT RELATING TO THE ESTABLISHMENT OF THE INTERIM ASSISTANCE REIMBURSEMENT SPECIAL FUND," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Chun Oakland, for the majority of the Committee on Human Services, presented a report (Stand. Com. Rep. No. 2074) recommending that S.B. No. 2395, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Judiciary and Labor.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the majority of the Committee was adopted and S.B. No. 2395, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO THE HOMELESS," passed Second Reading and was referred to the Committee on Judiciary and Labor.

Senator Chun Oakland, for the Committee on Human Services, presented a report (Stand. Com. Rep. No. 2075) recommending that S.B. No. 2842, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2842, S.D. 1, entitled: "A BILL FOR AN ACT MAKING AN EMERGENCY APPROPRIATION TO THE DEPARTMENT OF HUMAN SERVICES FOR THE MED-QUEST DIVISION," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Chun Oakland, for the Committee on Human Services, presented a report (Stand. Com. Rep. No. 2076) recommending that S.B. No. 2845, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2845, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO APPOINTMENT OF EXEMPT PERSONNEL IN THE DEPARTMENT OF HUMAN SERVICES FOR THE STATE MEDICAL ASSISTANCE PROGRAMS," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Chun Oakland, for the Committee on Human Services, presented a report (Stand. Com. Rep. No. 2077) recommending that S.B. No. 2846, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2846, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO ESTABLISHING A SECOND DEPUTY DIRECTOR POSITION FOR THE DEPARTMENT OF HUMAN SERVICES," passed Second Reading and was referred to the Committee on Ways and Means.

Senators Chun Oakland and Green, for the Committee on Human Services and the Committee on Health, presented a joint

report (Stand. Com. Rep. No. 2078) recommending that S.B. No. 2535, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the joint report of the Committees was adopted and S.B. No. 2535, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO HOUSING," passed Second Reading and was referred to the Committee on Ways and Means.

Senators Chun Oakland and Green, for the Committee on Human Services and the Committee on Health, presented a joint report (Stand. Com. Rep. No. 2079) recommending that S.B. No. 2264, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Judiciary and Labor.

On motion by Senator Espero, seconded by Senator Slom and carried, the joint report of the Committees was adopted and S.B. No. 2264, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO CAREGIVING," passed Second Reading and was referred to the Committee on Judiciary and Labor.

Senators Chun Oakland and Green, for the Committee on Human Services and the Committee on Health, presented a joint report (Stand. Com. Rep. No. 2080) recommending that S.B. No. 2531, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the joint report of the Committees was adopted and S.B. No. 2531, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO AGING," passed Second Reading and was referred to the Committee on Ways and Means.

Senators Dela Cruz, English, and Nishihara, for the Committee on Economic Development, Government Operations and Housing and the Committee on Transportation and International Affairs and the Committee on Agriculture, presented a joint report (Stand. Com. Rep. No. 2081) recommending that S.B. No. 2020, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the joint report of the Committees was adopted and S.B. No. 2020, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO ECONOMIC DEVELOPMENT," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Shimabukuro, for the Committee on Hawaiian Affairs, presented a report (Stand. Com. Rep. No. 2082) recommending that S.B. No. 2268, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2268, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO THE DEPARTMENT OF HAWAIIAN HOME LANDS," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Shimabukuro, for the Committee on Hawaiian Affairs, presented a report (Stand. Com. Rep. No. 2083) recommending that S.B. No. 2254, as amended in S.D. 1, pass Second Reading and be referred to the Committee on Ways and Means.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2254, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO THE HAWAIIAN HOMES COMMISSION," passed Second Reading and was referred to the Committee on Ways and Means.

Senator Baker, for the Committee on Commerce and Consumer Protection, presented a report (Stand. Com. Rep. No. 2084) recommending that S.B. No. 2819 pass Second Reading and be placed on the calendar for Third Reading.

On motion by Senator Espero, seconded by Senator Slom and carried, the report of the Committee was adopted and S.B. No. 2819, entitled: "A BILL FOR AN ACT RELATING TO HEALTH INSURANCE," passed Second Reading and was placed on the calendar for Third Reading on Thursday, February 6, 2014.

ORDER OF THE DAY

THIRD READING

S.B. No. 2026, S.D. 1:

Senator Hee moved that S.B. No. 2026, S.D. 1, having been read throughout, pass Third Reading, seconded by Senator Shimabukuro.

