

**LAW OFFICE OF
DEXTER K. KAIAMA**

Seven Waterfront Plaza
500 Ala Moana Blvd., Suite 400
Honolulu, HI 96813

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August 20, 2012

Office of the United Nations High Commissioner for Human Rights
Human Rights Council Branch-Complaint Procedure Unit
OHCHR- Palais Wilson
United Nations Office at Geneva
CH-1211 Geneva 10, Switzerland

Re: WAR CRIME: PROTEST AND DEMAND FILED WITH UNITED STATES
PACIFIC COMMAND'S HEADQUARTERS IN THE HAWAIIAN ISLANDS

ALLEGED WAR CRIMINAL: JUDGE GREG NAKAMURA
WAR CRIME VICTIM: KALE KEPEKAIIO GUMAPAC

Greetings:

This communication and complaint is provided to the Human Rights Committee under the *International Covenant on Civil and Political Rights* (1966) that was signed by the United States of America on October 5, 1977 and ratified on June 8, 1992. In particular, Article 14(1) that provides, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligation in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." The tribunals in the Hawaiian Islands are not competent tribunals established by law because Congressional laws of the United States of America, which are national laws that have no extraterritorial force and effect, established these tribunals in the Hawaiian Islands.

The Hawaiian Kingdom has been under an illegal and prolonged occupation since August 12, 1898 during the Spanish-American War. The United States disguised its occupation of the Hawaiian Islands as if a treaty of cession annexed the Hawaiian Islands. There is no treaty. The tribunals in the Hawaiian Islands stand in direct violation of treaties between the Hawaiian Kingdom and the United States of America, the 1907 Hague Convention, IV, the 1949 Geneva Convention, IV, and international law.

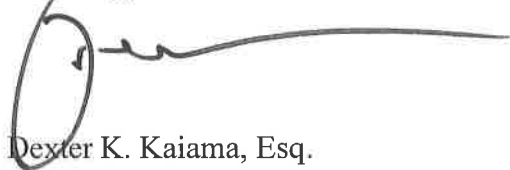
I would also like to bring to the attention of the Human Rights Committee that a Protest and Demand regarding the prolonged occupation of the Hawaiian Islands was filed by Dr. David Keanu Sai, Ambassador-at-large and Agent of the Hawaiian Kingdom,

with the President of the United Nations General Assembly on August 10, 2012 pursuant to Article 35(2) of the United Nations Charter. The Protest and Demand, Annexes, and Letters to the President of August 9, 2012 and August 14, 2012 can be accessed online at http://hawaiiankingdom.org/UN_Protest_pressrelease.shtml.

The Annexes to the Hawaiian Protest and Demand hereinafter referred to can be downloaded on the internet at http://hawaiiankingdom.org/UN_Protest_Annexes.shtml. The Hawaiian Kingdom was recognized as an independent and sovereign State on November 28, 1843 by joint proclamation from Great Britain and France (Annex 2), and by the United States of America on July 6, 1844 (Annex 4). The Hawaiian Kingdom currently has treaties with Austria (Annex 39), Belgium (Annex 40), Denmark (Annex 41), France (Annex 42), Germany (Annex 43), Hungary, (Annex 39), Italy (Annex 45), Japan (Annex 46), Netherlands (Annex 47), Norway (Annex 52), Portugal (Annex 48), Russia (Annex 49), Spain (Annex 50), Switzerland (Annex 51), Sweden (Annex 52), United Kingdom of Great Britain and Northern Ireland (Annex 44), United States of America (Annex 6), and the Universal Postal Union (Annex 54).

I am a practicing attorney and I represent Mr. Kale Kepekaio Gumapac, a Hawaiian national, who resides at 15-1716 Second Ave., Keaau, Hawaiian Islands, 96749. On behalf of my client, a Protest and Demand dated July 6, 2012 was communicated to Admiral Samuel Locklear, Commander of the United States Pacific Command, for war crimes committed by Judge Greg Nakamura against my client for not providing him a fair and regular trial by a competent tribunal (Attached CD). The Protest and Demand was sent to Admiral Locklear pursuant to Section 495(b), Department of the Army Field Manual 27-10; Hague Convention No. IV, *Respecting the Laws and Customs of War on Land*, 18 October 1907; the Geneva Convention *Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949; and Title 18 U.S.C. §2441(c)(1)—Definition of War Crime.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized initial 'D' followed by a long horizontal stroke that tapers to the right. The signature is written over the printed name 'Dexter K. Kaiama, Esq.'.

Dexter K. Kaiama, Esq.

cc: USPACOM

Enclosure (CD)

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July 6, 2012

ADMIRAL SAMUEL J. LOCKLEAR III, USN
HQ USPACOM
Attn JOO
Box 64028
Camp H.M. Smith, HI 96861-4031

Re: VIOLATIONS OF INTERNATIONAL LAW: PROTEST AND DEMAND
Alleged War Criminal: Judge Greg Nakamura
War Crime Victim: Kale Kepekaio Gumapac

Dear ADMIRAL SAMUEL J. LOCKLEAR III, USN:

NOTICE REQUIRED BY SECTION 495(b), SECTION I—REMEDIES
AND REPRISALS, CHAPTER 8—REMEDIES FOR VIOLATION OF
INTERNATIONAL LAW; DEPARTMENT OF THE
ARMY FIELD MANUAL 27-10

The following information is provided to you as required by Section 495(b), Department of the Army Field Manual 27-10; Hague Convention No. IV, *Respecting the Laws and Customs of War on Land*, 18 October 1907; Geneva Convention *Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949; and Title 18 U.S.C. §2441(c)(1)—Definition of War Crime.

Section 495 (FM 27-10). Remedies of Injured

Belligerent. In the event of violation of the law of war, the injured party may legally resort to remedial action of the following types:

a. Publication of the facts, with a view to influencing public opinion against the offending belligerent.

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HQ USPACOM
Attn JOO
July 6, 2012
Re: War Crime: Protest & Demand

b. Protest and demand for compensation and/or punishment of the individual offenders. Such communications may be sent through the protecting, a humanitarian organization performing the duties of a protecting power, or a neutral state, or by parlementaire direct to the commander of the offending forces. Article 3, [Hague Convention] IV, provides in this respect:

A belligerent party which violates the provisions of the said Regulations, shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

...

Section 502 (FM 27-10). Grave Breaches of the Geneva Conventions of 1949 as War Crimes. The Geneva Conventions of 1949 define the following acts as “grave breaches,” if committed against persons or property protected by the Conventions:

c. *GC [Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949]*

Grave breaches to which the preceding Article relates shall be those involving...willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention... (GC, art. 147.)

Pursuant to the authorization and instructions of my client, I hereby provide notice that my client has been deprived of a fair and regular trial in ejection proceedings in the Circuit Court of the Third Circuit of the State of Hawai‘i. As a practicing attorney and officer of the court, I took an oath to support and defend the constitutions of the United States of America and State of Hawai‘i.

Under the *Supremacy clause* (Art. VI, clause 2, U.S. Const.), “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.” According to the U.S. Supreme Court in *U.S. v. Belmont*, 301 U.S. 324 (1937),

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U.S. v. Pink, 315 U.S. 203 (1942), and *American Insurance Association v. Garamendi*, 539 U.S. 396, (2003), sole-executive agreements are treaties.

In the case of my client, as more fully set forth herein below, he raised jurisdictional arguments centered on two sole executive agreements entered into in 1893 between President Grover Cleveland, representing the United States of America, and Queen Lili'uokalani, representing the Hawaiian Kingdom. The first sole executive agreement, called the *Lili'uokalani assignment*, is a temporary and conditional assignment by the Queen of her executive power under threat of war, and binds the President and his successors in office to administer Hawaiian law.

The second sole executive agreement, called the *Agreement of restoration*, binds the President and his successors in office to restore the Hawaiian government, return the executive power to the Queen or her successor in office, and thereafter for the Queen or successor in office to grant amnesty to certain insurgents. The Congress politically prevented President Cleveland from using force to carry into effect these international agreements.

Unable to procure a treaty of cession from the Hawaiian Kingdom government acquiring the Hawaiian Islands as required by international law, Congress enacted a *Joint Resolution To provide for annexing the Hawaiian Islands to the United States*, which was signed into law by President McKinley on July 7, 1898 during the Spanish-American War (30 U.S. Stat. 750) as a war measure. The Hawaiian Kingdom came under military occupation on August 12, 1898 at the height of the Spanish-American War. The occupation was justified as a military necessity in order to reinforce and supply the troops that have been occupying the Spanish colonies of Guam and the Philippines since May 1, 1898. Following the close of the Spanish-American War by the Treaty of Paris signed December 10, 1898 (30 U.S. Stat. 1754), U.S. troops remained in the Hawaiian Islands and continued its occupation to date in violation of international law.

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Article 6, 1863 Lieber Code, regulated U.S. troops during the occupation of the Hawaiian Islands in 1898 and mandated the Commander of U.S. troops to administer the laws of the occupied country, being the civil and penal laws of the Hawaiian Kingdom. Article 6 was superseded by Article 43, 1899 Hague Convention, II (32 U.S. Stat. 1803), and then superseded by Article 43, 1907 Hague Convention, IV (36 U.S. Stat. 2227). Article 43 of the 1907 Hague Convention, IV, reinforces the 1893 *Lili'uokalani assignment* that mandates the President to administer the civil and penal laws of the Hawaiian Kingdom. On August 12, 1949, the United States signed and ratified the (IV) *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* of 12 August 1949 (6 U.S.T. 3516, T.I.A.S No. 3365, 75 U.N.T.S. 287). In July 1956, the U.S. Department of the Army published Field Manual 27-10—The Law of Land Warfare.

Furthering the illegal occupation, President McKinley signed into United States law *An Act To provide a government for the Territory of Hawai'i* on April 30, 1900 (31 U.S. Stat. 141); and on March 18, 1959, President Eisenhower signed into United States law *An Act To provide for the admission of the State of Hawai'i into the Union* (73 U.S. Stat. 4). These laws, which include the 1898 joint resolution of annexation, have no extraterritorial effect and stand in direct violation of the *Lili'uokalani assignment* and *Agreement restoration*, being international compacts, the 1907 Hague Convention, IV, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, IV.

Section 509 (FM 27-10). Defense of Superior Orders

a. The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know

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and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

Section 510 (FM 27-10). Government Officials

The fact that a person who committed an act which constitutes a war crime acted as the head of a State or as a responsible government official does not relieve him from responsibility for his act.

As the Commander of the U.S. Pacific Command, your office is the direct extension of the United States President in the Hawaiian Islands through the Secretary of Defense. As the Hawaiian Kingdom continues to remain an independent and sovereign State, the *Lili'uokalani assignment* and Article 43 of the 1907 Hague Convention IV mandates your office to administer Hawaiian Kingdom law in accordance with international law and the laws of occupation. The violations of my client's right to a fair and regular trial are directly attributable to the President's failure, and by extension your office's failure, to comply with the *Lili'uokalani assignment* and Article 43 of the 1907 Hague Convention, IV, which makes this an international matter.

STATEMENT OF FACTS

My client is Kale Kepekaio Gumapac, a Hawaiian subject and protected person, whose residential property was non-judicially foreclosed on and ejection proceedings instituted in the District Court of the Third Circuit, Hilo, Island of Hawai'i (Civil No. 3RC11-1-000150, District Court of the Third Circuit, Puna Division, State of Hawai'i). My client purchased title insurance to protect the lender in the event there is a defect in title, which was a condition of the loan, but the lender disregarded the policy and proceeded against my client for eviction. The Honorable Judge Harry Freitas dismissed

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HQ USPACOM
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the complaint and granted my client's motion for dismissal because of a title issue created by the aforementioned *Lili 'uokalani assignment*. The bank re-filed an ejectment complaint in the Circuit Court of the Third Circuit, State of Hawai'i (Civil no. 3CC11-1-000590), wherein the Honorable Judge Greg K. Nakamura committed a war crime by willfully depriving my client, as a protected person, of a fair and regular trial prescribed by the Geneva Convention, IV. According to Section 499—War Crimes, Department of the Army Field Manual 27-10, "The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."

- On December 15, 2011, Deutsche Bank filed their Complaint Ejectment ("Plaintiff's Complaint") against my client.
- On January 13, 2011, my client filed a Motion to Dismiss Plaintiff's Complaint for Ejectment pursuant to Hawai'i Rules of Civil Procedure Rule 12(b)(1) because there is clear evidence that the court lacked subject matter jurisdiction.
- On February 14, 2012, my client's motion was heard before the Honorable Judge Nakamura, where he took judicial notice of the *Lili 'uokalani assignment* and the *Agreement of restoration*, being two sole executive agreements. Instead of dismissing Plaintiff's Complaint, Judge Nakamura denied my clients' HRCP 12(b)(1) Motion to Dismiss in violation of my clients' rights to be tried by a court of competent jurisdiction.

My client has been deprived of his right to a fair and regular trial by a court that does not have subject matter jurisdiction and stands in direct violation of the 1893 *Lili 'uokalani assignment & Agreement of restoration*, 1899 Hague Convention, IV, the 1949 Geneva Convention, IV, and international law. An appropriate court with subject matter jurisdiction is an Article II Federal Court, which is a military court established by the President through executive order which would administer the civil and penal laws of

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the Hawaiian Kingdom under the international laws of occupation. However, the Circuit Court of the Third Circuit would have jurisdiction if your office established a military government that utilizes the infrastructure of the State of Hawai'i government to administer Hawaiian Kingdom law.

At present, the only war crime committed was the denial of my client's right to a fair and regular trial, but should Judge Nakamura sign the Order granting Summary Judgment and the Writ of Possession and my client is forcibly removed from his residence, a second war crime will be committed because private property cannot be confiscated. Article 46 of the 1907 Hague Convention, IV, states, "Family honour and rights, the lives of persons, and private property... must be respected. Private property cannot be confiscated." And Article 53 of the 1949 Geneva Question, IV, provides, "Any destruction by the Occupying Power of real or personal property belonging individually... to private persons... is prohibited."

In the *Trial of Friedrich Flick and Five Others, United States Military Tribunal, Nuremberg*, 9 Law Reports of Trials of Law Criminals (United Nations War Crime Commission) 1, 19 (1949), the U.S. Military Tribunal stated:

...responsibility of an individual for infractions of international law is not open to question. In dealing with property located outside his own State, he must be expected to ascertain and keep within the applicable law. **Ignorance thereof will not excuse guilt but may mitigate punishment** (emphasis added).

PROTEST AND DEMAND

In light of the aforementioned, I am formally lodging a protest and demand, on behalf of my clients, that your office:

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1. Comply with the 1893 *Lili'uokalani assignment & Agreement of restoration*, 1899 Hague Convention, IV, the 1949 Geneva Convention, IV, and international law;
2. Establish a military government, to include tribunals, to administer and enforce the civil and penal laws of the Hawaiian Kingdom pursuant to *Lili'uokalani assignment* and Article 43 of the 1907 Hague Convention, IV;
3. Order the Honorable Judge Nakamura to cease and desist these proceedings against my client;
4. Compensate my client for War Crimes committed against him and *restitutio in integrum* of his property that was the subject of the ejectment proceedings.

Due to the large volume of pages, I'm attaching a CD that has PDF files of: (1) my client's Motion to Dismiss Plaintiff's Complaint for Ejectment; (2) Plaintiff's Opposition to the Motion to Dismiss; (3) my client's Reply to the Opposition; (4) transcripts of the hearing on my client's Motion to Dismiss wherein the Honorable Judge Nakamura took judicial notice of the *Lili'uokalani assignment* and the *Agreement of restoration*; and (5) Order denying my client's Motion to Dismiss.

I am also providing PDF files of the doctoral dissertation of Dr. Keanu Sai who received his Ph.D. from the University of Hawai'i at Manoa in Political Science in 2008, and his law reviewed journal articles published at the University of Hawai'i at Manoa and the University of San Francisco School of Law regarding the prolonged occupation of the Hawaiian Kingdom. I respectfully direct your attention to Chapter 5, "Righting the Wrong," of Dr. Sai's dissertation, which provides a comprehensive plan for establishing a

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HQ USPACOM
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military government with the utilization of the current governmental infrastructure of the State of Hawai'i.

Dr. Sai served as lead agent for the *acting* government of the Hawaiian Kingdom in arbitral proceedings at the Permanent Court of Arbitration, The Hague, Netherlands, in *Larsen v. Hawaiian Kingdom*, 119 International Law Reports 566 (2001), and filed a complaint with the United Nations Security Council on July 5, 2001 regarding the prolonged occupation of the Hawaiian Kingdom. International law journal articles on the international arbitration and the Security Council complaint were published in the *American Journal of International Law*, (95 American Journal of International Law 927-933), and the *Chinese Journal of International Law*, (2(1) Chinese Journal of International Law 655-684).

Dr. Sai gave a presentation of the prolonged occupation of the Hawaiian Islands to the Officer's Corps of the 25th Infantry Division in 2001 at the invitation of Brigadier General James M. Dubik, Commander. Dr. Sai also gave a presentation on the prolonged occupation of the Hawaiian Islands to Colonel James Herring, Staff Judge Advocate for the Army's 8th Theater Sustainment Command, and his staff of officers at Wheeler Court House on February 25, 2009.

It is undisputedly clear that notice regarding the prolonged occupation of the Hawaiian Kingdom has been provided to this office. We now respectfully demand that your office comply with your military obligations and provide my client the relief he is entitled to under international law.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized initial 'D' followed by a long, horizontal, wavy line that tapers to the right.

Dexter K. Kaiama, Esq.

Admiral Samuel J. Locklear III, USN
HQ USPACOM
Attn JOO
July 6, 2012
Re: War Crime: Protest & Demand

Encls.

CC: BARRACK OBAMA, President
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

LEON PANETTA, Secretary of Defense
U.S. Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

PRESIDENT
United Nations Security Council
1st Avenue & E 44th Street
New York, NY 10017

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Sent To Admiral Larkins, HQ US PACOM
 Street, Apt. No., or PO Box No. Box 64028
 City, State, ZIP+4 Camp Smith, HI 96861-4031

PS Form 3800, August 2006 See Reverse for Instructions

DOCUMENT INDEX

WAR CRIME: PROTEST AND DEMAND

Alleged War Criminal: Judge Greg Nakamura

War Crime Victim: Kale Kepekaio Gumapac

July 6, 2012

[PDF Documents]

DOC_1.....	Motion to Dismiss Complaint
DOC_2.....	Opposition to Motion to Dismiss
DOC_3.....	Reply to Opposition
DOC_4.....	Hearing Transcripts
DOC_5.....	Order Denying Motion to Dismiss
DOC_6.....	Dr. Sai's Doctoral Dissertation
DOC_7.....	Dr. Sai's Law Journal Article (HJLP)
DOC_8.....	Dr. Sai's Law Journal Article (JLSC)

Doc #1

KALE KEPEKAIO GUMAPAC
HC2 BOX 9607
Keaau, HI 96749
Phone no. (808) 896-7420

DEFENDANT
Pro se

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE IN TRUST FOR THE
BENEFIT OF THE CERTIFICATE HOLDERS
FOR ARGENT SECURITIES INC., ASSET-
BACKED PASS-THROUGH CERTIFICATES,
SERIES 2006-W2,

Plaintiff,

vs.

DIANNE DEE GUMAPAC; KALE KEPEKAIO
GUMAPAC; JOHN DOES 1-50; AND JANE
DOES 1-50,

Defendants.

) CIVIL NO. 11-1-0590
)
)
) DEFENDANT KALE KEPEKAIO
) GUMAPAC'S MOTION TO DISMISS
) COMPLAINT PURSUANT TO HRCP
) 12(B)(1); MEMORANDUM IN
) SUPPORT OF MOTION TO DISMISS;
) DECLARATION OF DEFENDANT;
) EXHIBITS "A-C"; NOTICE OF
) HEARING; CERTIFICATE OF
) SERVICE
)
) HEARING:
)
) DATE: FEB 14, 2012
) TIME: 9:00 AM
) JUDGE: NAKAMURA
)

CLERK

2012 JAN 13 PM 4:09

FILED
CIRCUIT COURT OF
THE THIRD CIRCUIT
STATE OF HAWAII

**DEFENDANT'S MOTION TO DISMISS COMPLAINT
PURSUANT TO HRCP 12(B)(1)**

COMES NOW the Defendant KALE KEPEKAIO GUMAPAC, hereinafter DEFENDANT, in pro se, makes the following Motion to Dismiss Complaint for lack of subject matter jurisdiction, which can be raised at any time throughout the proceedings pursuant to *Tamashiro v. State of Hawaii*, 112 Haw. 388, 398; 146 P.3d 103, 113 (2006), and a request for judicial notice of the enclosed exhibits attached to Defendant's Declaration.

DEFENDANT moves pursuant to Rule 12(b)(1) of the Hawaii Rules of Civil Procedure to dismiss Complaint for want of subject matter jurisdiction in that the suit would manifestly require the Court to act outside the constitutional limitations of its

judicial power, and unlawfully intrude upon, and in effect seize political control over two executive agreements entered into between President Grover Cleveland of the United States and Queen Lili`uokalani of the Hawaiian Kingdom. The first agreement is the *Lili`uokalani assignment* (January 17th 1893) that mandates the President to administer Hawaiian Kingdom law and the second is the *Agreement of restoration* (December 18th 1893) that mandates the President to restore the Hawaiian Kingdom government and the Queen thereafter to grant amnesty to the insurgents. As is more fully shown in Defendant's Brief in support of this dismissal motion, the Complaint attempts to have the Court act outside the confines of the judicial power and fails to give rise to any claim or issue over which the Court could constitutionally exercise subject matter jurisdiction without violating the *Supremacy clause*, in particular, the 1893 Executive Agreement and the precedence set in *U.S. v. Belmont*, 301 U.S. 324 (1937), *U.S. v. Pink*, 315 U.S. 203 (1942), and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) regarding executive agreements that do not require Senate ratification to have the force and effect of a treaty.

WHEREFORE, Defendant respectfully prays that the foregoing motions to dismiss be inquired into and sustained, that the Complaint, to the extent that it is sought to be maintained against the Defendant, be dismissed for the reasons stated in these motions as well as in the more fully detailed statement of the facts, set forth with pertinent legal background and authority, in the simultaneously filed Brief of the DEFENDANT in support of the motion to dismiss.

DATED: Keaau, Hawai'i, January 13, 2012.


KALE KEPEKAO GUMAPAC
Defendant, pro se

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

DEUTSCHE BANK NATIONAL TRUST	)	CIVIL NO. 11-1-0590
COMPANY, AS TRUSTEE IN TRUST FOR)	
THE BENEFIT OF THE CERTIFICATE)	
HOLDERS FOR ARGENT SECURITIES INC.,	)	MEMORANDUM IN SUPPORT OF
ASSET-BACKED PASS-THROUGH	)	MOTION TO DISMISS
CERTIFICATES, SERIES 2006-W2,)	
)	
Plaintiff,)	
)	
vs.)	
)	
DIANNE DEE GUMAPAC; KALE KEPEKAIO)	
GUMAPAC; JOHN DOES 1-50; AND JANE)	
DOES 1-50,)	
)	
Defendants.)	
)	

MEMORANDUM IN SUPPORT OF MOTION

I. NATURE OF THE PROCEEDING

Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY (hereafter "PLAINTIFF") filed a complaint in the Circuit Court of the Third Circuit against Defendant KALE KEPEKAIO GUMAPAC (hereafter "DEFENDANT") for ejectment. DEFENDANT asserts that he is obligated to abide by the laws of the Hawaiian Kingdom, a sovereign and independent State, and so is PLAINTIFF. §6, Hawaiian Civil Code, Compiled Laws of the Hawaiian Kingdom (1884), provides:

The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws. (emphasis added)

The PLAINTIFF cannot claim relief from the Circuit Court of the Third Circuit of the State of Hawai'i because it lacks subject matter jurisdiction. An appropriate Court with subject matter jurisdiction are Courts of the Hawaiian Kingdom, not the State of Hawai'i. The Compiled Laws of the Hawaiian Kingdom (1884) provides:

§870. The Kingdom shall be divided into four judicial circuits, as at present constituted, that is to say:... The third circuit shall consist of the Island of Hawaii, whose seat of justice shall be at Hilo and Waimea.

§880. The respective Circuit Courts shall...also have power to partition real estate; to grant writs of ejectment and of possession.

However, in light of the illegal overthrow of the Hawaiian Kingdom government by the United States and its failure to administer Hawaiian Kingdom law and restore the Hawaiian Kingdom government pursuant to two sole executive agreements entered into between President Cleveland and Queen Lili'uokalani as are more fully explained hereafter, an Article II Court established under and by virtue of Article II of the U.S. Constitution in compliance with Article 43, 1907 Hague Convention, IV (36 U.S. Stat. 2277). Article II Courts are Military Courts established by authority of the President,¹ being Federal Courts, which were established as "the product of military occupation." See *Bederman*, "Article II Courts," *Mercer Law Review* 44 (1992-1993): 825-879, 826. According to *United States Law and Practice Concerning Trials of War Criminals by Military Commissions, Military Government Courts and Military Tribunals*, 3 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 103, 114 (1948), military tribunals "are generally based upon the occupant's customary and conventional duty to govern occupied territory and to maintain law and order."²

II. BURDEN ESTABLISHING SUBJECT MATTER JURISDICTION RESTS WITH THE PLAINTIFF

In *State of Hawai'i v. Lorenzo*, 77 Haw. 219 (1994), the Defendant claimed to be a citizen of the Hawaiian Kingdom and that the State of Hawai'i courts did not have jurisdiction over him. In 1994, the case came before the Intermediate Court of Appeals (ICA) and Judge Heen delivered the decision. Judge Heen affirmed the lower court's decision denying Lorenzo's motion to dismiss, but explained that "Lorenzo [had] presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature." *Id.*, 221. In other words, the reason Lorenzo's argument failed was because he "did not meet his burden of proving his defense of lack of jurisdiction." *Id.* In *Nishitani v. Baker*, 82 Haw. 281, 289 (1996), however, the Court shifted that burden of proof not upon the Defendant, but

¹ These types of courts were established during the Mexican-American War, Civil War, Spanish-American War, and the Second World War, while U.S. troops occupied foreign countries and administered the laws of these States.

² See *Jecker v. Montgomery*, 54 U.S. 498 (1851); *Leitensdorfer v. Webb*, 61 U.S. 176 (1857); *Cross v. Harrison*, 57 U.S. 164 (1853); *Mechanics' & Traders' Bank v. Union Bank*, 89 U.S. 276 (1874); *United States v. Reiter*, 27 Federal Case 768 (1865); *Burke v. Miltenberger*, 86 U.S. 519 (1873); *New Orleans v. Steamship Co.*, 87 U.S. 387 (1874); *In re Vidal*, 179 U.S. 126 (1900); *Santiago v. Noguerras*, 214 U.S. 260 (1909); *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Williamson v. Alldridge*, 320 F. Supp. 840 (1970); *Jacobs v. Froehlke*, 334 F. Supp. 1107 (1971).

upon the Prosecution, whereby “proving jurisdiction thus clearly rests with the prosecution.” The Court explained, “although the prosecution had the burden of proving beyond a reasonable fact establishing jurisdiction, the defendant has the burden of proving facts in support of any defense...which would have precluded the court from exercising jurisdiction over the defendant (emphasis added).” *Id.*

PLAINTIFF will be unable to meet such a burden of proving subject matter jurisdiction “beyond a reasonable fact” because of two executive agreements entered into between President Cleveland of the United States and Queen Lili’uokalani of the Hawaiian Kingdom, called the *Lili’uokalani assignment* (Exhibit “A” of Expert Memorandum of Dr. David Keanu Sai, Exhibit “1” of Defendant’s Declaration) of executive power and the *Agreement of restoration* (Exhibit “B” of Expert Memorandum of Dr. David Keanu Sai, Exhibit “1” of Defendant’s Declaration). Congress was apprised of the *Lili’uokalani assignment* by Presidential Message, December 18, 1893, *See* United States House of Representatives, 53d Cong., Executive Documents on Affairs in Hawaii: 1894-95, 443-465 (1895). Presidential Message, January 13, 1894, apprised Congress of the *Agreement of restoration*. *See Id.*, 1241-1284.

III. STANDARD OF REVIEW

Rule 12(b)(1) of the HRCF reads as follows:

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter.

Jurisdictional issues, whether personal or subject matter, can be raised at any time and that subject matter jurisdiction may not be waived. Wong v. Takushi, 83 Hawai’i 94, 98 (1996), see also State of Hawai’i v. Moniz, 69 Hawai’i 370, 372 (1987). In Tamashiro v. State of Hawai’i, 112 Haw. 388, 398; 146 P.3d 103, 113 (2006), the Hawai’i Supreme Court stated, “The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties do not raise the issue, a court *sua sponte* will, for unless jurisdiction of the court over the subject matter exists, any judgment rendered is invalid.”

