

LINDA LINGLE
GOVERNOR



MARK J. BENNETT
ATTORNEY GENERAL

LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

May 20, 2005

The Honorable Robert Bunda
President of the Senate
The Twenty-Third Legislature
State of Hawaii
State Capitol, Room 003
415 South Beretania Street
Honolulu, Hawaii 96813

Dear President Bunda:

Re: Rule 31 of the Senate, Twenty-Third
Legislature of the State of Hawaii

By letter dated May 5, 2005, you requested a formal written opinion that addressed six questions relating to Senate Rule 31, as amended by Senate Resolution No. 137 (2005). The rule allows a majority of the members of the Senate to convene a meeting of the Senate "at any time for the purpose of carrying out the Senate's responsibilities under article III, section 12 of the Constitution of the State of Hawaii."

We have consolidated and rephrased the questions you ask as follows:

1. Notwithstanding the express language of Rule 31(3), must the Legislature or the Senate be in regular or special session in order for the Senate to meet to choose its officers, or adopt rules of procedure under Rule 31(3)?
2. If the Legislature or the Senate is not in regular or special session when the Senate's members meet to choose its officers or amend its rules, must the officers chosen or the rules adopted wait until the members' votes are ratified or cast again at a regular or special session of the Legislature before they may serve or take effect?

The Honorable Robert Bunda
May 20, 2005
Page 2

3. Does Rule 31(3) violate section 22-1, Hawaii Revised Statutes, inasmuch as that statutory section provides that the presiding officers of each house shall continue to serve in that capacity during the interim between the two regular sessions of each Legislature?

BRIEF ANSWERS

Our answer to all three questions is "No."

It is our opinion¹ that the provisions of article III, section 10 of the State Constitution apply only when the Legislature acts as a whole or the Senate is acting on judicial nominations. They do not limit the prerogatives conferred upon each house by article III, section 12 to choose its officers or amend its rules. Nothing in the Constitution expressly qualifies how those powers are to be exercised. As long as the members of each house do not exceed any limit expressly imposed upon them by the Constitution, or engage in activities that the State Constitution expressly prohibits or assigns to others, each house may prescribe how and when it chooses "its officers" and adopts "its rules." Meeting as an individual house to choose officers is not barred by the Constitution's prescription of the types of sessions allowable for passing legislation and advising and consenting to appointments.

More specifically, we conclude that (1) Rule 31(3) is constitutional; (2) the Senate may meet at any time to choose its officers or to adopt or amend its procedural rules, regardless of whether the Senate or the Legislature is in session; (3) persons elected pursuant to Rule 31(3) may serve immediately and rules adopted pursuant to Rule 31(3) would be effective immediately; and (4) Rule 31(3) does not violate section 22-1 because it merely establishes a portion of the process members must follow to terminate or choose their officers. We also note that we believe that a court would

¹Ordinarily, given the separation of powers doctrine, neither the executive nor the judicial branch of government may enforce a legislature's rules, or otherwise encroach into or interfere with the internal activities of the Legislature. Schwab v. Ariyoshi, 58 Haw. 25, 38-39, 564 P.2d 135, 142-43 (1977). However, section 28-3, Hawaii Revised Statutes, directs that we give opinions upon questions of law when requested by the Legislature or its members.

The Honorable Robert Bunda
May 20, 2005
Page 3

likely find a controversy over these issues nonjusticiable and would likely not reach the merits to affirm or overturn the adoption of Senate rules or the election of Senate officers.

BACKGROUND INFORMATION

We understand that by a vote of 13-12 the Senate adopted Senate Resolution No. 137. The resolution added to Senate Rule 31 a third paragraph that provides as follows:

(3) A meeting of the Senate may be convened at any time for the purpose of carrying out the Senate's responsibilities under Article III, Section 12, of the Constitution of the State of Hawaii, by a petition submitted to the Clerk of the Senate signed by a majority of the members to which the Senate is entitled. In such meeting, the Senate may organize itself, choose its officers, and adopt rules for its administration. The petition shall read:

"To the Clerk of the Senate

The petitioners, members of the Senate of the _____ Legislature of the State of Hawaii, shall convene a meeting of the Senate of the State of Hawaii at _____."