Senator Hee rose to speak in support of the measure as follows:

"Thank you, Madam President. This bill is long overdue; it prohibits the trafficking of dogs and cats and the consumption of dogs and cats. It is part of the cruelty to animals package. This bill, quite frankly, should have been passed by the Legislature many years ago. I urge my colleagues to support the passage of this measure and have it move forward for consideration. Bye... I mean, thank you."

Senator Slom rose to speak in support of the measure as follows:

"I have been instructed by Sunny, Chalupa Batman, Snuggles, Gray Kitty, and Hoku the dog in my family, and they urged me to take a very strong stand on this bill. Thank you."

The motion was put by the Chair and carried, S.B. No. 2026, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO ANIMAL CRUELTY," having been read throughout, passed Third Reading on the following showing of Ayes and Noes:

Ayes, 25. Noes, none.

S.B. No. 2120:

On motion by Senator Hee, seconded by Senator Shimabukuro and carried, S.B. No. 2120, entitled: "A BILL FOR AN ACT RELATING TO CAMPAIGN SPENDING," having been read throughout, passed Third Reading on the following showing of Ayes and Noes:

Ayes, 25. Noes, none.

At this time, Senator Nishihara rose to speak on a point of personal privilege as follows:

"The hearing we had yesterday was unusual for Senate Bill 110. Although I felt that its outcome was probably not in doubt, which was what occurred at the end, the members of the committee all spoke truthfully to what they believed about the way they took their vote; and to that extent, we should all be granted that opportunity. But in my view, science should not be trumped by emotional counterclaims to the contrary that are not supported by overwhelming research, data, studies, scientific journals, and organizations in support of the science of creating good technology for agriculture.

"By and large, our legislature and our process, to the public, probably appears opaque at best, but it is the process we work under. When I first got here 10 years ago, there were two things I was told. One was keeping your word, and the courtesy of letting the chair know if you decide you can't vote with them.

And those two I've always stayed with, and sometimes, I think we all do, more or less, because it's important for the good working of this body.

"So, having said that, I harbor no ill will to how it turned out. As I always tell people, we're big boys and girls here; we should be able to understand the process that we live with. That's the process. So, having said that, and whatever happens going forward for the rest of the session, I'm sure we'll all do our job, and I thank the committee for doing theirs, as well, and I appreciated the opportunity to at least get a hearing on that short-form bill. There was no intent to circumvent a process, as sometimes gets reported.

"So, you're welcome to ask me how I feel about it. I'll give you a straight answer; I always have. And to that extent, I appreciate the camaraderie we have in the Senate, and I think it's important that we remember that this body decides collaboratively, or tries to assume that role of collaboration. We should also be very deliberative about what we do, and for that, I thank everyone. Thank you."

Senator Solomon rose to make the following remarks:

"Thank you very much, Madam President. I'd like to speak in very strong support of the remarks that were made by our chairman of Agriculture.

"I cannot fully express the disappointment on behalf of many of my constituencies on the Big Island. Madam President, I represent one of the largest agricultural districts in the State of Hawai'i; and although many of our farmers were not so focused on issues that possibly influenced votes to deny the chairman's bill to be heard is irrelevant because we are the policy decision makers, in the State of Hawai'i, this body, is responsible for. If you look at the Constitution, it is the State of Hawai'i who is responsible for the protection and the perpetuation of agriculture. Our fiduciary duty as stated by the Constitution of the State of Hawai'i has given the state the responsibility to expedite and to get our agricultural industries moving in an expeditious manner; it's all about food security.

"The issues at hand – when you talk about agricultural technology, we're not talking about just biological technology; we're talking about many other scientific technologies that have made it possible for agriculture to pull itself up by their own bootstraps and to get food production going.

"We should consider a rule change if we are deadlocked; the chairman's position should prevail. We need more discussion on this matter. I think when you're at three to three, the chairman should be instructed to call recess and seek help from leadership. Maybe it is because of the referral system – some bills that are at three or four referrals, 50 percent of the Senate is sitting in one committee hearing. I have requested for a caucus to discuss this referral practice, which is indicative as to how we are managing our own house. It is impossible for members to be in attendance at many of the committee hearings due to conflicts caused by our referral system. For example, yesterday I had a dual referral with Higher Education; I was downstairs attending my own committee, rushed to Transportation because the committee did not have quorum. And I think what happened yesterday is not serving the best interest of the public and is a reflection of our own management problems.