The U.S. Constitution provides that treaties, like acts of Congress, are considered the “supreme law” of the land; see U.S. Constitution Article VI (2), and Maiorano v. Baltimore &

Ohio R.R. Co., 213 U.S. 268, 272-73 (1909). Also, Executive Agreements entered into by the President under his sole constitutional authority with foreign States are treaties that do not require ratification by the Senate or approval of Congress. See United States v. Belmont, 301 U.S. 324, 326 (1937). Given that valid executive agreements are binding treaties, this Court should grant Defendant's Motion to Dismiss in order to accomplish justice.

IV. SUMMARY OF ARGUMENT

DEFENDANT asserts that this Court lacks subject matter jurisdiction because of two executive agreements, the *Lili'uokalani assignment* (January 17, 1893) and the *Agreement of restoration* (December 18, 1893), that provides the legal and factual "basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature." See Lorenzo, at 221. The State of Hawai'i's claim to territorial jurisdiction under HRS 701-106(1)(a) is in conflict with the 1893 Executive Agreements and the precedence in Belmont, U.S. v. Pink, 315 U.S. 203 (1942), and American Insurance Association v. Garamendi, 539 U.S. 396, (2003), where sole executive agreements preempt State law.

Since the United States is a Federal government, States within the Federal Union are subject to the supremacy of Federal laws and treaties, in particular, executive agreements. U.S. constitution, article VI, clause 2, provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." The Supreme Court in Belmont stated that no state policy can be found to legally supersede an executive agreement between the federal government and a foreign country. The external powers of the U.S. government could be exercised without regard to State laws. The *Lili'uokalani assignment* and the *Agreement of restoration*, being executive agreements, remains binding today upon the current President as the successor in office to President Grover Cleveland. Should the Court exercise subject matter jurisdiction it would stand in direct violation of Federal law, in particular, the *Supremacy clause*.

V. ARGUMENT: CIRCUIT COURT OF THE THIRD CIRCUIT LACKS SUBJECT MATTER JURISDICTION

In State of Hawai'i v. Lee, 90 Haw. 130, 142; 976 P.2d 444, 456 (1999), the ICA stated, "it is an open legal question whether the 'Kingdom of Hawai'i' still exists." This open legal

question has since not been conclusively answered pursuant to the ICA's instructive exposition on determining whether or not the Hawaiian Kingdom continues to exist as a state. See Lorenzo and Baker. In Lorenzo, the ICA correctly cited attributes of a state's sovereign nature to be "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." See Lorenzo, at 221. The ICA restated Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991), which drew from §201, Restatement (Third) Foreign Relations Law of the United States. The Restatement (Third) drew its definition of a state from Article I, Montevideo Convention (1933), which provided, "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." (49 U.S. Stat. 3097, 3100).

The Hawaiian Kingdom had these attributes when Great Britain and France entered into a joint proclamation acknowledging and recognizing Hawai'i as an independent and sovereign State on November 28th 1843, and on July 6th 1844, United States Secretary of State John C. Calhoun notified the Hawaiian government of the United States formal recognition of the Hawaiian Kingdom as an independent and sovereign state since December 19th 1842 by President John Tyler. As a result of the United States' recognition, the Hawaiian Kingdom entered extensive treaty and diplomatic relations with other states, to include the United States of America.

In the 21st century, an international tribunal and the Ninth Circuit Court of Appeals acknowledged the Hawaiian Kingdom's status as an internationally recognized state in the 19th century. In Larsen v. Hawaiian Kingdom, 119 ILR 566, 581 (2001), the Permanent Court of Arbitration in The Hague stated, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom, and various other States." The 9th Circuit Court, in Kahawaiola`a v. Norton, 386 F.3rd 1271 (2004), also acknowledged the Hawaiian Kingdom's status as "a co-equal sovereign alongside the United States;" and in Doe v. Kamehameha, 416 F.3d 1025, 1048 (2005), the Court stated that, "in 1866, the Hawaiian Islands were still a sovereign kingdom."

Having established the Hawaiian Kingdom's internationally recognized status as an independent state in the 19th century, which met the standard of a state's sovereign nature referred to in Lorenzo, the next question is whether or not the Hawaiian Kingdom status as a state was extinguished after its government was overthrown by U.S. troops on January 17th 1893. As a subject of international law, statehood of the Hawaiian Kingdom can only be measured and

determined by the rules of international law and not the domestic laws of any State to include the United States and the Hawaiian Kingdom. According to Professor Crawford, "A State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three." See Crawford, The Creation of States in International Law 700 (2nd ed., 2006). In particular, military "occupation does not extinguish the State pending a final settlement of the conflict. And, generally, the presumption—in practice a strong presumption—favours the continuity and disfavors the extinction of a an established State." *Id.*, 701. Professor Wright, a renowned scholar in U.S. foreign relations law, states that, "international law distinguishes between a government and the state it governs." See Wright, The Status of Germany and the Peace Proclamation, 46(2) *American Journal of International Law* 299-308, 307 (April 1952). And a "state may continue to be regarded as such even though, due to insurrection or other difficulties, its internal affairs become anarchic for an extended period of time;" (Restatement (Third) Foreign Relations Law of the United States, Reporter's Note 2, §201) and "Military occupation, whether during war or after an armistice, does not terminate statehood." *Id.*, Reporter's Note 3. Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Two contemporary examples illustrate this principle of international law, the overthrow of the Taliban (Afghanistan) in 2001 and of Saddam Hussein (Iraq) in 2003. The former has been a recognized sovereign State since 1919, See Hudson, Afghanistan, Equador, and the Soviet Union in the League of Nations, 29 *American Journal of International Law* 109-116, 110 (1935), and the latter since 1932, See Hudson, The Admission of Iraq to Membership in the League of Nations, 27 *American Journal of International Law* 133-138, 133 (1933). Professor Dixon explains:

If an entity ceases to possess any of the qualities of statehood...this does not mean that it ceases to be a state under international law. For example, the absence of an effective government in Afghanistan and Iraq following the intervention of the USA did not mean that there were no such states, and the same is true of Sudan where there still appears to be no entity governing the country effectively. Likewise, if a state is allegedly 'extinguished' through the illegal action of another state, it will remain a state in international law. See Dixon, Textbook on International Law 119 (6th ed., 2007).

After the Hawaiian Kingdom government was illegally overthrown, two executive agreements were entered into between President Cleveland of the United States and Queen Lili'uokalani of the Hawaiian Kingdom in 1893. The President entered into these executive agreements under his sole constitutional authority to represent the United States in foreign relations and the Congress cannot intervene without violating the separation of powers doctrine being an encroachment upon the executive power. The first agreement, called the *Lili'uokalani*

assignment, (Exhibit “A” of Expert Memorandum of Dr. David Keanu Sai, Exhibit “3” of Dr. Sai’s Declaration, attached as Exhibit “1” of Defendant’s Declaration), assigned executive power to the United States President to administer Hawaiian Kingdom law and to investigate the overthrow of the Hawaiian government. The second agreement, called the *Restoration agreement*, (Exhibit “B” of Expert Memorandum of Dr. David Keanu Sai, Exhibit “3” of Dr. Sai’s Declaration, attached as Exhibit “1” of Defendant’s Declaration), obligated the President of the United States to restore the Hawaiian government as it was prior to the landing of U.S. troops on January 16, 1893, and for the Queen, after the government was restored and the executive power returned, to grant full amnesty to those members and supporters of the provisional government who committed treason.

In Belmont, the U.S. Supreme Court affirmed that executive agreements entered into between the President and a sovereign nation does not require ratification from the U.S. Senate to have the force and effect of a treaty; and executive agreements bind successor Presidents for their faithful execution. In Garamendi, at 397, the Court stated, “Specifically, the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress.” According to Justice Douglas, in Pink, at 241, executive agreements “must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy.”

In Belmont, the Court concluded that under no circumstances could a state policy be found to legally supersede an agreement between the national government and a sovereign foreign power. The external powers of the U.S. government could be exercised without regard to state laws. The Court also stated, “Plainly, the external powers of the United States are to be exercised without regard to state laws or policies,” see Belmont, at 330, and “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist.” Id. In Pink, at 230, the Court reiterated, “It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.... But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.... Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.”

Both Belmont and Pink were reinforced by Garamendi, at 396, where the Court reiterated, that “valid executive agreements are fit to preempt state law, just as treaties are,” and that the preemptive power of an executive agreement derives from “the Constitution’s allocation of the foreign relations power to the National Government.” All three cases affirm that the *Lili’uokalani Assignment* and the *Agreement of restoration* preempts all laws and policies of the State of Hawai`i. In Edgar v. Mite Corporation, 457 U.S. 624, 631 (1982), Justice White ruled, “A state statute is void to the extent that it actually conflicts with a valid federal statute; and ‘[a] conflict will be found where compliance with both federal and state regulations is a physical impossibility.’”

Since 1893, the United States government has violated the terms of its obligations under these executive agreements and in 1898 unilaterally annexed the Hawaiian Kingdom by enacting a congressional joint resolution justified as a military necessity during the Spanish-American War, and thereafter occupied Hawai`i. After the President, by Presidential Message on January 13, 1894, apprised the Congress of the *Restoration agreement* with Queen Lili’uokalani, both the House of Representatives³ and Senate⁴ took deliberate steps “warning the President against the employment of forces to restore the monarchy of Hawaii.” See Corwin, The President’s Control of Foreign Relations, 45 (1917). Senator Kyle’s resolution introduced on May 23, 1894 specifically addresses the *Agreement of restoration*. The resolution was later revised by Senator Turpie and passed by the Senate on May 31, 1894. Senator Kyle’s resolution stated:

Resolved, That it be the sense of the Senate that the Government of the United States shall not use force for the purpose of restoring to the throne the deposed Queen of the Sandwich Islands or for the purpose of destroying the existing Government: that, the Provisional having been duly recognized, the highest international interests require that it shall pursue its own line of polity,

³ House Resolution on the Hawaiian Islands, February 7, 1894:

“*Resolved*, First. That it is the sense of this House that the action of the United States minister in employing United States naval forces and illegally aiding in overthrowing the constitutional Government of the Hawaiian Islands in January, 1893, and in setting up in its place a Provisional Government not republican in form and in opposition to the will of a majority of the people, was contrary to the traditions of our Republic and the spirit of our Constitution, and should be condemned. Second. That we heartily approve the principle announced by the President of the United States that interference with the domestic affairs of an independent nation is contrary to the spirit of American institutions. And it is further the sense of this House that the annexation of the Hawaiian Islands to our country, or the assumption of a protectorate over them by our Government is uncalled for and inexpedient; that the people of that country should have their own line of policy, and that foreign intervention in the political affairs of the islands will not be regarded with indifference by the Government of the United States.” (U.S. Senate Resolution on Hawai’i, 53 Cong., 2nd Sess., 2000 (1894)).

⁴ Senate Resolution on the Hawaiian Islands, May 31, 1894:

“*Resolved*, That of right it belongs wholly to the people of the Hawaiian Islands to establish and maintain their own form of government and domestic polity; that the United States ought in nowise to interfere therewith, and that any intervention in the political affairs of these islands by any other government will be regarded as an act unfriendly to the United States.” (U.S. House Resolution on Hawai’i, 53 Cong., 2nd Sess., 5499 (1894)).

and that intervention in the political affairs of these islands by other governments will be regarded as an act unfriendly to the Government of the United States. (U.S. Senate Resolution on Hawai'i, 53 Cong., 2nd Sess., 5127 (1894))

Not only do these resolutions acknowledge the executive agreements between Queen Lili'uokalani and President Cleveland, but also these resolutions violate the separation of powers doctrine whereby the President is the sole representative of the United States in foreign relations. "[C]ongressional resolutions on concrete incidents are encroachments upon the power of the Executive Department and are of no legal effect." See Wright, The Control of American Foreign Relations 281 (1922).

On May 4, 1998, Representative Francis Newlands (D-Nevada) introduced House Resolution 259 to the House Committee on Foreign Affairs. Representative Robert Hitt (R-Illinois) reported the Newlands Resolution out of Committee, and entered the House of Representatives for debate on May 17, 1998. Representative Thomas H. Ball (D-Texas) stated on June 15, 1898:

The annexation of Hawai'i by joint resolution is unconstitutional, unnecessary, and unwise. If the first proposition be true, sworn to support the Constitution, we should inquire no further. I challenge not the advocates of Hawaiian annexation, but those who advocate annexation in the form now presented, to show warrant or authority in our organic law for such acquisition of territory. To do so will be not only to subvert the supreme law of the land but to strike down every precedent in our history. ... Why, sir, the very presence of this measure here is the result of a deliberate attempt to do unlawfully that which can not be done lawfully. (55 Cong. 2nd Sess., 5975 (1898)) (Exhibit "C" of Expert Memorandum of Dr. David Keanu Sai, Exhibit "3" of Dr. Sai's Declaration, attached as Exhibit "1" of Defendant's Declaration).

Over the constitutional objections, the House passed the measure and the Newlands Resolution entered the Senate on June 16, 1898. Senators as well objected to the measure on constitutional grounds. In particular, Senator Augustus Bacon (D-Georgia) stated on June 20, 1898:

That a joint resolution for the annexation of foreign territory was necessarily and essentially the subject matter of a treaty, and that it could not be accomplished legally and constitutionally by a statute or joint resolution. If Hawai'i was to be annexed, it ought certainly to be annexed by a constitutional method; and if by a constitutional method it can not be annexed, no Senator ought to desire its annexation sufficiently to induce him to give his support to an unconstitutional measure.

...Now, a statute is this: A Statute is a rule of conduct laid down by the legislative department, which has its effect upon all of those within the jurisdiction. In other words, a statute passed by the Congress of the United States is obligatory upon every person who is a citizen of the United States or a resident therein. A statute can not go outside the jurisdiction of the United States and be

binding upon the subjects of another power. It takes the consent of the subjects of the other power, speaking or giving their consent through their duly authorized government, to be bound by a certain thing which is enacted in this country; and therein comes the necessity for a treaty.

What is it that the House of Representatives has done? ...The friends of annexation, seeing that it was impossible to make the treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House. (Exhibit "D" of Expert Memorandum of Dr. David Keanu Sai, Exhibit "3" of Dr. Sai's Declaration, attached as Exhibit "1" of Defendant's Declaration).

Notwithstanding the constitutional objections, the Senate passed the resolution on July 6, 1898, and President McKinley signed the joint resolution into law on July 7, 1898. Since 1900, the United States Congress has enacted additional legislation establishing a government in 1900 for the Territory of Hawai'i (31 U.S. Stat. 141), and in 1959 transformed the Territory of Hawai'i into the State of Hawai'i (73 U.S. Stat. 4). According to Born, "American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction." See Born, International Civil Litigation in United States Courts 493 (3rd ed. 1996). In Rose v. Himely, 8 U.S. 241, 279 (1807), the Court illustrated this view by asserting, "that the legislation of every country is territorial." In The Apollon, 22 U.S. 362, 370 (1824), the Court stated that the "laws of no nation can justly extend beyond its own territory" for it would be "at variance with the independence and sovereignty of foreign nations," Id., and in U.S. v. Belmont, 301 U.S. 324, 332 (1937), Justice Sutherland resounded, "our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens." Consistent with this view of non-extraterritoriality of legislation, *acting* Assistant Attorney General Douglas Kmiec opined: "It is...unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea." See Kmiec, Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. Off. Legal Counsel 238-263, 252 (1988).

Because U.S. legislation has no extraterritorial force and effect, except over U.S. citizens, it cannot be considered to have extinguished the Hawaiian Kingdom as a state, and the executive agreements are *prima facie* evidence that the United States recognizes the sovereignty and legal order of the Hawaiian Kingdom despite the overthrow of its government. §207(a), Restatement (Third) Foreign Relations Law of the United States, provides that "A state acts through its

government, but the state is responsible for carrying out its obligation under international law regardless of the manner in which its constitution and laws allocate the responsibilities and functions of government, or of any constitutional or other internal rules or limitations.” And §115(b), Restatement (Third) Foreign Relations Law, provides that “although a subsequent act of Congress may supersede a rule of international law or an international agreement as domestic law, the United States remains bound by the rule or agreement internationally... Similarly, the United States remains bound internationally when a principle of international law or a provision in an agreement of the United States is not given effect because it is inconsistent with the Constitution.”

By virtue of the temporary and conditional grant of Hawaiian executive power, the U.S. was obligated to restore the Hawaiian Kingdom government, but instead illegally occupied the Hawaiian Kingdom for military purposes on August 12, 1898 during the Spanish-American War, and has remained in the Hawaiian Islands ever since. See Sai, A Slippery Path Towards Hawaiian Indigeneity, 10 *Journal of Law and Social Challenges* 68-133 (Fall 2008). The failure to administer Hawaiian Kingdom law under the *Lili'uokalani Assignment* and then to reinstate the Hawaiian government under the *Restoration agreement* constitutes a breach of an international obligation, as defined by the *Responsibility of States for Internationally Wrongful Acts*, (see United Nations, Responsibility of States for International Wrongful Acts (2001), Article 12), and the breach of this international obligation by the U.S. has “a continuing character [that] extends over the entire period during which the act continues and remains not in conformity with the international obligation.” *Id.*, Article 14(2) The extended lapse of time has not affected in the least the international obligation of the U.S. under the both executive agreements; despite over a century of non-compliance and prolonged occupation, and according to Wright, the President binds “himself and his successors in office by executive agreements.” See Wright, The Control of American Foreign Relations 235 (1922). More importantly, the U.S. “may not rely on the provisions of its internal law as justification for failure to comply with its obligation.” See Responsibility of States, Article 31(1).

According to Professor Marek, “the legal order of the occupant is...strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness [e.g. no government]. ...[Occupation] is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned.” See Marek, Identity and Continuity of States in Public International Law (1968), 102. Referring to the United States’ occupation of the Hawaiian Kingdom in his law journal article, Dumberry states:

the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied. See Dumberry, The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom's Claim to Continue as an Independent State under International Law, 2(1) Chinese Journal of International Law 655-684 (2002).

In Belmont, Pink, and Garamendi, the Court gave effect to the express terms of an executive agreement that extinguishes all underlying claims of relief sought under State law. The *Lili'uokalani assignment* mandates the President to administer Hawaiian Kingdom law until the Hawaiian Kingdom government can be restored as mandated by the *Agreement of restoration*. Instead, the State of Hawai'i was established by an Act of Congress in 1959, which is an encroachment on the executive power of the President, and the recognized principle of the "exclusive power of the President as the sole organ of the federal government in the field of international relations," See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

The *Lili'uokalani assignment* and the *Agreement of restoration* are Federal matters under the exclusive authority of the President by virtue of Article II of the U.S. Constitution. This court cannot exercise subject matter jurisdiction without violating *Supremacy clause*, notwithstanding the general principle that there is a presumption that State courts possess concurrent jurisdiction with Federal courts over Federal matters. In Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981), the Court stated, "the presumption of concurrent jurisdiction can be rebutted by...a clear incompatibility between state court jurisdiction and federal interests." The *Lili'uokalani assignment* and the *Agreement of restoration* divests this Court from exercising subject matter jurisdiction over matters being exclusively Federal because the 1893 Executive Agreements binds the Federal government to administer Hawaiian Kingdom law and to restore the Hawaiian Kingdom government, notwithstanding a century long of non-compliance. Therefore, the *Lili'uokalani assignment* and the *Agreement of restoration*, being executive agreements, expressly precludes this Court from exercising subject matter jurisdiction within the territorial dominion of the Hawaiian Kingdom, and consequently the presumption of concurrent jurisdiction over Federal matters is rebuttable because of a "clear incompatibility between state court jurisdiction and federal interests." See Id.

Additional evidence of the Hawaiian Kingdom's continuity as a state in accordance with recognized attributes of a state's sovereign nature was the international arbitration case, Lance Larsen v. Hawaiian Kingdom, 119 International Law Reports 566 (2001), at the Permanent Court

of Arbitration, The Hague, Netherlands, whereby only states have access to international proceedings at the Permanent Court of Arbitration. See Bederman, David, & Hilbert, Kurt, “Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii” *American Journal of International Law* 95 (2001): 927; Dumberry, Patrick, “The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law,” *Chinese Journal of International Law* 2(1)(2002): 65; Sai, David Keanu, “American Occupation of the Hawaiian State: A Century Gone Unchecked,” *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 46; and Sai, David Keanu, “A Slippery Path towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its Use and Practice in Hawai‘i today,” *Journal of Law and Social Challenges* 10 (Fall 2008): 165.

In the Twenty-sixth Legislature of the State of Hawai‘i (2011), Representative Mele Carroll introduced House Concurrent Resolution 107 “Establishing a Joint Legislative Investigating Committee to Investigate the Status of Two Executive Agreements entered into in 1893 between the United States President Grover Cleveland and Queen Lili‘uokalani of the Hawaiian Kingdom, called the *Lili‘uokalani Assignment* and the *Agreement of Restoration*.” Representative Carroll stated that the purpose of House Concurrent Resolution 107 is to:

ensure that we, as Legislators, who took an oath to support and defend not only the Constitution of the State of Hawai‘i, but also the Constitution of the United States, must be mindful of our fiduciary duty and obligation to conform to the *Supremacy Clause* of the United States Constitution. As Majority Whip for the House of Representatives of the State of Hawai‘i, it is my duty to bring the executive agreements to the attention of the Hawai‘i State Legislature and that the joint investigating committee have the powers necessary to receive all information for its final report to the Legislature. (See News Release—Office of Rep. Mele Carroll, March 14, 2011, <http://MeleCarroll.wordpress.com>)

VI. REQUEST FOR JUDICIAL NOTICE

Judicial notice is the act by which a court recognizes the existence and truth of certain facts that have a bearing on the case. “All courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government, and that extent and boundaries of the territory under which they can exercise jurisdiction.” See 29 Am.Jur.2d Evidence, §83 (2008). “State and federal courts must judicially notice all treaties [executive agreements] of the United States.” *Id.*, §123. “When considering a treaty [executive agreement], courts must take judicial notice of all facts connected therewith which may be necessary for its interpretation or enforcement, such as the historical data leading up to the making of the treaty [executive agreement].” *Id.*, §126. Rule 201(d) of the Hawai‘i Rules of Evidence states that the Court is

mandated to “take judicial notice if requested by a party and supplied with the necessary information,” provided the Defendant supplies the Court with data consistent with the requirement of Rule 201(b). See Rule 201 Commentary, Hawai‘i Rules of Evidence, at 401.

Exhibits “A,” “B,” “C,” and “D” of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit “1” to Declaration of Defendant herein, are copies of official government publications. Exhibits “A” and “B” are copies made under the seal of the United States Department of State’s government printing office, 1895; and exhibits “C” and “D” are copies from the United States Congress government printing office, 1898. Exhibit “2” of Declaration of Defendant is a copy “A Study Prepared for the Committee on Foreign Relations United States Senate by the Congressional Research Service Library of Congress” from the United States government printing office, 2001. Exhibit “3” of Declaration of Defendant is a copy from the State of Hawai‘i House of Representatives, Twenty-sixth Legislature, 2011, which is an official government publication. Rule 902 of the Hawai‘i Rules of Evidence states that “**extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to ... (5) Official publications.**” According to 3 Wigmore (Evidence) §1684 (1904):

In general, then, where an official printer is appointed, his printed copies of official documents are admissible. It is not necessary that the printer should be an officer in the strictest sense, nor that he should be exclusively concerned with official work; it is enough that he is appointed by the Executive to print official documents. **As for authentication of his copies, it is enough that the copy offered purports to be printed by authority of the government; its genuineness is assumed without further evidence.**

In Flagstar Bank v. Kuilipule, civil no. 11-1-0387, this Court has already taken judicial notice of the exhibits herein, and pursuant to Myers v. Cohen, 67 Haw. 389, 688 P.2d 1145 (1984), a circuit court can take judicial notice of pleadings, findings of fact and conclusions of law, and judgments contained in file in another case in the same circuit. DEFENDANT hereby formally requests this Court to take judicial notice pursuant to Rules 201(d) and 902(5), Hawai‘i Rules of Evidence, of the following:

- *Lili‘uokalani assignment*, January 17, 1893, (Exhibit “A” of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit “1” to Declaration of Defendant) comprising of an exchange of diplomatic notes acknowledging the assignment of executive power and conclusions of a Presidential investigation (United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office, 443-464, 1895);
- *Agreement of restoration*, December 18, 1893, (Exhibit “B” of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit “1” to Declaration of Defendant) comprising an exchange of diplomatic notes that acknowledged negotiations and settlement of the illegal overthrow of the Hawaiian Kingdom government and its

restoration (United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office, 1269-1270; 1283-1284, 1895);

- Statements made on the floor of the House of Representatives by Representative Thomas Ball (Exhibit “C” of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit “1” to Declaration of Defendant) are copies from the 55th Cong. 2nd Sess., 5975-5976 (1898);
- Statements made on the floor of the Senate by Senator Augustus Bacon (Exhibit “D” of Expert Memorandum of Dr. David Keanu Sai attached as Exhibit “1” to Declaration of Defendant) are copies from the 55th Cong., 2nd Sess., 6148-6150 (1898).
- “A Study Prepared for the Committee on Foreign Relations United States Senate by the Congressional Research Service Library of Congress” (Exhibit “2” to Declaration of Defendant) from the United States government printing office, 2001.
- House Concurrent Resolution no. 107 (Exhibit “3” to Declaration of Defendant) is a copy from the State of Hawai‘i House of Representatives, Twenty-sixth Legislature, 2011.

VII. CONCLUSION

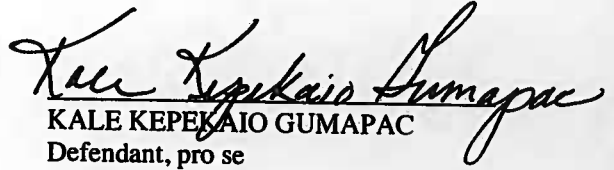
The *Lili‘uokalani assignment* and the *Agreement of restoration*, being executive agreements entered into under the sole authority of the President in foreign relations provides the factual and legal basis “for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state’s sovereign nature,” Lorenzo, 221. As treaties, these executive agreements continue to remain binding upon the office of the President, and present irrefutable evidence that “the Sovereign Kingdom of Hawaii is currently recognized by the federal government,” as inquired by Judge O’Scannlain in United States v. Lorenzo (1992), and by Judge Heen in Lorenzo (1994). Therefore, this Court should dismiss this case because the Circuit Court of the Third Circuit of the State of Hawai‘i lacks subject matter jurisdiction over matters exclusively Federal, in particular, under the exclusive authority of the current President to faithfully discharge his duties under the 1893 executive agreements, being the successor in office to President Grover Cleveland.

In event the Court grants or denies the instant Motion, DEFENDANT requests the Court to direct the prevailing party to draft proposed findings of fact and conclusions of law for the granting or denial of the DEFENDANT’S motion to dismiss under Rule 12(b)(1), Hawaii Rules of Civil Procedure. Pursuant to Rule 52, Hawaii Rules of Civil Procedure, the Court is requested

to direct the prevailing party to (a) submit proposed findings of fact and conclusions of laws and (b) a draft decision.

Prior to rendering its final order, the Court is requested to ask the prevailing party to draft findings of fact, conclusions of law and a draft decision. This will provide a clear record in the event an appeal is filed.

Dated: Keaau, Hawai'i, January 13, 2012.


KALE KEPEKAIIO GUMAPAC
Defendant, pro se

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

DEUTSCHE BANK NATIONAL TRUST	)	CIVIL NO. 11-1-0590
COMPANY, AS TRUSTEE IN TRUST FOR THE)	
BENEFIT OF THE CERTIFICATE HOLDERS)	
FOR ARGENT SECURITIES INC., ASSET-	)	DECLARATION OF KALE
BACKED PASS-THROUGH CERTIFICATES,	)	KEPEKAIO GUMAPAC; EXHIBITS
SERIES 2006-W2,	)	"1-3"
)	
Plaintiff,)	
)	
vs.)	
)	
DIANNE DEE GUMAPAC; KALE KEPEKAIO)	
GUMAPAC; JOHN DOES 1-50; AND JANE)	
DOES 1-50,)	
)	
Defendants.)	

