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

July 8, 2005

The Honorable Linda Lingle
Governor of Hawaii
State Capitol, Fifth Floor
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Governor Lingle:

Re: Governor's Proclamations on H.B. Nos. 1309, 1548, 1556, and 1715, and on S.B. No. 813

Your letter of July 5, 2005, asked for a formal opinion on whether the proclamations you issued on June 27, 2005 for House Bill Nos. 1309, 1548, 1556, and 1715, and Senate Bill No. 813 satisfied the requirements of article III, section 16 of the Constitution of the State of Hawaii and gave the Legislature valid notice of your intent to return those five bills for its further consideration on July 12, 2005. We opine that the proclamations did comply with article III, section 16, and did give valid notice of your intent to return the five subject bills, thereby preserving your ability to validly veto those bills. We also explain that your "transmittal letter" attached to them, as well as your five supplemental proclamations, provide additional support for this conclusion.

The Governor's proclamation for each of the five above-mentioned bills, issued and dated June 27, 2005,[1] contains what

[1] Section 16 of article III of the Hawaii Constitution requires that "bills presented to the governor less than ten days before . . . adjournment [sine die], or presented after adjournment" "shall become law on the forty-fifth day unless the governor by proclamation shall have given ten days' notice to the legislature that the governor plans to return such bill with the

is obviously a clerical error in that the bill number mentioned in the closing paragraph does not match with the bill number mentioned in the preceding two clauses. The proclamation for House Bill No. 1309, for example, reads as follows:

P R O C L A M A T I O N

WHEREAS, under Section 16 of Article III of the Constitution of the State of Hawaii, the Governor is required to give notice, by a proclamation, of the Governor's plan to return with the Governor's objections any bill presented to the Governor less than ten days before adjournment sine die or presented to the Governor after adjournment sine die of the Legislature; and

WHEREAS, House Bill No. 1309, entitled "A Bill for an Act Relating to Taxation," passed by the Legislature, was presented to the Governor within the aforementioned period; and

WHEREAS, House Bill No. 1309 is unacceptable to the Governor of the State of Hawaii;

NOW, THEREFORE, I, LINDA LINGLE, Governor of the State of Hawaii, do hereby issue this proclamation, pursuant to the provisions of Section 16 of Article III of the Constitution of the State of Hawaii, giving notice of my plan to return House Bill No. 85 with my objections thereon to the Legislature as provided by said Section 16 of Article III of the Constitution.

As is clearly evident, the reference to House Bill No. 85 does not match with the bill numbers identified in the preceding two clauses. The proclamations for the remaining four bills contain the identical erroneous references to House Bill No. 85 in their closing paragraphs, instead of the bill numbers specified in their preceding two clauses.

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governor's objections on that day." Based upon this provision, the deadline for the proclamations for the above five bills was June 27, 2005.

The Governor issued a "transmittal letter" on, and dated, June 27, 2005, to which all thirty-three proclamations issued that day were attached, which reads as follows:

> Pursuant to the notice requirement of Section 16 of Article III of the Constitution of the State of Hawaii, I am transmitting herewith thirty-three proclamations giving notice of my plan to return the following bills with my objections:
>
> **HB 85** HD2 SD2 — A BILL FOR AN ACT RELATING TO HARBORS
> [6 other bills and their titles are then listed]
>
> **HB 1309** HD2 SD2 CD1 — A BILL FOR AN ACT RELATING TO TAXATION
> [2 other bills and their titles are then listed]
>
> **HB 1548** HD1 SD1 CD1 — A BILL FOR AN ACT RELATING TO THE EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
> [1 other bill and its title are then listed]
>
> **HB 1556** HD1 SD1 CD1 — A BILL FOR AN ACT RELATING TO THE ISSUANCE OF SPECIAL PURPOSE REVENUE BONDS TO ASSIST INDUSTRIAL ENTERPRISES
> [1 other bill and its title are then listed]
>
> **HB 1715** HD1 SD1 — A BILL FOR AN ACT RELATING TO CIVIL RIGHTS
> [1 other bill and its title are then listed]
>
> **SB 813** SD2 HD2 CD1 — A BILL FOR AN ACT RELATING TO EMPLOYMENT SECURITY
> [16 other bills and their titles are then listed]
>
> Sincerely,
>
> LINDA LINGLE

Enclosures

(Boldface added). Because all five subject bills were listed in this transmittal letter, the Governor clearly indicated that she intended her thirty-three proclamations to provide notice of her plan to return all five subject bills with her objections.

One of the proclamations was for House Bill No. 85, and that proclamation correctly referenced House Bill No. 85 in the last paragraph, matching the House Bill No. 85 reference in the preceding two clauses. Thus, there is no question that, as to House Bill No. 85, the Governor's ability to veto that bill has been preserved by that timely proclamation.

