IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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HERMINA M. MORITA,
Petitioner/Plaintiff-Appellant,

vs.

THOMAS GORAK and STATE OF HAWAI'I,
Respondents/Defendants-Appellees.

SCAP-16-0000686

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-16-0000686; S.P. NO. 16-1-0251)

NOVEMBER 18, 2019

DISSENTING OPINION BY RECKTENWALD, C.J.

The appointment of individuals to executive and administrative boards and commissions is largely governed by article V, section 6 of the Hawai'i Constitution. However, in drafting article V, section 6, the 1950 Constitutional Convention Committee of Executive Powers and Functions "subscribed, by and

large, to the principle that a constitution should state only basic fundamentals, and that many desirable matters, for which there is strong temptation to make constitutional provisions, should be left open for legislative treatment as future conditions may require." Stand. Comm. Rep. No. 67 in I Proceedings, at 215; Debates in the Committee of the Whole on Executive Powers and Functions Prop. No. 22, II Proceedings, at 268. Thus, article V, section 6, arose, in part, out of the founders' "belie[f] that it is only through such delegation to the legislature that the flexibility necessary to keep government in step with economic and social development is possible." Id.

This court has long recognized that "the subject of appointment of members to boards and commission[s] must necessarily be considered to be the joint responsibility of the governor and the senate[.]" Life of the Land v. Burns, 59 Haw. 244, 251, 580 P.2d 405, 410 (1978). According to this balance of power, members of most government boards and commissions must be approved by both the executive branch and the legislature before taking office. Haw. Const. art. V, § 6.

In the instant case, Governor Ige utilized the interim appointment process to replace Public Utilities Commission (PUC) Commissioner Michael Champley at the expiration of Champley's term of office without senate confirmation. Respectfully, the

governor's utilization of the interim appointment process was an unauthorized exercise of executive power, as the natural expiration of Champley's term did not create a vacancy. By upholding the Governor's actions, the Majority disregards an intentional delegation of authority to the legislature and effects a rebalancing of power that the framers of our state constitution carefully contemplated and clearly proscribed. I therefore respectfully dissent.

I. DISCUSSION

A. The Manner of Appointment and Removal of PUC Commissioners is Provided by Law

The appointment and removal of members of executive and administrative boards and commissions is set forth in paragraphs three and four of article V, section 6 of the Hawai'i Constitution as follows:

> Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as provided by law.
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> . . . .
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> The governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law. If the manner of removal of an officer is not prescribed in this constitution, removal shall be as provided by law.

Article V, section 6 delineates a specific appointment

process for the heads of the principal departments, only to be deviated from where provided for by the constitution itself. In contrast, the legislature may set forth by law the appointment process for boards and commissions that do not head principal departments and processes for the removal of all board and commission members. Haw. Const. art. V, § 6; Comm. of the Whole Rep. No. 17 in 1 Proceedings of the Constitutional Convention of 1950 (1961) (I Proceedings) at 325 ("[B]oards [that are not] heads of principal departments of the State . . . come within the powers of the Legislature, under the clear implications of the 4th paragraph [of article V, section 6] to provide 'by law' for the election or appointment of 'officers for whose election or appointment provision is not otherwise made by the Constitution.'"). This bifurcation in treatment between principal department heads and all other boards and commissions reflects the framers' recognition that "the Governor should be strong in his branch of government[,] but that he should be precluded from infringing upon the other branches[.]" Stand. Comm. Rep. No. 67 in I Proceedings, at 217.

The PUC, which is within the Department of Commerce and Consumer Affairs for administrative purposes only, is not one of the eighteen principal departments of the state government

enumerated by statute.[1] See HRS § 269-2(c). Pursuant to article V, section 6, both the appointment and removal of PUC commissioners may be - and indeed is - provided for by law. This is consistent with the framers' rationale for dividing appointment powers between the executive and legislative

[1] The first paragraph of article V, section 6 of the Hawai'i Constitution provides, in pertinent part, "[a]ll executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and related functions." (Emphasis added).