DECLARATION OF KALE KEPEKAIO GUMAPAC

I, KALE KEPEKAIO GUMAPAC, do hereby declare as follows:

1. Attached to this Declaration as Exhibit "1" is a true and correct copy of the Declaration of Dr. Keanu Sai and exhibits attached thereto.
2. Attached as Exhibit "2" is a true and correct copy of "A Study Prepared for the Committee on Foreign Relations United States Senate by the Congressional Research Service Library of Congress" (United States government printing office, 2001).
3. Attached as Exhibit "3" is a true and correct copy of House Concurrent Resolution no. 107 (House of Representatives, Twenty-Sixth Legislature, 2011, State of Hawai'i).

I, KALE KEPEKAIO GUMAPAC, DO DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE AND CORRECT.

Dated: Keaau, Hawai'i, January 13, 2012.

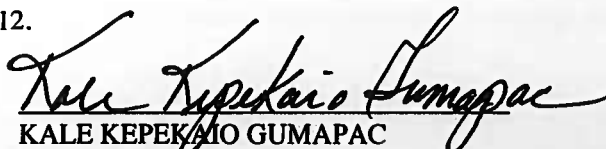

KALE KEPEKAIO GUMAPAC
Defendant, pro se

Exhibit “1”

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

DEUTSCHE BANK NATIONAL TRUST	)	CIVIL NO. 11-1-0590
COMPANY, AS TRUSTEE IN TRUST FOR)	
THE BENEFIT OF THE CERTIFICATE)	
HOLDERS FOR ARGENT SECURITIES INC.,	)	DECLARATION OF DAVID KEANU
ASSET-BACKED PASS-THROUGH	)	SAI, PH.D.; EXHIBITS "1-5"
CERTIFICATES, SERIES 2006-W2,)	
)	
Plaintiff,)	
)	
vs.)	
)	
DIANNE DEE GUMAPAC; KALE KEPEKAIO)	
GUMAPAC; JOHN DOES 1-50; AND JANE)	
DOES 1-50,)	
)	
Defendants.)	
_____)	

DECLARATION OF DAVID KEANU SAI, PH.D

I, DAVID KEANU SAI, declare under penalty that the following is true and correct:

1. I have a Ph.D. in political science specializing in international relations, international law, U.S. constitutional law and Hawaiian constitutional law. My contact information is 47-605 Puapo'o Place, Kaneohe, Hawai'i, 96744, 808-383-6100 and e-mail address at keanu.sai@gmail.com.
2. Attached herein as Exhibit "1" is a true and correct copy of my Ph.D. degree in Political Science.
3. Attached herein as Exhibit "2" is a true and correct copy of my Curriculum Vitae verifying my qualifications to testify as an expert on such matters. I have previously been qualified and testified as an expert witness, on matters referred to hereinabove, in the District Court of the Third Circuit.
4. Attached herein as Exhibit "3" is a true and correct copy of my "Expert Memorandum on the Legal Continuity of the Hawaiian Kingdom as an Independent and Sovereign State (November 28, 2010)."
5. Attached herein as Exhibit "A" of Exhibit "3" is a true and correct copy of the *Lili'uokalani assignment* through exchange of diplomatic notes, 53rd Congress, Executive Documents on Affairs in Hawaii: 1845-95, (Government Printing Office, U.S. State Department, 1895), p. 445-464.

6. Attached herein as Exhibit “B” of Exhibit “3” is a true and correct copy of the *Agreement of restoration* through exchange of diplomatic notes, 53rd Congress, Executive Documents on Affairs in Hawaii: 1845-95, (Government Printing Office, U.S. State Department, 1895), p. 1269-1284.
7. Attached herein as Exhibit “C” of Exhibit “3” is a true and correct copy of statements made on the floor of the House of Representatives by Representative Thomas Ball, 55th Cong. 2nd Sess., 5975-5976 (1898).
8. Attached herein as Exhibit “D” of Exhibit “3” is a true and correct copy of statements made on the floor of the Senate by Senator Augustus Bacon, 55th Cong. 2nd Sess., 6148-6150.
9. I am qualified and competent to testify as an expert witness in matters concerning my “Expert Memorandum on the Legal Continuity of the Hawaiian Kingdom as an Independent and Sovereign State (November 28, 2010)” attached herein as Exhibit “3.”
10. My doctoral dissertation and law reviewed article published in the *Journal of Law and Social Challenges*, (San Francisco School of Law), Vol. 10 (Fall 2008), p. 68-133, centers on two executive agreements entered into between President Grover Cleveland of the United States and Queen Lili‘uokalani of the Hawaiian Kingdom. The first executive agreement was a temporary and conditional assignment of executive power to the President of the United States by Queen Lili‘uokalani under threat of war, and the second executive agreement was an agreement of restoration of the Hawaiian Kingdom government whereby the Queen thereafter would grant amnesty to the insurgents.
11. On January 17, 1893, Queen Lili‘uokalani temporarily and conditionally assigned executive power she was constitutionally vested with under Article 31 of the Hawaiian constitution to the President of the United States under threat of war (attached herein as Exhibit “A” of Exhibit “3”, at 461), to wit:

I, Liliuokalani, by the grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a provisional government of and for this Kingdom.

That I yield to the superior force of the United States of America, whose minister plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be

landed at Honolulu and declared that he would support the said provisional government.

Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

12. It wasn't until President Grover Cleveland was inaugurated on March 4, 1893, that the assignment was accepted and a Presidential investigation was initiated to investigate the overthrow of the Hawaiian Kingdom government. The acknowledgment of the assignment was noted in a dispatch of special instructions by Secretary of State Walter Gresham to newly commissioned Minister Plenipotentiary Albert Willis dated October 18, 1893, who was preparing to depart for the Hawaiian Kingdom after the investigation was completed (attached herein as Exhibit "A" of Exhibit "3", Document no. 4, at 463-64), to wit:

The Provisional Government was not established by the Hawaiian people, or with their consent or acquiescence, nor has it since existed with their consent. The Queen refused to surrender her powers to the Provisional Government until convinced that the minister of the United States had recognized it as the *de facto* authority, and would support and defend it with the military force of the United States, and that resistance would precipitate a bloody conflict with that force. She was advised and assured by her ministers and by leaders of the movement for the overthrow of her government, that if she surrendered under protest her case would afterwards be fairly considered by the President of the United States. The Queen finally wisely yielded to the armed forces of the United States then quartered in Honolulu, relying upon the good faith and honor of the President, when informed of what had occurred, to undo the action of the minister and reinstate her and the authority which she claimed as the constitutional sovereign of the Hawaiian Islands.

13. The Presidential investigation concluded that the Hawaiian government was to be restored, and in the same aforementioned dispatch to Minister Plenipotentiary Willis dated October 18, 1893, Secretary of State Gresham directed Willis (*Id.*, at 464), to wit:

On your arrival at Honolulu you will take advantage of an early opportunity to inform the Queen of this determination, making known to her the President's sincere regret that the reprehensible conduct of the American minister and the unauthorized presence on land of a military force of the United States obliged her to surrender her sovereignty, for the time being, and rely on the justice of this Government to undo the flagrant wrong.

You will, however, at the same time inform the Queen that, when reinstated, the President expects that she will pursue a magnanimous course by granting full amnesty to all who participated in the movement against her, including persons who are, or have

been, officially or otherwise, connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution. All obligations created by the Provisional Government in due course of administration should be assumed.

14. After nearly a month of negotiations with U.S. Minister Willis, Queen Lili‘uokalani agreed to the President’s conditions of restoration and on December 18, 1893, she signed the following declaration (attached herein as Exhibit “B” of Exhibit “3”, Document no. 16, at 1269-70), to wit:

I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both native and foreign born, do hereby and herein solemnly declare and pledge myself that, if reinstated as the constitutional sovereign of the Hawaiian Islands, that I will immediately proclaim and declare, unconditionally and without reservation, to every person who directly or indirectly participated in the revolution of January 17, 1893, a full pardon and amnesty for their offenses, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof, and that I will forbid and prevent the adoption of any measures of proscription or punishment for what has been done in the past by those setting up or supporting the Provisional Government. I further solemnly agree to accept the restoration under the constitution existing at the time of said revolution and that I will abide by and fully execute that constitution with all the guaranties as to person and property therein contained. I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown

15. On December 20, 1893, Minister Willis dispatched the signed declaration to the Secretary of State, and in a dispatch to Willis dated January 12, 1893, Gresham acknowledged the Queen’s declaration of acceptance of the conditions (Id., 1283-84), to wit:

Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested, but that the Provisional Government refuses to acquiesce in the President’s decision.

...In the mean time, while keeping the Department fully informed of the course of events, you will, until further notice, consider that your special instructions upon this subject have been fully complied with.

16. These agreements between the President and the Queen are called sole-executive agreements, and according to the U.S. Supreme Court in *United States v. Belmont*, 301 U. S. 324 (1937), *United States v. Pink*, 315 U.S. 203 (1942), *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), sole executive agreements do not require ratification by the Senate or approval by Congress to have

the force and effect of a treaty. In *American Insurance Association v. Garamendi*, 539 U.S. 396, 398 (2003), the U.S. Supreme Court stated, “valid executive agreements are fit to preempt state law, just as treaties are.”

17. In *U.S. v. Belmont*, U.S. Attorney Lamar Hardy for Southern District of New York relied on a 1933 sole-executive agreement between President Franklin D. Roosevelt and the Soviet Union’s People’s Commissar for Foreign Relations Maxim M. Litvinov, which is similar in form to the *Lili‘uokalani assignment* and the *Agreement of restoration*. The purpose of the executive agreement was that it was an assignment that released and assigned to the United States all amounts to which the Soviet Government was entitled to within the United States as the successor to former governments of Russia.
18. Attached herein as Exhibit “4” is a true and correct copy of the amended Complaint (excepting Exhibits “1”, “2”, “4”, “5” and “6”), filed by United States Attorney Lamar Hardy in the United States District Court for the Southern District of New York on April 3, 1936. The amended Complaint has a transcription of the sole-executive agreement identified as Exhibit “3.” The transcription of the agreement is from the government publication of *Foreign Relations of the United States, Diplomatic Papers, The Soviet Union: 1933-1939*, (Government Printing Office, 1952), p. 35-36, published under the Seal of U.S. Department of State.
19. Attached herein as Exhibit “5” is a true and correct copy of the U.S.-Soviet sole-executive agreement from the government publication of *Foreign Relations of the United States, Diplomatic Papers, The Soviet Union: 1933-1939*, (Government Printing Office, 1952), p. 35-36.
20. In similar fashion, the *Lili‘uokalani assignment* and the *Agreement of restoration*, being sole-executive agreements as well, are also from the government publication of *Foreign Relations of the United States*. In both cases, the Hawaiian and Soviet executive agreements are published under the Seal of U.S. Department of State, and as such these copies are self-authenticating pursuant to Rule 902(5) of the Hawai‘i Rules of Evidence.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOLLOWING IS TRUE AND
CORRECT.

DATED: Kane'ohē, O'ahu, Hawai'i, January 13, 2012.

A handwritten signature in black ink, appearing to read "David Keanu Sai". The signature is written in a cursive, flowing style with a period at the end.

David Keanu Sai

Exhibit "1"

The Regents of
The University of Hawai'i
on the recommendation of the Faculty at
University of Hawai'i at Mānoa

have conferred upon
David Keam Sai

the degree of
Doctor of Philosophy
Political Science

with all its privileges and obligations
Given at Honolulu, Hawai'i, this twentieth day of December,
two thousand eight

Viggo D. Hinckley
Chancellor

Allan R. Landon
Chairperson, Board of Regents



David McClain
President

Exhibit "2"

Curriculum Vitae

DR. DAVID KEANU SAI, Ph.D.



EXPERTISE:

International relations, state sovereignty, international laws of occupation, United States constitutional law, Hawaiian constitutional law, and Hawaiian land titles.

ACADEMIC QUALIFICATIONS:

- Dec. 2008: Ph.D. in Political Science specializing in international law, state sovereignty, international laws of occupation, United States constitutional law, and Hawaiian constitutional law, University of Hawai'i, Manoa, H.I.
- Doctoral dissertation titled, "American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State."
- May 2004: M.A. in Political Science specializing in International Relations, University of Hawai'i, Manoa, H.I.
- May 1987: B.A. in Sociology, University of Hawai'i, Manoa, H.I.
- May 1984: A.A. in Pre-Business, New Mexico Military Institute, Roswell, N.M., U.S.
- May 1982: Diploma, Kamehameha Schools, Honolulu, H.I.

TEACHING EXPERIENCE:

Graduate Assistant (Political Science), University of Hawai'i at Manoa

47-605 Puapo'o Place
Kane'ohe, HI 96744
Tel: (808) 383-6100
anu@hawaii.edu

- Fall 2004 – Spring 2005
- Fall 2005 – Spring 2006
- Fall 2006 – Spring 2007

Fall 2011

- Hawaiian Studies 107 (online course), *Introduction to the History of the Hawaiian People*, Windward Community College
- Hawaiian Studies 255 (online course), *Introduction to the Hawaiian Kingdom*, Windward Community College

Spring 2011

- Hawaiian Studies 107, *Introduction to the History of the Hawaiian People*, Windward Community College
- Hawaiian Studies 107, *Introduction to the History of the Hawaiian People*, Windward Community College
- Hawaiian Studies 107 (online course), *Introduction to the History of the Hawaiian People*, Windward Community College
- Hawaiian Studies 190-V, *Hawaiian Land Tenure*, University of Hawai`i Maui College

Fall 2010

- Hawaiian Studies 107, *Introduction to the History of the Hawaiian People*, Windward Community College

Spring 2010

- Hawaiian Studies 297(WI), *Introduction to the Hawaiian Kingdom*, Kapi`olani Community College

Fall 2009

- Hawaiian Studies 107 (online course), *Introduction to the History of the Hawaiian People*, Kapi`olani Community College

Spring 2009

- Political Science 110, *Introduction to Political Science*, Kapi`olani Community College

Spring 2007

- Political Science 110 (3), *Introduction to Political Science*, University of Hawai`i at Manoa

Fall 2006

- Political Science 110 (6), *Introduction to Political Science*, University of Hawai`i at Manoa

Spring 2006

- Political Science 130 (2), *Introduction to American Politics*, University of Hawai`i at Manoa

Fall 2005

- Anthropology, 699-399, *Hawaiian Land Titles*, co-taught with Ty Tengan, Assistant Professor, University of Hawai`i at Manoa
- Political Science 130 (1), *Introduction to American Politics*, University of Hawai`i at Manoa

Spring 2005

- Anthropology 699, *Introduction to the Hawaiian State*, co-taught with Ty Tengan, Assistant Professor, University of Hawai`i at Manoa
- Political Science 120 (1), *Introduction to World Politics—Hawai`i's View*, University of Hawai`i at Manoa

Fall 2004

- Anthropology 699, *Introduction to the Hawaiian State*, co-taught with Ty Tengan, Assistant Professor, University of Hawai`i at Manoa
- Political Science 120 (2), *Introduction to World Politics—Hawai`i's View*, University of Hawai`i at Manoa

Spring 2004

- Anthropology 750D, *Introduction to the Hawaiian State*, University of Hawai`i at Manoa
- Hawaiian Studies 301(2), *Introduction to the Hawaiian State*, co-taught with Kanalu Young, Associate Professor, University of Hawai`i at Manoa

Fall 2003

- Anthropology 699, *Directed Reading on the Hawaiian State*, co-taught with Ty Tengan, Assistant Professor, University of Hawai`i at Manoa

Spring 2000

- Ethnic Studies 221, *The Hawaiians: A Critical Analysis*, co-taught with Lynette Cruz, Ph.D. candidate, University of Hawai`i at Manoa

PANELS AND PRESENTATIONS:

- *Puana Ka `Ike Lecture Series (Imparting Knowledge)*, Kamehameha Investment Corporation, Keahou Hotel, Kona, Hawai`i. A presentation entitled "1893 Overthrow Settled by Executive Agreements," March 18, 2011.
- "1893 Overthrow Settled by Executive Agreements," *Native Hawaiian Education Association Conference*, Windward Community College, March 18, 2011.
- "The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State." *Sustainability for Biological Engineers Lecture Series*, University of Hawai`i at Manoa, Agricultural Science Bldg. 219, December 7, 2010.

- “1893 Cleveland-Lili`uokalani Executive Agreements and their Impact Today.” Presentation at the *Annual Convention of Hawaiian Civic Clubs*, Sheraton Keauhou Bay Resort & Spa, Island of Hawai`i, November 9, 2010.
- “The History of the Hawaiian Kingdom.” Presentation at the annual convention of the *Victorian Society of Scholars*, Kana`ina Bldg., Honolulu, October 28, 2010.
- “Pu`a Foundation: E pu pa`akai kakou.” Joint presentation with Pu`a Foundation of an educational package and curriculum I authored for teaching Hawaiian history, *Healing Our Spirit World, The Sixth Gathering*, Hawai`i Convention Center, September 7, 2010.
- “Evolution of Hawaiian land Titles and the Impact of the 1893 Executive Agreements.” Sponsored by the County of Maui, Real Property Tax Division, HGEA Bldg, Kahului, June 28, 2010.
- “Evolution of Hawaiian land Titles and the Impact of the 1893 Executive Agreements.” Sponsored by the City & County of Honolulu, Real Property Assessment Division, Mission Memorial Auditorium, June 9, 2010.
- “Hawai`i’s Legal and Political History.” Sponsored by *Kokua A Puni Hawaiian Student Services*, UH Manoa, Center for Hawaiian Studies, UHM, May 26, 2010.
- “Ua Mau Ke Ea: Sovereignty Endured.” Joint presentation with Pu`a Foundation of an educational package and curriculum I authored for teaching Hawaiian history, *Native Hawaiian Education Association Conference*, Windward Community College, March 19, 2010.
- *Puana Ka `Ike Lecture Series (Imparting Knowledge)*, Kamehameha Investment Corporation, Keahou Hotel, Kona, Hawai`i. A presentation entitled “Evolution of Hawaiian Land Titles and its Impact Today,” March 12, 2010.
- “1893 Cleveland-Lili`uokalani Agreement of Restoration (Executive Agreement).” Sponsored by the Haloa Research Center, Baldwin High School Auditorium, February 20, 2010.
- “1893 Cleveland-Lili`uokalani Agreement of Restoration (Executive Agreement).” Sponsored by Kamehameha Schools’ Kula Hawai`i Teachers Professional Development, Kapalama Campus, Konia, January 4, 2010.
- “The Legal and Political History of Hawai`i.” Sponsored by House Representative Karen Awana, National Conference of Native American State Legislators, State of Hawai`i Capital Bldg, November 16, 2009.
- “The Myth of Ceded Lands: A Legal Analysis.” Sponsored by Hawaiian Studies, Ho`a and Ho`okahua (STEM), Maui Community College, Noi`i 12-A, November 2, 2009.

- “The Legal and Political History of Hawai`i.” Presentation to the *Hui Aloha `Aina Tuahine*, Center for Hawaiian Studies, University of Hawai`i at Manoa, October 30, 2009.
- “The Legal and Political History of Hawai`i.” Presentation to *Kahuewai Ola*, Queen Lili`uokalani Center for Student Services, University of Hawai`i at Manoa, October 23, 2009.
- “The Myth of Ceded Lands: A Legal Analysis.” Sponsored by Kamehameha Schools Ka`iwakiloumoku Hawaiian Cultural Events Series, Ke`eliokalani Performing Arts Center, Kamehameha Schools Kapalama campus, October 21, 2009.
- “The Myth of Ceded Lands: A Legal Analysis.” Sponsored by ASUH and Hawaiian Studies, Paliku Theatre, Windward Community College, September 10, 2009.
- *Puana Ka `Ike Lecture Series (Imparting Knowledge)*, Kohana Center/Kamehameha Investment Corporation, Keauhou II Convention Center, Kona, Hawai`i. A presentation entitled “The Myth of Ceded Lands: A Legal Analysis,” March 13, 2009.
- “American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State.” Briefing for Colonel James Herring, Army Staff Judge Advocate, 8th Theater Sustainment Command, and his staff officers, Wheeler AAF Courthouse, U.S. Army Pacific, Wahiawa, Hawai`i, February 25, 2009.
- *Ka Nalu: Towards a Hawaiian National Consciousness*, Symposium of the Hawaiian Society of Law and Politics, University of Hawai`i at Manoa, Imin Conference Bldg (East West Center). Presented a portion of my doctoral dissertation entitled “The Myth of Ceded Lands: A Legal Analysis,” February 28, 2009.
- *Manifold Destiny: Disparate and Converging Forms of Political Analysis on Hawai`i Past and Present*, International Studies Association Annual Conference, San Francisco, California, March 26, 2008. Presented a paper entitled “A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian Nationality and Hawaiian Indigeneity and its Use and Practice in Hawai`i today,” March 26, 2008.
- *Mana Kupuna Lecture Series*, University of Waikato, New Zealand. A presentation entitled “Legal and Political History of the Hawaiian Kingdom,” March 5, 2008.
- *Indigenous Politics Colloquium* speaker series, Department of Political Science, University of Hawai`i at Manoa. Presented an analysis and comparison between Hawaiian State sovereignty and Hawaiian indigeneity and its use and practice in Hawai`i today,” January 30, 2007.
- Conference at Northeastern Illinois University entitled *Dialogue Under Occupation: The Discourse of Enactment, Transaction, Reaction and Resolution*. Presented a paper on a panel entitled “Prolonged Occupation of the Hawaiian Kingdom,” Chicago, Illinois, November 10, 2006.

- The 14th Biennial Asian/Pacific American Midwest Student Conference, “Refocusing Our Lens: Confronting Contemporary Issues of Globalization and Transnationalism.” Presented article “American Occupation of the Hawaiian State: A Century Unchecked” on Militarization Panel, Oberlin College, Ohio, February 18, 2006.
- 2005 American Studies Association Annual Conference. Panelist on a roundtable discussion entitled, “The Case for Hawai`i's Independence from the United States - A Scholarly and Activist Roundtable Discussion,” with Keala Kelly and Professor Kehaulani Kauanui. Renaissance Hotel, Washington, D.C., November 4, 2005.
- Kamehameha Schools 2005 Research Conference on Hawaiian Well-being, sponsored by the Kamehameha Schools *Policy Analysis & Systems Evaluation* (PACE). Presented article “Employing Appropriate Theory when Researching Hawaiian Kingdom Governance” with two other presenters, Malcolm Naea Chun and Dr. Noelani Goodyear-Kaopua. Radisson Prince Kuhio Hotel, Waikiki, October 22, 2005.
- 1st Annual Symposium of the *Hawaiian Society of Law & Politics* showcasing the first edition of the *Hawaiian Journal of Law & Politics* (summer 2004). Presented article “American Occupation of the Hawaiian State: A Century Gone Unchecked,” with response panellists Professor John Wilson, Political Science, and Kanale Sadowski, 3rd year law student, Richardson School of Law. Imin International Conference Center, University of Hawai`i at Manoa, April 16, 2005.
- “A Symposium on Practical Pluralism.” Sponsored by the *Office of the Dean*, William S. Richardson School of Law. Panelist with Professor Williamson Chang and Dr. Kekuni Blaisdell, University of Hawai`i at Manoa, Honolulu, April 16-17, 2004.
- “Mohala A`e: Blooming Forth,” *Native Hawaiian Education Association's 5th Annual Conference*. Presented a workshop entitled “Hawaiian Epistemology.” Windward Community College, Kane`ohe, March 23, 2004.
- “First Annual 'Ahahui o Hawai`i Kukakuka: Perspectives on Federal Recognition.” Guest Speaker at a symposium concerning the Akaka Bill. Sponsored by the *'Ahahui o Hawai`i* (organization of native Hawaiian law students), University of Hawai`i at Manoa Richardson School of Law, Honolulu, March 12, 2004.
- “The Status of the Kingdom of Hawai`i.” A debate with Professor Didrick Castberg, University of Hawai`i at Hilo (Political Science), and moderator Professor Todd Belt University of Hawai`i at Hilo (Political Science). Sponsored by the *Political Science Club*, University of Hawai`i at Hilo, Campus Center, March 11, 2004.
- “The Political History of the Hawaiian Kingdom: Past and Present.” A presentation to the *Hawai`i Island Association of Hawaiian Organizations*, Queen Lili`uokalani Children's Center, Hilo, February 13, 2004.

- “Globalization and the Asia-Pacific Region.” Panel with Dr. Noenoe Silva (Political Science). *East-West Center Spring 2004 Core Course*, Honolulu, February 4, 2004.
- Televised symposium entitled, “Ceded Lands.” Other panelists included Professor Jon Van Dyke (Richardson School of Law) and Professor Lilikala Kame`eleihiwa (Center for Hawaiian Studies). Sponsored by the *Office of Hawaiian Affairs*, Wai’anae, August 2003.
- “Hawai`i’s Road to International Recovery, II.” Sponsored by *Kipuka*, University of Hawai`i at Hilo, September 25, 2003.
- “An Analysis of Tenancy, Title, and Landholding in Old Hawai`i.” Sponsored by *Kipuka*, University of Hawai`i at Hilo, September 26, 2002.
- “The Hawaiian Kingdom in Arbitration Proceedings at the Permanent Court of Arbitration, The Hague, Netherlands.” A presentation at the 6th World Indigenous Peoples Conference on Education, Stoney Park, Morley, Alberta, Canada, August 6, 2002.
- "The Hawaiian Kingdom and the United States of America: A State to State Relationship." *Reclaiming the Legacy*, U.S. National Archives and Records Administration, University of San Francisco, May 4, 2002
- “Hawai`i’s Road to International Recovery.” Sponsored by *Kipuka*, University of Hawai`i at Hilo, April 11, 2002.
- “Hawai`i’s Road to International Recovery,” a presentation to the Officers Corps of the 25th Infantry Division, U.S. Army, Officer’s Club, Schofield Barracks, Wahiawa, February 2001.
- “Lance Larsen vs. the Hawaiian Kingdom,” presentation to the *Native Hawaiian Bar Association*, quarterly meeting, Kana`ina Building, Honolulu, 2001.
- “Hawaiian Political History,” *Hawai`i Community College*, Hilo, March 5, 2001.
- “The History of the Hawaiian Kingdom,” A guest speaker at the *Aloha March* rally in Washington, D.C., August 12, 1998.
- Symposium entitled, “Human Rights and the Hawaiian Kingdom on the occasion of the 50th anniversary of the Universal Declaration of Human Rights.” Other panelist included Francis Boyle (Professor of International Law, University of Illinois), Mililani Trask (Trustee, Office of Hawaiian Affairs), Richard Grass (Lakota Sioux Nation), and Ron Barnes (Tununak Traditional Elders Council, Alaska). University of Hawai`i at Hilo, April 16, 1998.
- Symposium entitled, “Perfect Title Company: Scam or Restoration.” Sponsored by the *Hawai`i Developers Council*, Hawai`i Prince Hotel, Honolulu, August 1997.

PUBLICATIONS:

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- “The Relationship between the Hawaiian Kingdom and the United States”
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- “What does TWA Flight 800 and the Hawaiian Kingdom have in Common”
- “American Migration to the Hawaiian Kingdom and the Push for State into the American Union”
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VIDEO/RADIO:

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Internet Radio: “The Gary Baumgarten Report News Talk Online: Hawai`i 'Kingdom' Proponent Makes Case For An Independent Hawai`i.” Guest on a daily talk internet radio show, <http://garybaumgarten.blogspot.com/2008/04/hawaii-kingdom-proponent-makes-case-for.html>, April 11, 2008.

Radio: “Talk Story with Uncle Charlie.” Guest on a weekly talk radio show. *KNUI AM 900*, Kahului, January 23, 2004.

Radio: “Perspective.” Co-host with Keaumiki Akui for a weekly talk radio show concerning Hawaiian political history. *KCCN AM 1420*, Honolulu, 1999-2001.

Video: “Hawaiian Kingdom Law a Presentation.” *Na Maka o ka Aina*, 1999.

Video: Segments of *Aloha Quest* (six-hour broadcast), KFVE television, Honolulu, December 19, 1999.