However, because the last paragraph of the proclamation for each of the five subject bills (containing the "I . . . do hereby issue this proclamation . . . giving notice of my plan to return House Bill No. 85 with my objections") references "House Bill No. 85," rather than the correct bill numbers mentioned in the prior two clauses of the respective proclamations, the question raised is: do those proclamations satisfy article III, section 16's requirement that "the governor by proclamation shall have given ten days' notice to the legislature that the governor plans to return such bill," such that the Governor now has authority to veto those bills?

We answer "yes," for the following reasons.

Under the literal language of article III, section 16, the Governor's veto power is preserved as long as her proclamations, despite the clerical error, "[gave] . . . ten days' notice to the legislature that the governor plans to return such bill with the governor's objections."[2] We conclude that the proclamations did give such notice, despite the clerical error.

First, and most importantly, because each proclamation listed the correct bill number in the preceding two clauses, including the title of the bill, it is obvious from the face of each proclamation that the reference to House Bill No. 85 in the last paragraph is a clerical mistake, and that the Governor was

[2] Article III, section 16, does not prescribe a specific form or wording for the proclamation.

intending to reference the bill number provided in the prior two clauses. To take the proclamation for House Bill No. 1309 as an example, the second clause of the proclamation explains that **House Bill No. 1309** was presented to the Governor, and the third clause states that **House Bill No. 1309** is unacceptable to the Governor. The final paragraph then begins "NOW, **THEREFORE**, I, LINDA LINGLE . . . do hereby issue this proclamation . . . giving notice of my plan to return House Bill No. 85 . . . ." Because the action mentioned in the last paragraph obviously relates to the prior two clauses, and are joined by a "THEREFORE" clause, the last paragraph obviously was intended to reference the same bill mentioned in the prior two clauses, namely, House Bill No. 1309. Therefore, one could not reasonably be confused into thinking that the Governor had intended to issue the proclamation with respect to House Bill No. 85, rather than House Bill No. 1309. Consequently, the Legislature was in fact given "ten days' notice . . . that the governor plans to return [House Bill No. 1309] with the governor's objections," as required by article III, section 16. The clerical mistake, which is obvious on its face, could not as a factual matter deprive the Legislature of actual knowledge of the Governor's intent.

Furthermore, the second clause of the five subject proclamations contained not only the bill numbers, but also the corresponding bill titles, which state that the bills are "relating to" taxation, the Employer-Union Health Benefits Trust Fund, the issuance of special purpose revenue bonds to assist industrial enterprises, civil rights, and employment security, respectively. The last paragraph referencing House Bill No. 85 is obviously mistaken given that House Bill No. 85 is a bill relating to harbors, which does not match any of the five titles just mentioned.

It cannot be seriously argued that it is unclear which bill number reference -- the bill number mentioned in the second and third clauses, versus the bill number mentioned in the last paragraph -- is the erroneous one. That is, no one could reasonably think that the last paragraph's bill number (House Bill No. 85) is accurate, and that the erroneous bill number is in the second and third clauses instead, inasmuch as the packet of thirty-three proclamations already contains a proclamation (without any bill number discrepancy) for House Bill No. 85. It

would thus make no sense to construe the five subject proclamations as covering House Bill No. 85, as that would mean that the Governor issued six proclamations for House Bill No. 85, an obviously redundant and unnecessary act.

Moreover, any doubt on this matter -- although any doubt would not be reasonable as just explained -- is wholly eliminated by the Governor's transmittal letter, which expressly states that the attached proclamations "giv[e] notice of [her] plan to return the following bills with [her] objections," and then lists, among the thirty-three bills mentioned, all five subject bills. This provides conclusive proof that the proclamations containing the clerical errors were intended to cover the bill numbers mentioned in the second and third clauses of the respective proclamations. None of the other twenty-eight proclamations covered those five subject bills, making it obvious that the remaining five proclamations referencing the five subject bills (in their second and third clauses) had to be the ones intending to proclaim the Governor's intent to return those five subject bills; otherwise, the transmittal letter referencing those five subject bills would have been false.

Under these circumstances, the Governor surely satisfied the purpose behind the ten days' notice provision -- which is to put the Legislature on notice of which bills face an impending veto so that it can possibly prepare to convene a special session to consider bill amendments or overriding the upcoming gubernatorial vetoes.[3] As explained above, the members of the Legislature clearly knew on June 27, 2005 (upon issuance of the original proclamations with transmittal letter), that the Governor was intending to return the five subject bills, and could thus begin to prepare for a possible special session.

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[3] See Committee of the Whole Debates, 2 Proceedings of the Constitutional Convention of Hawaii 1950, at 263-64 (1961) (ten days' notice provision is designed "to make sure that the legislators were given adequate notice to appear if the governor planned to return some of those bills with his veto. Ten days' notice having been given, they then knew that the governor was going to present that. Now, if he gave no notice, then it was the intention that the governor did not plan to veto any of the bills but adopted them all.").

