JOURNAL

of the

SENATE OF THE

SIXTEENTH LEGISLATURE

of the

STATE OF HAWAII

Special Session of 1991

Convened Monday, June 24, 1991
Adjourned Friday, June 28, 1991

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THE

SIXTEENTH LEGISLATURE

STATE OF HAWAII

SPECIAL SESSION OF 1991

JOURNAL OF THE SENATE

FIRST DAY

Monday, June 24, 1991

The Senate of the Sixteenth Legislature of the State of Hawaii, Special Session of 1991 was called to order at 11:05 o'clock a.m. by Senator James Aki, Vice President of the Senate, in accordance with the following Proclamation:

"PROCLAMATION

We, Richard S. H. Wong, President of the Senate, and Daniel J. Kihano, Speaker of the House of Representatives, of the Sixteenth Legislature of the State of Hawaii, pursuant to the power vested in us by Section 10, Article III of the Constitution of the State of Hawaii, and at the written request of two-thirds of the members to which each house is entitled, do hereby convene the Special Session of 1991 of the Sixteenth Legislature of the State of Hawaii for a period of five (5) days, excluding Saturdays and Sundays, commencing on Monday, June 24, 1991.

/s/ Richard S.H. Wong
RICHARD S.H. WONG
President of the Senate

/s/ Daniel J. Kihano
DANIEL J. KIHANO
Speaker of the House"

The Divine Blessing was invoked by the Reverend Edward Robinson, Central Union Church, after which the Roll was called showing all Senators present with the exception of Senators Chang, McMurdo and Wong who were excused.

At this time, Senator Tungpalan introduced to the members of Senate Senator Elizabeth Arriola of the 21st Guam Legislature who was seated in the gallery. Senator Arriola chairs the youth, senior citizens and cultural affairs committee of the Guam Legislature.

INTRODUCTION OF SENATE BILL

On motion by Senator Solomon, seconded by Senator Reed and carried, the following bill passed First Reading by title and was referred to the Committee on Judiciary:

Senate Bill:

No. S1-91 "A BILL FOR AN ACT RELATING TO ADMINISTRATIVE LICENSE REVOCATION."

Introduced by: Senator Blair.

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

"Mr. President, I would like to applaud everyone involved in forcing the Senate to reconvene a special session to fix the drunk driving bill. First of all, I'd like to congratulate the members of this body who transcended the all powerful chairman system to do the right thing. Most importantly, I want to congratulate the people of Hawaii for 'ringing Wong' and in numerous other ways bringing pressure to bear on their elected officials. At the top of the list must be the Mothers Against Drunk Driving (MADD). MADD did a superb job of informing the public and rallying support to keep the pressure on. Also involved, of course, were doctors, insurers and a wide host of others citizens intent on fixing the DUI bill.

"It is regrettable that the public had to pressure us to do what should have been done during the regular session. But, at least to the Senate's credit, it responded. MADD and others involved deserve the public's gratitude because this successful campaign proves that public pressure works. The one sour note in all of this, Mr. President, are comments made by some members of the Senate that can only be seen as arrogant and elitist. The concern has been expressed that this sets a dangerous precedent in terms of allowing the public to pressure their elected officials into doing what the public wants. That's what elected officials are supposed to be doing in the first place. This is supposed to be a representative form of government.

"There has even been some fear expressed that bowing to public pressure may change the way business is done in the Senate. I can only hope that it does. The way the Senate does its business -- the way the entire Legislature does its business -- must change. The Legislature has become an elitist fraternity whose members have forgotten they are supposed to be public servants.

"Mr. President, I have asked this body before to radically change the system and to begin by throwing out the all powerful chairman system and to stop making decisions behind closed doors. Let the sunshine in; let the public back into the process. A democratic form of government works only as well as its citizens are informed and involved in the process.

"I congratulate the public for its successful lobbying effort and I urge this Senate to respond in a more lasting manner by making fundamental changes in the system to encourage continued public participation in this democratic process. Thank you."

Senator Solomon also rose to speak on a point of personal privilege and said:

"Mr. President, I just would like to thank the Minority Floor Leader for his remarks but I would also like to remind him that I think that the issue is moot. The fact is that the Majority decided to convene and to hold this special session and this is where we are now.

"As far as my remarks, Mr. President, I just feel that it is a sad situation but that's how it is when we deal with the media. I am still of the opinion that this does set a precedence. A dangerous precedent, if you like. As far as I am concerned, each and every one of us do represent different constituencies and as a representative of the

Third Senatorial District I did not receive one phone call urging me to vote for a special session. These are the remarks that I had made to the media.

"As far as I'm concerned, Mr. President, I think, that as far as the chairmanships and how we do our business here in the Senate, we have done a fair and reasonable job. I think that Senator Fernandes Salling as chair of the Transportation and Intergovernmental Relations Committee did an excellent job.

"I would like to remind the Minority that if this bill was so important why was it not brought to the forefront at the beginning of the session when we convened the Legislature. Instead, this bill was discussed and brought to the forefront when we had decided to extend the Legislature. So I think that the logistics of the emergence of the bill and how the bill was handled, Mr. President, is something that we in the leadership of the Majority party should seriously look into.

"In closing, Mr. President, we are here today and I think that this proves that no matter how those of us in the Majority feel about an issue, the bottom line is to do what is the best for Hawaii. This is what the majority party has done. We have buried our differences, Mr. President. We have agreed to work together. I feel that President Wong made an excellent recommendation to have this bill re-referred to the Committee on Judiciary because of the kinds of amendments that we would be dealing with. In terms of subject matter, we felt it more appropriate for this bill to be referred to the Committee on Judiciary.

"Again, Mr. President, I would like to reiterate, I felt that the Senator from Kauai, in her jurisdiction as chairman of the Transportation and Intergovernmental Relations, did an excellent job from her perspective. I'm hoping, Mr. President, that the Majority and the Minority can come together in the five days, work with our Judiciary Committee and come up with the kinds of amendments that will be appropriate and resolve this problem in helping us overcome the drunk driving problem. Thank you."

Senator Cobb also rose to speak on a point of personal privilege and remarked:

"Mr. President, in rising to speak on a point of personal privilege I would like to address two areas that appear different or disparate and yet come together.

"One is the idea of changing in some manner the system of committee chairmanships that has evolved which I have been a part of the evolution in the Senate over the last 12 to 15 years. The second is a small recommendation, perhaps, to effect the cost savings in the way we do business.

"On November 20, 1990, I forwarded to every Democratic senator a detailed set of recommendations on how to improve the committee system, how to allow for more floor votes and contrast to that with the way business is conducted in such widely disparate bodies as the New Hampshire legislature, the Louisiana legislature, the European parliament, the Polish 'Sejm,' and the Supreme Soviet for the Union of Soviet Socialist Republics. That was considered but not acted on and yet the same problem is here before us today albeit in a slightly different manner. That is, how do we arrive at a system that encourages floor votes on issues of major concern to the public and yet not receiving a majority of support in either house of the Legislature.

"During the discussions on whether or not to have a special session, an idea was floated to create a committee of the whole to deal with this issue. I thought that idea had some merit, but, yes, it would set a precedent. The irony is, as I was coming down the elevator this morning I noticed a staff member with a congratulatory Senate certificate which is going to be duly circulated and signed by all Senators, and I have no objection to that, but if I look back on the last few years it seems that we have spent more time and perhaps even more staff money circulating and signing congratulatory Senate certificates than we have dealing with issues of real substance here in the Senate.

"I would like to make two suggestions, rather than merely complaining about it, two very detailed suggestions. One, when it comes to congratulatory certificates we should create a master sheet that can be xeroxed or reproduced very easily and then the sponsoring Senator signs below with the Senate President. Think of the thousands of hours of staff time and legwork that would save.

"Second, we should devise a system, somewhat to what exists in the European parliament and even the Supreme Soviet, that allows for a floor vote on any issue when a significant minority of either the committee members or the Senate desires it. I make that suggestion short of a recall motion which is a public motion involving the yanking of a bill and war on the floor. Because of the way our timetable is structured, Mr. President, very seldom do we have the full 20 legislative days for a bill to repose in a committee before it becomes eligible for a recall motion. If you look at our timetable over the last five sessions, normally, it is less than 20 days from one crossover to another or from one lateral deadline to another.

"While doing that, Mr. President, I think we should then be willing to say that if an issue is voted on on the floor of this body that issue is settled at least for that legislative session and cannot be resurrected again except by the prevailing side.

"Too often, Mr. President, we hear complaints not about how we do business but the lack of what's done. At least this way the public would have a very clear picture of what's happening. It would tend to open it up. Both of these suggestions are made in a constructive manner and when it comes to congratulatory certificates, Mr. President, the suggestion is made not just to save money, not just to save the staff time and the hours and hours of circulating and legwork and going to other Senators, especially when we are in recess or not in session as we are now, and many of us are travelling, but to simplify and streamline the system to make it work better and to allow us to devote more time to what we are elected for -- to vote on issues and represent our constituents. Thank you.'

At 11:25 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:26 o'clock a.m.

Senator Fernandes Salling then rose to speak on a point of personal privilege and stated:

"Mr. President, very briefly, I would like to share this thought with my fellow colleagues and that is, that from my point of view perhaps there is one good thing that may come out of this special session; that I am no longer the issue, which allow Senators the time to focus on the issues before them as outlined in this bill. I ask, though, that all of you keep in mind what the opposition has said are the reasons for the special session. What needs to be fixed? Keep those points in mind when reading this bill. From my cursory reading at this point in time, I think

that it goes further than that. But that is for all of you to determine after hearing all of the testimony. Thank you very much."

Senator Holt also rose on a point of personal privilege and said:

"Mr. President, in brief response to some comments made by our Senator from West Maui and also to some remarks that have been made in the press -- 'You're right, Senator from Kohala, it's very sad when it gets to the media.'

"And about this elitist fraternity that we have here in the Senate and the all too powerful chairmen, there have been some mention made that certain issues, major issues, are bottled up in committees by the chairmen, one of them being land use initiative. I want to set the record straight that the vote was seven to two in my committee. Thank you."

Senator Blair also on a point of personal privilege stated:

"Mr. President, two of the prior speakers referred to the Senate as a fraternity. In order to curry favor with the powerful women's caucus, I'd like the Journal to reflect that we are definitely not a fraternity."

STANDING COMMITTEE REPORT

On motion by Senator Solomon, seconded by Senator Reed and carried unanimously, the Senate authorized the Clerk to receive the standing committee report on Senate Bill No. S1-91. In consequence thereof, and subsequent to its recessing at 11:30 o'clock a.m., the folowing standing committee report was received:

Senator Blair, for the Committee on Judiciary, presented a report (Stand. Com. Rep. No. S1-91) recommending that S.B. No. S1-91, as amended in S.D. 1, pass Second Reading and be placed on the calendar for Third Reading.

By unanimous consent, action on Stand. Com. Rep. No. S1-91 and S.B. No. S1-91, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO ADMINISTRATIVE LICENSE REVOCATION," was deferred until Tuesday, June 25, 1991.

ADJOURNMENT

At 10:00 o'clock p.m., the Senate adjourned until 11:00 o'clock a.m., Tuesday, June 25, 1991, in memory of the late Mrs. Charlene Holt Uchima, sister of Senator Milton Holt.

SECOND DAY

Tuesday, June 25, 1991

The Senate of the Sixteenth Legislature of the State of Hawaii, Special Session of 1991, convened at 11:15 o'clock a.m. with the President in the Chair.

The Divine Blessing was invoked by the Reverend Bob Gillchrest, Kalihi Baptist Church, after which the Roll was called showing all Senators present with the exception of Senators Chang, McMurdo and Reed who were excused.

The President announced that he had read and approved the Journal of the First Day.