- “The Hawaiian Kingdom”
- “What is a Hawaiian subject”
- “Attempted Overthrow of 1893”

- “The Annexation that Never Was”
- “Internal Laws of the United States”
- “Supreme Courts and International Courts”
- “U.S. Senate debate: Apology resolution, Oct. 1993”

LEGAL EXPERIENCE:

- Expert consultant and witness for Defence, *Fukumitsu v. Fukumitsu* (case no. 08-1-0843 RAT)
- Expert consultant and witness for Defence, *Onewest Bank v. Tamanaha* (case no. 3RC 10-1-1306)
- *Pro se* litigant in Complaint filed with the U.S. District Court for the District of Columbia, *Sai v. Obama, Clinton, Gates, Willard and Lingle*, June 1, 2010.
<http://hawaiiankingdom.org/sai-obama.shtml>
- Expert consultant for Petitioner Contested hearing, BLNR, *Kale Gumapac v. OTEC*, 2010.
- Expert consultant and witness for Defence, *State of Hawai`i v. Larsen* (case no. 3DTA 08-03139)
- Expert consultant for Defence, *State of Hawai`i v. Kaulia* (case no. 09-1-0352K)
- Expert consultant and witness for Defence, *State of Hawai`i v. Larsen* (case no. 3DTC 08-023156)
- Expert consultant for Plaintiff, *OHA vs. Housing and Community Development Corp. of Hawaii*, (a.k.a. Ceded Land Case), October-December 2001.
- Agent for the Hawaiian Kingdom in a *Complaint* filed with the United Nations Security Council concerning the U.S. illegal occupation of the Hawaiian Kingdom, July 5, 2001.
<http://hawaiiankingdom.org/united-nations.shtml>
- Agent for the Hawaiian Kingdom in the *Lance Larsen vs. Hawaiian Kingdom* arbitration at the Permanent Court of Arbitration, The Hague, Netherlands, November 1999-September 2001, *International Law Reports*, Volume 119, pp. 566-598.
<http://www.AlohaQuest.com/arbitration/index.htm>
- Plaintiff for the Hawaiian Kingdom in a *Complaint* filed at the U.S. Supreme Court, August 4, 1998, Case No. M-26.
- Plaintiff for the Hawaiian Kingdom in a *Petition for Writ of Mandamus* filed at the U.S. Supreme Court in November 17, 1997, Case No. 97-969.

MILITARY EXPERIENCE:

Aug. 1994: Honourably Discharged
Dec. 1990: Diploma, *U.S. Army Field Artillery Officer Advanced Course*, Fort Sill, OK
May 1990: Promoted to Captain (O-3)
Apr. 1990: Diploma, *U.S. Air Force Air Ground Operations School*, Hurlbert Field, FL
May 1987: Promoted to 1st Lieutenant (O-2)
Sep. 1987: Diploma, *U.S. Army Field Artillery Officer Basic Course*, Fort Sill, OK
Sep. 1984: Assigned to *1st Battalion, 487th Field Artillery*, Hawai`i Army National Guard, Honolulu, H.I.
May 1984: Army Reserve Commission, 2nd Lieutenant (O-1), Early Commissioning Program (ECP) from the New Mexico Military Institute, Roswell, NM

GENERAL DATA:

Nationality: Hawaiian/United States
Born: July 13, 1964, Honolulu, H.I.

Exhibit "3"



Expert Memorandum on the Legal Continuity of the Hawaiian Kingdom as an Independent and Sovereign State

November 28th 2010

According to article I, Montevideo Convention (1933), “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”¹

Synopsis

The Hawaiian Kingdom had these attributes when Great Britain and France entered into a joint proclamation acknowledging and recognizing Hawai`i as an independent and sovereign State on November 28th 1843, and on July 6th 1844, United States Secretary of State John C. Calhoun notified the Hawaiian government of the United States formal recognition of the Hawaiian Kingdom as an independent and sovereign state since December 19th 1842 by President John Tyler.² As a result of the United States’ recognition, the Hawaiian Kingdom entered into a Treaty of Friendship, Commerce and Navigation, Dec. 20th 1849;³ Treaty of Commercial Reciprocity, Jan. 13th 1875;⁴ Postal Convention Concerning Money Orders, Sep. 11th 1883;⁵ and a Supplementary Convention to the 1875 Treaty of Commercial Reciprocity, Dec. 6th 1884.⁶ The Hawaiian Kingdom also entered into treaties with Austria-Hungary, June 18th 1875; Belgium, Oct. 4th 1862; Bremen, March 27th 1854; Denmark, Oct. 19th 1846; France, July 17th 1839, March 26th 1846, Sep. 8th 1858; French Tahiti, Nov. 24th 1853; Germany, March 25th 1879; Great Britain, Nov. 13th 1836 and March 26th 1846; Great Britain’s New South Wales, March 10th

¹ 49 U.S. Stat. 3097, 3100.

² David Keanu Sai, *American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State*, Doctoral Dissertation, University of Hawai`i, Political Science (December 2008), 72; see also David Keanu Sai, *A Slippery Path Towards Hawaiian Indigeneity*, 10 *Journal of Law and Social Challenges* 74 (Fall 2008).

³ 9 U.S. Stat. 977.

⁴ 19 U.S. Stat. 625.

⁵ 23 U.S. Stat. 736.

⁶ 25 U.S. Stat. 1399.



1874; Hamburg, Jan. 8th 1848); Italy, July 22nd 1863; Japan, Aug. 19th 1871, Jan. 28th 1886; Netherlands, Oct. 16th 1862; Portugal, May 5th 1882; Russia, June 19th 1869; Samoa, March 20th 1887; Spain, Oct. 9th 1863; Sweden-Norway, April 5th 1855; and Switzerland, July 20th 1864.

In the 21st century, an international tribunal and the Ninth Circuit Court of Appeals acknowledged the Hawaiian Kingdom's status as an internationally recognized state in the 19th century. In *Larsen v. Hawaiian Kingdom* (2001), the Permanent Court of Arbitration in The Hague stated, "in the nineteenth century the Hawaiian Kingdom existed as an independent State recognized as such by the United States of America, the United Kingdom, and various other States."⁷ The 9th Circuit Court, in *Kahawaiola`a v. Norton* (2004), also acknowledged the Hawaiian Kingdom's status as "a co-equal sovereign alongside the United States;"⁸ and in *Doe v. Kamehameha* (2005), the Court stated that, "in 1866, the Hawaiian Islands were still a sovereign kingdom."⁹

Having established the Hawaiian Kingdom's internationally recognized status as an independent state in the 19th century, the next question is whether or not the Hawaiian Kingdom status as a state was extinguished after its government was overthrown by U.S. troops on January 17th 1893. As a subject of international law, statehood of the Hawaiian Kingdom can only be measured and determined by the rules of international law and not the domestic laws of any State to include the United States and the Hawaiian Kingdom. According to Professor Crawford, "A State is not necessarily extinguished by substantial changes in territory, population or government, or even, in some cases, by a combination of all three."¹⁰ In particular, military "occupation does not extinguish the State pending a final settlement of the conflict. And, generally, the presumption—in practice a strong presumption—favours the continuity and disfavors the extinction of a an established State."¹¹ Professor Wright, a renowned scholar in U.S. foreign relations law, states that, "international law distinguishes between a government and

⁷ *Larsen v. Hawaiian Kingdom*, 119 ILR 566, 581 (2001).

⁸ *Kahawaiola`a v. Norton*, 386 F.3rd 1271 (2004).

⁹ *Doe v. Kamehameha*, 416 F.3d 1025, 1048 (2005).

¹⁰ James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford University Press, 2006), 700.

¹¹ *Id.*, 701.



the state it governs.”¹² And according to §201, Restatement (Third) Foreign Relations Law of the United States, “A state may continue to be regarded as such even though, due to insurrection or other difficulties, its internal affairs become anarchic for an extended period of time;”¹³ and “Military occupation, whether during war or after an armistice, does not terminate statehood.”¹⁴ Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Two contemporary examples illustrate this principle of international law, the overthrow of the Taliban (Afghanistan) in 2001 and of Saddam Hussein (Iraq) in 2003. The former has been a recognized sovereign State since 1919,¹⁵ and the latter since 1932.¹⁶ Professor Dixon explains:

If an entity ceases to possess any of the qualities of statehood...this does not mean that it ceases to be a state under international law. For example, the absence of an effective government in Afghanistan and Iraq following the intervention of the USA did not mean that there were no such states, and the same is true of Sudan where there still appears to be no entity governing the country effectively. Likewise, if a state is allegedly ‘extinguished’ through the illegal action of another state, it will remain a state in international law.¹⁷

After the Hawaiian Kingdom government was illegally overthrown, two executive agreements were entered into between President Cleveland of the United States and Queen Lili`uokalani of the Hawaiian Kingdom in 1893. The President entered into these executive agreements under his sole constitutional authority to represent the United States in foreign relations and the Congress cannot intervene without violating the separation of powers doctrine being an encroachment upon the executive power. The first agreement, called the *Lili`uokalani assignment*, (Exhibit A), assigned executive power to the United States President to administer Hawaiian Kingdom law and to investigate the overthrow of the Hawaiian government. The second agreement, called the *Restoration agreement*, (Exhibit B), obligated the President of the United States to restore the Hawaiian government as it was prior to the landing of U.S. troops on

¹² Quincy Wright, *The Status of Germany and the Peace Proclamation*, 46(2) American Journal of International Law 299-308, 307 (April 1952).

¹³ *Restatement (Third) Foreign Relations Law of the United States*, Reporter’s Note 2, §201.

¹⁴ *Id.*, Reporter’s Note 3.

¹⁵ Manley O. Hudson, *Afghanistan, Ecuador, and the Soviet Union in the League of Nations*, 29 American Journal of International Law 109-116, 110 (1935).

¹⁶ Manley O. Hudson, *The Admission of Iraq to Membership in the League of Nations*, 27 American Journal of International Law 133-138, 133 (1933).

¹⁷ Martin Dixon, *Textbook on International Law*, 6th ed. (Oxford University Press, 2007), 119.



January 16th 1893, and for the Queen, after the government was restored and the executive power returned to grant full amnesty to those members and supporters of the provisional government who committed treason.

First Executive Agreement—Lili`uokalani assignment

On January 17th 1893, Queen Lili`uokalani, by explicit grant, “yielded” her executive power to the President of the U.S. to do an investigation of their diplomat and military troops who illegally landed on Hawaiian territory in violation of Hawai`i’s sovereignty. The Queen specifically stated,

That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government.

Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest, and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.¹⁸

The quintessential question is what “authority” did the Queen yield as the “constitutional sovereign”? This authority is specifically stated in the Hawaiian constitution, which declares, “To the King [Queen] belongs the Executive power.” In *Grieve v. Gulick* (1883),¹⁹ Justice Austin of the Hawaiian Supreme Court stated that, “the Constitution declares [His Majesty] as the executive power of the Government,” which, according to the Indiana Supreme Court, “is the power to ‘execute’ the laws, that is, carry them into effect, as distinguished from the power to make the laws and the power to judge them.”²⁰

¹⁸ United States House of Representatives, 53d Cong., Executive Documents on Affairs in Hawaii: 1894-95, 461 [hereinafter *Executive Documents*.] (Exhibit A).

¹⁹ 5 Hawai`i 73, 76 (1883)

²⁰ *Tucker v. State of Indiana*, 218 Ind. 614, 35 N.E. 2d 270, 291 (1941).



President Cleveland acknowledged receipt of this conditional grant in March when he received the protest from the Queen through her attorney in fact, Paul Neumann, in Washington, D.C. This acceptance of the conditional grant of Hawaiian executive power to investigate is called the *Lili`uokalani Assignment*. In a report to the President after the investigation was completed, Secretary of State Gresham acknowledged the temporary transfer of the Queen's executive power by stating, "The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign."²¹ The President, in his message to Congress, also acknowledged the temporary transfer of executive power. Cleveland stated, the Queen "surrendered not to the provisional government, but to the United States. She surrendered not absolutely and permanently, but temporarily and conditionally until such time as the facts could be considered by the United States."²² This was the first of two international agreements to have taken place through an exchange of diplomatic notes committing the President to the administration of Hawaiian Kingdom law while he investigated the overthrow of the Hawaiian government. The investigation concluded that U.S. Minister John Stevens with the illegal presence of U.S. troops bore the responsibility for the overthrow of the Hawaiian government. As a result, negotiations would ensue whereby a second agreement was sought by the United States to restore the Hawaiian Kingdom government. On the responsibility of State actors, Oppenheim states that "according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologize or express its regret for his behaviour, or to pay damages."²³ Therefore, on October 18th 1893, U.S. Secretary of State Walter Gresham directed U.S. Minister Plenipotentiary Albert Willis to initiate negotiations with Queen Lili`uokalani for settlement and restoration of the Hawaiian Kingdom government. He stated to Willis,

On your arrival at Honolulu you will take advantage of an early opportunity to inform the Queen of...the President's sincere regret that the reprehensible conduct of the American minister and the unauthorized presence on land of a military force of the United States obliged her to surrender her

²¹ Executive Documents, 462 (Exhibit A).

²² *Id.*, 457.

²³ Lassa Oppenheim, *International Law: A Treatise*, 3rd ed., ed. Ronald F. Roxburgh, Vol. II (London: Longmans Green and Co., 1921), 252.



sovereignty, for the time being, and rely on the justice of this Government to undo the flagrant wrong.

You will, however, at the same time inform the Queen that, when reinstated, the President expects that she will pursue a magnanimous course by granting full amnesty to all who participated in the movement against her, including persons who are, or have been, officially or otherwise, connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution. All obligations created by the Provisional Government in due course of administration should be assumed.

Having secured the Queen's agreement to pursue this wise and humane policy, which it is believed you will speedily obtain, you will then advise the executive of the Provisional Government and his ministers of the President's determination of the question which their action and that of the Queen devolved upon him, and that they are expected to promptly relinquish to her constitutional authority.²⁴

On November 13th 1893, Willis met with the Queen at the U.S. Legation in Honolulu, "who was informed that the President of the United States had important communications to make to her."²⁵ Willis explained to the Queen of the "President's sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed."²⁶ In his message to the Congress, the President concluded that the "members of the provisional government and their supporters, though not entitled to extreme sympathy, have been led to their present predicament of revolt against the Government...by the indefensible encouragement and assistance of our diplomatic representative."²⁷ According to Wright, "statements of a decision on fact or policy, authorized by the President, must be accepted by foreign nations as the will of the United States."²⁸ Therefore, the Queen saw these conclusions by the President as representing the "will of the United States," and according Oppenheim, Willis, who was the U.S. envoy accredited to the Hawaiian Kingdom, represented "his home State in the totality of its international relations," and that he was "the mouthpiece of the head of

²⁴ *Executive Documents*, 464 (Exhibit A).

²⁵ *Executive Documents*, 1242.

²⁶ *Id.*

²⁷ *Executive Documents*, 457 (Exhibit A).

²⁸ Quincy Wright, *The Control of American Foreign Relations* (New York: The Macmillan Company, 1922), 22.



his home State and its Foreign Secretary, as regards communications to be made to the State to which he is accredited.”²⁹

The President’s investigation also concluded that members of the provisional government and their supporters committed the crime of treason and therefore subject to the pains and penalties of treason under Hawaiian law. On this note, the Queen was then asked by Willis, “[s]hould you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government?”³⁰ The Queen refused to grant amnesty and referenced Chapter VI, section 9 of the Penal Code, which states, “[w]hoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government.” When asked again if she would reconsider, she responded, “[t]hese people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated.”³¹ In the government transcripts of this meeting, it states that the Queen called for beheading as punishment, but the Queen adamantly denied making such a statement. She later explained that beheading “is a form of punishment which has never been used in the Hawaiian Islands, either before or since the coming of foreigners.”³²

In a follow-up dispatch to Willis, Gresham adamantly stated, “You will insist upon amnesty and recognition of obligations of the Provisional Government as essential conditions of restoration.”³³ In another communication on December 3rd 1893, Gresham directed Willis to continue to negotiate with the Queen, and should she “refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf.”³⁴ Gresham acknowledged that the President had a duty to restore the constitutional government of the Islands, but it was dependent upon an unqualified agreement of the Queen to assume all

²⁹ Oppenheim, *International Law* (3rd ed), 556.

³⁰ *Executive Documents*, 1242.

³¹ *Id.*

³² Lili‘uokalani, *Hawai‘i’s Story by Hawai‘i’s Queen* (Rutland: Charles E. Tuttle Co., Inc., 1964), 247.

³³ *Executive Documents*, 1191.

³⁴ *Id.*



administrative obligations incurred by the Provisional Government, and to grant full amnesty to those individuals instrumental in setting up or supporting the Provisional Government. He stated “The President feels that by our original interference and what followed we have incurred responsibilities to the whole Hawaiian community, and it would not be just to put one party at the mercy of the other.”³⁵ Gresham also stated “Should the Queen ask whether, if she accedes to conditions, active steps will be taken by the United States to effect her restoration, or to maintain her authority thereafter, you will say that the President can not use force without the authority of Congress.”³⁶

Second Executive Agreement—Agreement of restoration

On December 18th 1893, Willis was notified by the Queen’s assistant, Joseph Carter, that she was willing to spare their lives, not, however, their property, which, “should be confiscated to the Government, and they should not be permitted to remain in the Kingdom.”³⁷ But later that day, the Queen sent a communication to Willis. She stated,

Since I had the interview with you this morning I have given the most careful and conscientious thought as to my duty, and I now of my own free will give my conclusions.

I must not feel vengeful to any of my people. If I am restored by the United States I must forget myself and remember only my dear people and my country. I must forgive and forget the past, permitting no proscription or punishment of anyone, but trusting that all will hereafter work together in peace and friendship for the good and for the glory of our beautiful and once happy land.

Asking you to bear to the President and the Government he represents a message of gratitude from me and from my people, and promising, with God’s grace, to prove worthy of the confidence and friendship of your people.”³⁸

An agreement between the two Heads of State had finally been made for settlement of the international dispute called the *Restoration Agreement*. Coincident with the agreement was the temporary and conditional assignment of executive power by the Queen to the President of the

³⁵ *Id.*

³⁶ *Id.*, 1192.

³⁷ *Id.*, 1267.

³⁸ *Id.*, 1269 (Exhibit B).



United States, and that the assignment and agreement to restore the Hawaiian government “did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.”³⁹ Attached to the communication was the following pledge that was dispatched by Willis to Gresham on December 20th 1893.

I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both native and foreign born, do hereby and herein solemnly declare and pledge myself that, if reinstated as the constitutional sovereign of the Hawaiian Islands, that I will immediately proclaim and declare, unconditionally and without reservation, to every person who directly or indirectly participated in the revolution of January 17, 1893, a full pardon and amnesty for their offenses, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof, and that I will forbid and prevent the adoption of any measures of proscription or punishment for what has been done in the past by those setting up or supporting the Provisional Government. I further solemnly agree to accept the restoration under the constitution existing at the time of said revolution and that I will abide by and fully execute that constitution with all the guaranties as to person and property therein contained. I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.⁴⁰

On the same day the Queen accepted the President’s conditions of restoration on December 18th 1893, the President delivered a message to Congress apprising them of the conclusion of his investigation and the pursuit of settlement with the Queen. He was not aware that the Queen accepted the conditions. This was clarified in a correspondence with Willis from Gresham on January 12th 1894, whereby the Queen’s acceptance of the President’s offer was acknowledged, and on the following day, these diplomatic correspondences were forwarded to the Congress by message of the President on January 13th 1893.

Gresham stated,

On the 18th ultimo the President sent a special message to Congress communicating copies of the Mr. Blount’s reports and the instructions given to

³⁹ *U.S. v. Belmont*, 301 U.S. 324, 330 (1937).

⁴⁰ *Executive Documents*, 1269 (Exhibit B).



him and you. On the same day, answering a resolution of the House of Representatives, he sent copies of all correspondence since March 4, 1889, on the political affairs and relations of Hawaii, withholding, for sufficient reasons, only Mr. Stevens' No. 70 of October 8, 1892, and your No. 3 of November 16, 1893. The President therein announced that the conditions of restoration suggested by him to the Queen had not proved acceptable to her, and that since the instructions sent to you to insist upon those conditions he had not learned that the Queen was willing to assent to them. The President thereupon submitted the subject to the more extended powers and wider discretion of Congress, adding the assurance that he would be gratified to cooperate in any legitimate plan which might be devised for a solution of the problem consistent with American honor, integrity, and morality.

Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested, but that the Provisional Government refuses to acquiesce in the President's decision.

The matter now being in the hands of Congress the President will keep that body fully advised of the situation, and will lay before it from time to time the reports received from you, including your No. 3, heretofore withheld, and all instructions sent to you. In the meantime, while keeping the Department fully informed of the course of events, you will, until further notice, consider your special instructions upon this subject have been fully complied with.⁴¹

Supremacy Clause, U.S. Constitution

Since the United States is a Federal government, States within the Federal Union are subject to the supremacy of Federal laws and treaties, in particular, executive agreements. Article VI, clause 2, of the U.S. constitution, provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." This provision of the U.S. constitution is known as the *Supremacy clause* that binds every State of the federal union to faithfully observe. In *United States v. Belmont* (1937),⁴² the U.S. Supreme Court affirmed that executive agreements entered into between the President and a sovereign nation does not require ratification from the U.S. Senate to have the force and effect of a treaty; and executive agreements bind successor Presidents for

⁴¹ *Executive Documents*, 1283-1284 (Exhibit B).

⁴² *United States v. Belmont*, 301 U. S. 324 (1937).



their faithful execution. Other landmark cases on executive agreements are *United States v. Pink* (1942)⁴³ and *American Insurance Association v. Garamendi* (2003).⁴⁴ In *Garamendi*, the Court stated, “Specifically, the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate or approval by Congress.”⁴⁵ According to Justice Douglas, *U.S. v. Pink* (1942), executive agreements “must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy.”⁴⁶

The U.S. Supreme Court has held that under no circumstances could state law be found to legally supersede an agreement between the national government and a foreign country. The external powers of the federal government could be exercised without regard to the laws of any state within the union. In *Belmont*, the Court also stated, “Plainly, the external powers of the United States are to be exercised without regard to state laws or policies,”⁴⁷ and “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.”⁴⁸ In *United States v. Pink* (1942), the Court reiterated, “It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.... But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.... Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.”⁴⁹ Both *Belmont* and *Pink* were reinforced by *American Insurance Association v. Garamendi* (2003), where the Court reiterated, that “valid executive agreements are fit to preempt state law, just as treaties are,”⁵⁰ and that the preemptive power of an executive agreement derives from “the Constitution’s allocation of the foreign relations power

⁴³ *United States v. Pink*, 315 U.S. 203 (1942).

⁴⁴ *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

⁴⁵ *Id.*, 397.

⁴⁶ *U.S. v. Pink*, 315 U.S. 203, 241 (1942).

⁴⁷ *United States v. Belmont*, 301 U. S. 324, 330 (1937).

⁴⁸ *Id.*

⁴⁹ *United States v. Pink*, 315 U.S. 203, 230 (1942).

⁵⁰ *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).



to the National Government.”⁵¹ All three cases affirm that the *Lili`uokalani assignment* preempts all laws and policies of the State of Hawai`i. In *Edgar v. Mite Corporation* (1982), Justice White ruled, “A state statute is void to the extent that it actually conflicts with a valid federal statute; and ‘[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility.’”⁵²

United States’ Violation of the Executive Agreements

Since 1893, the United States government has violated the terms of its obligations under these executive agreements and in 1898 unilaterally annexed the Hawaiian Kingdom by enacting a congressional joint resolution justified as a military necessity during the Spanish-American War, and thereafter occupied Hawai`i. After the President, by Presidential Message on January 13th 1894, apprised the Congress of the *Restoration agreement* with Queen Lili`uokalani, both the House of Representatives⁵³ and Senate⁵⁴ took deliberate steps “warning the President against the employment of forces to restore the monarchy of Hawaii.”⁵⁵ Senator Kyle’s resolution introduced on May 23rd 1894 specifically addresses the *Agreement of restoration*. The resolution

⁵¹ *Id.*

⁵² *Edgar v. Mite Corporation*, 457 U.S. 624, 631 (1982).

⁵³ House Resolution on the Hawaiian Islands, February 7, 1894:

“*Resolved*, First. That it is the sense of this House that the action of the United States minister in employing United States naval forces and illegally aiding in overthrowing the constitutional Government of the Hawaiian Islands in January, 1893, and in setting up in its place a Provisional Government not republican in form and in opposition to the will of a majority of the people, was contrary to the traditions of our Republic and the spirit of our Constitution, and should be condemned. Second. That we heartily approve the principle announced by the President of the United States that interference with the domestic affairs of an independent nation is contrary to the spirit of American institutions. And it is further the sense of this House that the annexation of the Hawaiian Islands to our country, or the assumption of a protectorate over them by our Government is uncalled for and inexpedient; that the people of that country should have their own line of policy, and that foreign intervention in the political affairs of the islands will not be regarded with indifference by the Government of the United States.” (U.S. Senate Resolution on Hawai‘i, 53 Cong., 2nd Sess., 2000 (1894)).

⁵⁴ Senate Resolution on the Hawaiian Islands, May 31, 1894:

“*Resolved*, That of right it belongs wholly to the people of the Hawaiian Islands to establish and maintain their own form of government and domestic polity; that the United States ought in nowise to interfere therewith, and that any intervention in the political affairs of these islands by any other government will be regarded as an act unfriendly to the United States.” (U.S. House Resolution on Hawai‘i, 53 Cong., 2nd Sess., 5499 (1894)).

⁵⁵ Edward Corwin, *The President’s Control of Foreign Relations*, (Princeton: Princeton University Press, 1917), 45



was later revised by Senator Turpie and passed by the Senate on May 31st 1894. Senator Kyle's resolution stated:

Resolved, That it be the sense of the Senate that the Government of the United States shall not use force for the purpose of restoring to the throne the deposed Queen of the Sandwich Islands or for the purpose of destroying the existing Government: that, the Provisional having been duly recognized, the highest international interests require that it shall pursue its own line of polity, and that intervention in the political affairs of these islands by other governments will be regarded as an act unfriendly to the Government of the United States. (U.S. Senate Resolution on Hawai'i, 53 Cong., 2nd Sess., 5127 (1894))

Not only do these resolutions acknowledge the executive agreements between Queen Lili'uokalani and President Cleveland, but also these resolutions violate the separation of powers doctrine whereby the President is the sole representative of the United States in foreign relations. According to Professor Wright, "congressional resolutions on concrete incidents are encroachments upon the power of the Executive Department and are of no legal effect."⁵⁶

On May 4th 1998, Representative Francis Newlands (D-Nevada) introduced House Resolution 259 to the House Committee on Foreign Affairs. Representative Robert Hitt (R-Illinois) reported the Newlands Resolution out of Committee, and entered the House of Representatives for debate on May 17th 1998. Representative Thomas H. Ball (D-Texas) stated on June 15th 1898:

The annexation of Hawai'i by joint resolution is unconstitutional, unnecessary, and unwise. If the first proposition be true, sworn to support the Constitution, we should inquire no further. I challenge not the advocates of Hawaiian annexation, but those who advocate annexation in the form now presented, to show warrant or authority in our organic law for such acquisition of territory. To do so will be not only to subvert the supreme law of the land but to strike down every precedent in our history. ...Why, sir, the very presence of this measure here is the result of a

⁵⁶ Quincy Wright, *The Control of American Foreign Relations*, (New York: The Macmillan Company, 1922), 281.



deliberate attempt to do unlawfully that which can not be done lawfully.⁵⁷

Over the constitutional objections, the House passed the measure and the Newlands Resolution entered the Senate on June 16, 1898. Senators as well objected to the measure on constitutional grounds. In particular, Senator Augustus Bacon (D-Georgia) stated on June 20th 1898:

That a joint resolution for the annexation of foreign territory was necessarily and essentially the subject matter of a treaty, and that it could not be accomplished legally and constitutionally by a statute or joint resolution. If Hawai'i was to be annexed, it ought certainly to be annexed by a constitutional method; and if by a constitutional method it can not be annexed, no Senator ought to desire its annexation sufficiently to induce him to give his support to an unconstitutional measure.⁵⁸

...Now, a statute is this: A Statute is a rule of conduct laid down by the legislative department, which has its effect upon all of those within the jurisdiction. In other words, a statute passed by the Congress of the United States is obligatory upon every person who is a citizen of the United States or a resident therein. A statute can not go outside the jurisdiction of the United States and be binding upon the subjects of another power. It takes the consent of the subjects of the other power, speaking or giving their consent through their duly authorized government, to be bound by a certain thing which is enacted in this country; and therein comes the necessity for a treaty.⁵⁹

What is it that the House of Representatives has done? ...The friends of annexation, seeing that it was impossible to make the treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House.⁶⁰

⁵⁷ United States Congress, 55th Cong., 2nd Session, 31 Congressional Record: 1898, 5975 (Exhibit C).

⁵⁸ *Id.*, 6148 (Exhibit D).

⁵⁹ *Id.*, 6150 (Exhibit D).

⁶⁰ *Id.* (Exhibit D).



