

STAND. COM. REP. NO.

3732

Honolulu, Hawaii

APR 24 2006

RE: H.C.R. No. 192
H.D. 1
S.D. 1

Honorable Robert Bunda
President of the Senate
Twenty-Third State Legislature
Regular Session of 2006
State of Hawaii

Sir:

Your Committee on Water, Land, and Agriculture, to which was referred H.C.R. No. 192, H.D. 1, entitled:

"HOUSE CONCURRENT RESOLUTION REQUESTING THE ATTORNEY GENERAL TO APPOINT A SPECIAL DEPUTY ATTORNEY GENERAL TO INDEPENDENTLY AND IMPARTIALLY INVESTIGATE THE KALOKO RESERVOIR DAM COLLAPSE,"

begs leave to report as follows:

The purpose of this measure is to request the Attorney General to appoint a special attorney general to independently and impartially investigate the Kaloko reservoir dam collapse.

Testimony in support of this measure was submitted by a Representative of the State House of Representatives; Sakai, Iwanaga, Sutton Law Group; and sixty-seven individuals. Comments were submitted by the Department of the Attorney General and one individual.

On March 14, 2006, the Kaloko reservoir dam breached on the island of Kauai resulting in the loss of seven lives, massive flooding, and extensive property damage. In the aftermath of this tragic event, there have been numerous media and citizen reports making claims and accusations about both the actions and inaction by the State, the county of Kauai, and the private landowners that may have caused, contributed to, or exacerbated the conditions leading to the Kaloko reservoir dam's failure.

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Typically, the Attorney General, by law, is charged with the responsibilities of not only investigating and prosecuting criminal and civil actions on behalf of the citizens of the State, but also defending the State against such actions as well. Thus, there is a possibility that the Attorney General may find itself in the position of not only prosecuting or suing a state agency, but defending it as well.

At the federal level, Congress implemented a process of appointing an independent counsel, which could be used by Congress or the Attorney General to investigate individuals holding or formerly holding certain high positions within the federal government and in national Presidential election campaign organizations. As the United States President could not dismiss those investigating the executive branch, it was felt that the independence of the office would ensure impartiality of any reports presented to Congress.

Your Committee finds that after the Kaloko reservoir dam breached, this type of investigation appeared prudent and in the best interests of the State, the victims of the Kaloko reservoir dam breach, and the pursuit of justice. However, this type of action would require amendments to the current laws, a process that would have needed to be initiated in January or February 2006, before the dam failed. Based on these constraints, your Committee worked within the current laws to authorize an independent investigation of the Kaloko reservoir dam breach. Accordingly, this measure appoints a special deputy attorney general to independently and impartially investigate the Kaloko reservoir dam collapse.

After conferring with the Attorney General, your Committee amended this measure by:

- (1) Clarifying that the special deputy attorney general conduct a civil but not a criminal investigation;
- (2) Providing that the Special Deputy Attorney General Selection Committee be composed of:
 - (a) The Speaker of the House of Representatives or the Speaker's designee;
 - (b) The House Minority Leader or the Minority Leader's designee;



- (c) The President of the Senate or the President's designee; and
- (d) The Senate Minority Leader or the Minority Leader's designee;
- (3) Providing that each of the committee members must not have any conflict of interest or appearance of a conflict of interest;
- (4) Provide that the special deputy attorney general shall be appointed notwithstanding the special deputy attorney general process established under section 28-8(b), Hawaii Revised Statutes;
- (5) Requesting the Attorney General to consult with the Special Deputy Attorney General Selection Committee when establishing the qualifications and duties of the appointee;
- (6) Providing that the Special Deputy Attorney General Selection Committee, in consultation with the Attorney General, is requested to submit a list of at least five well-qualified attorneys;
- (7) Providing that the Attorney General is requested to appoint the Special Deputy Attorney General;
- (8) Requesting the Special Deputy Attorney General to recommend legislation or government actions that could help prevent another tragedy and make such other recommendations, as he or she believe appropriate;
- (9) Providing that the Special Deputy Attorney General have all the powers usually and customarily provided to a deputy attorney general under chapter 28, Hawaii Revised Statutes;
- (10) Revising the deadline for the Attorney General to report the Special Deputy Attorney General's findings to not later than twenty days prior to the convening of the Regular Session of 2007 or as soon thereafter as the special deputy attorney general determines to be appropriate;