At this time, Senator Tungpalan introduced to the members of the Senate her children, daughter Lori and son Jonathan, who were seated in the gallery.

ORDER OF THE DAY

SECOND READING

Stand. Com. Rep. No. S1-91 (S.B. No. S1-91, S.D. 1):

On motion by Senator Blair, seconded by Senator Holt and carried, Stand. Com. Rep. No. S1-91 was adopted and S.B. No. S1-91, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO ADMINISTRATIVE LICENSE REVOCATION," passed Second Reading and was placed on the calendar for Third Reading on Wednesday, June 26, 1991.

At 11:20 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:21 o'clock a.m.

ADJOURNMENT

At 11:22 o'clock a.m., on motion by Senator Solomon, seconded by Senator George and carried, the Senate adjourned until 8:30 o'clock p.m., Wednesday, June 26, 1991.

THIRD DAY

Wednesday, June 26, 1991

The Senate of the Sixteenth Legislature of the State of Hawaii, Special Session of 1991, convened at 9:10 o'clock p.m. with the President in the Chair.

The Divine Blessing was invoked by Senator Stanley T. Koki, Hawaii State Senate, after which the Roll was called showing all Senators present with the exception of Senators Chang, McMurdo and Nakasato who were excused.

The President announced that he had read and approved the Journal of the Second Day.

At this time, Senator Matsuura introduced to the members of the Senate Mrs. Lillian Aki, mother of Senator James Aki, who was seated on the floor of the Senate.

ORDER OF THE DAY

THIRD READING

S.B. No. S1-91, S.D. 1:

Senator Blair moved that S.B. No. S1-91, S.D. 1, having been read throughout, pass Third Reading, seconded by Senator Holt.

Senator Blair rose to speak in support of the bill and stated:

"Mr. President, I'd like to begin what I hope will be a very short period of debate by expressing my deeply felt appreciation for the assistance of Senator Iwase, Senator Levin and my vice chairman, Senator Holt. The gubernatorial veto of House Bill No. 1016, C.D. 1, made the drafting of this bill somewhat difficult. The Senators that I just mentioned helped to accelerate the drafting process as well as communicating with members of the Judiciary Committee and other members of the Senate. Also, I would like to mention Richard Perkins, Dennis Chu, Yen Lew and other members of the various Senate offices who discharged their responsibilities vigorously and enthusiastically over the past several days. I wanted to make my appreciation a matter of public record.

"Also, at the risk of overlooking some equally deserving members, I would like to mention Senators Cobb, Crozier, Ikeda, Ann Kobayashi, Matsuura and Tungpalan for their suggestions on improving the bill ... we do have a Senate draft 1 before us. And then, finally, Mr. President, I would like to go on record as thanking Representative Metcalf, who, despite the personal inconvenience, made himself available for consultation at late hours and was thoroughly helpful throughout the past week.

"I should also mention Senator Tungpalan for research above and beyond the call of duty. During our dinner break, she went down to the Beretania Street police station to double check that the testimony we were given was accurate. She reported that it was. (Senator Levin has passed me a note which reads: 'But any mistakes in the bill were the fault of the Judiciary chair.' That, also, is true.)

"I would be remiss if I did not mention Warren Price and Ted Baker. If there is ever a movie made of this special session I'm sure that the title will be 'Warren and Ted's Excellent Adventure.'

"Finally, a brief apology to the members for keeping them here tonight and quite possibly Friday night because of the Senate draft. It's in the nature of bills like this that they improve and are cleaned up, almost without end. I'm sure that six months from now when we are back in session we will have occasion to further improve and clean it up.

"Having said that, my opinion is that the bill before us is a very good and very important law that will materially contribute to the health, safety, and welfare of our community. It does not do so at the expense of anyone's civil liberties. Quite to the contrary, Mr. President, it reduces police discretion by reinstating the objective blood alcohol test to its appropriate position as the cornerstone of our DUI enforcement. We have dealt at length and the press has adequately covered the issue of implied consent which caused the Senate to reconvene.

"In addition, the bill takes care of three items that were important enough for the governor to veto House Bill 1016. First is the repeal of conditional licenses for refusers which is needed for achieving a greater consistency of purpose and at the same time preserving our option of receiving federal funds. Second, this bill fully separates the civil and criminal proceedings. Third, it provides for non-automatic but very easy setting of hearings in those instances where the arrestee desires a hearing. Mr. President, I believe this bill addresses all of the concerns that the governor's veto message contained. I am, therefore, optimistic that this will receive the signature of the governor and we will not have to deal with it again for at least six months.

"As a technical matter, I'd like to address the issue of jury trials in DUI cases.

"Among the sections of Act 188-90 which will now become effective on August 1, 1991, are provisions capping the potential maximum imprisonment period under §291-4. The maximum jail time is reduced from 180 days to 30 days for a first offense and 60 days for a second offense. The changes made with respect to the penalty provisions applicable to convictions for first and second offenses are intended to result in a determination that persons charged with the first and second DUI offenses are not entitled to a jury trial.

"In State v. O'Brien, 68 Haw. 39 (1985), the ICA held that DUI is a constitutionally serious offense and a DUI defendant is entitled to a jury trial. The Court's determination was based in large part on the maximum imprisonment penalty of 180 days. Although the court in O'Brien also relied on other factors, the Court indicated it would look to federal case law on the subject as a guide.

"In Blanton v. North Las Vegas, 489 U.S. 538 (1989), the U.S. Supreme Court held that there is no right to a jury trial under the Federal Constitution's Sixth Amendment for persons charged under a state statute with DUI where the statute provides for a potential maximum imprisonment period of six months together with other penalties similar to those existing under §291-4. The court in Blanton emphasized that the most relevant criterion for determining the seriousness of the offense is the length of permissible incarceration. Accordingly, the reduction in maximum jail time for first and second time DUI offenders, should extinguish the right to a jury trial for such cases after August 1, 1991.

"Legislative intent is less clear regarding cases pending on August 1. In my opinion, as a member of the Judiciary Committee and a conferee on Act 188-90, it was

the intent of the committee that the 'no jury' rule be applied to pending cases because such an application is neither an ex post facto law nor in violation of HRS section 1-3 which provides that '[n]o law has any retrospective operation, unless otherwise expressed or obviously intended.'

"The application of a new criminal measure to a crime already consummated which works to the detriment or material disadvantage of the wrongdoer is an ex post facto law as to the offender. State v. Von Geldern, 64 Haw. 210 (1981); State v. Bunn, 50 Haw. 351 (1968). The ex post facto prohibition does not bar legislation effecting a change in the penalty for a crime where the change operates to ameliorate or mitigate, and not aggravate, the penalty. Such legislation would neither be detrimental nor materially disadvantageous to the defendant. Id. The changes made to the §291-4 penalty provisions operate to ameliorate and not aggravate the §291-4 penalty. The amended law as applied to defendants in pending cases is not, therefore, an ex post facto law.

"In a recent U.S. Supreme Court case pertaining to the Ex Post Facto Clause of the Federal Constitution, Collins v. Youngblood, 497 U.S. __, 111 L. Ed. 30 (1990), where the Court held that the Ex Post Facto Clause was not violated by the application of a Texas statute to a convicted person which allowed reformation of a jury verdict assessing an unauthorized punishment, the Court observed that the Ex Post Facto Clause does not prevent a state from taking away a criminal defendant's right to a jury trial under the Sixth Amendment. The court emphasized that '[t]he right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses or punishments, which is the concern of the Ex Post Facto Clause.' 111 L. Ed. at 45.

"A denial of a jury trial to defendants in DUI Cases pending as of August 1 does not involve the creation of a new crime or enlarge the punishment. It is a change in procedure resulting from the §291-4 amendment reducing the maximum imprisonment penalty which, as Collins makes clear, does not amount to an ex post facto law. See also Dobbert v. Florida, 468 U.S. 123 (1984); Miller v. Florida, 486 U.S. 1061 (1987).

"As noted above, under HRS 1-3, a law cannot apply retrospectively unless the legislature intends such retrospective application. Act 188 of the 1990 Legislature which sets forth the amendment to the §291-4 penalty provisions indicates that the amendment is effective July 1. There is nothing in the language of Act 188 or in the legislative history discussing the application of the amendment to pending cases. We now extend that Act to August 1 and so I take this opportunity to address the 'pending cases' issue.

"A law is a retrospective law if it takes away or impairs vested rights. See Ohio Public Interest Action Group, Inc. v. Public Utilities Commission, 331 N.E. 2d 730 (1975). In State v. Long, 698 S.W.2d 898 (Mo. App. 1985), the Missouri Court of Appeals held that the application of an amended Missouri DUI statute to a case in which the offense was committed prior to the date of the amendment was not an improper retrospective application of the law. There, it appears that the law existing at the time the offense was committed permitted the jury to assess the punishment in cases of prior offenders. Prior to the date of the trial, the law was amended to indicate that the court and not the jury would determine the punishment in such cases. The court observed that the application of the amended law to the defendant did not violate any 'right' of the defendant since no new crime was crated by the change, and further since the punishment was not enlarged. The change was considered to be merely a procedural change, and it did not alter or take away any vested right of the defendant.

"A vested right must be something more than a mere expectation based upon an anticipated continuance of existing law. The right to a jury trial in DUI cases is a right which exists because of the magnitude of the penalties. When the penalties are reduced, the right does not change. The denial of the jury right in this context is a change in procedure which does not take away a vested right. Accordingly, the application to pending cases of a determination that no jury trial right exists because of the change in penalties does not appear to be a retrospective application.

"Even assuming that a denial of the right to a jury trial in pending cases is considered a retrospective operation within the meaning of HRS section 1-3, HRS section 1-3 is only a rule of statutory construction. Legislative intent to apply the law retrospectively can be ascertained, HRS section 1-3 is no longer determinative. See State v. Von Geldern, supra. Although there is nothing in the language of Act 188 to indicate that its provision may be applied retrospectively, the change in §291-4 penalties was made to eliminate the jury trial right in order to provide for a more expeditious resolution of DUI cases now pending and in the future. Retrospective application was intended and is the only interpretation that fully effectuates the policy of avoiding jury trials in most DUI cases.

"I urge your support of this bill. Thank you."

Senator Fernandes Salling then rose to speak against the measure and remarked:

"Mr. President, I would offer to insert my remarks in the Journal too but I don't think that that would help us here because I believe that we can't take the vote before 10:00 o'clock. (Chair: 'Correct.') So, what I will do is read it, with the indulgence of my fellow Senators here.

"Mr. President, I left the State Capitol last night resigned to the inevitable and prepared to simply say a few things for the record. But, while flying home, I had the opportunity to read all of the testimony on this bill including one from a Mr. Sullivan, a 70-year old retired Air Force colonel, and I urge all of you to read this piece of testimony that was given at the Senate hearing, on this measure before you, on Monday.

"With your indulgence, I would like to extrapolate some of the things that he had said that I think says it very simply and well: 'Good and sane decisions are seldom made well on an emotional high or in a high state of inebriation. Here we have the former challenging the latter and statistics and studies as we have seen can be twisted to prove or disprove any point of view.'

"He goes on to relate his experience with Honolulu's finest and it would take me a while to read it but I think I will allow you to do that on your own time. I was very shocked though by what I had read and what this one man had been put through by police officers, only to be let loose two hours later after not having been found to be driving under the influence through the objective and scientific evidence, I might point out, the test. Nevertheless, he did spend at least two hours in jail.

"Mr. Sullivan states, 'At 70 years of age, I must be too old-fashioned but what is happening here is still not right. And as a veteran of World War II, Korea and Vietnam, maybe I am too sensitive to those rights guaranteed under the Constitution I dedicated a lifetime to protect. We used to have a saying in the Pentagon that said, "If you want it bad, you'll get it bad."'

"Mr. Sullivan ends by saying, 'He deeply fears that we are destined to get bad legislation from such a hurried up session of the legislature.'

