



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:

**S.B. NO. 615, PROPOSING AN AMENDMENT TO ARTICLE VI, SECTION 3, OF THE
CONSTITUTION OF THE STATE OF HAWAII.**

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Tuesday, March 3, 2015 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Charleen M. Aina, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General takes no position on whether this bill should be enacted. The Department testifies only to correct section 1 of the bill, to the extent that it suggests or might leave the impression that Justice Pollack's appointment to the Hawaii Supreme Court was not made until after the 30-day deadline specified in article V, section 6, of the State Constitution, or that article V, section 6, requires that a governor give the Senate written notice of the appointment within that 30-day period.

Again, we do not object to this bill's proposed amendment to the State Constitution to literally direct the governor and the chief justice to **both** appoint a justice or judge within 30 days of receiving the Judicial Selection Commission's list of nominees **and** give the Senate written notice of the appointment on that same day. Article VI, section 6, does not presently require this.

In the case of Justice Pollack's appointment, written notice of the appointment was not sent to the Senate until after the 30-day deadline lapsed. However, the appointment was made on June 5, 2012, 5 days before the 30-day deadline expired, and Justice Pollack joined the Governor at the press conference called later that day, to announce the appointment to the media and the public. Afterward, a reporter inquired whether the appointment satisfied the 30-day deadline, and a copy of the Attorney General's written advice to the Governor, confirming that it did, was shared with the reporter. A copy of the written advice is attached.

Thank you for the opportunity to clarify the record.

NEIL ABERCROMBIE
GOVERNOR



DAVID M. LOUIE
ATTORNEY GENERAL


RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
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June 20, 2012

MEMORANDUM:

TO: The Honorable Neil Abercrombie
Governor

FROM: Russell A. Suzuki 
First Deputy Attorney General

SUBJECT: Appointment of Richard W. Pollack, Esq.

This is to confirm our oral advice as to whether your appointment of Richard W. Pollack, Esq. on June 5, 2012, which was confirmed to the Senate by letter on June 12, 2012, comports with the requirements of article VI, section 3 of the Hawai'i Constitution.

As explained below, we believe that under article VI, section 3, of the Hawai'i Constitution, you properly appointed Judge Pollack within thirty days of the presentation of the list of nominees to him by the Judicial Selection Commission.

The first two paragraphs of article VI, section 3, of the Hawai'i Constitution provide in relevant part:

The governor, with the consent of the senate, shall fill a vacancy in the office of the chief justice, supreme court, intermediate appellate court and circuit courts, by appointing a person from a list of not less than four, and not more than six, nominees for the vacancy, presented to the governor by the judicial selection commission.

If the governor fails to make any appointment within thirty days of presentation, or within ten days of the senate's rejection of any previous appointment, the appointment shall be made by the judicial selection commission from the list with the consent of the senate. If the senate fails to reject any appointment within thirty days thereof, it shall be deemed to have given its consent to such appointment.

In interpreting the Hawai'i Constitution, the Hawai'i Supreme Court has instructed us that we are to begin with the words of the Constitution itself. "In interpreting constitutional provisions, the general rule is that, if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written." Taomae v. Lingle, 108 Hawai'i 245, 251, 118 P.3d 1188, 1194 (2005) (quoting from Watland v. Lingle, 104 Hawai'i 128, 139, 85 P.3d 1079, 1090 (2004)). "Words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them." Pray v. Judicial Selection Comm'n, 75 Haw. 333, 342, 861 P.2d 723, 727 (1993) (internal ellipses and quotation marks omitted.)