"Therefore, Madam President, thank you for allowing me to present remarks in particular to agricultural issues and my concerns as to who is the lead – is it the county? Or is it the State? I feel the State is the lead regarding Agricultural policies. Thank you very much."

Senator Solomon's additional remarks read as follows:

"The right to farm.

"Hawaii State Constitution, Article XI, Section 3, mandates that 'The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self sufficiency and assure the availability of agriculturally suitable lands.' This policy sets forth the State's responsibility to oversee and implement uniform laws, rules and regulations to guide Hawaii's agricultural industry statewide.

"Thus the State has established the State Department of Agriculture, Agribusiness Development Corporation (ADC), Department of Land and Natural Resources, State Land Use Commission, State Water Commission, State Department of Health, State Office of Planning and other related agencies to oversee, coordinate and implement the laws, rules and regulations governing all aspects of agriculture on a statewide basis. The University of Hawaii is a land grant institution that further recognizes that the State's role and responsibility to provide the necessary research to support Hawaii's agriculture on a statewide basis. The State as mandated by the Constitution has set forth the resources, knowledge and expertise to support agriculture.

"In 2001, the Hawaii Right to Farm Act was enacted and put into law (HRS 165), that further recognized that the State has the responsibility to protect and enhance agriculture. The purpose of the Hawaii Right to Farm Act is to protect bona fide farming operations from urban encroachment. The Hawaii Right to Farm Act provides the farmer with the basic 'right to farm' without the fear of frivolous lawsuits by their neighbors. The Hawaii Right to Farm Act also assured the State that the farmers must operate in a legal and reasonable manner to be eligible for the law's protection and must follow best management practices.

"The Legislature also enacted legislation that provided additional protection of our most valuable agricultural lands in the State called the 'Important Agricultural Lands'. The passage of this legislation provided incentives to encouraged landowners and farmers to keep our ag lands in agricultural production.

"The State must also ensure that its laws, rules and regulations coincide with federal law. The Federal pre-emption ensures that all of the State and County laws does not conflict with the Federal law. The Commerce Clause allows our nation to control the economy. It is important that we have uniform laws so that the movement of goods and services between states as well as internationally is.

"The County does not have the appropriate charter that clearly provides the guidance and role in regulating or promoting agriculture. Nor does the county have the resources, knowledge, and expertise to dedicate towards agriculture. We should not create a situation that fragments Hawaii's agricultural industry making it more difficult for farmers to farm. Rather we should encourage, incentivize and promote Hawaii's agriculture so that we can perpetuate the future farmers of Hawaii and reach for sustainability."

Senator Solomon's additional remarks are identified as "**ATTACHMENT A**" to the Journal of this day.

The Chair responded:

"As a clarification, the purposes of having committees that are odd-numbered is so there isn't a deadlock; and if there is one, then it's not because of the makeup of the committee. Committees have time slots, and you're not supposed to be on a committee that conflicts with that. However, the chairs do have the prerogative of calling recesses or putting decision-making to

a different time and date, so those are all the tools available to the chairmen so that they can maneuver when there are situations where members are in other committees due to joint meetings.”

At 12:01 p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 12:03 p.m.

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

“Thank you for the recess. It provided some clarification. What is interesting with what happened yesterday is that, at least my understanding is, the matter was a procedural matter to allow, as our rules provide, for a proposal to be heard. And the procedural issue was denied. That’s unfortunate because the chair was merely making an effort to have a matter heard. I take no position on the matter that the chair wished to be heard, other than to share with my colleagues that there will be two short-form bills which I will ask, procedurally, to allow a matter to be heard. One is to allow the consideration of this chamber to designate Ni‘ihau as its own county. To do so will require a short-form bill that I will ask the appropriate committees to make a determination if that subject shall be heard for consideration, procedurally. The second is to repeal the extinguishment of the konohiki rights for the island of Ni‘ihau. That requires another short-form bill that, procedurally, for it to be considered by this chamber, would have to go through a vote, as was taken yesterday by the chairman of Agriculture.

“I would suggest very strongly that if there are members in this chamber that are opposed to the procedures – as opposed to the efficacy and merit of the proposal – that they do so at this time. That would save the Committee on Judiciary and Labor the effort to bring a matter before this chamber that by any other means could not be done. This goes back to the rule change that was adopted by this chamber. These are procedural matters that have been cut at its knees, preempted from having the merits debated in a public hearing, and that is unfortunate. So, I give notice to this chamber that there will be at least two matters that I have mentioned, procedurally, of which the members will be asked to vote.