HRS § 26-4 mirrors the language of article V, section 6 and enumerates the eighteen principal departments of the state:

> Under the supervision of the governor, all executive and administrative offices, departments, and instrumentalities of the state government and their respective functions, powers, and duties shall be allocated among and within the following principal departments that are hereby established:
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> (1) Department of human resource development[;]
> (2) Department of accounting and general services[;]
> (3) Department of the attorney general[;]
> (4) Department of budget and finance[;]
> (5) Department of commerce and consumer affairs[;]
> (6) Department of taxation[;]
> (7) University of Hawai'i[;]
> (8) Department of education[;]
> (9) Department of health[;]
> (10) Department of human services[;]
> (11) Department of land and natural resources[;]
> (12) Department of agriculture[;]
> (13) Department of Hawaiian home lands[;]
> (14) Department of business, economic development, and tourism[;]
> (15) Department of transportation[;]
> (16) Department of labor and industrial relations[;]
> (17) Department of defense[;]
> (18) Department of public safety[.]

(Emphasis added).

Notably, the Department of Commerce and Consumer Affairs is a principal department, while the PUC is not. HRS § 26-4(5).

branches: because the PUC was established by the legislature to exercise quasi-judicial or quasi-legislative powers, the legislature should set forth statutory requirements for the appointment and removal of commissioners.[2]

The appointment and removal of PUC commissioners are governed by HRS §§ 26-34 (2009) and 269-2 (2007). Pursuant to these provisions, all PUC commissioners "shall be nominated and, by and with the advice and consent of the senate, appointed by the governor." HRS §§ 26-34(a), 269-2(a). Where this process is not completed prior to the expiration of the incumbent commissioner's term of office, the incumbent commissioner shall serve in a holdover capacity[3] "until the [commissioner's]

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[2] The 1950 Constitutional Convention Committee on Executive Powers and Functions explained:

> The majority of your Committee believes that boards and commissions will not be established by the Legislature unless the administration of these functions by a board of commission, such as the Public Utilities Commission, is regulatory or involve[s] the exercise of quasi-judicial or quasi-legislative powers. Any member, therefore, on any board of commission should not be removed by the Governor at his pleasure. Some limitations or restrictions on removal should be provided by law.

2 Proceedings of the 1950 Constitutional Convention (1961) (II Proceedings) at 217 (emphases added).

As discussed infra, a commissioner's service in a holdover capacity after the expiration of the commissioner's term of office, in lieu of the installment of an interim commissioner who has not been confirmed by the senate, is one such statutory limitation on removal at the governor's pleasure.

[3] I note that, in my view, during this period, the governor may still remove a holdover commissioner pursuant to HRS § 26-34(d), which (continued...)

successor is appointed and qualified," provided that the commissioner's service shall not exceed twelve consecutive years.[4] HRS §§ 269-2(a), 26-34(a).

As with most board and commission positions, the term of office for each PUC commissioner always expires while the senate is not in session.[5] HRS § 26-34(a) ("Unless otherwise provided by law, each term shall commence on July 1 and expire on June 30[.]"). This framework was purposely devised by the legislature to ensure the continuity of office, based on the understanding that the governor's nomination of a candidate for

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[3](...continued)
provides that "[t]he governor may remove or suspend for cause any member of any board or commission after due notice and a public hearing."

[4] I agree with the Majority's conclusion that "a commissioner may not be made to hold office against the commissioner's will." Majority at 24-25, n.18. The word "shall" in HRS § 269-2(a) does not carry such a meaning - to interpret it as such would be unreasonable. Instead, "shall" as used here must circumscribe the power to replace the commissioner; this interpretation does not diminish the word's impact. Pursuant to the HRS §§ 26-34(b) and 269-2(a), a commissioner must be allowed to serve in a holdover capacity until a replacement commissioner is properly appointed with the approval of the senate, the commissioner has served twelve consecutive years, or until the end of the second regular legislative session following the expiration of the commissioner's term of office. If an incumbent commissioner does not wish to serve in a holdover capacity at the expiration of the incumbent commissioner's term of office, and no replacement commissioner has been properly appointed with the approval of the senate, the incumbent commissioner may resign. Because, as discussed above, such resignation would occur while the senate is not in session, a vacancy in office would be created, allowing the governor to utilize the interim appointment process.