The Governor's appointing authority for judicial appointments, except as to the thirty-day requirement, is not regulated in the Hawai'i Constitution or by statute.¹ The appointment is the designation by the Governor. According to Black's Law Dictionary (9th ed. 2009), an "appointment" is "the designation of a person, such as a nonelected public official, for a job or duty; esp., the naming of someone to a nonelected public office." What constitutes an act of appointment to an office is an open and unequivocal act on the part of the appointing authority empowered to make it. Marbury v. Madison, 1 Cranch (U.S.) 137, 2 L. Ed. 60 (1803). See also State ex rel. Brothers v. Zellar, 218 N.E., 729, 731 (Ohio 1966) ("Appointment relates to the act of the authority in whom the appointing power reposes."); Nat'l. Treasury Emp. Union v. Regan, 663 F.2d 239, 244-46 (D.C. Cir. 1981) (holding that notification sent to plaintiffs of their selection to federal jobs was an unconditional appointment, even though the required appointment forms had not yet been completed); Nippon Steel Corp. v. U. S. Int'l. Trade Comm'n, 239 F. Supp. 2d 1367, 24 I.T.R.D. (BNA) 1931 (Ct. Int'l. Trade 2002) (The various notations made by White House personnel demonstrate that the act of appointment was revealed to others and were done while the Senate was still in recess. As a result, sufficient open and unequivocal acts were performed to give Mr. Devaney "a right to his commission, or enable him to perform his duties without it."). It has been recognized that the requirement of an open and unequivocal act may be met through various means. See Watts v. Office of Pers. Mgmt., 814 F.2d 1567, 1580 (Fed. Cir. 1987) (recognizing regular appointing procedures do not necessarily exclude other rituals that may be devised to signalize an appointment).

In the debates in the Committee of the Whole on Committee Proposal No. 10, relating to the Judiciary, the following was stated by Delegate Walter H. Ikeda:

The selection process will work in the following manner. After a list of names is submitted to the governor or chief justice, the appointing authority would have 30 days in which to make a selection. If for some reason the governor or the chief justice failed to act or rejected all names on the list, the commission would make the selection, which must be confirmed by the senate.

¹ Further, there is nothing in the rules of the Senate prescribing how the Senate is to be notified of a governor's appointment of a Justice of the Supreme Court.

2 Proceedings of the Constitutional Convention of Hawaii of 1978, Debates in Committee of the Whole on the Judiciary, at 345 (1978).

On June 5, 2012, you informed Judge Pollack of his appointment, announced Judge Pollack's appointment to the public at a press conference held on that day, and issued a news release to news media on that day.² By letter dated June 12, 2012, sent to the Senate President and the members of the Senate, you stated, "on June 5, 2012, I made the appointment, and announced the appointment at a public press conference on the same day, of Richard W. Pollack to serve as Associate Justice of the Supreme Court of the State of Hawai'i for a term of ten years." We conclude that by your open and unequivocal actions, you appointed Judge Pollack on June 5, 2012, within the meaning of the provisions in article VI, section 3, to fill the vacancy on the Hawai'i Supreme Court caused by the retirement of the Honorable James E. Duffy, Jr.

² In addition your office by telephone calls on June 4, 2012, informed Shan S. Tsutsui, as President of the Senate, and Senator Clayton Hee, as Chair of the Senate Committee on Judiciary and Labor, of your intention to appoint Judge Pollack.

COMMITTEE ON JUDICIARY AND LABOR

Tuesday, March 3, 2015, 9:00 a.m., Room 016

SB615 PROPOSING AN AMENDMENT TO ARTICLE VI, SECTION 3,
OF THE CONSTITUTION OF THE STATE OF HAWAII.
PROPOSES A CONSTITUTIONAL AMENDMENT TO PROVIDE THAT THE SENATE RECEIVES
WRITTEN NOTICE OF THE GOVERNOR'S OR THE CHIEF JUSTICE'S APPOINTMENTS, AS
APPLICABLE, TO FILL A VACANCY IN THE OFFICE OF CHIEF JUSTICE, SUPREME COURT,
INTERMEDIATE APPELLATE COURT, CIRCUIT COURTS, AND DISTRICT COURTS
CONCURRENTLY WITH THE APPOINTMENT.

TESTIMONY

Joan Platz, Legislative Committee, League of Women Voters

Chair Keith Agaran, Vice-Chair Shimabukuro, and Committee Members:

The League of Women Voters of Hawaii supports SB615. This bill proposes a constitutional amendment to provide that the Senate receives written notice of the governor's or the chief justice's appointments to fill a vacancy in the office of chief justice, supreme court, intermediate appellate court, circuit courts, and district courts concurrently with the appointment.

This amendment would ensure that the Senate has received a formal notice about appointments to facilitate its constitutional duties to advise and give consent regarding appointments. It is clear that this amendment's intent is to improve communication and transparency in government, and its passage would benefit policy makers and the public.

Thank you for the opportunity to submit testimony in support of SB615.