The meeting of the Senate shall be held for the purpose of carrying out the Senate's responsibilities under Article III, Section 12, of the Constitution of the State of Hawaii to organize itself, choose its officers, and adopt rules for its administration.

The petition shall be in writing, above the signatures of the members.

When the Clerk of the Senate receives such a petition, and it is properly signed by a majority of the members to which the Senate is entitled, the Clerk of the Senate shall issue a notice of the meeting for the time and place sought in the petition.

Article III, section 10, entitled "Sessions," provides in pertinent part:

The legislature shall convene annually in regular session at 10:00 o'clock a.m. on the third Wednesday in January.

At the written request of two-thirds of the members to which each house is entitled, the presiding officers of both houses shall convene the legislature in special session. At the written request of two-thirds of the members of the senate, the president of the senate shall convene the senate in special session for the purpose of carrying out its responsibility established by Section 3 of Article VI. The governor may convene both houses or the senate alone in special session.

Regular sessions shall be limited to a period of sixty days, and special sessions shall be limited to a period of thirty days. Any session may be extended a total of not more than fifteen days. Such extension shall be granted by the presiding officers of both houses at the written request of two-thirds of the members to which each house is entitled or may be granted by the governor.

Each regular session shall be recessed for not less than five days at some period between the twentieth and fortieth days of the regular session. The legislature shall determine the dates of the mandatory recess by concurrent resolution. Any session may be recessed by concurrent resolution adopted by a majority of the members to which each house is entitled. Saturdays, Sundays, holidays, the days in mandatory recess and any days in recess pursuant to a concurrent resolution shall be excluded in computing the number of days of any session. . . .

(Emphases added.)

Article III, section 12, entitled "Organization; Discipline; Rules; Procedure," provides:

Each house shall be the judge of the elections, returns and qualifications of its own members and

shall have, for misconduct, disorderly behavior or neglect of duty of any member, power to punish such member by censure or, upon a two-thirds vote of all the members to which such house is entitled, by suspension or expulsion of such member. Each house shall choose its own officers, determine the rules of its proceedings and keep a journal. The ayes and noes of the members on any question shall, at the desire of one-fifth of the members present, be entered upon the journal.

Twenty days after a bill has been referred to a committee in either house, the bill may be recalled from such committee by the affirmative vote of one-third of the members to which such house is entitled.

Every meeting of a committee in either house or of a committee comprised of a member or members from both houses held for the purpose of making decision on matters referred to the committee shall be open to the public.

By rule of its proceedings, applicable to both houses, each house shall provide for the date by which all bills to be considered in a regular session shall be introduced.

(Emphases added.)

DISCUSSION

The Constitution is silent as to whether article III, section 10 prescribes when each house may exercise the powers conferred by article III, section 12. Literally, the provisions of section 10 do not apply to section 12. For them to apply, we either must assume that legislators act as legislators only while the Legislature is in session, or that every activity a legislator undertakes constitutes the enactment of laws. We do not believe that law or fact supports either assumption.

Aside from the provision that allows the Senate to convene in a special session to advise and consent on judicial nominations, section 10 literally speaks to the Legislature as a whole only, while the plain language of section 12 makes its provisions applicable only to each house. Neither section refers to the other, makes its provisions applicable to the

The Honorable Robert Bunda
May 20, 2005
Page 6

other, or incorporates the other's provisions by reference. By their respective plain language, the two sections appear to address wholly separate subjects.

The constitutional history to section 10 in particular lends further support to the idea that the two sections are separate and not intended to impact upon each other. Like section 10 itself, the delegates' comments and the committee reports about the section refer only to the Legislature as a whole, and only to actions the Legislature as a whole is expected to take. By its focus on bills and measures, the passage of bills, and the making of appropriations, and the absence of any reference to activities authorized by section 12, the constitutional history strongly suggests that the delegates intended section 10 to apply only to the Legislature's actual enactment of laws. See Stand. Comm. Rep. No. 92, 1 Proceedings of the Constitutional Convention of Hawaii 1950 at 250, 252 (1960).