Accordingly, the entire purpose of the ten days' notice provision was fulfilled. As one court has aptly noted:

> [W]e think it obvious . . . that the purpose of the language at issue here is to assure that the legislature have the earliest possible opportunity to consider, and, if it so chooses, to override a veto. The Governor's veto message here fully met that objective, and no one has suggested any nefarious consequence arising from the [challenged] procedure followed by the Governor [in this case].

D & M Healthcare, Inc. v. Kernan, 800 N.E.2d 898, 902 (Ind. 2003) (emphases added). Although the court was considering a slightly different procedural aberration, the point is that where the purpose or objective of a provision is satisfied, there is little reason to invalidate gubernatorial actions simply because of a technical irregularity.

In sum, the original proclamations by themselves, and certainly in conjunction with the transmittal letter, made the Governor's intent unambiguously clear, and thus were sufficient to effect compliance with article III, section 16.[4]

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[4] Although unnecessary given the unambiguous meaning of the original proclamations and transmittal letter, the Governor, upon realizing the clerical errors, issued the next day, June 28, 2005, five supplemental proclamations which read in relevant part (the following is House Bill No. 1309's supplemental proclamation; all five, however, are identical, except for the respective bill numbers):

> WHEREAS, that proclamation dated June 27, 2005, regarding House Bill No. 1309, contained a typographical error in one of the references to the bill:
>
> NOW, THEREFORE, I, LINDA LINGLE, Governor of the State of Hawaii, do hereby issue this supplemental proclamation to amend that proclamation dated June 27, 2005, issued . . . to give notice of my plan to return House Bill No. 1309 with my objections thereon to the Legislature . . ., to conform all references therein to House Bill No. 1309.

Indeed, because of the unambiguous nature of the original proclamations (combined with the transmittal letter), it is not

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These supplemental proclamations eliminate any possibility of there being confusion as to which bills her original proclamations related to. It is true, however, that these supplemental proclamations came one day after the deadline, and therefore probably cannot constitute valid proclamations in and of themselves, but that does not mean that they cannot serve to clarify the original proclamations, which were timely issued. There is a question, however, whether clarification a day later would be sufficient to meet the intent of article III, section 16, which requires notice ten days in advance. Under the circumstances presented here, we believe for the following reasons that the supplemental proclamations issued a day later are sufficient.

Had the original proclamations given no hint of the possibility that the Governor was intending to veto the five subject bills, we believe that supplemental proclamations issued the next day would not be able to retroactively provide the legislature with the required ten days' notice. For in that scenario, the Legislature would truly be caught off-guard, and would learn of the impending veto for the very first time only nine days in advance of the forty-fifth day. But in this case, because the original proclamations put the Legislature on notice that there was, **at the very least**, a strong possibility the Governor was intending a veto of the five subject bills -- of course, as explained earlier, the original proclamations were actually unambiguously clear about the Governor's veto intentions -- the Legislature was put on notice ten days in advance of the forty-fifth day that the Governor was likely objecting to those five bills. Because the supplemental proclamations the next day removed all doubt about the matter, the legislature was not deprived in any meaningful way of the full ten days' advance notice. Whether supplemental proclamations issued two, five, or nine days later would suffice is a question we need not decide. But clarifying supplemental proclamations issued a mere one day later should be sufficient given that the Legislature was put on notice ten days in advance of **at least** the strong possibility of the Governor's impending veto of the five subject bills.

even necessary to delve into concepts of "substance over form." For the question under the plain language of article III, section 16, is simply did the Governor by proclamation issued ten days in advance give notice of her intent to return the five subject bills. As already explained, she did, both as a matter of substance and as a matter of form. The form was valid because she issued "proclamations," ten days in advance, and which proclamations declare the Governor's intent to return the five subject bills. Although some might argue the form as to the latter point was defective because of the incorrect bill number in the last paragraph, the incorrect bill number was just an obvious clerical mistake, leaving no doubt as to the correct intended bill number. Given the mistake's (and the appropriate correction's) obviousness, the form was no more defective than if a word in the proclamation had simply been misspelled.