[5] Pursuant to article III, section 10 of the Hawai'i State Constitution, the legislative session commences on the third Wednesday in January. The close of the legislative session, or adjournment sine die, generally occurs in the first week of May. Cf. art. III, § 10 ("Regular sessions shall be limited to a period of sixty days. . . . Any session may be extended a total of not more than fifteen days."); e.g. Legislative Calendar, 30th Legislature (2019), https://www.capitol.hawaii.gov/legcal.aspx.

office and senate confirmation would occur during the legislative session prior to the expiration of the incumbent's term. 1985 Haw. Sess. Laws. Act 153 at 266-67 (indicating that these terms of office - which, prior to 1985, commenced on January 1 and expired on December 31 - were carefully amended to account for the lengthy confirmation process, to ensure the continuity of office). As the House Committee on Public Employment and Government Operations explained,

> [A] beginning date of July 1 and an ending date of June 30 may be more appropriate. Ordinarily, the name of a person nominated to serve on a board or commission is submitted to the Senate for confirmation during the legislative session which begins after January 1. If terms were to begin on January 1, several months of a term would elapse before the nomination is confirmed by the Senate and the appointed person is officially sworn in. On the other hand, if the beginning date of a member's term were July 1, the member would serve a full term. Moreover, the member's predecessor would not have to serve as a holdover member.

H. Stand. Com. Rep. No. 879 in 1985 H. Journal at 1417 (emphasis added).

The record establishes that the Governor has generally acted consistent with this vision by nominating and confirming board and commission members, including the PUC commissioners, prior to the end of the incumbent's term of office.

To ensure the continuous operation of the government, the legislature has also enacted various holdover provisions, including those set forth in HRS §§ 26-34 and 296-2. See, e.g., Territory v. Morita, 41 Haw. 1, 16 (Haw. Terr. 1955) (Towse,

C.J., dissenting) ("[C]ourts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions." (citation and internal quotation marks omitted)). Although the delegates to the 1950 constitutional convention considered including a holdover provision in the constitution, it appears the application of a holdover provision was one determination "left open for legislative treatment as future conditions may require."[6] Stand. Comm. Rep. No. 67 in I Proceedings, at 215; Debates in the Committee of the Whole on Executive Powers and Functions Prop. No. 22, II Proceedings, at 268; Stand. Comm. Rep. No. 67 in I Proceedings, at 218 (deferring consideration of "the last paragraph of Proposal No. 22, relating to continuity of incumbents in office until their successors are appointed and qualified").[7]

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[6] The Majority takes the position that this committee report left to the legislature only those matters in the Constitution specifically delegated as such. Majority at 23-25. Assuming arguendo that position is correct, it is in fact consistent with my view, as one matter specifically delegated to the legislature in the constitution is the appointment process for boards and commissions that do not head principal departments, along with processes for the removal of all board and commission members. Haw. Const. art. v § 6. The holdover provision is constitutionally permissible pursuant to this section.

[7] The Majority takes the Delegates' non-adoption of the holdover provision to be an explicit rejection of holdovers in favor of interim appointments. I believe that the statements deferring consideration of the holdover provision express something different - the committee explicitly left

(continued...)

Delegate Fong proposed the addition of the following language to article V, section 6: "All such officers shall hold office for the term of the governor and until their successors are appointed and qualified unless sooner removed." Debates in the Committee of the Whole on Executive Powers and Functions Prop. No. 22, II Proceedings, at 334. This provision, which Delegate Fong borrowed from the Organic Act, id., was not ultimately incorporated into the constitution. However, during the 1976 legislative session, the legislature utilized similar language amending the PUC act to add the holdover provision: "[e]ach member shall hold office until the member's successor is appointed and qualified." 1976 Haw. Sess. Laws Act 165, § 1 at 305; Organic Act of April 30, 1900, ch. 339, 31 Stat. 141, 156, 157.[8] The general holdover provision, which the legislature enacted as a compromise of power between the executive branch and the legislature, similarly provides in pertinent part that "[a]ny

[7](...continued)
open the possibility of adopting such a provision in the future without concern that holdovers would conflict with interim appointments.