"I must agree with all of these statements that I have read.

"But as I've stated, I had the opportunity to read all of the testimony, not just Mr. Sullivan's. I had the chance to read some of the unbelievable statements made by Mr. Price. I realized then that more needed to be said than just stating for the record.

"Fellow members of the Senate, what we are experiencing here is the most dishonorable and deceitful manipulation of this Legislature that I have ever witnessed in my years as a senator.

"Overwhelmed by pressure from without and within, Senators agreed to call themselves back into special session to correct a perceived flaw, the repeal of the implied consent or HRS 286-155, dealing with revocation of a driver's license when the driver refuses to take a test. But rather than reinstating this section or even amending the law with language similar to the proposal presented by the attorney general's office which was given to us at the end of this year's session, a copy of which has been circulated and which you have on your desk, which I might point out is less than a page. Rather than doing this, you are being asked instead to agree to make many changes, and major changes, which totally overhauls the law to reflect law enforcement's position staked out two years ago.

"These changes before you go far beyond the purposes for which this special session was deemed necessary. Changes are being proposed here which will invite opportunities for abuse. And though it may be argued that this will not occur, the question remains, have we provided enough safeguards to prevent the likelihood of abuse.

"This bill will empower individual police officers to act as policemen and judge and jury. And while I'm not saying that this power will be abused by police officers, the question is, do we have enough safeguards to protect against such abuse, should it occur.

"Make no mistake, this bill has ramifications that go far beyond license revocation.

"Ladies and gentlemen, I appeal to your sense of justice here. To your sense of what is right and wrong. We're not dealing with perceptions or gray areas within the law when we are being asked to decide whether it is right to change the law so that a person is no longer presumed innocent until proven guilty. Proponents of this bill would have you believe that this administrative revocation is civil 'in nature' rather than criminal. This fundamental principle need not apply. What they fail to point out is that this is an administrative procedure, NOT a civil procedure as between two people; that an administrative procedure is different from a civil or criminal procedure; that although we have created an administrative procedure to help alleviate the backlog in the courts, this does not change the fact that DUI is a criminal charge and that a person is being arrested by a police officer for a criminal charge of driving under the influence. And when have we ever said that when a person is charged criminally that they are no longer presumed innocent until proven guilty?

"We are not dealing with perceived flaws or gray areas within the law when we are being asked to make changes to allow a prosecutor to bring criminal proceedings against a person who was found innocent administratively, and under the lowest burden of proof. A person who plays by the rules and takes the test and is determined by this objective, scientific evidence not to be driving under the influence. Proponents of this bill, however, would have you believe that this is justified because they are now characterizing this new administrative proceeding as civil 'in nature' rather than criminal and, definitely, not administrative; that this civil procedure is separate from the criminal proceeding. Therefore, it must follow that criminal proceedings may be brought even when a person is found innocent by objective, scientific evidence. Rather confusing isn't it?

"And in order to characterize this as a civil proceeding and separate from criminal, we are being asked to agree to another major change made by this bill -- to allow prosecutors to remove themselves from administrative revocation proceedings entirely. The proponents' rationale that this is logical because that is how it's being done under the old implied consent law escapes me. The old implied consent law required a hearing before a judge and the prosecutors could participate, if they so chose to. The old implied consent law did not make a finding of DUI but rather a finding of whether or not a person refused to take a test after reasonable grounds and probable cause that a person was driving under the influence. The bill before us, however, now makes a finding of DUI and does so with or without a test.

"What I'm trying to show you is that there is no truth to what the proponents are saying that these changes are necessary because that is how it is being done under the old law. This bill isn't the same as the old law. If it were, we would have simply reinstated the affidavit hearing before a judge and the prosecutor could choose to participate. Do not be taken in by these legal gyrations.

"I find it amusing also to be told that if allowing the prosecutors the discretion to go both administratively and criminally results in problems out there, and it's substantiated by evidence of figures of data collected, why, let's wait and we can correct it next year.

"Ladies and gentlemen, the proponents of this bill have lost all sense of fair play here. If a person is drunk, throw the book at 'um! But for heaven's sake, the manner by which you determine this must be fair. And for anyone to suggest that if we choose to act responsibly and guard people's fundamental rights while at the same time pass stiff laws to get and keep the drunks off the roads that somehow we are in favor of drunks driving and killing people, these are despicable tactics. Tactics which only incite a lynch mob mentality.

"The fact that you have now agreed to convene this special session to deal with the implied consent issue does not mean you have agreed to make these major changes and many more; changes from not allowing drivers to confront the police officers unless the hearing officer now agrees to this. At least we had stated in the law that we passed last year that if we could not provide for confrontation with the police officer because that may result in a delay of the hearing process, that at least the driver could call him by phone. But, now we have gone further to change it to make it discretionary with the hearing officer by requiring the drivers to request an administrative hearing rather than it be scheduled.

"We are looking at the possibility of people losing their jobs because they no longer may qualify for a conditional permit to drive. Which, by the way, is contrary to the law today under our criminal statute, Section 291-4(b)(1)(B), which gives the judge discretion to grant a conditional permit to drive for a first time offender for up

to 60 days of the 90-day suspension, with or without the driver having taken a test.

"We have not separated here the refusal to take the test from the finding of a DUI with or without the test; therefore, we have not even addressed the question with respect to what will be on an abstract for insurance purposes. It's my contention that the refusal to take a test will be on the abstract as driving under the influence. There are many, many more changes such as this that you have made in this bill that we have before us.

"I've thought for a while now how I could best illustrate the mindset behind this new bill and I've decided to share with you Senate Resolution No. 188, which you also have on your desk. In testimony presented on Monday, the attorney general stated that at the request of the Senate in S.R. 188, a task force was formed to review the act and come up with the necessary 'fixes' to the law to present to this Legislature this year. Nothing could be further from the truth. As you can see for yourselves, S.R. 188 which you have was passed by the Senate unamended. It simply asks the law enforcement officials, the Judiciary and members of the community to begin the work necessary to implement the new 1990 administrative revocation law so that problems inherent in the passage of any new law could be minimized. And it asks that these people begin work immediately from April 16, 1990, more than a year ago, so that this new law would be administered in a just and fair manner so that we could provide proper notice; provide some minimum due process; provide an opportunity to be heard and do so in a manner which is not at the expense of people's rights and for the convenience of the law enforcement community. By agreeing to make these changes far-reaching and irreversible change, we have become victims of our own system. I urge you to consider this when you vote, and I urge you to keep in mind all of the testimony that you have heard this session and in previous sessions. Keep that knowledge in mind and apply it along with your own common sense about what is right and what is wrong, which in the end is all that the people that you represent can expect you to do. Thank you."

Senator Matsuura rose to speak in support of the measure and said:

"Mr. President, I was at the hearing and the thing that impressed me most, as far as people testifying, was a testimony given by a defense lawyer who specializes in drunk driving cases. His comment (I may be misquoting him, but...) was that he was able to win about two-thirds of the cases he represented the drunk drivers. His reaction was that he shudders to think that these people are now going back on the road and driving. He admitted he does not drive to work.

"At the time of questioning, I asked him how he managed to win his cases. He said it was simple. In the present law, if the alcohol blood level is 0.1 you are considered DUI. Unfortunately, many, if not all, of the people arrested for DUI take the breath test. In comparing the breathalyzer test and the blood testing, there is a margin of error of about 27 percent. So using that fact alone, if you're tested for .11, put the margin of error 27 percent, you can beat the DUI charge.

"The next question was, did we correct this in the proposed legislation? We did. You will see the correction on page 2. There is now a quantitative alcohol threshold for your blood alcohol and also for the breath test. In order words, there are now two different threshold alcohol levels: one for the blood test, and the other for the breathalyzer test. His comment at the end was that with this new proposed legislation, a person who registers an alcohol blood or breath test beyond the threshold level would have more difficulty proving that he or she was not DUI.

"I was also very pleased that this defense lawyer suggested the use of a video camera as a tool to convict these DUI offenders. This type of evidence is difficult to refute.

"This bill is good, and I support it. Thank you very much."

Senator Cobb also rose to speak in support of the measure and said:

"Mr. President, I was also present at the hearing and the particular attorney in question, upon further examination, and I'm not sure the previous speaker was there when this occurred, indicated that it was two-thirds of all the cases that went to trial rather than two-thirds of all the cases that he took for defendants. Nevertheless, that is an impressive figure. I believe the change he was alluding to involved the breath alcohol content rather than the blood alcohol content which was also a technical change made in bill.

"In supporting the measure, Mr. President, I would like to express a concern, not just because of an editorial but because I and others had raised this very question during the course of the hearing long before the editorial came out, and that is the discretion of the prosecutor to pursue criminal charges against a person who for any reason is cleared in an administrative revocation hearing or the case not brought forward because of a technical foul up or because of an error in paperwork or any other reason. I recall very clearly the response of the attorney general was that they didn't want to see another Bucky Lake case; that for any reason an individual is responsible for injury or death to others and then his administrative hearing somehow had a technical flaw in it that the prosecutor should have the ability to go ahead with a criminal prosecution. Now I can understand, sympathize and agree with that particular sentiment. However, I think there are limits to prosecutorial discretion and I think one of the areas in the editorial that points out correctly, should be addressed, is a full report on all cases where the individual is either cleared or not found to be intoxicated under administrative hearings and then goes forward for criminal prosecution. To see how relevant, how frequent such instances are. The response we received to several questions on this issue for myself and other Senators during the course of the hearing was that the prosecution would only go forward with criminal proceedings if there was substantial damage or injury or death involved in an accident as a result of DUI.

"I for one will be wanting to observe and watch very closely the conduct of the prosecutor in this case because I share the concern that if an individual does not cause injury, substantial damage or death, that individual, under the criteria outlined as a policy of the prosecutor, should not have to face a criminal charge.

"With those reservations, Mr. President, I will be supporting this measure. Thank you."

At 9:40 o'clock p.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 9:55 o'clock p.m.

Senator Yamasaki then rose to request the Chair's approval to have his written remarks in support of the measure entered into the Journal. The Chair having so ordered, Senator Yamasaki's remarks are as follows:

"Mr. President, I rise to speak in favor of Senate Bill-S1-91, Relating to Administrative License Revocation, and to explain the reason for the change in my position concerning the implied consent provision of the proposed legislation. My original position on this subject was that 'implied consent' constituted an infringement of the constitutional privilege against self incrimination under Article 1, Section 8 of the Hawaii Constitution or the Fifth Amendment to the United States Constitution.

"I was strongly against revocation of that privilege to drive upon refusal to submit to a breath or blood test which may be used as evidence against oneself in any proceeding. However, upon further research into my files, I found correspondence from myself addressed to the then Attorney General, Bert Kobayashi, dated February 12, 1968, requesting an opinion on the constitutionality of Part VII of the new chapter in the Revised Laws of Hawaii, 1955 established by Section 2 of Act 214, Session Laws of Hawaii 1967 and three questions were listed in the letter.

"In his reply dated March 22, 1968, he said, 'we answer to all of your questions in the negative' and his conclusion was based on Schmerber v. California, 384 U.S. 757 (1966). He said that the United States Supreme Court, in Schmerber held at page 761 that the privilege against self-incrimination 'protects an accused from being compelled to testify against himself, or otherwise provides the State with evidence of a testimonial or communicative nature,' Schmerber holds that the withdrawal of blood over the accused's objection and introduction of a chemical analysis thereof at his trial does not violate the constitutional privilege against self-incrimination. Reference to the State of Kansas v. Walker, 430 P.2d 246 (blood test), and the State of California v. Sudduth, 421 P.2d 401 (breath test).