“And quite frankly, for those of you who have been here any number of years, you should not be surprised that there will be other short-form bills because that’s the purpose of a short-form bill: to provide for opportunities that may not have existed. For example, I’m working with the state retirement system at this very moment so that those convicted of crimes shall not be eligible to collect their state retirement. Case in point: two prison guards accused of fencing meth and other drugs arrested. My view is if they get convicted, they should not be eligible for their state retirement benefits. These issues arose subsequent to the deadlines imposed by the House and Senate, so in order to do that, to consider the merits, would require the availability of a title. Procedurally, it would have to be done as was evidently conducted by the chairman on Agriculture. It makes no sense to me that under this scenario the merits of the bill would be shortchanged and curtailed because of a procedure. Thank you, Madam President.”

Senator English rose to speak on a point of personal privilege as follows:

“I think we just really need to clarify what happened yesterday in the Ag Committee. Procedurally, we did follow the rules. What has failed to come to light – and I think we have to put it on the table here – was that the difference is that there is an existing bill that dealt with this issue that’s already been referred. And that’s why part of my consideration for voting ‘no’ on it, besides being against the content, was that short-form bills are to be used when there are no available titles to deal

with the issue. In this case, there was one that was square on point and it was already referred. So, to my thinking, why not move the bill that was already there? The chairs couldn’t agree, I understand, on the hearing, but that is our process. So, to say that we have not followed our process is a little bit misleading. The fact of the matter is the difference is that there was an existing bill, and that one didn’t move. We tried to put the same content into a short-form, which might have been trying to circumvent our existing process. Thank you.”

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

“It’s a prerogative of the chair, regardless of the existence of other legislation that may or may not exist, to provide for this chamber the opportunity to weigh the merits of a proposal, regardless of whether we agree or disagree.

“I’m not involved with this issue and I couldn’t care less, quite frankly, that there may or may not have been another bill in existence. Each of you in this chamber, for the most part, sit as a chair, or have sat as a chair or a vice chair. Each of you has taken that responsibility, presumably, with the greatest seriousness of that leadership position. I’m not arguing about the merits of the proposal; I am arguing about the opportunity for each of you to exercise your discretion as a leader in this chamber. That’s all. There were at least five or six bills on minimum wage. I exercised my prerogative as the chair to hear one of them. It is the vehicle at such time that the chair provided for the committee to exercise its prerogative as a member of the committee. Case in point: If \$10.10 was too high, then someone should have said at the committee hearing, ‘\$9.25.’ But in fact, that didn’t occur.

“My comment is on the exercise of your authority as a chair. And from my reading in the newspaper, the chairman of Agriculture merely – merely – provided an opportunity to hear the merits of the bill, regardless that there may have been another vehicle, regardless that the bill may have been killed, regardless that he might take a House bill and stick it in a House bill *as is his prerogative*. We’ve been here long enough to know that. This wasn’t about the bill; it was about a procedure.

“So if this chamber starts on its way of undercutting the chair’s authority, so be it. Let us give notice to each other at this time. We give notice; we cut you at the knees procedurally. That’s the argument before this chamber – not the merits of the discussion. To hear the chairman of Agriculture apologize? For what? Exercising his authority to ask its members for the opportunity to hear a bill? This wasn’t about the bill; this was about the procedure. That’s what I’m arguing about, not about the bill. Thank you.”

The Chair responded:

“Just a note that at the end of the day, every member has the right to exercise their right to vote, whether it’s procedural or whether it’s on the merit of the bill.”

ADJOURNMENT

At 12:15 p.m., on motion by Senator Espero, seconded by Senator Slom and carried, the Senate adjourned until 11:30 a.m., Thursday, February 6, 2014.

ATTACHMENT A



NEIL ABERCROMBIE
GOVERNOR

DAVID M. LOUIE
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

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March 12, 2013

The Honorable Rosalyn H. Baker senbaker@capitol.hawaii.gov
 Senator, Sixth District
 The Twenty-Seventh Legislature
 State Capitol, Room 230
 415 South Beretania Street
 Honolulu, Hawaii 96813

Re: Your inquiry dated February 28, 2012, regarding H.B. No. 174, H.D. 2
 ("HB174") – Genetically Engineered Organism; Produce; Labeling; Import

Dear Senator Baker:

Thank you for your questions regarding the constitutionality of HB174.¹ You also asked whether the State has the legal authority to restrict the import of genetically engineered or genetically modified organism (GMO) food into the State that otherwise complies with all federal requirements.