Notwithstanding the constitutional objections, the Senate passed the resolution on July 6th 1898, and President McKinley signed the joint resolution into law on July 7th 1898. Since 1900, the United States Congress has enacted additional legislation establishing a government in 1900 for the Territory of Hawai`i,⁶¹ and in 1959 transformed the Territory of Hawai`i into the State of Hawai`i.⁶² According to Born, “American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction.”⁶³ In *Rose v. Himely* (1807),⁶⁴ the Court illustrated this view by asserting, “that the legislation of every country is territorial.” In *The Apollon* (1824),⁶⁵ the Court stated that the “laws of no nation can justly extend beyond its own territory” for it would be “at variance with the independence and sovereignty of foreign nations,”⁶⁶ and in *Belmont*,⁶⁷ Justice Sutherland resounded, “our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens.” Consistent with this view of non-extraterritoriality of legislation, *acting* Assistant Attorney General Douglas Kmiec opined “It is...unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.”⁶⁸

Because U.S. legislation has no extraterritorial force and effect, except over U.S. citizens, it cannot be considered to have extinguished the Hawaiian Kingdom as a state, and the executive agreements are *prima facie* evidence that the United States recognizes the sovereignty and legal order of the Hawaiian Kingdom despite the overthrow of its government. In §207(a) of the *Restatement (Third) Foreign Relations Law of the United States*, provides that “A state acts through its government, but the state is responsible for carrying out its obligation under international law regardless of the manner in which its constitution and laws allocate the

⁶¹ 31 U.S. Stat. 141

⁶² 73 U.S. Stat. 4

⁶³ Gary Born, *International Civil Litigation in United States Courts*, 3rd ed. (Den Hague, The Netherlands: Kluwer Law International, 1996), 493.

⁶⁴ *Rose v. Himely*, 8 U.S. 241, 279 (1807).

⁶⁵ *The Apollon*, 22 U.S. 362, 370 (1824).

⁶⁶ *Id.*

⁶⁷ *U.S. v. Belmont*, 301 U.S. 324, 332 (1937).

⁶⁸ Douglas Kmiec, *Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea*, 12 Op. Off. Legal Counsel 238-263, 252 (1988).



responsibilities and functions of government, or of any constitutional or other internal rules or limitations.” And §115(b), of the *Restatement (Third) Foreign Relations Law*, provides that “although a subsequent act of Congress may supersede a rule of international law or an international agreement as domestic law, the United States remains bound by the rule or agreement internationally... Similarly, the United States remains bound internationally when a principle of international law or a provision in an agreement of the United States is not given effect because it is inconsistent with the Constitution.”

By virtue of the temporary and conditional grant of Hawaiian executive power, the U.S. was obligated to administer Hawaiian law and thereafter restore the Hawaiian Kingdom government, but instead illegally occupied the Hawaiian Kingdom for military purposes, and has remained in the Hawaiian Islands ever since. The failure to administer Hawaiian Kingdom law under the *Lili`uokalani Assignment* and then to reinstate the Hawaiian government under the *Restoration agreement* constitutes a breach of an international obligation, as defined by the *Responsibility of States for Internationally Wrongful Acts*,⁶⁹ and the breach of this international obligation by the U.S. has “a continuing character [that] extends over the entire period during which the act continues and remains not in conformity with the international obligation.”⁷⁰ The extended lapse of time has not affected in the least the international obligation of the U.S. under the both executive agreements; despite over a century of non-compliance and prolonged occupation, and according to Wright, the President binds “himself and his successors in office by executive agreements.”⁷¹ More importantly, the U.S. “may not rely on the provisions of its internal law as justification for failure to comply with its obligation.”⁷²

According to Professor Marek, “the legal order of the occupant is...strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness [e.g. no government]. ...[Occupation] is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order

⁶⁹ United Nations, “Responsibility of States for Internationally Wrongful Acts” (2001), Article 12.

⁷⁰ *Id.*, Article 14(2).

⁷¹ Wright, 235.

⁷² Responsibility of States, Article 31(1).



is abandoned.”⁷³ Referring to the United States’ occupation of the Hawaiian Kingdom in his law journal article, Professor Dumberry states:

the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.⁷⁴

Conclusion

As a result of the President’s failure to establish a military government in the islands to administer Hawaiian law by virtue of the *Lili`uokalani assignment* (January 17th 1893) and the international laws of occupation, which was mandated under the 1863 Lieber Code, art. 6, G.O. 100, A.G.O. 1863, and then superseded by the 1907 Hague Convention, IV, art. 43, all acts performed by the provisional government, the Republic of Hawai`i, the Territory of Hawai`i and the State of Hawai`i, on behalf of or concerning the Hawaiian Islands cannot be considered lawful. The only exceptions, according to the seminal *Namibia* case, are the registration of births, deaths and marriages.⁷⁵ By estoppel, the United States cannot benefit from the violation of these executive agreements.

All persons who reside or temporarily reside within Hawaiian territory are subject to its laws. §6, Hawaiian Civil Code, Compiled Laws of the Hawaiian Kingdom (1884), provides:

The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws.

⁷³ Krystyna Marek, *Identity and Continuity of State in Public International Law*, (Geneve: Librairie Droz, 1968), 102.

⁷⁴ Patrick Dumberry, *The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law*, 2(1) Chinese Journal of International Law 655-684 (2002).

⁷⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion of June 21, 1971, ICJ Reports, 1971.



It is my professional opinion that there is clear and overwhelming evidence that the Hawaiian Kingdom continues to exist as a state in accordance with recognized attributes of a state's sovereign nature, and that the *Lili'uokalani assignment* and the *Agreement of restoration*, being sole executive agreements, are *prima facie* evidence of the United States' acknowledgment and continued recognition of the legal order of the Hawaiian Kingdom, being a recognized attribute of a state's sovereign nature, notwithstanding the United States violation of these sole executive agreements for the past 118 years.

David Keanu Sai, Ph.D.

Exhibit A

APPENDIX II

FOREIGN RELATIONS

OF THE

UNITED STATES

1894

AFFAIRS IN HAWAII



WASHINGTON
GOVERNMENT PRINTING OFFICE
1895

M E S S A G E .

To the Senate and House of Representatives :

In my recent annual message to the Congress I briefly referred to our relations with Hawaii and expressed the intention of transmitting further information on the subject when additional advices permitted.

Though I am not able now to report a definite change in the actual situation, I am convinced that the difficulties lately created both here and in Hawaii and now standing in the way of a solution through Executive action of the problem presented, render it proper, and expedient, that the matter should be referred to the broader authority and discretion of Congress, with a full explanation of the endeavor thus far made to deal with the emergency and a statement of the considerations which have governed my action.

I suppose that right and justice should determine the path to be followed in treating this subject. If national honesty is to be disregarded and a desire for territorial extension, or dissatisfaction with a form of government not our own, ought to regulate our conduct, I have entirely misapprehended the mission and character of our Government and the behavior which the conscience of our people demands of their public servants.

When the present Administration entered upon its duties the Senate had under consideration a treaty providing for the annexation of the Hawaiian Islands to the territory of the United States. Surely under our Constitution and laws the enlargement of our limits is a manifestation of the highest attribute of sovereignty, and if entered upon as an Executive act, all things relating to the transaction should be clear and free from suspicion. Additional importance attached to this particular treaty of annexation, because it contemplated a departure from unbroken American tradition in providing for the addition to our territory of islands of the sea more than two thousand miles removed from our nearest coast.

These considerations might not of themselves call for interference with the completion of a treaty entered upon by a previous Administration. But it appeared from the documents accompanying the

treaty when submitted to the Senate, that the ownership of Hawaii was tendered to us by a provisional government set up to succeed the constitutional ruler of the islands, who had been dethroned, and it did not appear that such provisional government had the sanction of either popular revolution or suffrage. Two other remarkable features of the transaction naturally attracted attention. One was the extraordinary haste—not to say precipitancy—characterizing all the transactions connected with the treaty. It appeared that a so-called Committee of Safety, ostensibly the source of the revolt against the constitutional Government of Hawaii, was organized on Saturday, the 14th day of January; that on Monday, the 16th, the United States forces were landed at Honolulu from a naval vessel lying in its harbor; that on the 17th the scheme of a provisional government was perfected, and a proclamation naming its officers was on the same day prepared and read at the Government building; that immediately thereupon the United States Minister recognized the provisional government thus created; that two days afterwards, on the 19th day of January, commissioners representing such government sailed for this country in a steamer especially chartered for the occasion, arriving in San Francisco on the 28th day of January, and in Washington on the 3d day of February; that on the next day they had their first interview with the Secretary of State, and another on the 11th, when the treaty of annexation was practically agreed upon, and that on the 14th it was formally concluded and on the 15th transmitted to the Senate. Thus between the initiation of the scheme for a provisional government in Hawaii on the 14th day of January and the submission to the Senate of the treaty of annexation concluded with such government, the entire interval was thirty-two days, fifteen of which were spent by the Hawaiian Commissioners in their journey to Washington.

In the next place, upon the face of the papers submitted with the treaty, it clearly appeared that there was open and undetermined an issue of fact of the most vital importance. The message of the President accompanying the treaty declared that “the overthrow of the monarchy was not in any way promoted by this Government,” and in a letter to the President from the Secretary of State, also submitted to the Senate with the treaty, the following passage occurs: “At the time the provisional government took possession of the Government buildings no troops or officers of the United States were present or took any part whatever in the proceedings. No public recognition was accorded to the provisional government by the United States Minister until after the Queen’s abdication and when they were in effective possession of the Government buildings,

the archives, the treasury, the barracks, the police station, and all the potential machinery of the Government." But a protest also accompanied said treaty, signed by the Queen and her ministers at the time she made way for the provisional government, which explicitly stated that she yielded to the superior force of the United States, whose Minister had caused United States troops to be landed at Honolulu and declared that he would support such provisional government.

The truth or falsity of this protest was surely of the first importance. If true, nothing but the concealment of its truth could induce our Government to negotiate with the semblance of a government thus created, nor could a treaty resulting from the acts stated in the protest have been knowingly deemed worthy of consideration by the Senate. Yet the truth or falsity of the protest had not been investigated.

I conceived it to be my duty therefore to withdraw the treaty from the Senate for examination, and meanwhile to cause an accurate, full, and impartial investigation to be made of the facts attending the subversion of the constitutional Government of Hawaii, and the installment in its place of the provisional government. I selected for the work of investigation the Hon. James H. Blount, of Georgia, whose service of eighteen years as a member of the House of Representatives, and whose experience as chairman of the Committee of Foreign Affairs in that body, and his consequent familiarity with international topics, joined with his high character and honorable reputation, seemed to render him peculiarly fitted for the duties entrusted to him. His report detailing his action under the instructions given to him and the conclusions derived from his investigation accompany this message.

These conclusions do not rest for their acceptance entirely upon Mr. Blount's honesty and ability as a man, nor upon his acumen and impartiality as an investigator. They are accompanied by the evidence upon which they are based, which evidence is also herewith transmitted, and from which it seems to me no other deductions could possibly be reached than those arrived at by the Commissioner.

The report with its accompanying proofs, and such other evidence as is now before the Congress or is herewith submitted, justifies in my opinion the statement that when the President was led to submit the treaty to the Senate with the declaration that "the overthrow of the monarchy was not in any way promoted by this Government", and when the Senate was induced to receive and discuss it on that basis, both President and Senate were misled.

The attempt will not be made in this communication to touch

upon all the facts which throw light upon the progress and consummation of this scheme of annexation. A very brief and imperfect reference to the facts and evidence at hand will exhibit its character and the incidents in which it had its birth.

It is unnecessary to set forth the reasons which in January, 1893, led a considerable proportion of American and other foreign merchants and traders residing at Honolulu to favor the annexation of Hawaii to the United States. It is sufficient to note the fact and to observe that the project was one which was zealously promoted by the Minister representing the United States in that country. He evidently had an ardent desire that it should become a fact accomplished by his agency and during his ministry, and was not inconveniently scrupulous as to the means employed to that end. On the 19th day of November, 1892, nearly two months before the first overt act tending towards the subversion of the Hawaiian Government and the attempted transfer of Hawaiian territory to the United States, he addressed a long letter to the Secretary of State in which the case for annexation was elaborately argued, on moral, political, and economical grounds. He refers to the loss to the Hawaiian sugar interests from the operation of the McKinley bill, and the tendency to still further depreciation of sugar property unless some positive measure of relief is granted. He strongly inveighs against the existing Hawaiian Government and emphatically declares for annexation. He says: "In truth the monarchy here is an absurd anachronism. It has nothing on which it logically or legitimately stands. The feudal basis on which it once stood no longer existing, the monarchy now is only an impediment to good government—an obstruction to the prosperity and progress of the islands."

He further says: "As a crown colony of Great Britain or a Territory of the United States the government modifications could be made readily and good administration of the law secured. Destiny and the vast future interests of the United States in the Pacific clearly indicate who at no distant day must be responsible for the government of these islands. Under a territorial government they could be as easily governed as any of the existing Territories of the United States."

* * * "Hawaii has reached the parting of the ways. She must now take the road which leads to Asia, or the other which outlets her in America, gives her an American civilization, and binds her to the care of American destiny." He also declares: "One of two courses seems to me absolutely necessary to be followed, either bold and vigorous measures for annexation or a 'customs union,' an ocean cable from the Californian coast to Honolulu, Pearl Harbor perpetually ceded to the United States, with an implied but not ex-

pressly stipulated American protectorate over the islands. I believe the former to be the better, that which will prove much the more advantageous to the islands, and the cheapest and least embarrassing in the end to the United States. If it was wise for the United States through Secretary Marcy thirty-eight years ago to offer to expend \$100,000 to secure a treaty of annexation, it certainly can not be chimerical or unwise to expend \$100,000 to secure annexation in the near future. To-day the United States has five times the wealth she possessed in 1854, and the reasons now existing for annexation are much stronger than they were then. I can not refrain from expressing the opinion with emphasis that the golden hour is near at hand."

These declarations certainly show a disposition and condition of mind, which may be usefully recalled when interpreting the significance of the Minister's conceded acts or when considering the probabilities of such conduct on his part as may not be admitted.

In this view it seems proper to also quote from a letter written by the Minister to the Secretary of State on the 8th day of March, 1892, nearly a year prior to the first step taken toward annexation. After stating the possibility that the existing Government of Hawaii might be overturned by an orderly and peaceful revolution, Minister Stevens writes as follows: "Ordinarily in like circumstances, the rule seems to be to limit the landing and movement of United States forces in foreign waters and dominion exclusively to the protection of the United States legation and of the lives and property of American citizens. But as the relations of the United States to Hawaii are exceptional, and in former years the United States officials here took somewhat exceptional action in circumstances of disorder, I desire to know how far the present Minister and naval commander may deviate from established international rules and precedents in the contingencies indicated in the first part of this dispatch."

To a minister of this temper full of zeal for annexation there seemed to arise in January, 1893, the precise opportunity for which he was watchfully waiting—an opportunity which by timely "deviation from established international rules and precedents" might be improved to successfully accomplish the great object in view; and we are quite prepared for the exultant enthusiasm with which in a letter to the State Department dated February 1, 1893, he declares: "The Hawaiian pear is now fully ripe and this is the golden hour for the United States to pluck it."

As a further illustration of the activity of this diplomatic representative, attention is called to the fact that on the day the above letter was written, apparently unable longer to restrain his ardor, he issued a proclamation whereby "in the name of the United

States" he assumed the protection of the Hawaiian Islands and declared that said action was "taken pending and subject to negotiations at Washington." Of course this assumption of a protectorate was promptly disavowed by our Government, but the American flag remained over the Government building at Honolulu and the forces remained on guard until April, and after Mr. Blount's arrival on the scene, when both were removed.

A brief statement of the occurrences that led to the subversion of the constitutional Government of Hawaii in the interests of annexation to the United States will exhibit the true complexion of that transaction.

On Saturday, January 14, 1893, the Queen of Hawaii, who had been contemplating the proclamation of a new constitution, had, in deference to the wishes and remonstrances of her cabinet, renounced the project for the present at least. Taking this relinquished purpose as a basis of action, citizens of Honolulu numbering from fifty to one hundred, mostly resident aliens, met in a private office and selected a so-called Committee of Safety, composed of thirteen persons, seven of whom were foreign subjects, and consisted of five Americans, one Englishman, and one German. This committee, though its designs were not revealed, had in view nothing less than annexation to the United States, and between Saturday, the 14th, and the following Monday, the 16th of January—though exactly what action was taken may not be clearly disclosed—they were certainly in communication with the United States Minister. On Monday morning the Queen and her cabinet made public proclamation, with a notice which was specially served upon the representatives of all foreign governments, that any changes in the constitution would be sought only in the methods provided by that instrument. Nevertheless, at the call and under the auspices of the Committee of Safety, a mass meeting of citizens was held on that day to protest against the Queen's alleged illegal and unlawful proceedings and purposes. Even at this meeting the Committee of Safety continued to disguise their real purpose and contented themselves with procuring the passage of a resolution denouncing the Queen and empowering the committee to devise ways and means "to secure the permanent maintenance of law and order and the protection of life, liberty, and property in Hawaii." This meeting adjourned between three and four o'clock in the afternoon. On the same day, and immediately after such adjournment, the committee, unwilling to take further steps without the coöperation of the United States Minister, addressed him a note representing that the public safety was menaced and that lives and property were in danger, and concluded as follows:

“We are unable to protect ourselves without aid, and therefore pray for the protection of the United States forces.” Whatever may be thought of the other contents of this note, the absolute truth of this latter statement is incontestable. When the note was written and delivered, the committee, so far as it appears, had neither a man nor a gun at their command, and after its delivery they became so panic-stricken at their position that they sent some of their number to interview the Minister and request him not to land the United States forces till the next morning. But he replied that the troops had been ordered, and whether the committee were ready or not the landing should take place. And so it happened that on the 16th day of January, 1893, between four and five o'clock in the afternoon, a detachment of marines from the United States steamer *Boston*, with two pieces of artillery, landed at Honolulu. The men, upwards of 160 in all, were supplied with double cartridge belts filled with ammunition and with haversacks and canteens, and were accompanied by a hospital corps with stretchers and medical supplies. This military demonstration upon the soil of Honolulu was of itself an act of war, unless made either with the consent of the Government of Hawaii or for the *bona fide* purpose of protecting the imperilled lives and property of citizens of the United States. But there is no pretense of any such consent on the part of the Government of the Queen, which at that time was undisputed and was both the *de facto* and the *de jure* government. In point of fact the existing government instead of requesting the presence of an armed force protested against it. There is as little basis for the pretense that such forces were landed for the security of American life and property. If so, they would have been stationed in the vicinity of such property and so as to protect it, instead of at a distance and so as to command the Hawaiian Government building and palace. Admiral Skerrett, the officer in command of our naval force on the Pacific station, has frankly stated that in his opinion the location of the troops was inadvisable if they were landed for the protection of American citizens whose residences and places of business, as well as the legation and consulate, were in a distant part of the city, but the location selected was a wise one if the forces were landed for the purpose of supporting the provisional government. If any peril to life and property calling for any such martial array had existed, Great Britain and other foreign powers interested would not have been behind the United States in activity to protect their citizens. But they made no sign in that direction. When these armed men were landed, the city of Honolulu was in its customary orderly and peaceful condition. There was no

symptom of riot or disturbance in any quarter. Men, women, and children were about the streets as usual, and nothing varied the ordinary routine or disturbed the ordinary tranquillity, except the landing of the *Boston's* marines and their march through the town to the quarters assigned them. Indeed, the fact that after having called for the landing of the United States forces on the plea of danger to life and property the Committee of Safety themselves requested the Minister to postpone action, exposed the untruthfulness of their representations of present peril to life and property. The peril they saw was an anticipation growing out of guilty intentions on their part and something which, though not then existing, they knew would certainly follow their attempt to overthrow the Government of the Queen without the aid of the United States forces.

Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister.

Therefore the military occupation of Honolulu by the United States on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property. It must be accounted for in some other way and on some other ground, and its real motive and purpose are neither obscure nor far to seek.

The United States forces being now on the scene and favorably stationed, the committee proceeded to carry out their original scheme. They met the next morning, Tuesday, the 17th, perfected the plan of temporary government, and fixed upon its principal officers, ten of whom were drawn from the thirteen members of the Committee of Safety. Between one and two o'clock, by squads and by different routes to avoid notice, and having first taken the precaution of ascertaining whether there was any one there to oppose them, they proceeded to the Government building to proclaim the new government. No sign of opposition was manifest, and thereupon an American citizen began to read the proclamation from the steps of the Government building almost entirely without auditors. It is said that before the reading was finished quite a concourse of persons, variously estimated at from 50 to 100, some armed and some unarmed, gathered about the committee to give them aid and confidence. This statement is not important, since the one controlling factor in the whole affair was unquestionably the United States marines, who, drawn up under arms and with artillery in readiness only seventy-six yards distant, dominated the situation.

The provisional government thus proclaimed was by the terms of

the proclamation "to exist until terms of union with the United States had been negotiated and agreed upon". The United States Minister, pursuant to prior agreement, recognized this government within an hour after the reading of the proclamation, and before five o'clock, in answer to an inquiry on behalf of the Queen and her cabinet, announced that he had done so.

When our Minister recognized the provisional government the only basis upon which it rested was the fact that the Committee of Safety had in the manner above stated declared it to exist. It was neither a government *de facto* nor *de jure*. That it was not in such possession of the Government property and agencies as entitled it to recognition is conclusively proved by a note found in the files of the Legation at Honolulu, addressed by the declared head of the provisional government to Minister Stevens, dated January 17, 1893, in which he acknowledges with expressions of appreciation the Minister's recognition of the provisional government, and states that it is not yet in the possession of the station house (the place where a large number of the Queen's troops were quartered), though the same had been demanded of the Queen's officers in charge. Nevertheless, this wrongful recognition by our Minister placed the Government of the Queen in a position of most perilous perplexity. On the one hand she had possession of the palace, of the barracks, and of the police station, and had at her command at least five hundred fully armed men and several pieces of artillery. Indeed, the whole military force of her kingdom was on her side and at her disposal, while the Committee of Safety, by actual search, had discovered that there were but very few arms in Honolulu that were not in the service of the Government. In this state of things if the Queen could have dealt with the insurgents alone her course would have been plain and the result unmistakable. But the United States had allied itself with her enemies, had recognized them as the true Government of Hawaii, and had put her and her adherents in the position of opposition against lawful authority. She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice. Accordingly, some hours after the recognition of the provisional government by the United States Minister, the palace, the barracks, and the police station, with all the military resources of the country, were delivered up by the Queen upon the representation made to her that her cause would thereafter be reviewed at Washington, and while protesting that she surrendered to the superior force of the United States, whose Minister had caused United States troops to be landed at Honolulu and declared that he would support the provisional government, and that she

yielded her authority to prevent collision of armed forces and loss of life and only until such time as the United States, upon the facts being presented to it, should undo the action of its representative and reinstate her in the authority she claimed as the constitutional sovereign of the Hawaiian Islands.

This protest was delivered to the chief of the provisional government, who endorsed thereon his acknowledgment of its receipt. The terms of the protest were read without dissent by those assuming to constitute the provisional government, who were certainly charged with the knowledge that the Queen instead of finally abandoning her power had appealed to the justice of the United States for reinstatement in her authority; and yet the provisional government with this unanswered protest in its hand hastened to negotiate with the United States for the permanent banishment of the Queen from power and for a sale of her kingdom.

Our country was in danger of occupying the position of having actually set up a temporary government on foreign soil for the purpose of acquiring through that agency territory which we had wrongfully put in its possession. The control of both sides of a bargain acquired in such a manner is called by a familiar and unpleasant name when found in private transactions. We are not without a precedent showing how scrupulously we avoided such accusations in former days. After the people of Texas had declared their independence of Mexico they resolved that on the acknowledgment of their independence by the United States they would seek admission into the Union. Several months after the battle of San Jacinto, by which Texan independence was practically assured and established, President Jackson declined to recognize it, alleging as one of his reasons that in the circumstances it became us "to beware of a too early movement, as it might subject us, however unjustly, to the imputation of seeking to establish the claim of our neighbors to a territory with a view to its subsequent acquisition by ourselves". This is in marked contrast with the hasty recognition of a government openly and concededly set up for the purpose of tendering to us territorial annexation.

I believe that a candid and thorough examination of the facts will force the conviction that the provisional government owes its existence to an armed invasion by the United States. Fair-minded people with the evidence before them will hardly claim that the Hawaiian Government was overthrown by the people of the islands or that the provisional government had ever existed with their consent. I do not understand that any member of this government claims that the

people would uphold it by their suffrages if they were allowed to vote on the question.

While naturally sympathizing with every effort to establish a republican form of government, it has been the settled policy of the United States to concede to people of foreign countries the same freedom and independence in the management of their domestic affairs that we have always claimed for ourselves; and it has been our practice to recognize revolutionary governments as soon as it became apparent that they were supported by the people. For illustration of this rule I need only to refer to the revolution in Brazil in 1889, when our Minister was instructed to recognize the Republic "so soon as a majority of the people of Brazil should have signified their assent to its establishment and maintenance"; to the revolution in Chile in 1891, when our Minister was directed to recognize the new government "if it was accepted by the people"; and to the revolution in Venezuela in 1892, when our recognition was accorded on condition that the new government was "fully established, in possession of the power of the nation, and accepted by the people."

As I apprehend the situation, we are brought face to face with the following conditions:

The lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may safely be asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.

But for the notorious predilections of the United States Minister for annexation, the Committee of Safety, which should be called the Committee of Annexation, would never have existed.

But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.

But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the provisional government from the steps of the Government building.

And finally, but for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Stevens's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her Government would never have yielded to the provisional government, even for a time and for the

sole purpose of submitting her case to the enlightened justice of the United States.

Believing, therefore, that the United States could not, under the circumstances disclosed, annex the islands without justly incurring the imputation of acquiring them by unjustifiable methods, I shall not again submit the treaty of annexation to the Senate for its consideration, and in the instructions to Minister Willis, a copy of which accompanies this message, I have directed him to so inform the provisional government.

But in the present instance our duty does not, in my opinion, end with refusing to consummate this questionable transaction. It has been the boast of our Government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals. I mistake the American people if they favor the odious doctrine that there is no such thing as international morality, that there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory.

By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair. The provisional government has not assumed a republican or other constitutional form, but has remained a mere executive council or oligarchy, set up without the assent of the people. It has not sought to find a permanent basis of popular support and has given no evidence of an intention to do so. Indeed, the representatives of that government assert that the people of Hawaii are unfit for popular government and frankly avow that they can be best ruled by arbitrary or despotic power.

The law of nations is founded upon reason and justice, and the rules of conduct governing individual relations between citizens or subjects of a civilized state are equally applicable as between enlightened nations. The considerations that international law is without a court for its enforcement, and that obedience to its commands practically depends upon good faith, instead of upon the mandate of a superior tribunal, only give additional sanction to the law itself and brand any deliberate infraction of it not merely as a wrong but as a disgrace. A man of true honor protects the unwritten word which binds his conscience more scrupulously, if possible, than he does the bond a breach of which subjects him to

legal liabilities ; and the United States in aiming to maintain itself as one of the most enlightened of nations would do its citizens gross injustice if it applied to its international relations any other than a high standard of honor and morality. On that ground the United States can not properly be put in the position of countenancing a wrong after its commission any more than in that of consenting to it in advance. On that ground it can not allow itself to refuse to redress an injury inflicted through an abuse of power by officers clothed with its authority and wearing its uniform; and on the same ground, if a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation.

These principles apply to the present case with irresistible force when the special conditions of the Queen's surrender of her sovereignty are recalled. She surrendered not to the provisional government, but to the United States. She surrendered not absolutely and permanently, but temporarily and conditionally until such time as the facts could be considered by the United States. Furthermore, the provisional government acquiesced in her surrender in that manner and on those terms, not only by tacit consent, but through the positive acts of some members of that government who urged her peaceable submission, not merely to avoid bloodshed, but because she could place implicit reliance upon the justice of the United States, and that the whole subject would be finally considered at Washington.

I have not, however, overlooked an incident of this unfortunate affair which remains to be mentioned. The members of the provisional government and their supporters, though not entitled to extreme sympathy, have been led to their present predicament of revolt against the Government of the Queen by the indefensible encouragement and assistance of our diplomatic representative. This fact may entitle them to claim that in our effort to rectify the wrong committed some regard should be had for their safety. This sentiment is strongly seconded by my anxiety to do nothing which would invite either harsh retaliation on the part of the Queen or violence and bloodshed in any quarter. In the belief that the Queen, as well as her enemies, would be willing to adopt such a course as would meet these conditions, and in view of the fact that both the Queen and the provisional government had at one time apparently acquiesced in a reference of the entire case to the United States Government, and considering the further fact that in any event the provisional

government by its own declared limitation was only "to exist until terms of union with the United States of America have been negotiated and agreed upon," I hoped that after the assurance to the members of that government that such union could not be consummated I might compass a peaceful adjustment of the difficulty.