"The letter continues to state that 'A clear distinction is made in the Schmerber case between evidence of a testimonial and communicative nature, such as oral testimony or a required filing of documents, and papers of a physical nature taken from the body of the accused, such as fingerprinting, measurements of the suspect's body, medical examination and extraction of a substance from the body of a suspect for purposes of analysis and use in evidence. The former examples are subject to the privilege; the latter examples are not.' Reference is made to the State of Arizona v. Stelzriede, 420 P.2d 170 (fingerprints), Battese v. the State of Alaska, 425 P.2d 606 (measurement of body).

"The arguments of the Attorney General's office continues to state that 'The removal of blood as is described in the Schmerber case and the removal of blood or administering of a breath test provided for in the subject portion of Act 214 involve the securing of physical evidence from the body of the accused. Since Part VII involves the latter, we conclude that Part VII does not violate the privilege against self-incrimination.'

"The letter continues with the explanation of 'due process of the law' which is covered in the Schmerber opinion.

"Complete copies of the original letter sent to the Attorney General dated February 12, 1968 and the reply dated March 22, 1968 will be entered into the journal. (Attachments "I" and "II")

"Thank you, Mr. President, and I urge approval of this bill."

Senator Cobb then added:

"Mr. President, the vote will be very positive with one or two possible exceptions, I'd like to invite the chairman of the Transportation Committee, the distinguished Senator from Kauai to come by my office. In my inner office, there is a calendar of all the czars of Russia on one side and a picture of President Gorbachev that he gave me on the other and your picture is in the middle and below it is a caption that reads, 'Sometimes nobody listens.' She's most welcomed to come by and commiserate with me on that point."

The Chair then remarked:

"Members of the Senate, before proceeding with the vote, the Chair would like to take this opportunity to thank Senator Fernandes Salling. In the discussion about the debate earlier, she had informed the Chair that she had a few words she would like to enter into the record but that she would not like to prolong the debate. In fact she never did consider the idea of a filibuster. For that, the Chair, knowing her strong feelings on the measure, appreciate very much. Thank you, Senator Fernandes Salling."

At this time, Senator Tungpalan rose to speak in support of the measure and said:

"Mr. President, the last speaker prompted me to stand and let the Senator from Kauai know that her comments were taken into consideration during our deliberations in the committee hearing. In fact, we began the hearing at 2:00 o'clock and we didn't get out till 10:00, so you can see it was not something that was rubber-stamped.

"I would also like to say that I feel very certain that the message that we are sending out to people in our communities is that they should not drink and drive because they will certainly be dealt with harshly through the courts.

"One consideration, though, has always been uppermost in my mind. That is that everyone be treated with dignity and respect. It is hopeful that everyone involved in the judicial process, including police officers, court officials and hearings officers, will recognize that people have always been presumed innocent until proven guilty. I hope that this will always be remembered. Thank you."

Senator Holt, in support of the bill, said:

"Mr. President, I would like to thank the Judiciary Committee chairman, Senator Levin, Senator Iwase, the leadership, all the membership of the committee, Senator Fernandes Salling, and the staff for a job well done. Thank you."

The motion was put by the Chair and carried, S.B. No. S1-91, S.D. 1, entitled: "A BILL FOR AN ACT RELATING TO ADMINISTRATIVE LICENSE REVOCATION," having been read throughout, passed Third Reading on the following showing of Ayes and Noes:

Ayes, 21. Noes, 1 (Fernandes Salling). Excused, 3 (Chang, McMurdo, Nakasato).

Senator Solomon then rose to speak on a point of personal privilege and stated:

"Mr. President, I'd like to insert remarks that I have prepared into the Journal and would like to briefly state them for the information of my colleagues.

"This is just my summary of what has happened during this special session. Mr. President, I'm making remarks

as to how ... not just me but others of my colleagues who have been so misconstrued by the media in terms of our presentation and our representation on some of the issues that have been discussed this session.

"And, also, I want to clear for the record, some accusations made by other colleagues as to the sincerity of some members of the majority in understanding the importance of this issue and in pursuing and trying to resolve this issue during this special session, I would like to clarify that at this point, Mr. President. I'm sure I speak for all legislators when I say that, of course we are all very sensitive to and guided by public opinion, the will of the people.

"I would like to quote at this time from the testimony given by Tom Gill, representing the ACLU, because I thought he did an excellent job in presenting the other side, so to speak.

"Mr. Gill stated, 'The ACLU ... does not support drunk drivers. However, we do insist that everyone in our society have the same right to due process when faced with adverse governmental actions. We fully recognize the difficulties faced by a legislature which was forced back into special session by public and media outcry over a matter which has been under consideration for several years. It is particularly interesting when the main point of the outcry was the elimination of a section (HRS 286-155) dealing with the revocation of a driver's license when the driver refused to take a breath or blood test. That section was removed in 1990. The amendment was in the statute books for over a year. It would appear the fervent supporters of this section -- including the "law enforcement community" -- were modestly inattentive until a few weeks ago.'

"Mr. Gill closed his testimony by stating: 'In summary, these are some of the more obvious due process or civil liberties questions which we hope the legislature will consider in dealing with this bill. While it is certainly appropriate for elected representatives to respond to public outcry and public pressure, it is also their duty to insure that those making the outcry don't shoot the rest of us -- and themselves -- in the foot by violating the civil rights to which we are all entitled. In most parts of the world, civil rights are of no concern -- there aren't any. Let's keep our state and nation unique in this regard.

"Mr. Gill continues, 'Finally, in the interest of legislative objectivity let us suggest that license revocation is not a simple cure-all for drunk driving. Many will continue to drive, even though their license has been revoked, and unfortunately this is more likely to be the irresponsible people who react badly to alcohol. By the time you go into session in 1992 you should have some information as to how the law you enact is working. We would suggest including in the bill -- or even in the committee report -- that the agency administering the act, and/or an outside body such as the LRB or Legislative Auditor, compile competent statistics showing the number and type of arrests, the number of DUI arrests of persons driving without a license or whose license had been revoked, the number of administrative hearing held and the results of those hearings, along with any other information which would help you, and the public, gauge the effectiveness of the law you enact.

"'Wouldn't this be a reasonable approach?'

"Thank you."

MISCELLANEOUS COMMUNICATION

Misc. Com. No. S1, "Report of the Senate President Concerning the Matter of Senator Milton Holt," dated June 26, 1991, was read by the Clerk and was placed on file. (Attachment "A")

ADJOURNMENT

At 10:01 o'clock p.m., on motion by Senator Solomon, seconded by Senator Reed and carried, the Senate adjourned until 11:00 o'clock a.m., Thursday, June 27, 1991.

ATTACHMENT "I"

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU, HAWAII 96813

March 22, 1968

The Honorable Mamoru Yamasaki
Senator, Second District
Fourth Legislature
State of Hawaii

Dear Senator Yamasaki:

This is in reply to your request for an opinion of this office on the constitutionality of PART VII of the new chapter in the Revised Laws of Hawaii 1955, established by SECTION 2 of Act 214, Session Laws of Hawaii 1967. More specifically, you asked:

1. Does PART VII on its face constitute an infringement of the constitutional privilege against self-incrimination under Article I, Section 8, of the Hawaii Constitution, or the Fifth Amendment to the United States Constitution?

2. If PART VII does not on its face constitute an infringement of the state or federal constitutional privilege against self-incrimination, would a motor vehicle driver's proper claim of such privilege provide a complete defense in any proceeding pursuant to said PART VII?

3. Does PART VII on its face violate state or federal constitutional privileges, rights or guarantees other than the privilege against self-incrimination, viz:

   (a) Due process of law, including an offense against the "sense of justice" referred to in Rochin v. California, 342 U.S. 165, under Article I, section 4, of the Hawaii Constitution and the Fifth and Fourteenth Amendments to the United States Constitution;

   (b) Right to counsel under Article I, section 11, of the Hawaii Constitution and the Sixth and Fourteenth Amendments to the United States Constitution;

   (c) Exclusion of evidence obtained by unlawful search and seizure under Article I, section 5, of the Hawaii Constitution and the Fourth and Fourteenth Amendments to the United States Constitution; and

   (d) Right of privacy "within the penumbra of... guarantees of the Bill of Rights," Grisiwold v. Connecticut, 381 U.S. 479 and Katz v. U.S., 36 L.W. 4080?

We answer all of your questions in the negative. Our conclusion is based on Schmerber v. California, 384 U.S. 757 (1966).

In the Schmerber case, the petitioner was hospitalized following an accident involving an automobile which he apparently had been driving. The police officer smelled liquor on the petitioners' breath and noticed other symptoms of drunkenness at the accident scene. The police officer placed the petitioner under arrest and directed a physician to take a blood sample. A report of the chemical analysis of the blood which indicated intoxication was admitted over objection at the trial. The petitioner was convicted and conviction was affirmed by the appellate court which reviewed the claims of denial of due process, of his privilege of self-incrimination, of his right to counsel and of his right not to be subjected to unlawful searches and seizures under the federal constitution. He appealed. The conviction was affirmed by the United States Supreme Court.1/

1. The privilege against self-incrimination.

The United States Supreme Court in Schmerber held, at page 761, that the privilege against self-incrimination "...protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature...." (Footnotes omitted; emphasis supplied.) Schmerber holds that the withdrawal of blood over the accused's objection and introduction of a chemical analysis thereof at his trial does not violate the constitutional privilege against self-incrimination. Accord: State of Kansas v. Walker, 430 P.2d 246 (blood test), and State of California v. Sudduth, 421 P.2d 401 (breath test).

The opinion in the Schmerber case is an excellent discussion of the privilege against self-incrimination and its bounds or limitations. See also 8 Wigmore, Evidence, Section 2250 et seq. (McNaughton rev. 1961), especially Section 2265, pages 391-394.

A clear distinction is made in the Schmerber case between evidence of a testimonial and communicative nature, such as oral testimony or a required filing of documents and papers, and evidence of a physical nature taken from the body of the accused, such as fingerprinting, measurement of the suspect's body, medical examination and extraction of a substance from inside the body of a suspect for purposes of analysis and use in evidence. The former examples are subject to the privilege; the latter examples are not. Accord: State of Arizona v. Stelzriede, 420 P.2d 170 (fingerprints); Battese v. State of Alaska, 425 P.2d 606 (measurement of body).

Marchetti v. United States, 36 L.W. 4143, and Grosso v. United States, 36 L.W. 4150, involving the filing of tax returns on gambling proceeds, and Haynes v. United States, 36 L.W. 4164, involving the registration of firearms, concern

evidence of a testimonial or communicative nature. The removal of blood as is described in the Schmerber case and the removal of blood or administering of a breath test provided for in the subject portion of Act 214 involve the securing of physical evidence from the body of the accused. Since PART VII involves the latter, we conclude that PART VII does not violate the privilege against self-incrimination.

2. Due Process of Law.

The Schmerber opinion contains a detailed discussion of claims made by the petition based upon theories of "Due Process of Law," "Unlawful Search and Seizure" and "Right to Privacy." Each claim was discussed and rejected by the court.

Act 214 directs that a procedure be used by police officers, which procedure is patterned after those used in the Schmerber case and in Breithaupt v. Abram, 352 U.S. 432, which the Schmerber opinion cites as controlling. In neither case did the procedure used offend the "sense of justice" referred to in Rochin.

The Schmerber opinion declares that the question of whether an unlawful search and seizure has taken place must be answered on a case-by-case basis. The court in Schmerber ruled that probable cause existed for the arrest and that a warrant to proceed with the test was not required, particularly, where, under the circumstances, the police officer's assumption that a delay in obtaining a warrant would threaten the loss of evidence because of the way that the percentage of alcohol diminished after drinking stops as the body functions to eliminate it from the system. Moreover, the attempt to secure the evidence was an appropriate incidence of the petitioner's arrest. The court also felt that the test involving the extraction of blood was a reasonable one; that such tests are a common place in these days of physical examinations, and that the test was performed by a physician in a hospital environment, and that there was no invasion of the right to privacy. Accord: the Walker case, supra, the Sudduth case, supra.