[8] The origins of the language used in the PUC holdover provision in the Organic Act may explain the legislature's use of the term "appointed and qualified" instead of the term "nominated and confirmed." Although, as the majority points out, the Organic Act also used the phrase "advice and consent of the Senate," in context, it appears to use the two phrases interchangeably. For example, the Act states: "That the president shall nominate and, by and with the advice and consent of the Senate, appoint the chief justice and justices of the supreme court, the judges of the circuit courts. . . . All such officers shall hold office for four years and until their successors are appointed and qualified, unless sooner removed." 31 Stat. 141, 156. In my view, this passage clearly equates nominated and confirmed with "appointed and qualified."

member of a board or commission whose term has expired and who is not disqualified for membership . . . may continue in office as a holdover member until a successor is nominated and appointed[.]"[9] HRS § 26-34(b); 1984 S. Journal at 581 (statement of Senator Cayetano that the bill enacting HRS § 26-34 was "a compromise of sorts between the Senate and this present governor").

B. The Expiration of Champley's Term Did Not Create a Vacancy in Office for Purposes of the Interim Appointments Process

As discussed above, the legislature amended term expiration dates and enacted holdover provisions in order to ensure continuity of office. Despite these precautionary measures, unforeseen vacancies in office still occur, most commonly due to death, incapacitation, resignation, or removal. If a vacancy in office occurs while the senate is not in session, completion of the general appointment process may be delayed for several months, resulting in a vacancy in office. This court has stated:

> Vacancies in public office are contrary to the proper and efficient administration of business. They should not be permitted to exist longer than the discharge of a governmental authority of appointment reasonably requires. Moreover[,] the law abhors vacancies. And it is the policy of the law to fill vacancies as soon as possible after the vacancy occurs.

[9] To the extent that the general holdover provision contained in HRS § 26-34 conflicts with the PUC-specific holdover provision contained in HRS § 269-2, HRS § 269-2 controls. Richardson v. City & Cty. of Honolulu, 76 Hawai'i 46, 55, 868 P.2d 1193, 1202 (1994) ("[W]here there is a plainly irreconcilable conflict between a general and a specific statute concerning the same subject matter, the specific will be favored." (citation and internal quotation marks omitted)).

In re Jones, 34 Haw. 12, 17 (Terr. Haw. 1936) (internal citations omitted).

Thus, where a vacancy in office occurs while the senate is not in session, the balance of power between the executive branch and the legislature is temporarily adjusted out of the practical necessity of governmental economy, through the interim appointment process. The interim appointment process is set forth in paragraph five of article V, section 6 as follows:

> When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session of the senate.

(Emphasis added).

The plain language of this provision is silent with regard to the circumstances under which a "vacancy" in office occurs. We therefore look to extrinsic aids to determine the framers' intent. State ex rel. Anzai v. City and Cnty. of Honolulu, 99 Haw. 433, 444 (2002) (citing State v. Kahlbaun, 64 Haw. 197, 201-02 (1981)).

The framers discussed at length the imbalance of power that would occur if the governor were permitted to cause a vacancy while the senate was out of session in order to utilize the interim appointment power and bypass the need for senate confirmation. As Delegate Kellerman explained, if the governor

were allowed to remove officials at will rather than as provided by law,

> a governor could appoint persons who he considered and knew to be acceptable to the Senate, and the Senate would confirm those appointees. The day after the legislature adjourned such a governor could remove those appointees, and appoint an entirely new slate. Until the legislature [] reconvened in the next session he would have the means at his disposal to use public funds . . . to build up a machine not only to support himself, and his executives through himself, but to support a second legislature that might come back in with the support of his regime. It seems to me that it's giving an amazing amount of power to an executive to give him, through this chance at expending public funds through his department and his power of putting in any executive he sees fit once the legislature has adjourned, it gives him the kind of power that I don't think any community today can afford to have placed in one person.
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> It seems to me between the extremes we must find a mean that will grant a reasonable amount of responsibility and power to one executive to make his department function, and a limitation upon the extreme of that power by granting the Senate the right to control to that degree the executive appointments. The Senate also represents the people as well as the chief executive. We have checks and balances and I believe that is one of the major checks upon the extreme power of any executive.