Actuated by these desires and purposes, and not unmindful of the inherent perplexities of the situation nor of the limitations upon my power, I instructed Minister Willis to advise the Queen and her supporters of my desire to aid in the restoration of the status existing before the lawless landing of the United States forces at Honolulu on the 16th of January last, if such restoration could be effected upon terms providing for clemency as well as justice to all parties concerned. The conditions suggested, as the instructions show, contemplate a general amnesty to those concerned in setting up the provisional government and a recognition of all its *bona fide* acts and obligations. In short, they require that the past should be buried, and that the restored Government should reassume its authority as if its continuity had not been interrupted. These conditions have not proved acceptable to the Queen, and though she has been informed that they will be insisted upon, and that, unless acceded to, the efforts of the President to aid in the restoration of her Government will cease, I have not thus far learned that she is willing to yield them her acquiescence. The check which my plans have thus encountered has prevented their presentation to the members of the provisional government, while unfortunate public misrepresentations of the situation and exaggerated statements of the sentiments of our people have obviously injured the prospects of successful Executive mediation.

I therefore submit this communication with its accompanying exhibits, embracing Mr. Blount's report, the evidence and statements taken by him at Honolulu, the instructions given to both Mr. Blount and Minister Willis, and correspondence connected with the affair in hand.

In commending this subject to the extended powers and wide discretion of the Congress, I desire to add the assurance that I shall be much gratified to cooperate in any legislative plan which may be devised for the solution of the problem before us which is consistent with American honor, integrity, and morality.

GROVER CLEVELAND.

EXECUTIVE MANSION,

Washington, December 18, 1893.

DEPARTMENT OF STATE,
Washington, October 18, 1893.

The PRESIDENT:

The full and impartial reports submitted by the Hon. James H. Blount, your special commissioner to the Hawaiian Islands, established the following facts:

Queen Liliuokalani announced her intention on Saturday, January 14, 1893, to proclaim a new constitution, but the opposition of her ministers and others induced her to speedily change her purpose and make public announcement of that fact.

At a meeting in Honolulu, late on the afternoon of that day, a so-called committee of public safety, consisting of thirteen men, being all or nearly all who were present, was appointed "to consider the situation and devise ways and means for the maintenance of the public peace and the protection of life and property," and at a meeting of this committee on the 15th, or the forenoon of the 16th of January, it was resolved amongst other things that a provisional government be created "to exist until terms of union with the United States of America have been negotiated and agreed upon." At a mass meeting which assembled at 2 p. m. on the last-named day, the Queen and her supporters were condemned and denounced, and the committee was continued and all its acts approved.

Later the same afternoon the committee addressed a letter to John L. Stevens, the American minister at Honolulu, stating that the lives and property of the people were in peril and appealing to him and the United States forces at his command for assistance. This communication concluded "we are unable to protect ourselves without aid, and therefore hope for the protection of the United States forces." On receipt of this letter Mr. Stevens requested Capt. Wiltse, commander of the U. S. S. *Boston*, to land a force "for the protection of the United States legation, United States consulate, and to secure the safety of American life and property." The well armed troops, accompanied by two gatling guns, were promptly landed and marched through the quiet streets of Honolulu to a public hall, previously secured by Mr. Stevens for their accommodation. This hall was just across the street from the Government building, and in plain view of the Queen's palace. The reason for thus locating the military will presently appear. The governor of the Island immediately addressed to Mr. Stevens a communication protesting against the act as an unwarranted invasion of Hawaiian soil and reminding him that the proper authorities had never denied permission to the naval forces of the United States to land for drill or any other proper purpose.

About the same time the Queen's minister of foreign affairs sent a note to Mr. Stevens asking why the troops had been landed and informing him that the proper authorities were able and willing to afford full protection to the American legation and all American interests in Honolulu. Only evasive replies were sent to these communications.

While there were no manifestations of excitement or alarm in the city, and the people were ignorant of the contemplated movement, the committee entered the Government building, after first ascertaining that it was unguarded, and read a proclamation declaring that the existing Government was overthrown and a Provisional Government established in its place, "to exist until terms of union with the United States of America have been negotiated and agreed upon." No audience was present when the proclamation was read, but during the reading 40 or 50 men, some of them indifferently armed, entered the room. The executive and advisory councils mentioned in the proclamation at once addressed a communication to Mr. Stevens, informing him that the monarchy had been abrogated and a provisional government established. This communication concluded:

Such Provisional Government has been proclaimed, is now in possession of the Government departmental buildings, the archives, and the treasury, and is in control of the city. We hereby request that you will, on behalf of the United States, recognize it as the existing *de facto* Government of the Hawaiian Islands and afford to it the moral support of your Government, and, if necessary, the support of American troops to assist in preserving the public peace.

On receipt of this communication, Mr. Stevens immediately recognized the new Government, and, in a letter addressed to Sanford B. Dole, its President, informed him that he had done so. Mr. Dole replied:

GOVERNMENT BUILDING,
Honolulu, January 17, 1893.

SIR: I acknowledge receipt of your valued communication of this day, recognizing the Hawaiian Provisional Government, and express deep appreciation of the same.

We have conferred with the ministers of the late Government, and have made demand upon the marshal to surrender the station house. We are not actually yet in possession of the station house, but as night is approaching and our forces may be insufficient to maintain order, we request the immediate support of the United States forces, and would request that the commander of the United States forces take command of our military forces, so that they may act together for the protection of the city.

Respectfully, yours,

SANFORD B. DOLE,
Chairman Executive Council.

His Excellency JOHN L. STEVENS,
United States Minister Resident.

Note of Mr. Stevens at the end of the above communication.

The above request not complied with.

STEVENS.

The station house was occupied by a well-armed force, under the command of a resolute capable, officer. The same afternoon the Queen, her ministers, representatives of the Provisional Government, and others held a conference at the palace. Refusing to recognize the new authority or surrender to it, she was informed that the Provisional Government had the support of the American minister, and, if necessary, would be maintained by the military force of the United States then present; that any demonstration on her part would precipitate a conflict with that force; that she could not, with hope of success, engage

in war with the United States, and that resistance would result in a useless sacrifice of life. Mr. Damon, one of the chief leaders of the movement, and afterwards vice-president of the Provisional Government, informed the Queen that she could surrender under protest and her case would be considered later at Washington. Believing that, under the circumstances, submission was a duty, and that her case would be fairly considered by the President of the United States, the Queen finally yielded and sent to the Provisional Government the paper, which reads:

I, Liliuokalani, by the grace of God and under the constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.

That I yield to the superior force of the United States of America, whose minister plenipotentiary, his excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.

Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate me and the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

When this paper was prepared at the conclusion of the conference, and signed by the Queen and her ministers, a number of persons, including one or more representatives of the Provisional Government, who were still present and understood its contents, by their silence, at least, acquiesced in its statements, and, when it was carried to President Dole, he indorsed upon it, "Received from the hands of the late cabinet this 17th day of January, 1893," without challenging the truth of any of its assertions. Indeed, it was not claimed on the 17th day of January, or for some time thereafter, by any of the designated officers of the Provisional Government or any annexationist that the Queen surrendered otherwise than as stated in her protest.

In his dispatch to Mr. Foster of January 18, describing the so-called revolution, Mr. Stevens says:

The committee of public safety forthwith took possession of the Government building, archives, and treasury, and installed the Provisional Government at the head of the respective departments. This being an accomplished fact, I promptly recognized the Provisional Government as the *de facto* government of the Hawaiian Islands.

In Secretary Foster's communication of February 15 to the President, laying before him the treaty of annexation, with the view to obtaining the advice and consent of the Senate thereto, he says:

At the time the Provisional Government took possession of the Government building no troops or officers of the United States were present or took any part whatever in the proceedings. No public recognition was accorded to the Provisional Government by the United States minister until after the Queen's abdication, and when they were in effective possession of the Government building, the archives, the treasury, the barracks, the police station, and all the potential machinery of the Government.

Similar language is found in an official letter addressed to Secretary Foster on February 3 by the special commissioners sent to Washington by the Provisional Government to negotiate a treaty of annexation.

These statements are utterly at variance with the evidence, documentary and oral, contained in Mr. Blount's reports. They are contradicted by declarations and letters of President Dole and other annexationists and by Mr. Stevens's own verbal admissions to Mr. Blount.

The Provisional Government was recognized when it had little other than a paper existence, and when the legitimate government was in full possession and control of the palace, the barracks, and the police station. Mr. Stevens's well-known hostility and the threatening presence of the force landed from the *Boston* was all that could then have excited serious apprehension in the minds of the Queen, her officers, and loyal supporters.

It is fair to say that Secretary Foster's statements were based upon information which he had received from Mr. Stevens and the special commissioners, but I am unable to see that they were deceived. The troops were landed, not to protect American life and property, but to aid in overthrowing the existing government. Their very presence implied coercive measures against it.

In a statement given to Mr. Blount, by Admiral Skerrett, the ranking naval officer at Honolulu, he says:

If the troops were landed simply to protect American citizens and interests, they were badly stationed in Arion Hall, but if the intention was to aid the Provisional Government they were wisely stationed.

This hall was so situated that the troops in it easily commanded the Government building, and the proclamation was read under the protection of American guns. At an early stage of the movement, if not at the beginning, Mr. Stevens promised the annexationists that as soon as they obtained possession of the Government building and there read a proclamation of the character above referred to, he would at once recognize them as a *de facto* government, and support them by landing a force from our war ship then in the harbor, and he kept that promise. This assurance was the inspiration of the movement, and without it the annexationists would not have exposed themselves to the consequences of failure. They relied upon no military force of their own, for they had none worthy of the name. The Provisional Government was established by the action of the American minister and the presence of the troops landed from the *Boston*, and its continued existence is due to the belief of the Hawaiians that if they made an effort to overthrow it, they would encounter the armed forces of the United States.

The earnest appeals to the American minister for military protection by the officers of that Government, after it had been recognized, show the utter absurdity of the claim that it was established by a successful revolution of the people of the Islands. Those appeals were a confession by the men who made them of their weakness and timidity. Courageous men, conscious of their strength and the justice of their cause, do not thus act. It is not now claimed that a majority of the people, having the right to vote under the constitution of 1887, ever favored the existing authority or annexation to this or any other country. They earnestly desire that the government of their choice shall be restored and its independence respected.

Mr. Blount states that while at Honolulu he did not meet a single annexationist who expressed willingness to submit the question to a vote of the people, nor did he talk with one on that subject who did not insist that if the Islands were annexed suffrage should be so restricted as to give complete control to foreigners or whites. Representative annexationists have repeatedly made similar statements to the undersigned.

The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional

sovereign, and the Provisional Government was created "to exist until terms of union with the United States of America have been negotiated and agreed upon." A careful consideration of the facts will, I think, convince you that the treaty which was withdrawn from the Senate for further consideration should not be resubmitted for its action thereon.

Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.

Can the United States consistently insist that other nations shall respect the independence of Hawaii while not respecting it themselves? Our Government was the first to recognize the independence of the Islands and it should be the last to acquire sovereignty over them by force and fraud.

Respectfully submitted.

W. Q. GRESHAM.

[Confidential.]

Mr. Gresham to Mr. Willis.

No. 4.]

DEPARTMENT OF STATE,
Washington, October 18, 1893.

SIR: Supplementing the general instructions which you have received with regard to your official duties, it is necessary to communicate to you, in confidence, special instructions for your guidance in so far as concerns the relation of the Government of the United States towards the *de facto* Government of the Hawaiian Islands.

The President deemed it his duty to withdraw from the Senate the treaty of annexation which has been signed by the Secretary of State and the agents of the Provisional Government, and to dispatch a trusted representative to Hawaii to impartially investigate the causes of the so-called revolution and ascertain and report the true situation in those Islands. This information was needed the better to enable the President to discharge a delicate and important public duty.

The instructions given to Mr. Blount, of which you are furnished with a copy, point out a line of conduct to be observed by him in his official and personal relations on the Islands, by which you will be guided so far as they are applicable and not inconsistent with what is herein contained.

It remains to acquaint you with the President's conclusions upon the facts embodied in Mr. Blount's reports and to direct your course in accordance therewith.

The Provisional Government was not established by the Hawaiian people, or with their consent or acquiescence, nor has it since existed with their consent. The Queen refused to surrender her powers to the Provisional Government until convinced that the minister of the United States had recognized it as the *de facto* authority, and would support and defend it with the military force of the United States, and that resistance would precipitate a bloody conflict with that force. She was advised and assured by her ministers and by leaders of the movement for the overthrow of her government, that if she surrendered under protest her case would afterwards be fairly considered by the President of the United States. The Queen finally wisely yielded to the armed forces of the United States then quartered in Honolulu, relying upon the good faith and honor of the President, when informed

of what had occurred, to undo the action of the minister and reinstate her and the authority which she claimed as the constitutional sovereign of the Hawaiian Islands.

After a patient examination of Mr. Blount's reports the President is satisfied that the movement against the Queen, if not instigated, was encouraged and supported by the representative of this Government at Honolulu; that he promised in advance to aid her enemies in an effort to overthrow the Hawaiian Government and set up by force a new government in its place; and that he kept this promise by causing a detachment of troops to be landed from the *Boston* on the 16th of January, and by recognizing the Provisional Government the next day when it was too feeble to defend itself and the constitutional government was able to successfully maintain its authority against any threatening force other than that of the United States already landed.

The President has therefore determined that he will not send back to the Senate for its action thereon the treaty which he withdrew from that body for further consideration on the 9th day of March last.

On your arrival at Honolulu you will take advantage of an early opportunity to inform the Queen of this determination, making known to her the President's sincere regret that the reprehensible conduct of the American minister and the unauthorized presence on land of a military force of the United States obliged her to surrender her sovereignty, for the time being, and rely on the justice of this Government to undo the flagrant wrong.

You will, however, at the same time inform the Queen that, when reinstated, the President expects that she will pursue a magnanimous course by granting full amnesty to all who participated in the movement against her, including persons who are, or have been, officially or otherwise, connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution. All obligations created by the Provisional Government in due course of administration should be assumed.

Having secured the Queen's agreement to pursue this wise and humane policy, which it is believed you will speedily obtain, you will then advise the executive of the Provisional Government and his ministers of the President's determination of the question which their action and that of the Queen devolved upon him, and that they are expected to promptly relinquish to her her constitutional authority.

Should the Queen decline to pursue the liberal course suggested, or should the Provisional Government refuse to abide by the President's decision, you will report the facts and await further directions.

In carrying out these general instructions you will be guided largely by your own good judgment in dealing with the delicate situation.

I am, sir, your obedient servant,

W. Q. GRESHAM.

Mr. Gresham to Mr. Willis.

[Telegram sent through dispatch agent at San Francisco.]

DEPARTMENT OF STATE,
Washington, November 24, 1893.

The brevity and uncertainty of your telegrams are embarrassing. You will insist upon amnesty and recognition of obligations of the Provisional Government as essential conditions of restoration. All interests will be promoted by prompt action.

W. Q. GRESHAM.

Exhibit B

APPENDIX II

FOREIGN RELATIONS

OF THE

UNITED STATES

1894

AFFAIRS IN HAWAII



WASHINGTON
GOVERNMENT PRINTING OFFICE
1895

Mr. Willis to Mr. Gresham.

[Confidential.]

No. 16.]

LEGATION OF THE UNITED STATES,
Honolulu, Hawaiian Islands, December 20, 1893.

SIR: On Monday afternoon at 6 p. m., before the report of the Washington Place interview, referred to in my dispatch, No. 15, of December 19, had been written from the stenographic notes, Mr. Carter called at the legation and read to me a note to him, just received from the Queen, in which she unreservedly consented, when restored as the constitutional sovereign, to grant amnesty and assume all obligations of the Provisional Government.

On yesterday (Tuesday) morning at 9 o'clock Mr. Carter brought a letter from the Queen, a copy of which I inclose, and an agreement signed by her, binding herself, if restored, to grant full amnesty, a copy of which I inclose.

Very respectfully,

ALBERT S. WILLIS.

[Inclosure 1 with No 16.]

WASHINGTON PLACE,
Honolulu, December 18, 1893

His Excellency ALBERT WILLIS,
Envoy Extraordinary and Minister Plenipotentiary, U. S. A. :

SIR: Since I had the interview with you this morning I have given the most careful and conscientious thought as to my duty, and I now of my own free will give my conclusions.

I must not feel vengeful to any of my people. If I am restored by the United States I must forget myself and remember only my dear people and my country. I must forgive and forget the past, permitting no proscription or punishment of any one, but trusting that all will hereafter work together in peace and friendship for the good and for the glory of our beautiful and once happy land.

Asking you to bear to the President and to the Government he represents a message of gratitude from me and from my people, and promising, with God's grace, to prove worthy of the confidence and friendship of your people,

I am, etc.,

LILIUOKALANI.

[Inclosure 2 with No. 16.]

I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both native and foreign born, do hereby and herein solemnly declare and pledge myself that, if reinstated as the constitutional sovereign of the Hawaiian Islands, that I will immediately proclaim and declare, unconditionally and without reservation, to every person who directly or indirectly participated in the revolution of January 17, 1893, a full pardon and amnesty for their offenses, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof, and that I will forbid and prevent the adoption of any measures of proscription or punishment for what has been done in the past by those setting up or supporting the Provisional Government.

I further solemnly agree to accept the restoration under the constitution existing at the time of said revolution and that I will abide by and fully execute that constitution with all the guaranties as to person and property therein contained.

I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of

administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.

Witness my hand this 18th of December, 1893.

LILIUOKALANI.

Attest:

J. O. CARTER.

Mr. Willis to Mr. Gresham.

[Confidential.]

No. 17.]

LEGATION OF THE UNITED STATES,

Honolulu, December 20, 1893.

SIR: On Monday, December 18, the interview with the Queen at her residence, Washington Place, was held, lasting until 1 p. m.

At 5:30 p. m. of the same day I received a communication from the Provisional Government, through the Hon. S. B. Dole, minister of foreign affairs, referring to my visit to the Queen. He asked to be informed whether I was "acting in any way hostile to this (his) Government," and pressed for "an immediate answer." I inclose a copy of the communication.

As I had two days before notified a member of the cabinet, Hon. W. O. Smith, attorney-general, that I would be ready in forty-eight hours to make known to the Provisional Government the President's decision, and as the tone of the communication—doubtless without intention—was somewhat mandatory, I thought it best not to make any reply to it. Moreover, at that hour I had not received the written pledge and agreement of the Queen, without which I could take no step.

This morning at 9:30 o'clock I received the letter and agreement of the Queen, as set forth in my No. 16 of this date. I immediately addressed a note to the minister of foreign affairs, Mr. Dole, informing him that I had a communication from my Government, which I desired to submit in person to the president and ministers of his Government at any hour during the day that it might please him to designate. I inclose a copy of my letter. This note was delivered to the minister of foreign affairs by Mr. Mills, and the hour of 1:30 p. m. was verbally designated for the interview.

At the hour appointed I went to the executive building and met the President and his associate ministers, to whom I submitted the decision of the President of the United States.

A memorandum of what I said upon the occasion was left with them after delivery, a copy of which I inclose.

It may be proper at this time briefly to state my course of action since arriving here on Saturday the 4th day of November last. My baggage containing credentials did not come to hand until 4 o'clock, before which time the offices of the Provisional Government were closed.

On Monday morning following, Mr. Mills, our consul-general, bore a note to the minister of foreign affairs asking that he designate a time for the presentation of Mr. Blount's letter of recall and my letter of credence. Mr. Mills was authorized to say, and did say to him, that I was ready on that day (Monday) to present my credentials. The Provisional Government, however, appointed the following day (Tuesday) at 11 o'clock, at which time I was formally presented.

As our Government had for fifty years held the friendliest relations with the people of these islands—native as well as foreign born—in

WILLIS,

WASHINGTON, *January 12, 1894.**Minister, Honolulu:*

Your numbers 14 to 18, inclusive, show that you have rightly comprehended the scope of your instructions, and have, as far as was in your power, discharged the onerous task confided to you.

The President sincerely regrets that the Provisional Government refuses to acquiesce in the conclusion which his sense of right and duty and a due regard for our national honor constrained him to reach and submit as a measure of justice to the people of the Hawaiian Islands and their deposed sovereign. While it is true that the Provisional Government was created to exist only until the islands were annexed to the United States, that the Queen finally, but reluctantly, surrendered to an armed force of this Government illegally quartered in Honolulu, and representatives of the Provisional Government (which realized its impotency and was anxious to get control of the Queen's means of defense) assured her that, if she would surrender, her case would be subsequently considered by the United States, the President has never claimed that such action constituted him an arbitrator in the technical sense, or authorized him to act in that capacity between the Constitutional Government and the Provisional Government. You made no such claim when you acquainted that Government with the President's decision.

The solemn assurance given to the Queen has been referred to, not as authority for the President to act as arbitrator, but as a fact material to a just determination of the President's duty in the premises.

In the note which the minister of foreign affairs addressed to you on the 23d ultimo it is stated in effect that even if the Constitutional Government was subverted by the action of the American minister and an invasion by a military force of the United States, the President's authority is limited to dealing with our own unfaithful officials, and that he can take no steps looking to the correction of the wrong done. The President entertains a different view of his responsibility and duty. The subversion of the Hawaiian Government by an abuse of the authority of the United States was in plain violation of international law and required the President to disavow and condemn the act of our offending officials, and, within the limits of his constitutional power, to endeavor to restore the lawful authority.

On the 18th ultimo the President sent a special message to Congress communicating copies of Mr. Blount's reports and the instructions given to him and to you. On the same day, answering a resolution of the House of Representatives, he sent copies of all correspondence since March 4, 1889, on the political affairs and relations of Hawaii, withholding, for sufficient reasons, only Mr. Stevens' No. 70 of October 8, 1892, and your No. 3 of November 16, 1893. The President therein announced that the conditions of restoration suggested by him to the Queen had not proved acceptable to her, and that since the instructions sent to you to insist upon those conditions he had not learned that the Queen was willing to assent to them. The President thereupon submitted the subject to the more extended powers and wider discretion of Congress, adding the assurance that he would be gratified to cooperate in any legitimate plan which might be devised for a solution of the problem consistent with American honor, integrity, and morality.

Your reports show that on further reflection the Queen gave her unqualified assent in writing to the conditions suggested, but that the

Provisional Government refuses to acquiesce in the President's decision.

The matter now being in the hands of Congress the President will keep that body fully advised of the situation, and will lay before it from time to time the reports received from you, including your No. 3, heretofore withheld, and all instructions sent to you. In the meantime, while keeping the Department fully informed of the course of events, you will, until further notice, consider that your special instructions upon this subject have been fully complied with.

GRESHAM.

Exhibit C

CONGRESSIONAL RECORD:

CONTAINING

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VOLUME XXXI.

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war ships would beset our path and we would be compelled to send with every coal barge a full complement of our own war ships, and we would, indeed, realize that we must win our way through "bloody seas." Again, it is declared to be a defensive necessity from a war standpoint.

We are told that we need the islands as a kind of military break-water against attack on our western coast. Eminent military authority is offered for this statement. Both land and naval officers are produced to justify this claim. All honor, Mr. Speaker, to our soldiers on land and sea. I glory in their just fame. Their deeds of valor are known wherever civilized man is found. They have carried our glorious flag to victory in every land, on every sea where they have fought, from the day they wrested from Great Britain the power to longer enslave us to that May day just gone when they sent to the bottom of Manila Harbor a Spanish fleet with every man on board.

But, Mr. Speaker, the calm judgment of a free people who believe, aye, know, that "eternal vigilance is the price of liberty" realizes, and in the years to come, if not now, will so declare, that the military arm of the Government can not safely be intrusted with the duty of controlling and shaping its civil policy. The profession, the training, and tendency of military life forbids it. The tendency of the military, whether on land or sea, is toward aggression and ever toward imperialism. And, again, we are to be made believe that if the United States does not annex the Hawaiian Islands some other power will, either with the consent of the islands or without it, and by the force of its own army and navy.

Does anybody really believe this? Has not this country many times declared that it would view with alarm and treat as an hostile act any such attempt? It could never be done and would not be attempted by any government of the Old World, unless it was predetermined and known that it could only be done by conquering the resistance of the United States. If such a determination is ever reached, our present annexation and possession of the islands would not stay the government that so lusts for territory, for the same power that could overcome our resistance in the first instance could wrest our occupation and possession in the last, and neither would or could ever be accomplished.

What do we fear, Mr. Speaker, and whom? Certainly not the ghost of dead and forgotten Spain. The throes of internal discord and colonial revolutions have rendered this effete Kingdom powerless for harm. Does Germany threaten us? No. Her good sense will restrain any ambition she otherwise might indulge for conquest. Does France? Most assuredly not. Nor Russia, nor Prussia, nor Italy. No Eastern power threatens our Western supremacy. In the meantime the British lion licks the hand that twice smote him, and England's Queen sends greeting and begs us believe she is willing to join hands with us and march forth on a mission of conquest and plunder.

No, Mr. Speaker; no cloud flicks the horizon in token of the brewing storm. None will appear unless we, "forgetful, stray after little lures;" unless we forget that Jefferson told us to have friendly relations with all nations, entangling alliances with none; unless we mix up in the politics of the East, none will appear. Finally, Mr. Speaker, we are urged to take Hawaii anyhow; the islands are offered, and let us take them. Suppose we take them, what form of government under our system by our Constitution will we give them? Is it proposed, does anyone believe, would any member of this House consent, to go 2,200 miles from our shores into the Pacific Ocean and erect a State in the American Union? No one contemplates, none would consent to such a proposition. Conditions will not warrant the making of a Territory of these islands, for the Constitution would control in this case as in that of the State.

What, then, remains to be done? Nothing is left except a military government for them; and surely no American who is not forgetful of the teachings of our fathers, unmindful of the traditions of the past, and, I hope, our welfare in the future, will ever consent to have any portion of this country in such condition. To do it we must write a new policy, tear down every safeguard of a free people—a democratic form of government—and declare our Republic a sham and a delusion. We must affirm our faith to be: The military is of right and ought to be superior to the civil arm of the Government. When this time comes, farewell, my country; thy honor and thy glory have departed forever; thy strength proved thy weakness.

This land has been dedicated to freedom. Here and under our system no chains of class or prejudice can fetter the wings of aspiring, ambitious genius. Here in free America true worth, whether it comes heralded from the palaces of the rich or springs of its own unaided strength from the hovels of the poor, may hope to find its just reward. In the twinkling of an eye things have changed—a military satrapy is set up, a ruling class is constituted.

Mr. Speaker, by every memory of the past, by every hope for the future; in the name of my country, whose institutions and people I love and whose greatness and glory I share, I appeal to its

Representatives on this floor not to enter upon this policy of aggression, fraught, as so many believe, with danger at every step. Have regard for the promise given the world but recently, and hedged about with all the binding force and obligation that official utterance could lend it, when you said in your declaration of war against Spain that war was to be waged for freedom's sake, in the cause of humanity, that no purpose of conquest or gain animated the purposes of the United States. On this declaration we won the world's respect and confidence and the approving smile of Him who holds in the hollow of His hand the destiny of nations as He does of individuals. It seems, however, the die is cast, the determination is entered upon, and take these islands we will.

Mr. Speaker, what do we need them for and what will we do with them? I suppose we might fit them up in royal style as a sort of national vaudeville theater or up-to-date "Midway Plaisance," and by Congressional enactment interdict any cheap and mere vulgar imitations that shall take place, but that only the original and genuine Hulas may appear in all the glory and splendor of nakedness unadorned, and give to the denizens of this benighted country daily and nightly exhibitions of their innocent divertisement. Or rather, shall we throw off the mask, come into the open, and join in the cry, but feebly heard now, On to Manila, to Puerto Rico, to the Carolinas, to the Canaries; down with the people; on with the empire? Mr. Speaker, what sound is it I hear? Is it the coming of the "Man on Horseback"?

Mr. DINSMORE. I yield fifteen minutes to the gentleman from Texas [Mr. BALL].

Mr. BALL. Mr. Speaker, in the limited time allotted me I can not attempt a full or satisfactory discussion of the pending resolution. I would not speak at all did I not in my heart believe that the question under consideration involves the most crucial period in our national history, not excepting the fratricidal conflict between the States.