The only question which you have raised which was not discussed in the Schmerber case is that concerning the right to counsel. There was an attorney present when the test was taken in Schmerber. Act 214 is, however, silent with respect to whether an attorney must or must not be present. Act 214, on its face, does not deny the right to counsel. The safeguard of Miranda v. Arizona, 384 U.S. 436, would still be applicable at the accusatory stage of any investigation of a charge of driving while under the influence of intoxicating liquor.

Very truly yours,

/s/ H. K. Bruss Keppeler
H. K. BRUSS KEPPELER
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi
BERT T. KOBAYASHI
Attorney General

1/ California Vehicle Code, Sec. 23102(a) provides, in pertinent part, "It is unlawful for any person who is under the influence of intoxicating liquor...to drive a vehicle upon any highway....' The offense is a misdemeanor. The case does not indicate whether or not California has a statute similar to Hawaii's. Although petitioner was ultimately prosecuted for a misdemeanor, he was subject to prosecution for a felony since a companion in his vehicle was injured in the accident because of traffic law violations. Cal. Vehicle Code, Sec. 23101.

ATTACHMENT "II"

February 12, 1968

Mr. Bert Kobayashi
Attorney General
Department of the
Attorney General
Iolani Palace
Honolulu, Hawaii 96813

Dear Mr. Kobayashi:

Recent opinions of the United States Supreme Court have held that a gambler's proper claim of the constitutional privilege against self-incrimination provides a complete defense to federal prosecutions for violation of federal tax statutes requiring gamblers to register and to pay excise and occupational taxes (Marchetti v. U.S. and Grosso v. U.S.*), and that a defendant's proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register firearms under Section 5841 of the Internal Revenue Code or for possession of unregistered firearms under Section 5851 (Haynes v. U.S.**).

Under the rules of these and other United States Supreme Court decisions, I request your opinions on the following questions:

1. Does Part VII of the new chapter of the Revised Laws of Hawaii 1955, established under Section 2 of Act 214, Session Laws of Hawaii 1967, entitled "ALCOHOL AND HIGHWAY SAFETY" on face constitute an infringement of the constitutional privilege against self-incrimination under Article 1, section 8, of the Hawaii Constitution or the Fifth Amendment to the United States Constitution, in as much as said Part VII provides that "any person who operates a motor vehicle. . .shall be deemed to have given his consent. . .to a test. . .of his breath or blood for the purpose of determining the alcoholic content of his blood. . .at the request of a police officer having reasonable grounds to believe the person driving. . .is under the influence of intoxicating liquor only after (1) a lawful arrest and (2) the police officer has informed the person of the sanctions of section___-164", such sanctions leading ultimately to potential revocation of the person's operating license for six months?

2. If Part VII of the new chapter of the Revised Laws of Hawaii 1955, established under Section 2 of Act 214, Session Laws of Hawaii 1967, entitled "ALCOHOL AND HIGHWAY SAFETY" does not on face constitute an infringement of the state or federal constitutional privilege against self-incrimination, would a motor vehicle driver's proper claim of such privilege provide a complete defense in any proceeding pursuant to said Part VII?

3. Does Part VII of the new chapter of the Revised Laws of Hawaii 1955, established under Section 2 of Act 214, Session Laws of Hawaii 1967, entitled "ALCOHOL AND HIGHWAY SAFETY" on face violate state or federal constitutional privileges, rights, or guarantees, other than the privilege against self-incrimination, viz.

   (a) Due process of law, including an offense against the "sense of justice" referred to in Rochin v. California, 342 U.S. 165, under Article I, section 4, of the Hawaii Constitution and the Fifth and Fourteenth Amendments to the United States Constitution;

   (b) Right to counsel under Article I, section 11, of the Hawaii Constitution and the Sixth and Fourteenth Amendments to the United States Constitution;

   (c) Exclusion of evidence obtained by unlawful search and seizure under Article I, section 5, of the Hawaii Constitution and the Fourth and Fourteenth Amendments to the United States Constitution; and

   (d) Right of privacy "within the penumbra of. . .guarantees of the Bill of Rights, Grisivold v. Connecticut, 381 U.S. 479 and Katz v. U.S., 36 L W 4080.

I would appreciate your earliest convenient response to this request since the questions raised appear serious, warranting intensive consideration by the 1968 Legislature.

Sincerely Yours,

Mamoru Yamasaki
Senator, 2nd District

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*36 L W 4143, 4150
**36 L W 4164

ATTACHMENT "A"

MISC. COMM. NO. S1

REPORT OF THE SENATE PRESIDENT
CONCERNING THE MATTER OF
SENATOR MILTON HOLT

Honolulu, Hawaii

June 26, 1991

The Senate
Sixteenth State Legislature
State of Hawaii

Members of the Senate:

In my capacity as President of the Senate of the Sixteenth State Legislature, I herewith submit this report on the matter of the recent events involving Senator Milton Holt and his wife, Cheryl Holt.

The purpose of this report is to review the pertinent facts of Senator Holt's case and to make such recommendations as may be deemed appropriate regarding possible disciplinary action against him on the part of the Senate.

Disciplinary Powers of the Senate

Article III, Section 12 of the Hawaii State Constitution and Rule 70 of the Rules of the Senate provides that the Senate may punish a member for misconduct, disorderly behavior or neglect of duty by censure, or upon a two-thirds vote of all the members of the Senate, by suspension or expulsion of such members. It is pursuant to these powers that this report has been prepared.

Background

This matter arises from a domestic quarrel occurring on May 10, 1991 at the home of Senator and Mrs. Holt. As a consequence of the incident, Senator Holt was charged with violating Section 709-906, Hawaii Revised Statutes, the abuse of a family member. Senator Holt entered a plea of guilty at the arraignment and plea in the Family Court of the First Circuit Court on May 24, 1991. He received and served the mandatory minimum sentence of two days in jail and is required to undergo the mandatory family counseling.

Meeting with Senator Milton Holt

On June 13, 1991, the members of the Senate met with Senator and Mrs. Holt to discuss this matter and to ascertain the couple's personal recollections and feelings about what had occurred.

Their account provided us with a clearer understanding of the incident. Senator Holt and his wife had a family quarrel over whether they should visit his terminally ill sister that night to present her with a special gift of Hawaiian herbs. Both of them were tired and strained at that time. The quarrel apparently reached a point where she tried to strike out at him. He restrained her by holding her arms down, and, in the process, caused some bruising. She accidentally fell down the stairs in freeing herself, causing pains to her neck. She stated that it was never her intention to report this to the police or to file a complaint against him. The police were notified by the hospital, which is standard procedure in cases of suspected abuse, when she went to the hospital to check out her injuries. At the hospital and while in a distraught state of mind, she made certain extreme allegations which she subsequently recanted. From there on, the process of prosecution became mechanical even though she did not want to pursue it.

In a news conference held on May 21, 1991, Senator Holt publicly apologized and expressed his love and concern for the well-being of his wife and three children. He took responsibility for the event and expressed his willingness to accept whatever consequences might befall him. His conduct had contributed to the onset of the quarrel. Cheryl Holt acknowledged her own share of responsibility for the quarrel and further stated that she had requested the prosecutors to drop the complaint. They both stated that they wanted to put the incident behind them and to get on with their lives.

The prosecutors did not honor her request to drop the complaint. It is the administrative policy of the prosecutor's office to proceed forward with all abuse cases, regardless of the wishes of the purported victim or the strength of the factual evidence.

The Senator's attorney, James Stone, filed in court a "Motion to Dismiss for De Minimus Infraction." An affidavit of Cheryl Holt and a report by a psychologist, Dr. Richard Kappenberg, was attached to the motion. Recanting her prior allegations, Cheryl Holt affirmed that she is not a battered or abused wife, that she shared in the responsibility for the quarrel and that she wanted the charges against her husband dropped. Dr. Kappenberg offered his opinion that the Holt case should not be pursued and that pursuing it would have a deleterious effect on the Holts' efforts with counseling. The motion, the affidavit, and the report are attached hereto as Exhibits I, II and III.

Before the submission of the Motion to Dismiss to the court, the Senator decided to enter a plea of guilty. This decision was taken on his own against the advice of his attorney. The attorney wanted to plead not guilty, go to trial and seek vindication. It is Mr. Stone's firm belief that had the case gone to trial, the Senator would have been found not guilty. However, the Senator wanted to close the matter and not subject his family to any prolonged aggravation.

In the June 13 meeting with Senator and Mrs. Holt, the members of the Senate were able to observe the couple's demeanor, assess the veracity of their statements, and to ask questions regarding specific points which may have been unclear.

Both Senator and Mrs. Holt were extremely contrite about the incident. They both emphasized that it was an isolated incident, in fact, the first time something like that ever happened between the two of them. They both assured the Senate that it will not happen again.

The consensus from that meeting is that Senator Holt is truly remorseful. He once again apologized to the members of the Senate. He spoke candidly and openly about his personal and family problems.

The Sentiment of the Senate

My judgment is that Senator Holt's statements, as corroborated by Cheryl Holt's own statements and her sworn affidavit, is a credible account of the occurrence. From the discussion at the June 13 meeting, there was nothing to suggest or to lead us to believe otherwise. The Senate believes it has sufficient information to make a decision on this case.

The fact remains that Senator Holt did plead guilty in court. We recognize the rationale for his decision to do so in face of his attorney's recommendation that he had a good probability of obtaining an acquittal had he contested the charge. Nonetheless, despite these circumstances, we cannot dismiss this matter out of hand. A quarrel did occur, to which he was a party, and that quarrel led to unfortunate consequences.

Spouse abuse is a major social problem. Until recent years, it had not been acknowledged as such but public awareness and sensitivity has been growing. The publicity resulting from the Holt case has heightened public awareness of the issue and has served to remind us of the work that has yet to be done. We in the Senate firmly support strong legislation to prevent spouse abuse and to protect and treat the victims of abuse. For the victims, the law should be their shield and their refuge. We in the Senate reaffirm our commitment to continuing our efforts to deal with this very vital issue.

Being a high-profile issue, spouse abuse is subject to intense public attention. One consequence of this is heightened public awareness on individual cases. This has happened with Senator Milton Holt. He is a public figure. The spouse abuse law was invoked in his case. He has the unenviable distinction of being a sitting member of the Senate having to serve a term in jail because of the law. The juxtaposition of a high-profile public issue, spouse abuse, and a high-profile public figure, Senator Milton Holt, has naturally focused intense public attention on him and on the institution to which he belongs, the Senate. His case has been elevated from a personal matter to a public issue.

Because the Senate as an institution has been drawn into this case, I find it appropriate that we assume jurisdiction - to investigate the facts and to take such actions as may be necessary.

Recommendations

In accordance with Article III, Section 12 of the Hawaii State Constitution and Rule 70 of the Rules of the Senate, I respectfully submit the following recommendations to the Senate.

After much individual and collective discussion with members of the Senate, and after much personal deliberation drawing upon my 14 years experience as President of the Senate, I recommend that the full Senate go on record as not condoning Senator Milton Holt's participation in this incident which has brought disapprobation upon the Senate.

As a member of the Senate, he is expected to be held to a higher standard than an ordinary citizen. His conduct - even in his private life - is expected to be exemplary. Any lapse is subject to public disapproval. Senator Holt experienced such a lapse.

Based on the information received by the Senate from Senator and Mrs. Holt as to what happened on May 10, there does not appear to be grounds for any further action against him on the part of the Senate. The incident does not fit the general perception of a spouse abuse case where one spouse (usually the male) assaults the other. Moreover, both Senator and Mrs. Holt contributed to starting the quarrel and letting it get out of hand. We have no evidentiary knowledge of anything further beyond what the Holts have told us. We have to proceed with the information available, as obtained from the Holts. They are the only two people who can speak authoritatively on the incident.