At the same time, there is ample evidence that the drafters of the State Constitution knew that legislators acted outside the formal sessions described in article III, section 10, and anticipated that that would continue after statehood. Proposals to establish a legislative council to work on issues of interest to the Legislature year-round were rejected because it was already the Legislature's practice to establish holdover committees for this purpose.² In addition, because several legislators and the attorney general served as delegates to the 1950 Convention, we can also reasonably infer that the delegates were probably aware of the predecessor provisions to title 3 of the Hawaii Revised Statutes, including the predecessor provisions of chapter 21, Hawaii Revised Statutes, i.e., Revised

²See Debates of the Committee of the Whole, July 8, 1950, 2 Proceedings of the Constitutional Convention of Hawaii 1950 at 233-37; 259-60 (1960); Comm. of the Whole Rep. No. 24, 1 Proceedings of the Constitutional Convention of Hawaii 1950 at 346 (1960); Stand. Comm. Rep. No. 92, 1 Proceedings of the Constitutional Convention of Hawaii 1950 at 253 (1960). Section 577 of Act 101, Haw. Sp. Sess. Laws at 12 (1949), confirms the prior existence of holdover committees. Several of the delegates who were also legislators themselves acknowledged the existence of holdover committees and what they did. See Remarks of Delegate Fong, Debates of the Committee of the Whole, July 8, 1950, 2 Proceedings of the Constitutional Convention of Hawaii 1950 at 234 (1961).

The Honorable Robert Bunda
May 20, 2005
Page 7

Laws of Hawaii of 1945 sections 570-578, which were added by Act 101, Haw. Sp. Sess. Laws at 9 (1949), and which authorized the Legislature to establish investigative committees and summon witnesses to open or closed hearings whether the Legislature was in session or not.³

Indeed, the drafters of the Constitution could have made section 10 apply to section 12, but did not expressly do so. And, nothing in the literal language of the Constitution suggests that a house may choose or change its officers only in a session to adopt legislation or advise and consent on judicial appointments.

Moreover, the words of section 22-1, Hawaii Revised Statutes, themselves anticipate the possibility of changes in each house's leadership in the interim:

The presiding officer and vice-presiding officer of each house of the legislature shall retain their respective offices, and shall discharge duties appropriate to their offices in the interim between sessions of the legislature, until such time as their successors are qualified in accordance with the rules

³Current laws recognize that the Legislature and legislators work year-round notwithstanding the session limitations of section 10. Some of the laws assign specific responsibilities, others provide resources year-round, and still others provide remunerations to legislators for the work they do after formal sessions are adjourned. See section 21-3, Hawaii Revised Statutes, "Establishment of investigating committees by legislature"; section 21E-2, Hawaii Revised Statutes, "Establishment of the joint legislative management committee; members; terms; vacancies"; section 22-4, Hawaii Revised Statutes, "Permanent staffing"; sections 23-63 and 23-64, Hawaii Revised Statutes, "Establishment [Legislative advisory committee]" and "Composition; appointment"; and section 24-4, Hawaii Revised Statutes, "Allowance for expenses while on official legislative business during period of recess and interim official legislative business."

of the respective houses or unless their tenure be terminated by action of the respective houses.⁴

(Emphasis added.)

Hawaii's courts have only had limited occasion to construe article III, section 12,⁵ and no court in Hawaii has addressed the issue as to when the power to choose its officers and adopt or amend its rules of procedure may be exercised by each house.⁶ Nonetheless, there is significant support for our opinion in judicial decisions from other jurisdictions.