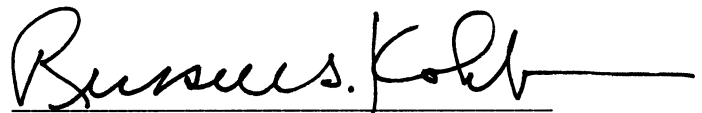
- (11) Requesting that a certified copy of the resolution be transmitted to the Speaker of the House of Representatives and the President of the Senate; and
- (12) Deleting the provision requesting that a certified copy of the resolution be transmitted to James Pflueger and the Mary N. Lucas Trust.

Your Committee has further amended this measure by:

- (1) Clarifying that the Attorney General is charged, by law, with the responsibility of not only investigating and prosecuting criminal and civil actions on behalf of the citizens but defending the State against the same action as well;
- (2) Detailing the background and history of the federal independent counsel appointment process and duties; and
- (3) Making technical, nonsubstantive changes for clarity, consistency, and style.

As affirmed by the record of votes of the members of your Committee on Water, Land, and Agriculture that is attached to this report, your Committee concurs with the intent and purpose of H.C.R. No. 192, H.D. 1, as amended herein, and recommends its adoption in the form attached hereto as H.C.R. No. 192, H.D. 1, S.D. 1.

Respectfully submitted on
behalf of the members of the
Committee on Water, Land, and
Agriculture,



RUSSELL S. KOKUBUN, Chair



The Senate
Twenty-Third Legislature
State of Hawaii

Record of Votes of the
Committee on Water, Land and Agriculture
(Bills and Resolutions)

Measure:* HC 192 HD 1	Committee Referral: WLA	Date: 4/21/06		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is to: <input type="checkbox"/> Pass, unamended (2312) <input checked="" type="checkbox"/> Pass, with amendments (2311) <input type="checkbox"/> Hold (2310) <input type="checkbox"/> Recommit (2313)				
Members	Ayes	Ayes(WR)	Nays	Excused
KOKUBUN, Russell S. (C)	✓			
HOOSER, Gary L. (VC)	✓			
ENGLISH, J. Kalani	✓			
FUKUNAGA, Carol	✓			
HEMMINGS, Fred	✓			
TOTAL	5			
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature: 				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Do not list more than one measure per Record of Votes.

HOUSE CONCURRENT RESOLUTION

REQUESTING THE ATTORNEY GENERAL TO APPOINT A SPECIAL DEPUTY
ATTORNEY GENERAL TO INDEPENDENTLY AND IMPARTIALLY
INVESTIGATE THE KALOKO RESERVOIR DAM COLLAPSE.

1 WHEREAS, the Kaloko reservoir dam breach on March 14, 2006,
2 on the island of Kauai, resulted in the loss of seven lives,
3 massive flooding, and extensive property damage; and
4

5 WHEREAS, the people of Hawaii and, more specifically, the
6 residents of Kilauea, Kauai, deserve and expect a complete and
7 thorough investigation into the facts and circumstances that led
8 to the tragic events of the Kaloko reservoir dam breach; and
9

10 WHEREAS, the Department of the Attorney General,
11 immediately after the incident, launched an investigation
12 related to the Kaloko reservoir dam failure and hired
13 consultants and experts to collect information and evidence and
14 to review the engineering and legal issues related to the
15 incident; and
16

17 WHEREAS, in the aftermath of this tragic event, there have
18 been numerous media and citizen reports making claims and
19 accusations about both the acts and omissions of the State, the
20 county of Kauai, and the private landowners that may have
21 caused, contributed to, or exacerbated the conditions leading to
22 the Kaloko reservoir dam failure; and
23

24 WHEREAS, whether real or perceived, the State's ability to
25 investigate the incident may appear to be compromised by these
26 claims and accusations which jeopardize the credibility of such
27 a thorough investigation; and
28

29 WHEREAS, in view of the fact that the Kaloko reservoir was
30 privately owned and the State of Hawaii was responsible for
31 regulating the dam, there is a question as to who may be held
32 liable for the breach; and
33