The glowing picture presented by those who would lightly set aside the traditional policy of this Government and enter upon a career of colonial aggrandizement supported by a great army and navy, is certainly no more alluring than was Napoleon's dream of universal empire. Let us hope that, once entered upon, the result may not prove equally disastrous.

Mr. Speaker, in opposing this measure I shall present for the consideration of the House three propositions only. The annexation of Hawaii by joint resolution is unconstitutional, unnecessary, and unwise. If the first proposition be true, sworn to support the Constitution, we should inquire no further. I challenge not the advocates of Hawaiian annexation, but those who advocate annexation in the form now presented, to show warrant or authority in our organic law for such acquisition of territory. To do so will be not only to subvert the supreme law of the land but to strike down every precedent in our history. I know, as was said by the gentleman from Arkansas [Mr. DINSMORE], that the mention of the Constitution in this body often invokes a smile, and yet it can not be that a majority of this body agree with the insignificant few "that there is a higher law than the Constitution;" or with that former member of this House who, in his good fellowship, "did not think the Constitution should come between friends."

Why, sir, the very presence of this measure here is the result of a deliberate attempt to do unlawfully that which can not be lawfully done. The gentleman from Minnesota [Mr. TAWNEY], in a very able argument in support of annexation on March 15 last, rested his case upon the general power in our Constitution and the express power in the constitution of Hawaii, conferred upon the Presidents and Senates of the two countries, to conclude a treaty of annexation. Now that, in pursuance of those powers, the President has submitted the treaty to the United States Senate and has been unable to obtain the consent of two-thirds of that body, we are called upon to override the constitutions of both parties to the proposed contract in order that we may do this thing.

When Louisiana was acquired, when Florida was received, when Alaska came to us, no statesman connected with the executive or legislative branch of the Government dreamed the territory sought to be added to our possessions could be received, except by treaty duly ratified. In their desperation, grasping at shadows for substance, those who now resort to this subterfuge cite the admission of the imperial State from which I hail—Texas—as warrant and authority for their purpose.

Mr. Speaker, no one familiar with the history of that transaction should make such claim. Advocates of the annexation of Texas rested their case upon the express power conferred upon Congress in the Constitution to admit new States. Opponents of the annexation of Texas contended that even that express power did not confer the right to admit States not carved from territory already belonging to the United States or some one of the States forming the Federal Union. Whether, therefore, we subscribe to the one or the other school of thought in that matter, we can find no precedent to sustain the method here proposed for admitting foreign territory.

Members need only refer to the extended debates in Senate and House of Representatives while the annexation of Texas was being considered to be assured of the correctness of this conclusion. The original proposition as offered contemplated the formation of a State from certain prescribed limits within the territory embraced in the Republic of Texas, while the balance of the area of the Republic was to be ceded as territory to the United States. The treaty having failed of ratification by the Senate, annexation by joint resolution was resorted to, and the outcome of the whole matter was that the entire Republic of Texas was admitted as one State, with the right to carve therefrom four additional States, this being done for the purpose alone of coming within the constitutional power to admit new States and in recognition of the fact that territory could only be constitutionally acquired by treaty.

I have not time to review much that was interestingly said about the matter. I shall quote only a few of the opinions advanced during the discussion of that matter. The Senate committee on Foreign Affairs consisted of five members, four of whom questioned the right to admit new States out of foreign territory, claiming it could only be done by treaty, the other member of the committee admitting that foreign territory could only be acquired by treaty, but contending that Texas could be admitted as a State.

Mr. Walker, of Mississippi, claiming to be the author of the idea to have Texas admitted under the clause of the Constitution authorizing Congress to admit new States, said—

That he was rejoiced that the great American question of the reannexation of Texas was being presented on all hands on the grounds on which it was placed originally by him [Mr. Walker] in his Texas letter of the 8th of January, 1844.

He [Mr. Walker] then proposed, more than a year since, to admit Texas as a State of the Union by the action of Congress under that clause of the Constitution which authorizes Congress to admit new States into the Union. That clause was not confined to our then existing territory, but was without limitation, and the framers of the Constitution had expressly refused to limit the general power contained in this clause to the territory then embraced within the Union. The general power was in express words, and no man had a right to interpolate restrictions, especially restrictions which the framers of the Constitution had rejected.

Mr. Buchanan, of Pennsylvania, the dissenting member of the Foreign Affairs Committee, advocating the resolution, said:

All the reasoning and ingenuity in the world could not abolish the plain language of the Constitution, which declared that new States might be admitted by Congress into the Union.

Mr. Henderson, of Mississippi, Mr. Benton, of Missouri, and other able advocates of the annexation of Texas urged the same arguments in support of the measure.

In the House of Representatives Mr. Yancey, of Alabama, supporting the resolution, advanced the same line of argument. On the other hand, the opposition, insisting that the power to admit new States was confined to territory already belonging to the United States, put forward many able advocates.

Mr. Morehead, of Kentucky, speaking for the Foreign Affairs Committee of the Senate, contended—

In the case now under consideration it was not proposed by the joint resolution before the Senate that Texas should be acquired according to what he considered the constitutional mode of proceeding, by the treaty-making power. The proposition is for Congress to admit her as a State. Now—

He asked—

when this Government was about to add a foreign domain to ours, was there any other mode of accomplishing that object except by the interposition of the treaty-making power, composed of the President of the United States in conjunction with the Senate? Was it constitutional to annex Texas by the treaty which was submitted to the Senate last session?

He believed there were few, if any, constitutional objections made. If, then, the power to annex foreign territory by treaty does appertain to the treaty-making power, he should like to see upon what ground it could be held that the Congress of the United States possesses concurrent legislative power upon this subject. If that which it is competent for the treaty-making power alone to accomplish, the majority of a quorum of both Houses of Congress could accomplish. The argument, he apprehended, would be this, that as a constitutional mode of proceeding we do not deny that foreign territory can be admitted into this Union by the treaty-making power. But there is another clause in the Constitution which gives Congress the power to admit new States into the Union. He proposed now to consider what was the character of that article and upon what conditions it rests. [Mr. Buchanan: That is the true ground.] His friend from Pennsylvania said that was the question, and to it he proposed to call particular attention.

Mr. Choate for three hours reviewed the whole question, bringing to bear his knowledge of the Constitution and its formation and the history of the country, clothed in redundant adjectives. He denied that the clause in the fourth article in the Constitution giving the power to Congress of admitting new States into the Union was given with the most remote idea of its being ever applied to anything but domestic territory. Said he:

No man could believe that by that provision it was intended to confer the tremendous power of admitting new States in any part of the world without limitation as to habits, customs, language, principles, or anything but the semblance of republicanism. Until it was found the treaty of last session had no chance of passing the Senate, no human being save one, no man, woman, or child in the Union or out of the Union, wise or foolish, drunk or sober, was ever heard to breathe one syllable about this power in the Constitution of admitting new States being applicable to the admission of foreign nations, governments, or states. It was a new and monstrous heresy on the Constitution, got up not from any well-founded faith in its orthodoxy, but for the mere purpose of carrying a measure by a bare majority of Congress that could not be carried by a two-thirds majority of the Senate in accordance with the treaty-making power.

Mr. Speaker, I will not further quote from this discussion. The language used by Mr. Choate certainly applies with peculiar force to the proposition now pending, and the entire debate upon both sides of that proposition shows conclusively that the advocates of this measure have no ground to stand upon so far as the annexation of Texas is concerned.

The gentleman from North Carolina [Mr. PEARSON] and the gentleman from Ohio [Mr. GROSVENOR] seek to aid their contentions in favor of this measure by the decision of Chief Justice Marshall. Let us see if they are sustained thereby:

The course—

Said Judge Marshall—

which the argument has taken will require that in deciding this question the court should take into view the relation in which Florida stands to the United States. The Constitution confers absolutely upon the Government the powers of making war and of making treaties; consequently that Government possesses the power of acquiring territory either by conquest or by treaty.

Thus it will be seen, Mr. Speaker, that Chief Justice Marshall not only fails to sustain these gentlemen, but bases the acquisition of territory, either by conquest or treaty, upon the war-making and treaty-making powers conferred by the Constitution upon the Government. Certainly, the treaty having failed to pass, no gentleman will contend that we are attempting to take Hawaii by conquest or by the power to admit States. They must therefore stand with the chairman of the Foreign Affairs Committee [Mr. HERR], who insists, in substance, that the National Government has the inherent right to acquire territory in this manner. The Constitution having pointed out the several ways in which territory may be lawfully acquired, I for one decline to accept this new doctrine by which territory can eventually come into partnership with the States and have equal rights and representation on the floor of Congress and elsewhere without first running the gantlet of every constitutional safeguard.

Mr. Speaker, I shall even venture to differ with those who declare this measure to be a military necessity. Even the array of expert testimony they bring to their support is not conclusive. A leading member of the bar once defined unreliable testimony as of three classes: "Ordinary liars, accomplished liars, and expert witnesses." [Laughter.] While I do not accede to this classification, I do know that great military and naval authority is not agreed at all times. It is also true that only witnesses in the matter were called who favored annexation. Even then, as stated by the gentleman from Missouri [Mr. CLARK], General Schofield, upon cross-examination, admitted that Pearl Harbor, now possessed by this country, was the only harbor that could be successfully fortified and defended. I will say in passing that we possess this harbor by treaty that can not be abrogated except by the consent of this Government. Again, we should bear in mind that, by professional instinct, Army and Navy officers are naturally predisposed toward that policy which would make this country a great military and naval power.

Mr. CLARK of Missouri. Will the gentleman allow me an interruption?

Mr. BALL. Yes; certainly.

Mr. CLARK of Missouri. I want to make one statement, and it is the gospel truth, that every one of these statements in favor of annexation was an ex parte statement, and I believe that any ordinary lawyer, just a plain, ordinary, average lawyer, can take every one of these men and on cross-examination make him swear to the same thing that General Schofield swore to, that that is the only harbor that can be fortified.

Mr. BALL. All right, put that in my speech. Now, against their judgment we have the safest of all guides—experience. For more than fifty years the Atlantic Ocean has bounded our eastern, the Gulf and Republic of Mexico our southern, the Pacific our western, and the British possessions our northern borders. During this period we have made marvelous strides in progress, the development of our resources, and increase of population. We have waged the greatest of all wars in our own borders, placing in hostile conflict two armies either of which could have whipped the combined legions of Napoleon or Wellington.

Since then we have nearly doubled our resources and population, and even now we are demonstrating to the world that the foreign power which breaks our peace must whip every man within our borders from Maine to Texas, from New York to California, before they can successfully give us battle. Why, then, extend our borders more than 2,000 miles in the Pacific Ocean? To do so will be a breach of public and national faith.

December 19, 1840, Mr. Webster announced that—

The Government of the Sandwich Islands ought to be respected; that no power ought to take possession of the islands, either as a conquest or for purposes of colonization.

President Tyler, two years afterwards, reiterated the same doctrine.

In 1843 Secretary of State Legaré notified our minister to England—

That we had no wish to acquire or plant colonies abroad, but would, if necessary, feel justified in using force to prevent their acquisition by one of the great powers of Europe.

Exhibit D

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No Senator would ever think of interrupting another under those conditions; but yet, strictly speaking, according to parliamentary rule, the Senator yielding the floor had lost it. No Senator can call for the regular order when a Senator is on the floor discussing any question in the Senate, because he is not required under the laws of the Senate to speak germanely to the subject under consideration, and he can not be interrupted unless he is speaking out of order, as suggested, or is committing some impropriety or some violation of parliamentary ethics or parliamentary rule; but the fact that he is speaking about something else than the bill under consideration does not entitle any Senator to call him to order. Every Senator is supposed to have judgment himself upon all such questions and to discuss whatever he thinks is proper. The great liberty of debate which here exists has been one of the things which has also made service in this body pleasant.

Mr. President, I only mention this for fear there will grow up a feeling here that a Senator who gets the floor and does not proceed to make a speech has any claim to the floor, or that he is under any obligation to go on and make a speech. He may decline to make a speech after having given notice that he intended to make it. It may embarrass others, who are not prepared to go on, and all that, and sometimes retard the business of the body; but that is one of the rights of a Senator. No one can say, "I insist now that the Senator from Georgia go on," if he does not wish to go on.

I have said this because I thought it was a good time to do so. If the Senator from Georgia had been himself pressing, I would not have said this at all.

I believe we can go through this debate in a Senatorial way. The question is one of a good deal of importance, about which some of us have a great deal of feeling. I myself have. I am so decidedly in favor of this joint resolution, and so thoroughly impressed that the interests of this country require its adoption, that I should be willing to vote right now, without a word of explanation or any defense of my vote, which I have not had an opportunity to make, except in executive session; and yet I would not deny, upon a great question like this, to every Senator who does not agree with me the right to present his views. There can be no such haste in coming to a conclusion in this case as to justify the American Senate in taking any unusual course and departing from the well-established and well-regulated rules of this Senate—not all of which are in a book, but rules which are well understood by members of this body who have served here for a good many years and which, I can say, are universally obeyed in the Senate.

One of the cardinal rules here has been that every Senator's convenience, even though it may lead to delay, shall be consulted. Of course if the request for delay is for the purpose of postponement, for the purpose of preventing a vote, then the Senate has the right to insist upon speedy and prompt action; but it has always been the custom since I have been a member of the Senate, when a Senator rose in his seat and said he was not prepared to go on, to give him time, especially when there is no constitutional limit as to the length of the session, as is the case now.

I should be delighted, Mr. President, to have a vote this week on this proposition; but I should not be willing to vote on this proposition this week if the members of the Senate who desire to discuss it have not had a fair opportunity to do so.

The PRESIDING OFFICER. The Chair will state that, under strict parliamentary law, he understands when a Senator yields the floor to another for a speech, of course the Senator originally having the floor loses his right to the floor. The custom, however, has grown up that when a Senator begins a long speech and yields for collateral matters, he retains the floor, and the Chair has simply respected that custom. The Senator from Washington [Mr. WILSON] was taken from the floor not by any order of the Chair, but by his own consent.

Mr. WHITE. Under duress, as I understand.

The PRESIDING OFFICER. The Chair recognizes the Senator from Georgia [Mr. BACON].

Mr. WILSON. The Senator thought I was through. Perhaps I should have finished a little bit earlier, but it was no fault of the Chair or of anybody else that I lost the floor, and I do not care anything about it.

Mr. BACON. All this very pleasant episode was occasioned by an act of courtesy on my part, which I did not anticipate would consume so much time. I simply yielded to the Senator from Arkansas [Mr. JONES] in order to make the statement that he had not called for a quorum for the purpose of delay, and I thought that would be the end of it.

Mr. President, the Senator from Colorado [Mr. TELLER] says that he would be very glad to vote on this question to-day; that his mind is made up. The Senator from Colorado is one of the Senators whom I am anxious to speak to to-day, not because I believe I can change his mind or his opinion on the general merits of this question, but because I desire to ask him and all Senators, especially those who are lawyers, to consider the question whether

or not they have the right, under their constitutional obligations, to vote for this resolution, however much they may favor the annexation of Hawaii.

Mr. TELLER. Will the Senator permit me to answer that now?

Mr. BACON. I beg that the Senator will hear me before he answers.

Mr. TELLER. I want to say that I will hear the Senator, but the Senator is not to understand that I have not myself considered this question very carefully. I will hear the Senator, of course.

Mr. BACON. Mr. President, of course I do not presume that the Senator from Colorado had not considered this question, but we are here for the purpose of interchanging views. I have great confidence in the Senator from Colorado, and am gratified by the fact that I seldom differ from him, and I shall be more than gratified if we can get together upon this question.

I assume that Senators will not vote for a resolution if they can be satisfied that it is unconstitutional. I assume that they will not vote for an unconstitutional resolution which directly impairs and strikes down one of the highest prerogatives of the Senate; and it is to that question that I propose to address myself to-day and upon which I am extremely anxious to have the hearing of Senators who favor the annexation of Hawaii.

The proposition which I had stated before the interruption was this: That a joint resolution for the annexation of foreign territory was necessarily and essentially the subject-matter of a treaty, and that it could not be accomplished legally and constitutionally by a statute or joint resolution. If Hawaii is to be annexed, it ought certainly to be annexed by a constitutional method; and if by a constitutional method it can not be annexed, no Senator ought to desire its annexation sufficiently to induce him to give his support to an unconstitutional measure.

I trust, Mr. President, that the time has not come when a Senator can not appeal with confidence to his fellow-Senators in opposition to a measure on the ground that it is unconstitutional. It matters not how important it may be that Hawaii should be annexed, it matters not how valuable it may be, it will be too costly if its price is the violation of a great fundamental provision of the Constitution of the United States.

Mr. President, it is a painful fact that not only people at large, but officials are losing to some extent the reverence which they ought to have for constitutional obligations. It is a matter of a smile with some when you oppose a measure on the ground that it is unconstitutional, and I confess that I have been pained when I have heard, as I have heard in this Chamber, learned and distinguished Senators say that they would approve and applaud the action of the President of the United States if he would seize Hawaii and run up upon it the flag of the United States, and take possession of it as the property of the United States as a war measure.

I say I have been pained when I have heard that, as I have heard it in this Chamber from very learned and very distinguished Senators, and I have been more than gratified that the President of the United States has not suffered himself to be guided by such foolish and such unwise counsels. If he had done so, every lover of his country must have been grieved that such a blow had been stricken at the integrity of the Constitution.

Mr. President, it surprises me that I even have to mention such a proposition; but if the President of the United States can in time of war, or at any other time, without the action of Congress in the performance of its constitutional functions, take possession of the territory of a friendly power, proclaim it as the territory of the United States, run the flag of the United States up over it as the insignia of its power and its dominion—if he can do so in one case, he can do so in any.

If the President of the United States can do it in the case of Hawaii, he can with equal propriety and legality do it in the case of Jamaica, and I repeat that I am more than gratified, although my apprehensions were aroused by the source from which those intimations came, that the President of the United States has not seen proper to listen to their unwise counsels.

And yet, Mr. President, if my view of this question is correct, the President of the United States would have as much power to take possession of the Island of Hawaii by a proclamation as would the Congress of the United States have the power to gain possession of it by a joint resolution of the two Houses. The powers of the executive department and the legislative department are as distinctly divided the one from the other as are the powers of the judicial department and the legislative department.

There are two kinds of law which are recognized by the Constitution of the United States and which are provided for by the Constitution of the United States, and each of these kinds of law is termed in the Constitution of the United States the supreme law of the land. One class of these laws is statute law, and it is provided that statute law shall be enacted by Congress; that statute law shall be made by a majority vote of the House of Representatives and of the Senate, with the approval of the President, or

that it may be made, in case of the disapproval of the President, by the two-thirds vote of the House of Representatives and the two-thirds vote of the Senate, overriding his veto, and that law, when made, is declared by the Constitution of the United States to be the supreme law of the land. In the same way the Constitution of the United States declares that there are other laws which are also supreme, and those laws are made as treaties. The Constitution of the United States in the same section declares both of these as the supreme law of the land.

The Supreme Court of the United States in construing the question of supremacy has ruled that each is supreme. It has ruled that a treaty may be nullified by a statute and that a statute may be nullified by a treaty, and that where they come in conflict the question of the later is the one invoked to determine which shall prevail. As to those two classes of law, each one of them supreme, there is provided in the Constitution an entirely distinct method by which they may be enacted or made. I have stated the manner in which the statute law is made. Now, in an entirely different manner, the Constitution of the United States declares how a treaty, which is also a supreme law, shall be made. It declares that a treaty must be made by the President of the United States, by and with the advice and consent of two-thirds of the Senate present. I am not quoting literally, but stating it substantially.

I ask the attention of Senators to this most marked provision in the Constitution of the United States and the two distinct classes of law, each of them declared by the Constitution to be supreme, each of them declared by the Supreme Court of the United States in construing that provision to be equally supreme with the other, which are made and enacted in specific ways in the manner pointed out in the Constitution, one totally different from the other. Is that provision of the Constitution a vital principle? Does it mean anything? Is it possible that the power which is clothed by the Constitution with the authority to make one class of laws can make the other class of laws?

Is it possible that the power which is conferred upon the Congress of the United States, the lawmaking power, the Senate and the House, with the approval of the President, can be used to make that other supreme law which the Constitution says shall be made in a different way, to wit, by the President, with the advice and consent of the Senate? If it is possible for the House of Representatives and the Senate and the President, acting in the lawmaking capacity, and known generally in the Constitution as Congress, can make a treaty, and in so making it make it the supreme law of the land, then this joint resolution is constitutional. But if it be true that when the Constitution devolved upon the President and the Senate the power to make treaties it denied to the Congress of the United States the right to make treaties, then the joint resolution is necessarily unconstitutional, as I shall endeavor to show.

Mr. President, the Constitution gives to the President the power to appoint all officers of the United States by and with the advice and consent of the Senate. If Congress can by statute make a treaty, why may it not by a statute make an ambassador or a chief justice or a general of the Army?

Mr. President, there are two ways in which the provision in the Constitution conferring upon the President of the United States and the Senate the power to make treaties can be absolutely nullified. One is the manner I have suggested, by Congress openly and boldly assuming to make a treaty; and if constitutional restrictions are not to be respected, if no man is bound by the Constitution, if a Senator or a Representative, because forsooth he may be in the majority can effect his purpose by overriding the Constitution and disregarding it, then that is the simplest way to do it. There is still another way in which this provision in the Constitution can be nullified, and that is by undertaking to put into the form of a statute that which in reality is a treaty. Now, one method is just as effective as the other, and either method is as absolutely illegal as the other.

Before going further in that line of argument, in order that I may have the attention of Senators and that they may not think there is an answer which I do not recognize, I desire to say that I of course fully understand the argument which is made in reply that the State of Texas was admitted in this way. I can not stop to interrupt the thread of the argument at the present point to show that that reply is not a good one. Not to elaborate it further, I will merely state that it is the distinction between the authority of Congress to admit a State, to do which it is given the power in words in the Constitution, and the power to acquire foreign territory not for the purpose of making it a State, which, as I shall endeavor to show, is essentially and necessarily the subject-matter of treaty between two governments.

Mr. President, when the framers of the Constitution put the word "treaties" into the Constitution without any other defining words or without any limitation, is it to be supposed for a moment that they did not recognize the fact that the term "treaties" had a distinct, legitimate, necessary, well-understood meaning? Is it

to be supposed that they for one moment contemplated that when the question came up whether a certain measure which involved a negotiation and agreement between this country and another should be accomplished in the way it provided, through a treaty by the President and the Senate, or whether it should be remitted to Congress, that the question of the form of the measure would control?

Is it to be supposed for a moment that they supposed that that which is essentially a treaty, and which they had provided should be made only by the President and the Senate, would be by any species of legislative legerdemain converted into the form of a statute, and another power or department of the Government, which had had distinct powers conferred upon it and which had been denied this power, would usurp it and that its usurpation would be recognized?

Mr. ELKINS. Will the Senator from Georgia allow me to interrupt him?

Mr. BACON. Certainly.

Mr. ELKINS. Does the Senator admit now that Congress can admit a State into the Union?

Mr. BACON. Undoubtedly.

Mr. ELKINS. And it admitted Texas?

Mr. BACON. Yes; but I will say to the Senator that I am coming to the distinct discussion of that branch of the case.

Mr. ELKINS. I merely want to put this question—

Mr. BACON. And I would be very glad if the Senator would pretermitt the question until I reach that point, and I shall be very happy at that time to take it up. I am now discussing another line. I am coming to the question of the power to admit States, and that will be the time for the question.

Mr. ELKINS. Having it in mind now, I should like to ask why, if it can admit a State, it can not admit anything less than a State; something that is not a State?

Mr. BACON. I am coming to that, and would be very glad if the Senator would repeat his question if I do not answer it before I get through, because I do the Senator the justice to say that I believe if I can possibly satisfy him of the unconstitutionality of the joint resolution he will not vote for it, however much he may desire the annexation of Hawaii. It is true I am very much discouraged by the fact that the Senator said to me, in private conversation, when I asked him if he was bound by the Constitution, yes, as he interpreted it.

Mr. ELKINS. No; now tell the whole of it. I beg the Senator's pardon. I said as the Supreme Court of the United States interpreted it and as I interpreted it.

Mr. BACON. Very well.

Mr. ELKINS. And not as the Senator interpreted it.

Mr. TELLER. Will the Senator from Georgia allow me?

Mr. BACON. Let me answer the Senator from West Virginia first. If the Senator from West Virginia will stand to that proposition, I will promise to show him a decision of the Supreme Court of the United States which says that the United States Government has no right—I do not go so far as the Supreme Court go in this particular, and I am merely stating this for the benefit of the Senator from West Virginia—to annex territory which it does not intend to make into a State, and Senators themselves say they do not intend to make a State of Hawaii.

Mr. ELKINS. You can not state what will be the intention of the Government a hundred years from now?

Mr. BACON. I am not putting it on that ground at all. Now I yield to the Senator from Colorado.

Mr. TELLER. The position of the Senator from West Virginia is good Democratic doctrine, a doctrine which old Jackson pressed on the country with great force, that every Senator and every Representative could construe the Constitution as he understood it.

Mr. BACON. Of course.

Mr. TELLER. And it was his duty not to look to the Supreme Court of the United States, but to his own judgment and conscience in these matters.

Mr. BACON. I am perfectly satisfied if that shall be the rule. I was discouraged by the fact that the manner of the reply of the Senator from West Virginia indicated that he would not be controlled by what some of the more distinctive lawyer members of the Senate might consider to be the law. He was going to take it into his own hands.

But to return, I am coming to a discussion of the question, to which I ask the attention of Senators, as to what the framers of the Constitution meant when they said "treaties" and what they must necessarily have meant. I asked the question whether it was possible that the framers of the Constitution when they put the word "treaties" into the Constitution in this connection understood that it simply meant an agreement or a negotiation put in a certain form, and that if it were not put in that certain form, it could be refined away and the exercise of the function could be usurped by Congress which had been denied the right to make a treaty. I had asked that question when the Senator from West Virginia interrupted me.

Now, Mr. President, has the word "treaty" a definite, well-fixed meaning? Is a treaty only that which is put in the form of a treaty as we usually see it when submitted to the Senate on the part of the President, or does a treaty mean a certain thing regardless of the form? I say the latter. The distinction between a statute and a treaty does not depend on the form. A statute may be in various forms. It may be in the ordinary form of a statute or in the form of a joint resolution. One has the same effect as the other. A treaty depends for the fact that it is a treaty according to the substance of it and what it proposes to accomplish.

Now, a statute is this: A statute is a rule of conduct laid down by the legislative department, which has its effect upon all of those within the jurisdiction. In other words, a statute passed by the Congress of the United States is obligatory upon every person who is a citizen of the United States or a resident therein. A statute can not go outside the jurisdiction of the United States and be binding upon the subjects of another power. It takes the consent of the subjects of the other power, speaking or giving their consent through their duly authorized government, to be bound by a certain thing which is enacted in this country; and therein comes the necessity for a treaty.

A treaty is that which is binding upon the people of two countries by mutual agreement that it shall be binding upon the two countries. A treaty is binding on two countries because the authority in each country undertakes that it shall be binding in its particular country, and that is the essential element and feature of a treaty, that it is binding on two countries because the authority which makes it binding is the particular authority in each country, not having a general authority over both.

If it were practicable for a statute to be made obligatory upon the citizens of another country, there would be no need of a treaty. We could simply enact what we wanted, and the people in the other country would have to obey. But as we can not do it, we have to invoke the consent of the people or the authority in that other country that they will also be bound by the same law, and that makes a treaty.

Now, Mr. President, I repeat possibly, but I desire to state it in another shape, that the distinction between a treaty and a statute is this: The statute affects only the people within the jurisdiction of the authority by which it is enacted. There is no consent required on the part of those who are subject to such a statute. It is made obligatory upon them by the authority of those who enact it.

A treaty, on the other hand, is something which involves negotiation with another country. It requires the consent of the duly authorized department in this Government, and it also requires that they shall negotiate and obtain the consent of the power in the other Government. This is stated with very great clearness in a report made by the Senate Committee on Foreign Relations in 1844—I have forgotten the number of the Congress—when it had under consideration the Texas resolutions. I will read it. This is a definition of a treaty. I read from Senate Documents, volume 3, 1844 and 1845. It is broken up so that the pages can not be told, as the documents are bound together, but it is Document No. 79, page 5 thereof; not the page of the volume.

But let it be remembered—

And I ask the attention of Senators now to this definition of a treaty—

on the other hand, that although this treaty only acts for other powers and in the singular sphere of exterior concerns, within this sphere no other power has privilege to intrude; the domain is all its own; in a property exclusive. If the affair to be accomplished be exterior and require the intervention of compact to accomplish it, here with the treaty-making power is the office, and sole office, to accomplish it. No other power has privilege to touch.