Relying on the express language of a constitution, courts have held that absent express limits imposed by the constitution itself, each house alone is authorized to exercise the powers

⁴While the emphasized portion of this section could be read to refer to the next convening of the Legislature in a formal session, such a reading would be inconsistent with the literal text of the section, and would be very strained given the ease with which the Legislature could have written a statute with that clear meaning by reference to a regular or special session.

⁵The decision in Schwab v. Ariyoshi, 58 Haw. 25, 37-39, 564 P.2d 135, 142-43 (1977), is helpful but not dispositive. There, the Hawaii Supreme Court repeated "the general rule, [that] the role of the court in supervising the activity of the legislature is confined to seeing that the actions of the legislature do not violate any constitutional provision," acknowledged that article III, section 12 gives each house exclusive authority to adopt rules for its proceedings, and concluded that "alleged violations of its own rules remain the province of the legislature itself" since all of the procedures prescribed by the Constitution appeared to have been satisfied. Similarly, in both Hayes v. Gill, 52 Haw. 251, 473 P.2d 872 (1970), and Akizaki v. Fong, 51 Haw. 354, 461 P.2d 221 (1969), the court acknowledged the constitutionally conferred power of each house to judge the qualifications of its members and their elections, but in both instances, concluded that these powers are subordinate to the provisions in what are presently denominated as article III, section 8 and article II, section 10, respectively, of the State Constitution, and may only be exercised consistent with those provisions.

⁶Aki v. Woo, Civil No. 94-1-0167, the suit for declaratory and injunctive relief former Senate President James Aki filed in 1994, probably presented the issue but the First Circuit Court dismissed the suit as non-justiciable. There, during the interim between the 1993 Special Session and the 1994 Regular Session of the Seventeenth Legislature, a majority of the members voted to terminate Senator Aki from that office. Senator Aki sued for a declaration that the vote terminating the office was invalid and for an injunction restoring him to the office of President. See Haw. S.J. at 4 (1994).

conferred by constitutional provisions like article III, section 12, as the powers are plenary and solely for each house to determine. See Birmingham-Jefferson Civic Center Authority v. City of Birmingham, 2005 WL 1023157 (Ala. 2005) (since "there is . . . no provision of the Alabama Constitution that defines or limits what is meant by the term 'a majority of each house,' and there is no other provision of the Constitution that would be defeated by allowing the legislature the final authority over its internal voting rules and procedures . . . whether a 'majority of each house' has voted in favor of a bill must be decided by the rules established by the legislature"). See also Brady v. Dean, 790 A.2d 428, 432 (Vt. 2001) (when the legislature is assigned a task without qualification, the legislature has sole authority and responsibility to perform that task).

As the Supreme Court of Alaska noted in construing Alaska's counterpart to section 12's "each house shall choose its own officers,"⁷

It is clear that the matter of the election or removal of the Speaker of the House has been committed to the House. Article II, § 12 of the Alaska Constitution expressly so provides.

Malone v. Meekins, 650 P.2d 351, 357 (Alaska 1982).

At least two concepts are implicit in that grant of authority: (1) each House has the exclusive power to remove as well as choose its own officers without any participation by the other House; (2) a majority vote

⁷Alaska's counterpart provision, Alaska Const. Art. II, § 12, provides:

The houses of each legislature shall adopt uniform rules of procedure. Each house may choose its officers and employees. Each is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members. Each shall keep a journal of its proceedings. A majority of the membership of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day and may compel attendance of absent members. The legislature shall regulate lobbying.

of the members of the body is all that is required to either elect or remove an officer.

Id. at 355-56. Albeit dicta because the Alaska legislature was in session when the controversy before the court began, the court also noted, "While a legislative body's leadership may be changed at any time a majority wishes it, the avoidance of chaos during such a change depends primarily on the sense of decency, fair play, and mutual respect of the contestants." Id. at 357 (emphasis added).⁸

⁸See also Des Moines Register and Tribune Company v. Dwyer, 542 N.W.2d 491, 496-97 (Iowa 1996) quoting from Cliff v. Parsons, 90 Iowa 665, 57 N.W. 599 (1894), and a 1969 opinion of the Iowa Attorney General

"Neither house has power to control the other in choosing its officers"

"The right of each house to choose its own officers is derived from the Constitution"

In light of the language of the Supreme Court in *Cliff v. Parsons*, supra, it is our opinion that either house or both houses could provide by rule, joint rule, resolution, joint resolution or statute that the terms of officers should carry over from the first session to the second. *But even if this were done, Article III, § 7 would permit either house at any time to terminate the term of any officer and replace him with another*"

(Italics supplied, emphasis added.)