1 WHEREAS, the State is preparing for possible litigation, as
2 evidenced by the emergency appropriations submitted by the
3 Governor in House Bill No. 970, House Draft 1, Senate Draft 1;
4 and

5
6 WHEREAS, House Bill No. 970, House Draft 1, Senate Draft 1,
7 currently provides an appropriation to the Attorney General to,
8 among other things, "conduct an independent investigation
9 regarding reservoir failures"; and

10
11 WHEREAS, the Attorney General, by law, is charged with the
12 responsibilities of not only investigating and prosecuting
13 criminal and civil actions on behalf of the citizens of the
14 State, but also defending the State against such actions as
15 well; and

16
17 WHEREAS, when dealing with the potential legal issues that
18 may ensue over the Kaloko reservoir dam breach, the Attorney
19 General may find itself in the position of not only prosecuting
20 or suing a state agency, but defending it as well; and

21
22 WHEREAS, the investigation of the Kaloko reservoir dam
23 breach, conclusions about its cause, and possible subsequent
24 legal actions to place responsibility for it should not be
25 jeopardized or mired in conflict of interest charges; and

26
27 WHEREAS, the Legislature believes that invoking a process
28 to select an independent counsel to investigate the Kaloko
29 reservoir dam breach similar to how the United States Office of
30 the Independent Counsel is selected would ameliorate a potential
31 conflict of interest of the Attorney General; and

32
33 WHEREAS, the United States Office of the Independent
34 Counsel is an independent prosecutor distinct from the Attorney
35 General of the United States Department of Justice - that
36 provided reports to the United States Congress under Title 28 of
37 the United States Code, Section 595; and

38
39 WHEREAS, in 1978, the United States Congress determined to
40 curb the powers of the United States President and other senior
41 executive branch officials due in part to the Watergate scandal
42 and related events such as the "Saturday Night Massacre"; and



1 WHEREAS, in response to these scandals, the United States
2 Congress drafted the Ethics In Government Act, creating a
3 special prosecutor (later changed to the independent counsel)
4 position, which could be used by Congress or the Attorney
5 General to investigate individuals holding or formerly holding
6 certain high positions in the federal government and in national
7 Presidential election campaign organizations; and
8

9 WHEREAS, the special prosecutor/independent counsel, who
10 was appointed by a special panel of the United States Court of
11 Appeals for the District of Columbia, could investigate
12 allegations of any misconduct, with an unlimited budget and no
13 deadline, and could be dismissed by only the Attorney General or
14 a panel of three federal judges; and
15

16 WHEREAS, as the United States President could not dismiss
17 those investigating the executive branch, it was felt that the
18 independence of the office would ensure impartiality of any
19 reports presented to Congress; and
20

21 WHEREAS, under the Independent Counsel Reauthorization Act
22 of 1994, United States Attorney General Janet Reno had Donald C.
23 Smaltz appointed as an Independent Counsel by the United States
24 Court of Appeals for the District of Columbia on September 9,
25 1994, to "investigate to the maximum extent authorized by law"
26 whether the United States Department of Agriculture Secretary
27 Mike Espy "committed a violation of any federal criminal
28 law . . . relating in any way to the acceptance of gifts by him
29 from organizations or individuals with business pending before
30 the Department of Agriculture."; and
31

32 WHEREAS, Independent Counsel Smaltz was also given
33 jurisdiction to investigate "other allegations or evidence of
34 violations of any federal criminal law by organizations or
35 individuals developed during the course of the investigation of
36 Secretary Espy and connected with or arising out of that
37 investigation."; and
38

39 WHEREAS, the Legislature believes that utilizing a process
40 that is similar to the federal process of appointing an
41 independent counsel would be in the best interests of the State,



1 the victims of the Kaloko reservoir dam breach, and the pursuit
2 of justice; and

3
4 WHEREAS, however, there are two types of investigations
5 that may be conducted, one being a criminal investigation and
6 the other a civil investigation; and

7
8 WHEREAS, the Legislature believes that at this time, the
9 investigation of any criminal charges should remain with the
10 prosecutors and a civil investigation conducted by a special
11 deputy attorney general is appropriate; and now, therefore,