Debates in the Committee of the Whole on Executive Powers and Functions Prop. No. 22, II Proceedings, at 334.

Delegate Fong expressed similar concern with regard to the concentration of executive power that could result from allowing the governor to remove senate-confirmed officials at will:

> Now, what protection has the public in a situation like this? Say we predicate a situation in which the governor appoints a certain individual to be public welfare director and the Senate is in session and the Senate confirms the appointment. One month afterwards

> he fires him [when the Senate is not in session] and for the next two years he places another man in there.
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> I feel again we are concentrating power in the hands of the executive to such an extent that he will build such a political machine in this territory that it is going to be difficult for the people to uproot it.
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> And I can say that in no other state of the Union is there such a concentration of power, and I am opposed to this phrase in which [the Governor] shall remove the department heads without the approval of the Senate.

Id. at 332-33.

The delegates revisited this concern, with Delegate Holroyde asking "whether the governor could remove someone from office immediately after the legislature went out of session if there was just cause[,]" and explaining, "[t]hat's the thing that worries me a little bit." Debates in the Committee of the Whole on Executive Powers and Functions Prop. No. 22, II Proceedings, at 356. Similarly, Delegate Arashiro asked what could be done "[i]f the governor abuses this power and has the tendency of creating a political machine[.]" Id. at 357. Delegate Tavares responded, "[t]hen all the legislature has to do is repeal the law." Id. This response was apparently sufficient to allay the delegates' concerns, as they voted in favor of the amendment immediately thereafter. Id.

And indeed, in order to preclude the governor from abusing the interim appointment process in this way, the framers

empowered the legislature to define the scope of the governor's removal power, to set term limits, and to otherwise provide for the removal of officers by law. Haw. Const. art. V, § 6 ("If the manner of removal of an officer is not prescribed in this constitution, removal shall be as provided by law.").[10] In doing so, the framers also delegated to the legislature the authority to define the circumstances under which a vacancy in office is created for purposes of the interim appointment power.

Because HRS § 269-2 requires allowing commissioners to serve in a holdover capacity, the expiration of a PUC commissioner's term of office does not, in and of itself, create a "vacancy" for purposes of article V, section 6.[11] Indeed,

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[10] This is in line with the expressed intent of the Constitutional Convention of 1950 Committee of the Whole to "permit the legislature, if it deems such action necessary or expedient, to enact laws permitting the Governor to suspend or remove officers for whose removal the consent of the senate is required by the constitution, for such causes, pursuant to such procedures, and subject to such restrictions, as the legislature might see fit to enact." Comm. of the Whole Rep. No. 23 in I Proceedings, at 339.

Pursuant to HRS § 26-34(d), "[t]he governor may remove or suspend for cause any member of any board of commission after due notice and public hearing."

[11] Black's law dictionary defines "vacancy" as follows:

> 1. The quality, state, or condition of being unoccupied, esp. in reference to an office, post, or piece of property. 2. The time during which an office, post, or piece of property is not occupied. 3. An unoccupied office, post, or piece of property; an empty place. Although the term sometimes refers to an office or post that is temporarily filled, the more usual reference is to an office or post that is unfilled even temporarily. An officer's misconduct does not create a vacancy even if a suspension occurs; a vacancy, properly speaking, does not occur until the

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allowing the governor to utilize the interim appointment process upon the ordinary expiration of a commissioner's term of office permits the exception to swallow the rule, runs contrary to the intent of the framers, and disregards an intentional delegation of authority to the legislature.

The attorney general has issued two opinions discussing whether the governor may use the interim appointments clause to appoint a replacement PUC commissioner where the previous commissioner chooses to holdover. Opinions of the attorney general are not binding on this court. See Zemis v. SCI Contractors, Inc./E.E. Black, Inc., 80 Haw. 442, 449 (1996) (rejecting attorney general's opinion). Nonetheless, I address the reasoning of the opinions here.