The Senate feels confident that this was an isolated incident which will not reoccur. Senator Holt has already suffered much grief and criticism as a result of this affair.

The Senate was moved by Senator and Mrs. Holt's remorse over what had happened and their evident earnest desire to put the incident behind them and to renew and strengthen their marriage bonds. Given all the media attention and other pressures which they must face, they will have many obstacles to overcome. Our prayers are with them.

Senator Holt recognizes the embarrassment he has brought upon his constituents as well as his colleagues. A cloud hangs over the institution to which he belongs, the Senate, and he needs to take action to lift that cloud. Towards this end, he has written a formal letter of apology to the citizens of the Eighteenth Senatorial District, attached hereto as Exhibit IV. In addition, he has also written a formal letter of apology to the members of the Senate. A copy of his letter to me is attached as Exhibit V. Similar letters were sent to all other Senators. His willingness to accept responsibility for the consequences of his actions is duly acknowledged.

Senator Holt is earnestly encouraged to continue and complete the psychological counseling which he and his wife have already voluntarily begun. We are gratified that they recognize their problems and are taking positive steps to address those problems. While we in the Senate are concerned about the short-term public criticism and stigma of Senator Holt's

case, we are more concerned about the long-term impact on him - both in his ability to deal with personal stresses and in the strengthening of the foundations of his marriage. The Senator's future well-being - and that of his wife, Cheryl - is paramount in our minds. Their marriage relationship has gone through a traumatic experience. They need help and guidance to make things whole again. This, I feel, should be their first priority.

I recommend acceptance of this report by the members of the full Senate. Acceptance means that the Senate concurs with my recommendations.

The receipt of this report shall be entered into the Journal of the Senate upon its acceptance.

Very truly yours,

/S/Richard S.H. Wong
RICHARD S.H. WONG

Attachments

Attachments:

FUJIYAMA, DUFFY & FUJIYAMA

WALLACE S. FUJIYAMA 197-0
JAMES E. DUFFY, JR. 775-0
JAMES J. STONE 1949-0
DAVID Z. ARAKAWA 2908-0
Suite 2700, Pauahi Tower
Bishop Square
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone No. 536-0802

Attorneys for Defendant

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

1991 MAY 24 AM 8:11

F. OTAKE
CLERK

IN THE FAMILY COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	FC-CR NO. 91-2515
vs.	DEFENDANT'S MOTION TO DISMISS FOR DE MINIMUS
MILTON A. HOLT,	INFRACTION; AFFIDAVIT OF JAMES J. STONE; EXHIBITS "A"
Defendant.	& "B"; NOTICE OF HEARING OF MOTION; CERTIFICATE OF SERVICE
	Charge: H.R.S. 709-906
	Arraignment and Plea: May 24, 1991, 8:30 a.m.
	Judge: Honorable Marjorie Manuia
	Date: May 24, 1991
	Time: 8:30 AM
	Judge: MARJORIE HIGA MANUIA

DEFENDANT'S MOTION TO DISMISS FOR DE MINIMUS INFRACTION

Comes now Defendant MILTON A. HOLT, by his attorneys, FUJIYAMA, DUFFY & FUJIYAMA, for a Motion to Dismiss for De Minimus Infraction pursuant to Rule 7B, Hawaii Family Court Rules, Rules 3 and 7, Rules of the Circuit Court of the State of Hawaii, Rules 12 and 47 of the Hawaii Rules of Penal Procedure, and Section 702-236, Hawaii Revised Statutes, the attached Affidavit of James J. Stone, Exhibit "A" and the entire files and records herein.

DATED at Honolulu, Hawaii, May 23, 1991.

/S/ JAMES J. STONE
WALLACE S. FUJIYAMA
JAMES E. DUFFY, JR.
JAMES J. STONE
DAVID Z. ARAKAWA
Attorneys for Defendant

IN THE FAMILY COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	)	FC-CR NO. 91-2515
	)	
vs.	)	AFFIDAVIT OF JAMES J. STONE;
	)	EXHIBIT "A"
MILTON A. HOLT,	)	
	)	
Defendant.	)	

AFFIDAVIT OF JAMES J. STONE

STATE OF HAWAII)
: SS.
CITY AND COUNTY OF HONOLULU)

JAMES J. STONE, being first duly sworn, on oath, deposes and says:

1. That he is licensed to practice law in all courts of the State of Hawaii;

2. That he is a member of the law firm of FUJIYAMA, DUFFY & FUJIYAMA, attorneys for MILTON A. HOLT ("MR. HOLT"), the Defendant in FC-CR No. 91-2515;

3. That MR. HOLT has been charged with a violation of Hawaii Revised Statutes, Section 709-906, and is scheduled for arraignment and plea on Friday, May 24, 1991, at 8:30 a.m., before the Honorable Marjorie Manuia;

4. That on May 22, 1991, in the course of preparing for the arraignment and plea, he became aware of certain additional facts regarding the incident involving MR. HOLT and his wife, the complainant in the above-referenced case, CHERYL A. HOLT ("MRS. HOLT"), through the attached statement prepared by MRS. HOLT;

5. That attached as Exhibit "A" is a true and correct copy of MRS. HOLT's statement, which was prepared with the assistance of MRS. HOLT's attorney, Stephanie A. Rezents, Esq.;

6. That based on said additional relevant facts and the nature of the attendant circumstances as shown in MRS. HOLT's statement, there is evidence that MR. HOLT's conduct did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense, or did so only to an extent too trivial to warrant the condemnation of conviction, and presents other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense;

7. That based on the above additional relevant facts and the nature of the attendant circumstances, he is filing a Motion to Dismiss for De Minimus Infraction, to allow the Court to consider all of the relevant facts bearing on MR. HOLT's conduct and the nature of the attendant circumstances, and to exercise its discretion to dismiss the case;

8. That prior to the incident, both MR. HOLT and MRS HOLT were emotionally upset and were arguing;

9. That during the course of the argument, MRS. HOLT struck MR. HOLT;

10. That during the argument, MRS. HOLT suffered minor injuries: bruises to both of her arms as a result of MR. HOLT trying to hold her from running away to her mouth, when MR. HOLT was attempting to cover her mouth to stop her from raising her voice, and to her neck, when she fell down on the stairs while trying to get away from MR. HOLT;

11. That MRS. HOLT later made a police report because she was mad at MR. HOLT, and before knowing all of the facts;

12. That attached as Exhibit "B" is a true and correct copy of a letter from psychologist Richard P. Kappenberg, Ph.D., to the Department of the Prosecuting Attorney. Dr. Kappenberg's letter states that both MR. HOLT and MRS. HOLT were under considerable pressure at the time of the incident, however, they are aware of the seriousness of the incident and have a desire not to have such reoccur. Dr. Kappenbergh also states that he believes that both MR. HOLT and MRS. HOLT should benefit from the counseling which they have independently and voluntarily agreed to continue;

13. That in his letter, Dr. Kappenbergh further urges the Department of the Prosecuting Attorney not to pursue the current charges against MR. HOLT because he believes that pursuit of the charge will likely have only deleterious effect upon both MR. HOLT and MRS. HOLT in their efforts with counseling;

14. That said Motion to Dismiss for De Minimus Infraction should be considered by the Court at the time of the arraignment and plea, on May 24, 1991, so that the case can be resolved expeditiously; and

Further Affiant sayeth naught.

DATED at Honolulu, Hawaii, May 23, 1991.

/S/ James J. Stone
JAMES J. STONE

Subscribed and sworn to before me
this 23rd day of May , 1991.

/S/ Joycelyn P.S. Costa
Notary Public, State of Hawaii.

My commission expires: 2/1/92

FUJIYAMA, DUFFY & FUJIYAMA

WALLACE S. FUJIYAMA 197-0
JAMES E. DUFFY, JR 775-0
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Honolulu, Hawaii 96813
Telephone No. 536-0802

Attorneys for Defendant

IN THE FAMILY COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	)	FC-CR NO. 91-2515
	)	
vs.	)	ABUSE OF FAMILY AND
	)	HOUSEHOLD MEMBERS
MILTON A. HOLT,	)	(Police Report No.
	)	91-170479)
Defendant.	)	
	)	Charge: H.R.S. 709-906
	)	
	)	Arraignment and Plea:
	)	May 24, 1991, 8:30 a.m.
	)	
	)	Judge: Honorable
	)	Marjorie Manuia
	)	
	)	AFFIDAVIT OF CHERYL HOLT
	)	

AFFIDAVIT OF CHERYL HOLT

STATE OF HAWAII)
: SS.
CITY AND COUNTY OF HONOLULU)

CHERYL HOLT, being first duly sworn on oath, deposes and says:

1. My name is Cheryl Holt and I reside at 2221 Aupuni Street, Honolulu, Hawaii, 96817, within the City and County of Honolulu, Hawaii;

2. I have had the advice of additional legal counsel, Stephanie Resents;

3. I am the wife of Milton Holt and we had an argument on May 10, 1991 at our residence which is the subject of this proceeding being FC-CR No. 91-2515;

4. I am not a battered or abused wife which some people say women in my circumstances are suppose to say because of guilt and for purposes of trying to help their husband. I don't appreciate what the media or others are saying about our situation and their comments are not making things easier. Milton and I have started marriage counseling and I wish the media and others would give us the privacy we need to heal our wounds and strengthen the bonds of our marriage;

5. Further, I am not being coerced to say things as some people are saying for political or other reasons. I just want to clarify the record and events of the evening of
May 10, 1991. I sincerely feel I am just as much to blame as Milton for what happened during the evening of May 10, 1991 and if he is punished then I should likewise be punished;

6. On May 10, 1991 I came home about 7:45 p.m. from my son's open house at school. Milton was home after returning from Molokai and was immediately upset because he didn't tell he was going to Molokai. I later learned

that he went to Molokai to obtain a special gift for his sister who is terminally ill and is expected to live for only a short time. Milton is very close to his sister and our families are having a difficult time trying to cope with her imminent death. When Milton invited me to go to his sister's house I was not aware of the special gift or the hardship he went through to obtain the gift on Molokai. I simply said "no" to his invitation and when he approached me to talk to me I pushed him away and said "no" again. I refused to talk or listen to him which I should have done. I didn't realize that as a family he wanted us all to present the gift to his sister during dinner at her home;

7. Milton then approached me again and I pushed him away. He then reached for me brushing my hair and grabbed my arm and we went in to the house together and he asked me to sit so he could talk to me. I refused to sit and talk to him and I hit him several times and tried to leave the house but he held me and locked the door asking all the time that I listen and talk to him. I refused to do so and started to raise my voice at which time he asked me to be quiet and covered my mouth. I then managed to free myself where he was holding me by my two (2) arms to restrain me and stop me from hitting him. In freeing myself I fell down on the stairs and I believe that's when I strained my neck. His sister then called when we were coming over for dinner and I told her that Milton was bothering me. Milton then approached me and I dropped the phone to the ground. He then approached me saying he only wanted to talk and I threw my car keys at him. When he went to pickup the keys I left the house through the back door;

8. I then walked to Milton brother's house two (2) blocks away and because of my sore neck I then decided to go to the hospital to get it checked out. When I went to the hospital I was still mad at Milton. I didn't realize that when you go to the hospital and tell them that your husband injured you the hospital automatically reports it to the police. When I talked to the police I was still very mad and upset at Milton. I didn't tell the police that I initially hit Milton or that I repeatedly did so during our argument. I believe I also told the police that Milton hit me in the face when he didn't. I had no facial injuries at all. I only had bruises on my arms where Milton was trying to hold me and talk to me while I tried to hit him and free myself. These are the only injuries I had;

9. I later realized what I had done and what Milton was trying to tell me. I apologized to him and he apologized to me. On May 10, 1991, I made a report to the police because I was mad at my husband and I didn't know all of the facts. I then went to the police on May 13, 1991 and asked that the matter be dropped and that my request be attached to the May 10, 1991 police report. I don't know how the media got a copy of the police report which is suppose to be private and not public but apparently they have. Both Milton and I and our families have suffered enough by all of the media and press and we just want to be left alone;

10. I have recently learned that the prosecutor and the courts don't have to honor my request to drop my complaint against Milton. I can't believe this is happening and that Milton may serve two (2) or more days in jail because of what happened. If I had only listened to Milton none of this would have happened. I would gladly have gone to the dinner at his sister's house. I was also wrong in striking Milton first and repeatedly during our argument. I told him he should file a complaint against me for hitting him and he said he doesn't want to do that;

11. I respectfully ask the court do dismiss all charges against my husband. I am just as much to blame as he is. I shouldn't have been so stubborn as I am at times and I should have listened to him. I don't want husband to go to jail for something that is just as much my fault. Because of these facts and circumstances I ask the court to please grant the request that this case be dismissed; and

Further Affiant Sayeth Naught.