This bill will very likely be found unconstitutional because (1) state efforts to require GMO labels have been preempted by the federal government, (2) it violates the First Amendment protections of commercial speech, and (3) it violates the Commerce Clause. In addition, the Commerce Clause will prohibit the State from restricting the importation of GMO food into Hawaii that meets applicable federal requirements.

As a preliminary matter, we note that the Legislature provides no articulation of the basis for its presumption that HB174 furthers a state interest. Pursuant to any constitutional inquiry, a federal court will seek to find justification for the proposed state action. The federal government, as discussed in more detail below, has taken the position that GMO food poses no threat to consumers and is not, from a scientific perspective, materially distinguishable from non-GMO food. For purposes of a constitutional analysis of what the likely outcome of litigation in federal court will be, any information that runs counter to conclusions embraced by the Food and Drug Administration (FDA) will certainly be treated as suspect. The absence of any statement of

¹ HB174 imposes labeling requirements on imported genetically modified or engineered produce. The bill authorizes labeling of non-genetically engineered food and creates a private right of action to enjoin violations.

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purpose at all, which is the case here, precludes a federal court from even considering whether a legitimate state interest exists.

1. Express or Field Preemption

State law can either be expressly or field preempted. Express preemption is exactly what it sounds like. Congress has explicitly determined and stated that federal law will preempt state law. In the absence of express preemption language in a federal statute, courts may infer an intention to preempt state law where the federal regulatory scheme is pervasive. In this instance, Congress is said to occupy the entire field of regulation to the exclusion of the states. Congress, in enacting the Federal Food Drug and Cosmetic Act (FDCA), empowered the FDA with the authority to create a federal scheme for the labeling of food.

State GMO labeling laws may be expressly preempted by section 403A², an amendment to the FDCA under the Nutrition, Labeling and Education Act, which provides that "[i]n]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce [a]ny requirement for the labeling of food of the type required by [various sections related to misbranded articles] that is not identical to the requirement of such section." See 21 U.S.C. § 343-1(a). The misbranding sections of the FDCA to which this preemption language refers include prescriptions for "definition and standard of identity," "standards of quality and fill of container," and "nutrition levels and health-related claims." See 21 U.S.C. § 343(g), (h), and (r), respectively. These provisions strongly suggest that, where there is no federal mandate to label GMO food, any state effort to do so would be contrary and inconsistent with the misbranding provisions of the FDCA and be expressly preempted. Interestingly, the FDCA does not require any nutritional labeling on produce, to which HB174 is currently directed. See 21 U.S.C. § 343(q)(4). Nutritional labeling for what the FDA describes as "conventional" foods, by which it means fruits and vegetables, is voluntary. However, the same analysis that applies to food more broadly also applies to produce, i.e., the FDA has determined that, in both instances, there is no basis in fact or in the federal misbranding laws to require what would amount to a GMO "warning" label.

Requirements to label GMO food may also be field preempted. The federal government, via the FDA and its authority to prescribe the content of food labels pursuant to the FDCA, in furtherance of Congress' power to regulate commerce, has arguably "occupied the field" of food labeling. The FDA's regulations are expansive and cover all aspects of what a food label must and must not contain. Specifically, the FDA has examined the question of whether food labels should contain information about the content of GMO and has determined that no such information should be on the label. In fact, the FDA has suggested that even the voluntary labeling of food as "non-GMO" by the industry might be a violation of its rules because it would constitute the misbranding of food. The FDA reaches this conclusion because it has found no scientific basis for the claim that there is a material difference between GMO foods and non-

² Note that the FDCA contains section 403A, which consists of nutrition labeling requirements, and section 403(a), which is part of the material defining misbranding. Thus, what appears at first to be a possible typo is, instead, a reference to different sections of the FDCA.

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GMO foods. Therefore, the requirement by state law, as contemplated by HB174, of GMO labeling is inconsistent with the scope of FDA's rules regarding food labeling and is thus preempted. Even if the Legislature were to amend HB174 by articulating a state interest, it is likely to be viewed as inconsistent with the conclusions reached by the FDA. The FDA has advised that,

[T]he use or absence of use of bioengineering in the production of a food or ingredient does not, in and of itself, mean that there is a material difference in the food. Therefore, a label statement that expresses or implies that a food is superior (e.g., safer or of higher quality) because it is not bioengineered would be misleading.

Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering; Draft Guidance in Docket Number OOD-1598 (Draft released for comment January 2001 for comment purposes only).

2. First Amendment Protection of Commercial Free Speech

In addition to facing preemption challenges, state measures requiring GMO food labeling will likely be subject to claims that such measures violate the First Amendment. In the case of Vermont's effort to require the dairy industry to label milk produced from cows treated with growth hormones (International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996)), the Second Circuit Court of Appeals undertook a very methodical review of the rationale provided by the Vermont legislature and determined that the state label requirement was an impermissible restriction on the dairy producers' right to free (commercial) speech. The court reached this conclusion despite Vermont's argument that the legislation was justified on the basis of consumer protection and a citizen's right to know. Id., at 73. This case was decided strictly on First Amendment grounds without reaching the preemption or Commerce Clause issues raised in the lower court. Id., at 70. This suggests that any state effort (regardless of how well-intentioned) to require labeling that is inconsistent with federal law, particularly where the veracity and relevance of the information sought to be mandated remains a matter of contention at the federal level, will be met with great skepticism in federal court. The decision in International Dairy also demonstrates the lengths to which a federal court will go to call into question the state's rationale in support of its labeling requirement. The court found:

Vermont's failure to defend its constitutional intrusion on the ground that it negatively impacts public health is easily understood. After exhaustive studies, the FDA has "concluded that rBST has no appreciable effect on the composition of milk produced by treated cows, and that there are no human safety or health concerns associated with food products derived from cows treated with rBST." 898 F.3d at 248. Because bovine somatotropin ("BST") appears naturally in cows, and because there are no BST receptors in a cow's mammary glands, only trace amounts of BST can be detected in milk, whether or not the cows received the supplement.

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Id. Moreover, it is undisputed that neither consumers nor scientists can distinguish rBST-derived milk from milk produced by an untreated cow. Id., at 248-49. Indeed, the already extensive record in this case contains no scientific evidence from which an objective observer could conclude that rBST has any impact at all on dairy products. It is thus plain that Vermont could not justify the statute on the basis of "real" harms. See Edenfield v. Fane, 507 U.S. 761, 770-71 (1993). We do not doubt that Vermont's asserted interest, the demand of its citizenry for such information, is genuine; reluctantly, however, we conclude that it is inadequate. We are aware of no case in which consumer interest alone was sufficient to justify requiring a product's manufacturers to publish the functional equivalent of a warning about a production method that has no discernable impact on a final product.

Id., at 73.

3. The Dormant Commerce Clause

State action to restrict the importation of GMO, whether taking the form of a labeling requirement, an additional tax burden or an outright ban, will likely run up against the Commerce Clause's overarching goal of ensuring a national marketplace. The Supreme Court has said:

This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949).

[W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.

Baldwin v. Seeig, 294 U.S. 511, 527 (1935).

Article I, section 8, clause 3 of the United States Constitution empowers the federal government to regulate commerce among the states. A line of Supreme Court cases, exemplified most recently in United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste, 550 U.S. 330 (2007), has developed the concept of a dormant Commerce Clause which dictates that, in addition to the power it vests in the federal government, the Commerce Clause also acts as a limitation on the individual states' authority to regulate commerce even in the absence of a contrary federal statute. This line of cases is summarized by the United Haulers decision as follows:

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Moreover, as appellants correctly note, that "residuum" [of legislative authority] is particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963). By the same token, however, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view, we have noted, "would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951). Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national "common market," we are confronted with the task of effecting an accommodation of the competing national and local interests.

Id. at 350.

4. Conclusion

It is likely that any state effort to require GMO labeling (of any kind) will be viewed as either expressly preempted by the FDCA or an intrusion on the comprehensive federal scheme of food labeling. Furthermore, as the International Dairy decision clearly demonstrates, the federal courts will apply strict scrutiny to examine whether a labeling requirement violates the First Amendment protection of commercial speech. Finally, the Commerce Clause may be implicated where a state seeks to impose a restraint on interstate commerce and a court examining, for example, a labeling requirement, an import tax, or some other import restriction, may find that law invalid where the facts are not sufficiently compelling to justify state action.

Very truly yours,



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