The first, Opinion No. 80-4, issued in 1980, concludes that an officer (in this case, a member of the Board of Regents), "once appointed by the governor and confirmed by the senate may serve for his fixed term and until his successor is appointed and qualified." Op. Att'y Gen. No. 80-2, at 2. To reach this conclusion, the Opinion notes the rule that "[w]here a statute specifies that the incumbent shall continue to hold office until

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[11](...continued)
officer is officially removed. 4. A job opening; a position that has not been filled.

Vacancy, Black's Law Dictionary (10th ed. 2014) (emphases added).

his successor is appointed and qualified . . . no vacancy exists at the expiration of the incumbent's term." Id. at 1 (citing 63 Am. Jur. 2d, Public Officers and Employees, §§ 138, 157; People ex rel. Lamm v. Banta, 542 P.2d 377 (Colo. 1975); State ex rel. McCarthy v. Watson, 132 A.2d 716 (Conn. 1946)). This supports Morita's argument that Governor Ige exceeded his constitutional authority when he utilized the interim appointments clause to appoint Gorak.

The attorney general issued a second opinion in 2016 that contradicts some of the conclusions of the first.[12] The second opinion is not persuasive. First, the opinion goes to great lengths to conclude that the interim appointments clause is self-executing - and therefore that any limits the legislature places upon the interim appointment power are unconstitutional. The Majority, too, makes this argument. Majority at 19. But, as noted above, the holdover statute does not limit the interim appointment power; it merely provides for appointment and term limits of PUC commissioners, which the legislature must do because the PUC is not the head of a principal department and therefore not the subject of Hawai'i Constitution article V, section 6, clauses 1–3. The self-execution of the interim

[12] The second opinion notes that some portions of the first opinion reach different conclusions than the second, but asserts that "those issues were not central to the issue resolved in [the first] opinion and are superseded by the analysis here." Op. Att'y Gen. No. 16-3 at 1.

appointments provision - denoted by the absence of the phrase "as provided for by law," - is irrelevant because the provision does not conflict with any statute. Problematically, the attorney general appears to suggest that any provision of law that prevents a position from being vacant thereby improperly limits the interim appointments clause. Taken to its logical end, this argument cannot support a functioning government because any otherwise-valid law that bears on appointing an officer would in some small way necessarily limit the interim appointments clause by causing the position not to be vacant. In any event, by endorsing holdovers, HRS § 269-2(a) makes clear that there is not necessarily a "vacancy" upon the expiration of a commissioner's term.

The attorney general's second opinion also addresses the meaning of the term "vacancy" in the Hawaiʻi Constitution - first noting that "[t]his is [] a question of Hawaiʻi constitutional law that could be definitively answered only by our appellate courts." Op. Att'y Gen. No. 16-3 at 6. For the reasons already explained, I would answer that, where a holdover commissioner occupies the position of PUC commissioner, that position is not vacant. Importantly, the second attorney general opinion comes to the conclusion that a position is vacant upon the expiration of the commissioner's term based only on concerns

about the balance of power in Hawaii's state government. For reasons explained above and further below, I believe the second attorney general opinion and the Majority's position are inconsistent with the balance of power that the framers envisioned. I therefore respectfully reject the conclusion that a position is "vacant" for constitutional purposes when a holdover commissioner occupies it.

The Majority relies on the legislative history to conclude that holdover commissioners serve in an acting capacity, which leaves the position itself vacant. Majority at 30-40. The Majority arrives at this conclusion by comparing the language in the holdover provision - "appointed and qualified" - to language in other statutes requiring appointment and confirmation for an officer to assume her position. But the Majority's analysis neglects to discuss the significance of the word "qualified," and instead focuses on the use of the word "appointed." Although other statutes use "appointed" alone in situations where senate confirmation is not required, that does not explain why "qualified" does not encompass senate confirmation where senate confirmation is otherwise required. Respectfully, I believe this renders the Majority's analysis incomplete, particularly in light of the language in the Organic Act, quoted above, that uses "appointed and qualified" to mean appointed by the governor and

confirmed by the senate.