DATED at Honolulu, Hawaii, May 23, 1991 .

/S/ Cheryl A. Holt
CHERYL HOLT

Subscribed and sworn to before me
this 23rd day of May , 1991.

/S/ Jocelyn P.S. Costa
Notary Public, State of Hawaii.

My commission expires: 2/1/92

TO: Department of Prosecuting Attorney
City and County of Honolulu
Third Floor
1164 Bishop Street
Honolulu, Hawaii 96813

RE: Milton and Cheryl Holt, May 10, 1991 Incident

Date: May 21, 1991

Gentlemen, I have had the opportunity to interview Milton and Cheryl Holt in my office on May 21, 1991 relative to the domestic incident which occurred between them on May 10, 1991. Each discussed their perception of what happened and why.

Mr. & Mrs. Holt were each aware of the seriousness of the incident. Both confirmed that they were under considerable pressure at the time. Nonetheless, Mr. Holt is readily able to take full responsibility for his actions that night, and does not attempt to blame anyone else for what happened.

Although I fully support the intent of the state law as it pertains to pursuing spouse abuse charges even when the abused later wishes to withdraw the complaint, it is my professional opinion that this specific case would be poorly served in so doing. Specifically, Mr. and Mrs. Holt demonstrate an attitude which indicates their awareness of the seriousness of the incident which occurred, and a desire not to have such recur. They have both agreed to seek and continue counseling to prevent any recurrence. As such, I believe that both should benefit significantly from counseling. In that they have independently and voluntarily sought the same type of treatment which the court would most likely determine is most appropriate. I would respectfully urge that your office not pursue the current charge against Mr. Holt, insofar as I believe that pursuit of the charge would likely have only a deleterious effect upon both Mr. and Mrs. Holt in their efforts with counseling.

Thank you for considering this request. Should you need further information in making your decision, please feel free to contact me at the above telephone number.

Yours truly,

/S/R.P. Kappenberg
Richard P. Kappenberg, Ph.D.
Diplomate, American Academy of Behavioral Medicine

June 5, 1991

Dear Neighbor:

Over the last few weeks, my family and I have suffered through an unfortunate series of events which were highly publicized by the news media.

I would like to take this opportunity to apologize for any embarrassment that these events may have caused for you and the rest of our community.

On Friday, June 7, I will accept the penalty for my actions as provided by the laws of this State. In addition, my wife Cheryl and I both realize the need to devote more time and effort to our family.

I deeply regret any hardship that this matter may have caused you.

Sincerely,

/S/ Milton Holt
Milton Holt

June 5, 1991

Dear Senator Wong:

As you are aware, my family and I have endured a series of highly publicized events over the last few weeks. Unfortunately, the extensive news coverage also resulted in unwarranted attention on the Senate as a whole.

I would like to take this opportunity to apologize for any embarrassment these events may have caused you and the rest of the members of the Senate. I have the greatest respect for the Senate and for my fellow Senators and I will do my best to bring honor to this body in the future.

On Friday, June 7, I will accept the penalty for my actions as provided by the laws of this State. In addition, my wife Cheryl and I both realize the need to devote more time and effort to our family.

I deeply regret any hardship that this matter may have caused the members of the Senate.

Sincerely,

/S/ Milton
Milton Holt

FOURTH DAY

Thursday, June 27, 1991

The Senate of the Sixteenth Legislature of the State of Hawaii, Special Session of 1991, convened at 11:05 o'clock a.m. with the President in the Chair.

The Divine Blessing was invoked by President Aldous Paalani, The Church of Jesus Christ of Latter-Day Saints, after which the Roll was called showing all Senators present with the exception of Senators Aki, Chang, Crozier, Iwase, Koki, and McMurdo who were excused.

The President announced that he had read and approved the Journal of the Third Day.

MESSAGES FROM THE GOVERNOR

The following messages from the Governor (Gov. Msg. Nos. 421 to 430 - see also Regular Session 1991, Governor's Messages Received After Adjournment Sine Die) were read by the Clerk and were placed on file:

Gov. Msg. No. 421, informing the Senate that on June 26, 1991, he signed various bills into law.

Gov. Msg. No. 422, June 26, 1991, returning S.B. No. 1449, without his approval, with his statement of objections relating to the measure.

Gov. Msg. No. 423, June 26, 1991, returning S.B. No. 1766, without his approval, with his statement of objections relating to the measure.

Gov. Msg. No. 424, June 26, 1991, returning S.B. No. 1915, without his approval, with his statement of objections relating to the measure.

Gov. Msg. No. 425, June 26, 1991, returning S.B. No. 2013, without his approval, with his statement of objections relating to the measure.

Gov. Msg. No. 426, June 26, 1991, transmitting H.B. No. 139, with his reduction reflected thereon and his statement of objections relating to the measure, which he has returned to the House of Representatives.

Gov. Msg. No. 427, June 26, 1991, transmitting his statement of objections to H.B. No. 600, which he has returned to the House of Representatives without his approval.

Gov. Msg. No. 428, June 26, 1991, transmitting his statement of objections to H.B. No. 776, which he has returned to the House of Representatives without his approval.

Gov. Msg. No. 429, June 26, 1991, transmitting his statement of objections to H.B. No. 1707, which he has returned to the House of Representatives without his approval.

Gov. Msg. No. 430, June 26, 1991, transmitting his statement of objections to H.B. No. 2107, which he has returned to the House of Representatives without his approval.

At 11:12 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:13 o'clock a.m.

At this time, Senator Tungpalan introduced to the members of the Senate Mrs. Jennifer Reed, wife of Senator Rick Reed, who was seated in the gallery.

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

"Mr. President, encouraged by an informal media poll of my Senate colleagues indicating a majority object to the planned move from the Capitol Building, I want once again to argue for common sense and fiscal restraint.

"It's not too late to say 'no' to spending $22 million on asbestos removal. It's not too late to say 'no' to spending $42 million on renovations.

"The Department of Health is adamant that the asbestos in this building poses no health threat if left alone. Unless the asbestos is damaged or disturbed, its fibers do not become airborne. If anyone is skeptical of these assurances, there are far cheaper ways to deal with the threat of asbestos particles in the air.

"There are high-efficiency filters on the market that can filter out even viruses -- and, certainly, these filters could stop any asbestos fibers that might become airborne.

"DAGS officials tell me that the only reason for the asbestos removal is the proposed renovations. For instance, the air-conditioning system is old. DAGS says some legislators complain that it's too cold, while others complain that it's too warm. But there are ways to deal with that problem short of a totally new, multi-million-dollar system. My office, for instance, is one of those that's too cold -- some mornings I swear you can almost see your breath in my office. But I deal with that problem in a far cheaper way, I keep sweaters in my office, I even have an old down jacket that I wouldn't get to wear otherwise. It's not as impressive as a hi-tech air-conditioning system, but it cost less than a hundred dollars.

"It's not too late to say 'no' to $5.1 million of granite flooring.

"It's not too late to say 'no' to $5.8 million in 'electronic enhancements' such as new sound systems in hearing rooms and chambers so that sound can be piped back to legislators' offices. If legislators want to know what's going on in a hearing, they should go to the hearing -- or send a staff member. It may not be as comfortable, but it's $6 million cheaper.

"There may be some necessary items in this $64 million proposal. For instance, the leaking liner in the pools surrounding the Capitol may need to be fixed. And, of course, access for the handicapped must be brought into conformance with state law. But those and other essential changes will cost less than $10 million -- and will not necessitate the removal of asbestos or legislators.

"On behalf of those Senators who share my views on this matter -- and on behalf of the people of Hawaii who are repulsed at the idea of spending $64 million on nonessential renovations on this building while our schools, highways and homeless are crying for money -- I urge you again, Mr. President, to abandon this extravagantly unnecessary renovation. Thank you."

Senator Cobb also rose to speak on a point of personal privilege and said:

"Mr. President, since two years ago I introduced a bill to disallow the move to lower Siberia on Beretania Street, I think, perhaps, a response or elaboration is in order.

"With the present bill that we now have, the bill meaning the $64 million for the move, we are embarking on a course that will spend twice as much money as the building of this Capitol originally. The original cost of the Capitol was in the neighborhood of $32 million even those were 1968 dollars.

"My prediction is, knowing the alacrity with which state government works, we will be lucky to be fully functional and back in this building by the end of this century. I wrote the year 2001 on a blackboard which I hope sticks in the mind of most of us because the original proposal, when it first came down, was for a year to eighteen months. The next time we had a hearing, it was for two years; the next hearing it was for three years; the following year it had gone to four years; now, it's between five and six years. I've seen very few state projects completed on time. My prediction is that it will be more than six years and, probably, near the end of the century unless we can in some way cut back on the scale of the move.

"I'm only regretful that the matter never came to a floor vote because I think now a majority of this body would probably take the position I took two years ago once we've seen the facts. Once we've seen all the implications of this move, we would probably reconsider and vote against it. Thank you."

At 11:19 o'clock a.m., the Senate stood in recess subject to the call of the Chair.

The Senate reconvened at 11:21 o'clock a.m.

Senator Solomon then rose to speak on a point of personal privilege and said:

"Mr. President, we all know that we occasionally have to take tough positions on controversial issues. It's part of the job of being a legislator. In reaching our decisions, we have to rely on our judgment and the dictates of our conscience. At times that decision is not necessarily the most popular one. We have to do what we think is the right thing to do, whether or not it's the popular thing to do.

"Decision making in the Legislature is not always easy. Obviously, public opinion plays a role. As elected officials, we have to always bear in mind how the people think and feel. That's one of our guides. We have to balance public opinion in general, the concerns of the different sectors in our community, our own interests and values as well as what we perceive to be the public good.

"If we think we did the right thing, we should stand fast to our position. If we think we made a mistake, we should be prepared to make the necessary correction.

"We're elected to exercise our best judgment, not to drift with the wind or flow with the tide. Hopefully, the people will understand what we're doing. In the end, at the polls, they will exercise the ultimate judgment on us.

"Thank you, Mr. President."

The Senate President then made the following observation:

"Members of the Senate, the Chair would like to take this opportunity to bring you up-to-date on the status of Senate Bill S1-91, the administrative license revocation bill.

"Last night, at 10:00 p.m., we passed the Senate version of the bill which was transmitted to the House at 10:07 p.m.

"The House amended the bill and decked its version at 10:20 p.m. The House amendments are basically technical in nature. There are no major substantive changes to the bill we passed last night. The 48-hour waiting period for the House will expire at 10:20 tomorrow night.

"The House version was brought over to the Senate Clerk's Office at 10:24 last night at which time the Clerk had copies made and delivered to the Senators' offices.