12
13 BE IT RESOLVED by the House of Representatives of the
14 Twenty-third Legislature of the State of Hawaii, Regular Session
15 of 2006, the Senate concurring, that the Attorney General is
16 requested to appoint, notwithstanding the special deputy
17 attorney general process established under section 28-8(b),
18 Hawaii Revised Statutes, a special deputy attorney general to
19 conduct a civil but not a criminal investigation according to
20 the following procedures:

- 21
22 (1) The Speaker of the House of Representatives and the
23 Senate President are requested to convene a Special
24 Deputy Attorney General Selection Committee to be
25 composed of:
- 26
27 (A) The Speaker of the House of Representatives or
28 the Speaker's designee, with no conflict of
29 interest or appearance of a conflict of interest;
- 30
31 (B) The House Minority Leader or the Minority
32 Leader's designee, with no conflict of interest
33 or appearance of a conflict of interest;
- 34
35 (C) The President of the Senate or the President's
36 designee, with no conflict of interest or
37 appearance of a conflict of interest;
- 38
39 (D) The Senate Minority Leader or the Minority
40 Leader's designee, with no conflict of interest
41 or appearance of a conflict of interest;
- 42



1 (2) The Attorney General is requested to consult with the
2 Special Deputy Attorney General Selection Committee
3 when establishing the qualifications and duties of the
4 special deputy attorney general who will be
5 responsible for conducting a civil investigation of
6 the Kaloko reservoir dam breach;
7

8 (3) The Special Deputy Attorney General Selection
9 Committee, in consultation with the Attorney General,
10 is requested to compile and submit a list of at least
11 five well-qualified attorneys who are willing to
12 serve, who are willing to accept reasonable
13 compensation for their service, who have no conflict
14 of interest and whose law firms have no conflict of
15 interest, and who are not currently representing
16 parties adverse to the State in litigation and whose
17 law firms are not concurrently representing parties
18 adverse to the State in litigation, and are
19 recommended by the Special Deputy Attorney General
20 Selection Committee for appointment by the Attorney
21 General as the special deputy attorney general
22 responsible for conducting a civil investigation of
23 the Kaloko reservoir dam breach; and
24

25 (4) The Attorney General is requested to appoint the
26 special deputy attorney general responsible for
27 conducting a civil investigation of the Kaloko
28 reservoir dam breach from the list of names
29 recommended by the Special Deputy Attorney General
30 Selection Committee; and
31

32 BE IT FURTHER RESOLVED, that, with regard to the Kaloko
33 reservoir dam breach, the special deputy attorney general is
34 requested to independently and with impartiality:
35

36 (1) Investigate the role and possible culpability of the
37 State of Hawaii;
38

39 (2) Investigate the role and possible culpability of the
40 County of Kauai;
41



- 1 (3) Investigate the role and possible culpability of the
2 private landowners;
3
- 4 (4) Investigate the role and possible culpability of other
5 yet to be identified parties;
6
- 7 (5) Recommend legislation or government actions that could
8 help prevent another tragedy; and
9
- 10 (6) Make such other recommendations, as he or she believes
11 appropriate;
12

13 BE IT FURTHER RESOLVED that the Attorney General is
14 requested to ensure that the special deputy attorney general
15 responsible for investigating the Kaloko reservoir dam breach
16 possesses all the powers usually and customarily provided to a
17 deputy attorney general under chapter 28, Hawaii Revised
18 Statutes, and any other state law applicable to the inherent
19 powers vested in a deputy attorney general;
20

21 BE IT FURTHER RESOLVED that the Attorney General is
22 requested to report the findings of the special deputy attorney
23 general responsible for conducting a civil investigation of the
24 Kaloko reservoir dam breach to the Legislature not later than
25 twenty days prior to the convening of the Regular Session of
26 2007 or as soon thereafter as the special deputy attorney
27 general determines to be appropriate; and
28

29 BE IT FURTHER RESOLVED that certified copies of this
30 Concurrent Resolution be transmitted to the Governor, the
31 Attorney General, the Speaker of the House of Representatives,
32 the President of the Senate, and the Mayor of the County of
33 Kauai.