C. The Governor's Use of the Interim Appointment Process Exceeded the Scope of his Constitutional Authority

As discussed above, because the PUC is not the head of a principal department, the legislature may provide for the appointment of PUC commissioners by statute. The legislature has done so by enacting HRS §§ 26-34 and 269-2. In the instant case, Governor Ige failed to nominate a prospective PUC commissioner to replace Champley during the legislative session prior to the expiration of Champley's term of office. Therefore, upon the expiration of his term, Champley was required either to resign or serve in a holdover capacity. HRS § 269-2(a). Champley indicated his intent to serve in a holdover capacity, and, pursuant to HRS § 269-2, he should have been allowed to do so until: (1) a replacement commissioner was properly nominated by the governor and appointed with the advice and consent of the senate; (2) the end of the second regular legislative session following the expiration of his term; or (3) his term of service reached twelve consecutive years.[13] HRS §§ 26-34(b), 269-2(a).

Because Champley was willing and able to remain in

[13] Once a holdover commissioner has served twelve consecutive years, or has served in a holdover capacity until the end of the second regular legislative session following the expiration of the commissioner's term of office, the commissioner shall resign or be removed for cause. HRS §§ 26-34(b), 269-2(a). If this occurs, a vacancy in office is created, allowing the governor to utilize the interim appointment process if the senate is not in session.

office in a holdover capacity, no vacancy was created for the purposes of invoking the interim appointment process under article V, section 6. Accordingly, in contrast to the Majority, I conclude that the Governor exceeded his constitutional authority by utilizing the interim appointment power to install Thomas Gorak as a PUC commissioner without senate confirmation.

The Majority insists that this interpretation would "limit the governor's authority to make interim appointments" and would therefore be "constitutionally suspect." Majority at 2. However, this interpretation is entirely in line with the intent and understanding of the framers. As discussed above, the governor retains the authority to invoke the interim appointment process if a vacancy occurs while the senate is not in session due to, inter alia, a commissioner's death, incapacitation, removal, or resignation. As such, limiting the governor's use of the interim appointment power to those circumstances under which the power was intended to be used does not "deprive" the governor of power. Rather, allowing commissioners to serve in a holdover capacity for up to two years honors the intent of the legislature when it passed a statute allowing holdovers and ensures that, where possible, those in office have been approved by both the governor and the senate, as the founders intended. If after two years of holdover service, a new commissioner has not been

properly nominated by the governor and confirmed by the senate, a vacancy in office is created and, at that point, the governor may utilize the interim appointment process.

The Majority's position effects a rebalancing of power that the founders clearly proscribed. As mentioned above, the terms of office for PUC commissioners and many other board and commission positions always expire when the senate is not in session. And, under the Majority's holding, the governor may utilize the interim appointment process to unseat officials serving in a holdover capacity after the expiration of their terms of office. This would allow the governor to refrain from nominating individuals for senate confirmation while the senate is in session and utilize the interim appointment power instead, wholly depriving the senate of a role in the appointment process.

Although an interim PUC commissioner may only serve for one year without senate approval, under the Majority's position, when that period expires, the governor may again utilize the interim appointment power to install another interim commissioner. Haw. Const. art. V, § 6. The governor could bypass the senate completely and indefinitely.[14] In sum, because

[14] In contrast, because "a holdover member shall not hold office beyond the end of the second regular legislative session following the expiration of the member's term of office," the holdover period is limited to two years. HRS § 26-34(b). Once that period expires, a vacancy in office is created, allowing the governor to utilize the interim appointment power if the (continued...)

a holdover commissioner was originally appointed to office with the approval of both the governor and the senate, the holdover's tenure in office beyond the expiration of his or her term of office is more constitutionally sound than that of an interim commissioner put in office by the governor alone.[15] Because I conclude that the Majority's position is unsupported by statutory and constitutional authority and effects a rebalancing of power unintended by the framers, I respectfully dissent.

II. CONCLUSION

For the foregoing reasons, I respectfully dissent from the Majority's judgment affirming the circuit court's ruling in favor of Gorak and the State.

/s/ Mark E. Recktenwald

[14](...continued)
senate is not in session pursuant to article V, section 6.

[15] Furthermore, unlike interim commissioners, holdover commissioners are familiar and experienced with the daily functioning of the PUC. Therefore, a holdover's tenure in office is also favorable for purposes of governmental efficacy.