"After the House passes the bill tomorrow night at 10:20 or a little bit thereafter, it will be returned to the Senate for final action.

"The plan is for us to reconvene tomorrow night at 10:30 p.m. By that time, the 48-hour waiting period will have lapsed and the House should have transmitted the bill over to us. We can then move to agree to the House amendments and pass the bill on Final Reading."

ADJOURNMENT

At 11:27 o'clock a.m., on motion by Senator Solomon, seconded by Senator Reed and carried, the Senate adjourned until 10:30 o'clock p.m., Friday, June 28, 1991.

FIFTH DAY

Friday, June 28, 1991

The Senate of the Sixteenth Legislature of the State of Hawaii, Special Session of 1991, convened at 10:35 o'clock p.m. with the President in the Chair.

The Divine Blessing was invoked by Senator Eloise Yamashita Tungpalan, Hawaii State Senate, after which the Roll was called showing all Senators present with the exception of Senators Chang, Fernandes Salling and McMurdo who were excused.

The President announced that he had read and approved the Journal of the Fourth Day.

HOUSE COMMUNICATION

Hse. Com. No. S1, returning S.B. No. S1-91, S.D. 1, H.D. 1, which passed Third Reading in the House of Representatives on June 28, 1991, in an amended form, was read by the Clerk and was placed on file.

On motion by Senator Blair, seconded by Senator Holt and carried, the Senate agreed to the amendments proposed by the House to S.B. No. S1-91, S.D. 1, seconded by Senator Holt and carried.

ORDER OF THE DAY

FINAL READING

S.B. No. S1-91, S.D. 1, H.D. 1 (Hse. Com. No. S1):

On motion by Senator Blair, seconded by Senator Holt and carried, the Senate agreed to the amendments proposed by the House to S.B. No. S1-91, S.D. 1, and S.B. No. S1-91, S.D. 1, H.D. 1, entitled: "A BILL FOR AN ACT RELATING TO ADMINISTRATIVE LICENSE REVOCATION," having been read throughout, passed Final Reading on the following showing of Ayes and Noes:

Ayes, 22. Noes, none. Excused, 3 (Chang, Fernandes Salling, McMurdo).

SENATE RESOLUTION

The following Senate resolution (S.R. No. S1) was read by the Clerk and was disposed of as follows:

S.R. No. S1, entitled: "SENATE RESOLUTION AUTHORIZING THE PRESIDENT TO APPROVE THE JOURNAL OF THE SENATE FOR THE FIFTH DAY OF THE SPECIAL SESSION OF 1991," was offered by Senators Hagino and George.

On motion by Senator Solomon, seconded by Senator Reed and carried, S.R. No. S1 was adopted.

The Senate President then addressed the members of the Senate as follows:

"Members of the Senate, the hour is late.

"We are approaching the close of this Special Session of 1991. We've done our job. It's time to go home.

"Looking back, the events leading up to this moment have been a tumultuous time for all of us.

"There was a lot of debate, controversy and confusion concerning the administrative license revocation issue, particularly with respect to implied consent. In the end, we decided the only way to resolve these problems definitively was for us to have a special session and clarify the language of the law.

"I want to thank the chair of the Judiciary Committee for his work in getting Senate Bill S1-91 through the Special Session. It was not an easy task and I know he worked very hard at it. It was a difficult job well done.

"I want to thank the members of the Senate for taking the time from their private lives to come back for this Special Session. Your contributions and participation are appreciated.

"I want to acknowledge the Senator from Kauai. As we all know, she has a contrary opinion on the work of this Special Session. She is strong in her opinion. She is sincere in her opinion. While we obviously did not agree with her, she contributed positively to the process by forcing us to think harder, by heightening our awareness and sensitivity. To you, Senator, thank you.

"There being no further business, I will entertain a motion for this Special Session of 1991 to adjourn sine die."

ADJOURNMENT

Senator Solomon moved that the Senate of the Sixteenth Legislature of the State of Hawaii, Special Session of 1991, adjourn sine die on a rising vote, seconded by Senator George and carried.

At 10:43 o'clock p.m., the President rapped his gavel and declared the Senate of the Sixteenth Legislature of the State of Hawaii, Special Session of 1991, adjourned Sine Die.

GOVERNOR'S MESSAGES RECEIVED AFTER THE ADJOURNMENT OF THE SPECIAL SESSION OF THE LEGISLATURE SINE DIE

Gov. Msg. No. 431, informing the Senate that on June 29, 1991, he signed Senate Bill No. S1-91 as Act 1 (of the Special Session of 1991), entitled: "RELATING TO ADMINISTRATIVE LICENSE REVOCATION."

STANDING COMMITTEE REPORTS

SCRep. S1-91 Judiciary on S.B. No. S1-91

The purpose of this bill is to amend Chapter 286, Hawaii Revised Statutes, to improve the pending law on administrative revocation of drivers' licenses (Act 188-90) concurrently with the effective date of that law. This bill amends Act 188-90 in the following ways:

Reinstatement of Provisions of H.B. No. 1016, C.D. 1

The following provisions were taken from H.B. No. 1016, C.D. 1, which was returned by the Governor without his approval on June 20, 1991. In the statement of his objections, the Governor excluded these provisions from the rationale for his veto. They are, therefore, revived in this bill for the same reasons that they were previously included in H.B. No. 1016, C.D. 1.

(1) Proof of financial responsibility is required after administrative revocation;

(2) The Notice of Administrative Revocation and the Temporary Permit are consolidated in order to reduce paper work;

(3) If a driver is convicted of criminal charges before the completion of the administrative proceedings the driver is required to surrender the temporary permit;

(4) The police are permitted to return the drivers' license if a breath or blood test shows that the arrestee's blood alcohol concentration is below .10;

(5) A driver who was unlicensed or whose license has been suspended or revoked is precluded from receiving a Temporary Permit;

(6) The driver's traffic abstract will include administrative license revocation decisions;

(7) Administrative revocation will not be stayed pending the outcome of a judicial review of the administrative proceedings; and

(8) Technical amendments for clarity and consistency.

Reinstatement of the Non-contingent Penalty Under Implied Consent

Prior to the Gubernatorial veto of H.B. No. 1016, C.D. 1, the Legislature scheduled a special session to amend Act 188-90 to provide that the sanction for refusing to take a breath or blood test would not be contingent on proof of driving under the influence of intoxicating liquor. In the statement of his objections, the Governor concurred in the desirability of such an amendment and this bill includes that amendment. The amendment will encourage drivers to submit to breath or blood tests and the resulting availability of objective evidence of intoxication, or the lack of it, will make the revocation procedure fairer, more accurate, and less subject to the discretion of police officers.

Repeal of Conditional Licenses for Refusers

The Governor's statement of objections noted that drivers who refuse to take the breath or blood test were eligible to receive a conditional license to the same extent as drivers who took the test. The Governor expressed his belief that this "will cost the State $262,000 per year for five years, a total of $1,310,000, in additional federal grants for alcohol countermeasures." The Governor's understanding was confirmed by Joe Cindrich, Regional Administrator, Region IX, U.S. Department of Transportation. His June 21, 1991 letter to the Chairman is a part of the record of your Committee's hearing on this bill.

Both because of the reasonableness of limiting conditional licenses to drivers who complied with the implied consent law and in order not to lose the funding, this bill limits conditional licenses to those drivers who submitted to a test of their breath or blood.

Separation of Administrative and Criminal Proceedings

The Governor's statement of objections also expressed a strong preference for a complete separation of the administrative license revocation process from the criminal proceedings under Section 291-4, Hawaii Revised Statutes. This bill excludes the provisions of H.B. No. 1016, C.D. 1, which were objected to by the Governor on that ground. Affirmatively, the bill completely separates the administrative and criminal proceedings. To that end, the prosecutors are not permitted to participate in the administrative process. If a driver prevails in the administrative proceedings, the prosecutor cannot appeal. Evidence adduced in the administrative proceeding is not admissible in the criminal proceeding. On the other hand, a favorable decision for the driver in the administrative proceedings does not affect any criminal proceedings initiated by the prosecutor.

Scheduling of Administrative Hearings

The Governor also deemed it essential that administrative hearings not be automatically set. He pointed to experience in other jurisdictions as establishing the probability that only 20% of the drivers would attend the administrative hearing.

Under those circumstances, scheduling all drivers would complicate the scheduling and hearing process and delay the hearings for the 20% who want a hearing.

The Governor endorsed the suggestion of a task force which convened during the interim prior to the 1991 legislative session, which proposed that drivers be required to request a hearing within five days of notice of the disposition under the automatic review.

Your Committee recognizes the legitimacy of the Governor's concern, but is not convinced that it is equitable to impose an absolute affirmative burden on the driver to act within such a short time. As a compromise, this bill allows the driver to request a hearing within sixty days. However, the thirty day expiration of the temporary license remains. It is likely that most drivers will make their request early because the expiration of the temporary license is a disincentive to delaying the request. Additionally, to ensure that drivers who desire hearings will be able to obtain them without undue difficulty or delay, your Committee has amended the bill to require that a simple, postage prepaid, mail-in form through which a hearing may be requested be included along with the decision on administrative review mailed to the arrestee. Your Committee wishes to make clear, however, that use of the form is not mandatory; any written request will suffice to perfect the arrestee's right to a hearing.

Temporary Permit

Under Act 188-90, those arrested for Driving Under the Influence (DUI) will be allowed to drive pursuant to a thirty-day temporary permit pending resolution of administrative revocation proceedings unless the arrestee was unlicensed, his or her license was revoked or suspended, or the arrestee had no license in possession at the time of the arrest. Your Committee was concerned that the Act could be read as providing that those who held valid licenses but simply did not have them in possession when stopped by the police would not be entitled to a temporary permit. For purposes of clarification, it is the intent of your Committee that a driver who holds a valid license but is without it at the time of arrest be given the opportunity to obtain a thirty-day permit upon production and surrender of the license subsequent to arrest. Your Committee has been assured by representatives of the judiciary that procedures will be implemented to accomplish this and, for this reason, amendment of the Act is unnecessary.

Admissibility of Prior Alcohol Enforcement Contacts

Section 286-259(f), as established by Act 188-90, provides that an arrestee's prior alcohol enforcement contacts shall be entered into evidence at the administrative hearing. It is the intent of your Committee, however, that pursuant to well established principles of relevancy applicable to evidence of this nature, prior alcohol enforcement contacts shall be relevant only to the issue of sanctions, and not be considered proof that the arrestee was under the influence.

Telephone Testimony

Your Committee has amended Section 286-259(g) to make clear that a police officer who cannot be present at the administrative hearing may testify by telephone only at the discretion of the hearing officer.

Effective Date of Act 188-90

Your Committee has delayed the effective date of Act 188-90 for one month to allow the Administrative Director of the Courts sufficient time to comply with the procedural changes in the Act made by this bill.

Technical and Clarifying Amendments

The balance of the amendments to Act 188-90 are for clarity, consistency or other non-policy considerations.

Your Committee on Judiciary is in accord with the intent and purpose of S.B. No. S1-91, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. S1-91, S.D. 1, and be placed on the calendar for Third Reading.

Signed by all members of the Committee except Senators McMurdo and Reed.

NUMBER AND TITLE	Received Referred	First Reading	Second Reading	Third Reading	Action of House	Conference Committee	Final Action	Action of Governor	Further Action	Act No.	Vetoed
S1-91 A BILL FOR AN ACT RELATING TO ADMINISTRATIVE LICENSE REVOCATION.	1 1	1	3 4	5	25		25	26		1	

NUMBER AND TITLE	Offered	Referred	Report of Committee	Adoption
S.R. S1 AUTHORIZING THE PRESIDENT TO APPROVE THE JOURNAL OF THE SENATE FOR THE FIFTH DAY OF THE SPECIAL SESSION OF 1991.	25			25