But in any event, even if one were to view the mistake as a defect in form, the Hawaii Supreme Court has made clear that form should not be exalted over substance. See, e.g., Coon v. City & County of Honolulu, 98 Haw. 233, 254, 47 P.3d 348, 369 (2002) ("elevat[ing] form over substance [is] an approach we have repeatedly eschewed"); Dubin v. Wakuzawa, 89 Haw. 188, 196, 970 P.2d 496, 504 (1998) (rejecting form over substance); State v. Timoteo, 87 Haw. 108, 119, 952 P.2d 865, 876 (1997) (same); Konno v. County of Hawaii, 85 Haw. 61, 71-72, 937 P.2d 397, 407-08 (1997) (same); Sussell v. Civil Service Comm'n, 74 Haw. 599, 615, 851 P.2d 311, 319 (1993) (same). Thus, because the **substance** and intent of the original proclamations are unambiguously clear, even if one considers the incorrect bill number in the last paragraph a **form** defect, it cannot defeat the validity of the proclamations. It is noteworthy that this substance-over-form principle has been applied to cases like the one before us, involving **references to an incorrect law** due to a clerical error. See, e.g., Bull v. King, 205 Minn. 427, 434-35, 286 N.W. 311, 315 (1939) ("Legislative enactments like other writings are not to be defeated by mere clerical errors or omissions in referring to and identifying the statute or section thereof to be amended. An amendatory act will not be held invalid because it incorrectly states the number of the statute to be amended, if it can be ascertained otherwise from the amendatory act with reasonable certainty."). And this principle of substance over form has also been specifically applied to **vetoes**. See D & M Healthcare, 800 N.E.2d at 903 (rejecting the

"vice" of placing "form" over "substance," and holding that because "the Governor's veto substantially conformed to the constitutionally prescribed process, the veto was properly returned"); see also Washington State Legislature v. Lowry, 131 Wash. 2d 309, 321 n.6, 931 P.2d 885, 892 n.6 (1997) (en banc) ("With respect to vetoes, we have indicated the desirability of elevating substance above form").

Viewed another way, the clerical mistake is in the nature of a "scrivener's error," that should be corrected to match the intent of the parties. Cf., e.g., United States Nat'l Bank of Oregon v. Indep. Ins. Agents of America, 508 U.S. 439, 462 (1993) ("scrivener's error . . . made by someone unfamiliar with the law's object and design" should be corrected where the "true meaning . . . is clear beyond question"); Luka v. Kalauokalani, 28 Haw. 385, 388 (1925) (scrivener's mistake in drafting deed can be overlooked in order to "uphold, rather than to defeat, the intention of parties to deeds").

Moreover, just last year, the Hawaii Supreme Court made clear that in interpreting article III, section 16's ten days' notice requirement, one must apply a "**rational**, **sensible**, and **practical** interpretation." Hanabusa v. Lingle, 105 Haw. 28, 35, 93 P.3d 670, 677 (2004) (emphases added). It would be wholly irrational, senseless, and highly impractical to deny the effectiveness of the Governor's proclamations simply because they contained an obvious clerical error, and whose correction (i.e., the correct bill number) was equally obvious. Because the Governor's intent was unmistakable, the "rational, sensible, and practical interpretation" rule of Hanabusa would be turned on its head were the original proclamations denied validity.

Furthermore, although the above analysis is more than sufficient to sustain the Governor's actions, the Hanabusa case further eliminates all possibility of denying the original proclamations' validity. For that case also holds that the Governor's action can only be invalidated if a "**plain**, **clear**, **manifest**, and **unmistakable** violation of article III, section 16" can be demonstrated. Hanabusa, 105 Haw. at 36, 93 P.3d at 678 (emphases added).[5] For all the reasons already provided, the

[5] This doctrine flows from the well-accepted principle that legislative acts are entitled to a presumption of

Governors' original proclamations were so clear in their intent and meaning that they gave the Legislature unequivocal notice of the Governor's intent with respect to the five subject bills, thereby fully and definitively satisfying article III, section 16's notice requirements. But even if one were somehow left with some doubt as to the proclamations' validity, that mere "doubt" would surely not amount to a "plain, clear, manifest, and unmistakable violation." Accordingly, the proclamations for the five subject bills cannot be deemed invalid.

Sincerely,

Girard D. Lau
Deputy Attorney General

APPROVED:

Mark J. Bennett
Attorney General

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constitutionality. See, e.g., Watland v. Lingle, 104 Haw. 128, 133-34, 85 P.3d 1079, 1084-85 (2004) ("every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. . . . [T]he plaintiffs have the burden of demonstrating that there was a plain, clear, manifest, and unmistakable violation of the procedure set forth in . . . the Hawai'i Constitution."). The Governor's exercise of veto power is such a legislative act. See Haw. Const. art. III, § 16 (Governor's veto powers fall within article III, which sets forth the "LEGISLATIVE POWER"; the "EXECUTIVE POWERS" under article V, section 5, do not include the Governor's veto power); Johnson v. Space Saver Corp., 172 Misc. 2d 147, 153, 656 N.Y.S.2d 715, 719 (N.Y. Sup. 1997) ("[I]n exercising his power to approve or veto legislation, the Governor performs a legislative function."); Allied Daily Newspapers v. Eikenberry, 121 Wash. 2d 205, 213, 848 P.2d 1258, 1262 (1993) ("In exercising the veto power, the governor performs a legislative function and therefore must be considered to be acting as part of the Legislature.").