Iowa's counterparts to article III, section 12 provide:

Each house shall choose its own officers, and judge of the qualification, election, and return of its own members. A contested election shall be determined in such manner as shall be directed by law.

I.C.A. Art. III, § 7.

Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; determine its rules of proceedings,

I.C.A. Art. III, § 9.

Other courts have relied in part upon the separation of powers doctrine and the "demonstrably textually committed" rule from Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962), to reach a similar conclusion. In Nixon v. U.S., 506 U.S. 224, 230, 113 S. Ct. 732, 736, 122 L. Ed. 2d 1 (1993), the U.S. Supreme Court concluded as a matter of "commonsense" that inherent in the Constitution's textual commitment of the plenary "Power to try all Impeachments" to the U.S. Senate, was the Senate's unlimited authority to prescribe the procedural rules for such trials -- "[i]f the courts may review the actions of the Senate in order to determine whether that body 'tried' an impeached official, it is difficult to see how the Senate would be 'functioning . . . independently and without assistance or interference.'" See also Mayhew v. Wilder, 46 S.W.3d 760, 770-71, 773 (Tenn.Ct.App. 2001) (because the Tennessee constitution expressly leaves it to the legislature to open or close its sessions, absent express constitutional restraints, only the legislature may make that determination and only its procedural rules may bind its exercise of that power); Mapp v. Lawaetz, 882 F.2d 49, 53 (3d Cir. 1989) ("The premise of Mapp's argument confuses the internal rules adopted by the legislature to govern its day-to-day affairs with constitutional and statutory law and would result in judicial interference in the legislature's conduct of its own internal affairs").⁹

Finally, "[c]ourts have generally interpreted legislative rules of proceedings broadly:

The [constitutional] provision that each House 'shall determine the rules of its proceedings' does not restrict the power . . . to the mere formulation of standing rules, or the proceedings of the body in ordinary legislative matter; but in the absence of constitutional restraints, . . . such authority extends to the determination of the propriety and

⁹The U.S. Court of Appeals for the Third Circuit concluded that the express language of the Virgin Islands' Revised Organic Act made the legislature the "sole judge" of both whether a member met all eligibility requirements, and which of its two procedural rules for what the requisite vote was to remove the member because the Organic Act did not specify what the vote needed to be.

The Honorable Robert Bunda
May 20, 2005
Page 12

effect of any action . . . taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the Constitution."

Dwyer, 542 N.W.2d at 498.

CONCLUSION

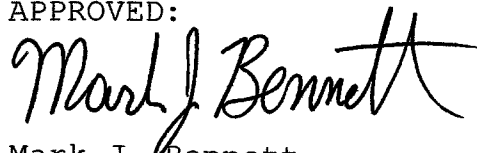
Thus, we believe several clear principles emerge. First, the Constitution provides the Senate plenary authority to choose its own officers and adopt its own rules. Second, the Constitution places no express temporal limitation on the Senate's exercise of that plenary authority. Third, Hawaii courts, the courts of the United States, and the courts of our sister states not only recognize the plenary nature of the type of authority conferred on the Senate by article III, section 12, they also refuse to interject themselves into the internal affairs of a co-equal branch of government. Thus, our opinion is that the Senate may select its officers and amend its rules at any time of its choosing, without offending the Constitution.

Very truly yours,



Charleen M. Aina
Deputy Attorney General

APPROVED:



Mark J. Bennett
Attorney General

142209_1.DOC