I do not know whether or not I make my distinction clear, but the framers of the Constitution had in view certain actions by this Government when they set up a distinct and separate department of Government for the making of treaties and when they conferred upon that department exclusive power to make treaties; and I suggest and urge as the crucial feature in this consideration that the framers of the Constitution necessarily, when they said that the President should have the power to make treaties, with the consent of the Senate, meant to put within that department the power to conduct all negotiations between this country and another country, and to come to any agreement with that other country as to what should be a rule of conduct between them.

If that be true, necessarily everything which is of that nature, everything which can be that and nothing else, must be the subject-matter of a treaty. If not, as I have said before, the framers of the Constitution made a great mistake when they unnecessarily put into the Constitution this machinery by which the power was conferred upon the President of the United States, by and with the advice and consent of the Senate, to make treaties.

Mr. President, I said that it was within the power of Congress to nullify this provision of the Constitution in two ways, either by directly making a treaty with another foreign Government or

by putting into the shape of a statute that which in reality is a treaty. Let me illustrate as to the latter, because that is what is attempted to be done here now. The attempt here is to make a treaty by statute. The treaty, as I understand it, which was proposed and negotiated by the President of the United States with the authority of Hawaii, and all the reports in connection with it have been made public, so that I can with propriety speak of them here.

A treaty was negotiated between the President of the United States and the Hawaiian Government. Why did the President of the United States and the Hawaiian Government negotiate a treaty for the annexation of those islands? I hope Senators who are considering this question and who propose to answer it will consider this particular feature of it. Why did the President of the United States negotiate with the Hawaiian Government by means of a treaty for the annexation of those islands except that the President of the United States and the authorities of the Hawaiian Islands recognized that it was the proper subject-matter of a treaty?

Why did the Senate of the United States, when the President submitted the treaty here, undertake to consider it and to give its consent to the treaty which had been negotiated between the President of the United States and the Hawaiian authorities? Why was it that it did not return it to the President and say "This is not the subject-matter of a treaty, and we should not be asked for our advice or consent?" Simply because of the fact that the Senate of the United States, without exception, regardless of what the opinion of any Senator might be on the merits, recognized that it was the proper subject-matter of a treaty.

Aside from this direct recognition it comes within the general definition of that which must be a treaty. It is to accomplish something which can not be accomplished by the unaided act of the United States. It is to accomplish something which requires not only the consent of the United States, but the consent of Hawaii, and therefore must be in its essence and in its character a treaty. And yet, Mr. President, as I have said, in the joint resolution now before the Senate there is an effort made to nullify this provision in the Constitution in the second of the methods which I suggested, to wit, in the method of putting in the form of a statute that which of necessity can be nothing else but the subject-matter of a treaty.

Mr. WHITE. If the Senator from Georgia will permit me, in line with the point he is making, it may be that the treaty was suggested because of the provision of the Hawaiian constitution, found in the thirty-second article of that instrument, which provides specifically for annexation to the United States by treaty, which treaty, of course, has never been made.

Mr. BACON. I understand that. I have no doubt that point will be fully brought out by the Senators who discuss the merits of the question.

What is it that the House of Representatives has done? And I say the House of Representatives, not in any spirit of criticism of it particularly, because the Senate, through its Foreign Relations Committee, had previously proposed the same thing. Here was the case of a treaty, which was not only recognized by both parties as a treaty and acted upon by both parties as a treaty, but which, in its essence, must of necessity be a treaty, which was practically abandoned in the Senate for the reason that in the manner and the method pointed out by the Constitution it could not be made law. The framers of the Constitution, in their wisdom, had provided that the President of the United States should make a treaty if two-thirds of the Senators present concurred in it.

Now, whether wise or unwise, that is the law. If only a majority concur, the treaty can not be made. Therefore the effect of the failure in the Senate to ratify that treaty was the same as the failure of an attempted passage of a statute law. The friends of annexation, seeing that it was impossible to make this treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House.

I will state the object I have in calling attention to this point. It is perfectly within the power of Congress—and when I speak of Congress in this discussion I mean the lawmaking power—if it has a majority in each House, if it can pursue the method legally which is sought to be pursued here, it is perfectly within the power of Congress not only to nullify and destroy that provision in the Federal Constitution, but to effect by statute any treaty that can not command a two-thirds vote in the Senate.

Mr. TELLER. I should like to ask the Senator if he thinks there is any treaty that we can not annul by a direct act of Congress?

Mr. BACON. I do not. I have so stated already. But I ask the learned Senator—

Mr. TELLER. Then the legislative power can not be inferior to the treaty-making power.

Exhibit "4"

Sir:

Form No. 336

You will please take notice that a
of which the within is a copy, was this day
duly entered in the within-entitled action, in
the office of the Clerk of the

Dated, N. Y.,, 1936

Yours, etc.,

U. S. Attorney,
Attorney for Defendant.

To

Attorney for

United States District Court
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

versus

MORGAN BELMONT and ELEANOR R.
BELMONT as Executors of the
last Will and Testament of
August Belmont, deceased,
Defendants.

AMENDED COMPLAINT

LAMAR HARDY,

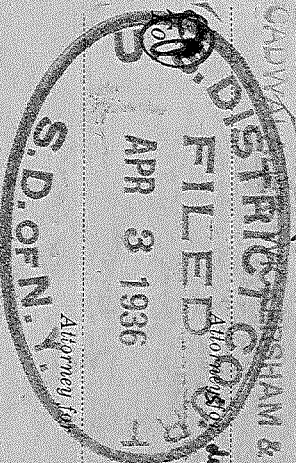
United States Attorney,
Attorney for Plaintiff.

~~The~~ Service of a copy of the within is hereby
admitted.

New York, April 2, 1936

GADWIN BRUSHAM & TAFT

Attorneys



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
 UNITED STATES OF AMERICA :
 :
 Plaintiff, :
 :
 -against- :
 :
 MORGAN BELMONT and ELEANOR R. :
 BELMONT, as Executors of the :
 Last Will and Testament of :
 August Belmont, deceased, :
 :
 Defendants :
 ----- X

AMENDED COMPLAINT
Law 63/274

The plaintiff, United States of America, by its attorney, LAMAR HARDY, United States Attorney for the Southern District of New York, for its complaint herein, alleges on information and belief:

I. The United States of America, hereinafter called the plaintiff, is a corporation sovereign and body politic.

II. Morgan Belmont and Eleanor R. Belmont, the executors of the last will and testament of August Belmont, deceased, hereinafter called the defendants, are residents of the State of New York and of the Southern District of New York.

III. Kompania Petrogradskago Metallicheskago Zavoda, sometimes styled in the German language "Petrograder Metal Fabrik" and sometimes styled in the English language "Petrograd Metal Works", hereinafter called the Metal Company, was prior to 1918 a corporation organized and existing under the laws of Russia with a fixed capital in excess of 1,000,000 rubles, which conducted a metallurgical and metal manufacturing business enterprise in Russia.

IV. Prior to 1918 and up to the date of his death, on or about December 10, 1924, August Belmont was a general partner in a partnership conducting a private banking and investment business in the City of New York under the firm name and style of August Belmont & Co., hereinafter called the Belmont firm.

V. Prior to 1918, the Metal Company had on deposit with the Belmont firm certain sums of money which remained on deposit with the Belmont firm thereafter and the amount of such sums on deposit on December 10, 1924 was \$25,438.48, for the repayment of which no demand had been made prior to that date. The defendants' testator was jointly liable together with the other partners of the Belmont firm for the repayment of these sums.

VI. In 1918 or thereabouts, duly enacted laws, decrees, enactments and orders of the Russian State, including the decree of June 28, 1918, on the nationalization of the largest industrial enterprises, a certified photostatic copy of which is annexed hereto, marked Exhibit 1 and made a part hereof as if set forth in full herein, and a certified copy of a translation of which is annexed hereto, marked Exhibit 2 and made a part hereof as if set forth in full herein, dissolved, terminated and liquidated certain Russian corporations and organizations and nationalized and appropriated the assets of such corporations.

VII. The Metal Company which prior to 1918, as hereinbefore alleged, was a corporation organized and existing under the laws of the State of Russia, with a fixed capital in excess of 1,000,000 rubles, by said duly enacted laws, decrees, enactments and orders of the Russian state, including the said decree of June 28, 1918

alleged in paragraph VI of this amended complaint, was dissolved, terminated and liquidated, and all of its property and assets of every kind and wherever situated, including the aforesaid cash deposit account with the Belmont firm in New York were nationalized and appropriated.

VIII. As a result of said duly enacted laws, decrees, enactments, and orders of the Russian State, the cash deposit account formerly standing to the credit of the Metal Company with the Belmont firm became the property of the Russian State, and remained the property of the Russian State at all times up to November 16, 1933.

IX. After the death of the aforesaid August Belmont, and on or about December 29, 1924, the Surrogate's Court of Nassau County issued letters testamentary to Morgan Belmont and Eleanor R. Belmont, the defendants herein, as executors of the last will and testament of August Belmont, deceased. Said defendants duly entered upon the performance of their duties as such executors, and have continued in the performance of such duties up to the present time.

X. On or about November 16, 1933, by an executive agreement contained in an exchange of diplomatic correspondence, a copy of which is annexed hereto as Exhibit 3 and made a part hereof as if set forth in full herein, the Union of Soviet Socialist Republics released and assigned to the plaintiff herein all amounts admitted to be due or that may be found to be due to the Union of Soviet Socialist Republics from American nationals. The said executive agreement released and assigned to the plaintiff the aforementioned cash deposit account formerly standing to the credit of the Metal Company with the Belmont firm and since November 16, 1933 plaintiff has been and now is the sole and exclusive owner entitled to

immediate possession of the aforesaid cash deposit account. A letter from the Attorney General of the United States, dated September 17, 1934, a reply thereto by the Secretary of State, and a letter from the Acting Secretary of State to the Attorney General, dated October 27, 1934, all of which are annexed as Exhibits 4, 5 and 6, and made a part hereof as if set forth in full herein, disclose the purpose of the executive agreement and assignment of November 16, 1933 to assign and release to the plaintiff all amounts and assets in the United States formerly owned by the Union of Soviet Socialist Republics, including the aforesaid cash deposit account formerly standing to the credit of the Metal Company with the Belmont firm.

XI. On or about June 18, 1935, the plaintiff demanded from the defendants the payment to the plaintiff of the sum of \$25,438.48, formerly standing to the credit of the Metal Company with the Belmont firm. The defendants have failed to comply with this demand up to the present time.

WHEREFORE, the plaintiff demands judgment against the defendants herein for the sum of \$25,438.48, with interest at 6% from June 18, 1935 to the date of judgment, together with the costs and disbursements of this action.

Lamar Hardy
LAMAR HARDY,
United States Attorney,
Southern District of New York,
Attorney for Plaintiff,
Office and Post Office Address:
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:
SOUTHERN DISTRICT OF NEW YORK)

EDWARD J. ENNIS, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York, and as such has charge of the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true; that the reason this verification is made by him and not by the plaintiff is that the plaintiff is a corporation sovereign; that the sources of his information and the grounds of his belief are records of this case on file in the office of the United States Attorney for the Southern District of New York.

Sworn to before me this
31st day of March, 1936.

A. Chankanian

Edward J. Ennis
Edward J. Ennis

EXHIBIT 3

(Copied from photostat certified by Department of State, on file in office of the United States Attorney.)

Washington,
November 16, 1933.

My dear Mr. President:

Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claims with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOV,
People's Commissar for Foreign Affairs
Union of Soviet Socialist Republics

Mr. Franklin D. Roosevelt,
President of the United States of America,
The White House.

EXHIBIT 3 Annexed to Complaint

(copied from photostat certified by Department of State, on file in office of the United States Attorney).

THE WHITE HOUSE
Washington

November 16, 1933.

My dear Mr. Litvinov:

I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of the their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or

(b) acts done or settlements made by or with the Government of the United States or public officials in the United States, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

Mr. Maxim M. Litvinov,
People's Commissar for Foreign Affairs,
Union of Soviet Socialist Republics."

EXHIBIT 3 Annexed to Complaint.

Exhibit "5"

Foreign Relations
of the
United States
Diplomatic Papers

The Soviet Union
1933-1939



United States
Government Printing Office
Washington : 1952

countries, only in the case of business and production secrets and in the case of the employment of forbidden methods (bribery, theft, fraud, etc.) to obtain such information. The category of business and production secrets naturally includes the official economic plans, in so far as they have not been made public, but not individual reports concerning the production conditions and the general conditions of individual enterprises.

“The Union of Soviet Socialist Republics has also no reason to complicate or hinder the critical examination of its economic organization. It naturally follows from this that every one has the right to talk about economic matters or to receive information about such matters in the Union, in so far as the information for which he has asked or which has been imparted to him is not such as may not, on the basis of special regulations issued by responsible officials or by the appropriate state enterprises, be made known to outsiders. (This principle applies primarily to information concerning economic trends and tendencies.)”

711.61/343%

*The Soviet Commissar for Foreign Affairs (Litvinov) to
President Roosevelt*

WASHINGTON, November 16, 1933.

MY DEAR MR. PRESIDENT: Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claim with respect to:

- (a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Re-

- publics or its nationals may have had or may claim to have an interest; or,
- (b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am [etc.]

MAXIM LITVINOFF

711.61/343%

*President Roosevelt to the Soviet Commissar for Foreign Affairs
(Litvinov)*

WASHINGTON, November 16, 1933.

MY DEAR MR. LITVINOV: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

[Here follows quotation of statement made by Mr. Litvinov in his note printed *supra*.]

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am [etc.]

FRANKLIN D. ROOSEVELT

711.61/343%

*The Soviet Commissar for Foreign Affairs (Litvinov) to
President Roosevelt*

WASHINGTON, November 16, 1933.

MY DEAR MR. PRESIDENT: I have the honor to inform you that, following our conversations and following my examination of certain documents of the years 1918 to 1921 relating to the attitude of the American Government toward the expedition into Siberia, the operations there of foreign military forces and the inviolability of the territory of the Union of Soviet Socialist Republics, the Government of the Union of Soviet Socialist Republics agrees that it will waive any and all claims of whatsoever character arising out of activities of military forces of the United States in Siberia, or assistance to military forces in Siberia subsequent to January 1, 1918, and that such claims shall be regarded as finally settled and disposed of by this agreement.

I am [etc.]

MAXIM LITVINOFF

Exhibit “2”

106TH CONGRESS }
2d Session }

COMMITTEE PRINT

{ S. PRT.
106-71 }

**TREATIES AND OTHER INTERNATIONAL
AGREEMENTS: THE ROLE OF THE
UNITED STATES SENATE**

A S T U D Y

PREPARED FOR THE

**COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE**

BY THE

**CONGRESSIONAL RESEARCH SERVICE
LIBRARY OF CONGRESS**



JANUARY 2001

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While the President's authority to conclude such agreements seems well-established, the constitutional doctrine underlying his power is seldom detailed by legal commentators or by the courts. It has been suggested that sufficient authority may be found in the President's duty under Article II, Section 3, of the Constitution to "take care that the laws [i.e., treaty law] be faithfully executed."¹¹⁸ If the making of such agreements is indeed sustainable on this ground, then the instruments technically would seem more properly characterized as Presidential or sole executive agreements in view of the reliance upon one of the Executive's independent powers under Article II of the Constitution.

On the other hand, an alternate legal basis is suggested by *Wilson v. Girard*,¹¹⁹ where the Supreme Court seemed to find sufficient authorization in the Senate's consent to the underlying treaty. The Court's decision was predicated on the following factual chronology. Pursuant to a 1951 bilateral security treaty,¹²⁰ Japan and the United States signed an administrative agreement¹²¹ which became effective on the same date as the security treaty and which was considered by the Senate before consenting to the treaty. The administrative agreement provided that once a NATO Status of Forces Agreement concerning criminal jurisdiction came into effect, the United States and Japan would conclude an agreement with provisions corresponding to those of the NATO Arrangements. Accordingly, subsequent to the entry into force of the NATO Agreement,¹²² the United States and Japan effected a protocol agreement¹²³ containing provisions at issue in the case at bar. In sustaining both the administrative agreement and the protocol agreement, the Court stated that:

In the light of the Senate's ratification of the Security Treaty after consideration of the Administrative Agreement, which had already been signed, and its subsequent ratification of the NATO Agreement, with knowledge of the commitment to Japan under Administrative Agreement, we are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol embodying the NATO Agreement provisions governing jurisdiction to try criminal offenses.¹²⁴

PRESIDENTIAL OR SOLE EXECUTIVE AGREEMENTS

Agreements concluded exclusively pursuant to the President's independent authority under Article II of the Constitution may be denominated Presidential or sole executive agreements. Unlike congressional-executive agreements or agreements pursuant to

porting authority for 1971 agreement with Portugal under which the United States agreed to provide some \$435 million in credits and assistance to Portugal in exchange for the right to station American forces at Lajes Airbase in the Azores).

¹¹⁸Henkin, pp. 219-220.

¹¹⁹354 U.S. 524 (1957).

¹²⁰Security Treaty Between the United States and Japan, Sept. 8, 1951, 3 U.S.T. 3329, TIAS 2491.

¹²¹Administrative Agreement under the United States-Japan Security Treaty, Feb. 28, 1952, 3 U.S.T. 3341, TIAS 2492.

¹²²Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, TIAS 2846.

¹²³Protocol Amending the Administrative Agreement under the United States-Japan Security Treaty, Sept. 29, 1953, 4 U.S.T. 1846, TIAS 2848.

¹²⁴354 U.S. at 528-29.

treaties, Presidential agreements lack an underlying legal basis in the form of a statute or treaty.

Numerous Presidential agreements have been concluded over the years on the basis of the President's independent constitutional authority. Agreements of this type deal with a variety of subjects and reflect varying degrees of formality. Many Presidential agreements, of course, pertain to relatively minor matters and are the subject of little concern. Other agreements, however, have provoked substantial interbranch controversy, notably between the Executive and the Senate.

Some idea of both the modern scope and contentious nature of Presidential agreements may be gained by noting that such agreements were responsible for the open door policy toward China at the beginning of the 20th century,¹²⁵ the effective acknowledgment of Japan's political hegemony in the Far East pursuant to the Taft-Katsura Agreement of 1905 and the Lansing-Ishii Agreement of 1917,¹²⁶ American recognition of the Soviet Union in the Litvinov Agreement of 1933,¹²⁷ the Destroyers-for-Bases Exchange with Great Britain prior to American entry into World War II,¹²⁸ the Yalta Agreement of 1945, a secret portion of which made far-reaching concessions to the Soviet Union to gain Russia's entry into the war against Japan,¹²⁹ the 1973 Vietnam Peace Agreement,¹³⁰ and, more recently, the Iranian Hostage Agreement of 1981.¹³¹

As previously indicated, legal authority supporting the conclusion of Presidential agreements may be found in the various foreign affairs powers of the President under Article II of the Constitution.

¹²⁵ The open door policy in China as initiated during the administration of President McKinley in the form of notes from Secretary of State John Hay to the Governments of France, Germany, Great Britain, Italy, Japan, and Russia. The text of the Hay notes may be found in Malloy, William. *Treaties, Conventions, International Acts, Protocols, and Agreements Between the United States of America and Other Powers*, v. 1, 1910, pp. 244-260 (hereafter cited as Malloy). Concerning the significance of these agreements, see McClure, p. 98, and Bemis, Samuel Flagg. *A Diplomatic History of the United States*. 1965, pp. 486 and 504 (hereafter cited as Bemis).

¹²⁶ The Taft-Katsura Agreement of 1905 may be found in Dennett, Tyler. *Roosevelt and the Russo-Japanese War*. 1925, pp. 112-114. The Lansing-Ishii Agreement of 1917 may be found in Malloy, v. 3, pp. 2720-2722. Concerning the latter agreement, see Bemis, pp. 690-693.

¹²⁷ The correspondence establishing the agreement may be found in U.S. Department of State, *Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, Eastern European Series No. 1 (1933) [No. 528]. Concerning President Roosevelt's failure to give the Senate formal notification of the agreement, see the remarks of Senator Vandenberg in *Congressional Record*, January 11, 1934, pp. 460-461.

¹²⁸ See the Agreement Respecting Naval and Air Bases (Hull-Lothian Agreement), *United States-Great Britain*, Sept. 2, 1940, 54 Stat. 2405, and the Opinion of Attorney General Robert Jackson supporting the constitutionality of the arrangement, 39 Op. Atty. Gen. 484 (1940). See also Wright, Q. *The Transfer of Destroyers to Great Britain*. *American Journal of International Law*, v. 34, 1940, p. 680; Borchard, E. *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*. *Id.*, p. 690; and Bemis, p. 858.

¹²⁹ For the text of the Yalta Agreement, see 59 Stat. 1823. Seven years after the Yalta Conference, the agreement was still being denounced in the Senate as "shameful," "infamous," and a usurpation of power by the President. *Congressional Record*, February 7, 1952, p. 900 (remarks of Senator Ives). See also Bemis, p. 904. Although there were statements made by President Roosevelt and Secretary of State James Byrnes which seemed to imply that Senate consent to the agreement would be necessary, the treaty mode was not utilized. In this connection, see Pan, *Legal Aspects of the Yalta Agreement*. *American Journal of International Law*, v. 46, 1952, p. 40, and Briggs, *The Leaders' Agreement at Yalta*. *American Journal of International Law*, v. 40, 1946, p. 380.

¹³⁰ See the Agreement on Ending the War and Restoring Peace in Vietnam, January 27, 1973, 24 U.S.T. 1, TIAS 7542, and the supporting case offered by the State Department in Rovine, Arthur. *Digest of United States Practice in International Law 1973*. 1974, p. 188.

¹³¹ See the Declarations of the Government of the Democratic and Popular Republic of Algeria Concerning Commitments and Settlement of Claims by the United States and Iran with Respect to Resolution of the Crisis Arising Out of the Detention of 52 United States Nationals in Iran, with Undertakings and Escrow Agreement, Jan. 19, 1981, TIAS _____, *Department of State Bulletin*, v. 81, February 1981, p. 1.

In a given instance, a specific agreement may be supportable on the basis of one or more of these independent executive powers.

One possible basis for sole executive agreements seem to lie in the President's general "executive power" under Article II, Section 1, of the Constitution. Early judicial recognition of this power in the context of Presidential agreements, and perhaps the earliest judicial enforcement of this mode of agreement-making as well, was accorded by the Supreme Court of the Territory of Washington in *Watts v. United States*.¹³² The agreement at issue was concluded between the United States and Great Britain in 1859 and provided for the joint occupation of San Juan Island pending a final adjustment of the international boundary by the parties.¹³³ The court stated that "[t]he power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government, and adheres where the executive power is vested."¹³⁴

The President's executive power was later acknowledged in broad terms in *United States v. Curtiss-Wright Export Corporation*¹³⁵ where the U.S. Supreme Court referred to the "very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations."¹³⁶ Although no agreement was at issue in *Curtiss-Wright*, the quoted language was subsequently applied by the Court in *United States v. Belmont*¹³⁷ to validate the Litvinov Agreement of 1933, supra, wherein the parties settled mutually outstanding claims incident to formal American recognition of the Soviet Union. Concerning this agreement, the Court declared that:

* * * [I]n respect of what was done here, the Executive had authority to speak as the sole organ of the government. The assignment and the agreements in connection therewith did not as in the case of treaties, as that term is used in the treaty-making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.¹³⁸

Similarly, in *United States v. Pink*,¹³⁹ the Court again approved the Litvinov Agreement on the ground that "[p]ower to remove such obstacles to full recognition as settlement of claims * * * certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.'" ¹⁴⁰ More recently, in *Dames & Moore v. Regan*,¹⁴¹ the Court relied upon, inter alia, the *Pink* case to sustain President Carter's suspension of claims pending in American courts against Iran as

¹³² 1 Wash. Terr. 288 (1870).

¹³³ Joint Occupation of San Juan Island, Exchanges of Notes of Oct. 25 and 29 and Nov. 2, 3, 5, 7, and 9, 1859, and Mar. 20 and 23, 1860, reprinted in Bevens, Charles, *Treaties and Other International Agreements of the United States of America 1776-1949*, v. 12, 1974, p. 123 (hereafter cited as Bevens, *Treaties*).

¹³⁴ 1 Wash. Terr. at 294. As the American correspondence establishing the agreement for the joint occupation of the island was conducted by military officials, the agreement may owe much for its authority to the Commander in Chief Power of the Executive (Article II Section 2 Clause 1). The *Watts* case is further discussed in the text accompanying note 160 infra.

¹³⁵ 299 U.S. 304 (1936).

¹³⁶ *Ibid.* at 320.

¹³⁷ 301 U.S. 324 (1937).

¹³⁸ *Ibid.* at 330.

¹³⁹ 315 U.S. 203 (1942).

¹⁴⁰ *Ibid.* at 229, citing *Curtiss-Wright*, 299 U.S. at 320.

¹⁴¹ 453 U.S. 654 (1981).

required by the Hostage Release Agreement of 1981, *supra*, and, more directly, by Executive order.¹⁴² In light of *Pink*, the Court indicated that “prior cases *** have recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate.”¹⁴³ Moreover, the Court’s decision was heavily influenced by a finding the general tenor of existing statutes reflected Congress’ acceptance of a broad scope for independent executive action in the area of international claims settlement agreements.¹⁴⁴

A second Article II power potentially available to the President for purposes for concluding sole executive agreements appears to lie in Article II, Section 2, Clause 1, of the Constitution which provides that the President shall be “Commander-in-Chief of the Army and Navy.” Cautious acceptance of the President’s power to conclude agreements pursuant to this power is reflected in dictum of the Supreme Court in *Tucker v. Alexandroff*¹⁴⁵ where the Court, after noting previous instances in which the Executive unilaterally had granted permission for foreign troops to enter the United States, declared that “[w]hile no act of Congress authorized the Executive Department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States.”¹⁴⁶

The treaty clause of the Constitution (Article II, Section 2, Clause 2), in empowering the President to make treaties with the consent of the Senate, may itself be viewed as supporting authority for some types of sole executive agreements. The President’s power under this clause, together with his constitutional role as sole international negotiator for the United States¹⁴⁷ suggest the existence of ancillary authority to make agreements necessary for the conclusion of treaties. Intermediate stages of negotiations or temporary measures pending conclusion of a treaty may, for example, be reflected in protocols or *modus vivendi*.¹⁴⁸ Although there appear to be no cases explicitly recognizing the treaty clause as authority for sole executive agreements, the Court’s opinion in *Bel-*

¹⁴² Executive Order No. 12294, 46 Fed. Reg. 14111 (1981).

¹⁴³ 453 U.S. at 682.

¹⁴⁴ The Court found that related statutes, though not authorizing the President’s action, might be viewed as inviting independent Presidential measures in a situation such as the one at issue “at least *** where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence of the sort engaged in by the President,” namely, claims settlement by executive agreement. *Ibid.* at 677–682. In *Barquero v. United States*, 18 F. 3d 1311 (5th Cir. 1994), *Dames & Moore* criteria were used by a Federal Circuit Court of Appeals to find an alternative constitutional basis for the President’s entry into tax information exchange agreements with countries that were not “beneficiary countries” under the Caribbean Basin Economic Recovery Act. The court primarily held, however, that the agreements were authorized under the 1986 Tax Reform Act.

¹⁴⁵ 183 U.S. 424 (1902).

¹⁴⁶ *Ibid.* at 435. Four dissenters felt that such exceptions from a nation’s territorial jurisdiction must rest on either a treaty or a statute, but noted that it was not necessary, in this case, to consider the full extent of the President’s powers in this regard. *Ibid.* at 456 and 459. Wright states, however, that “in spite of this dissent the power has been exercised by the President on many occasions. ***” Wright, Q. The Control of American Foreign Relations. 1922, p. 242 (hereafter cited as Wright, Control of Foreign Relations). See also Moore, John Bassett, A Digest of International Law, v. II, 1906, p. 389.

¹⁴⁷ The Supreme Court indicated in the *Curtiss-Wright* case that the “[President] alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.”: 299 U.S. at 319.

¹⁴⁸ Constitution—Analysis and Interpretation, p. 500.

mont seems suggestive in acknowledging that there are many international compacts not always requiring Senate consent “of which a protocol [and] a modus vivendi are illustrations.”¹⁴⁹

A fourth power of the President under Article II which is relevant to the conclusion of sole executive agreements lies in his authority to “receive Ambassadors and other public Ministers” (Article II, Section 3). To the extent that the receive clause is viewed as supporting the President’s authority to “recognize” foreign governments,¹⁵⁰ it is arguable that sole executive agreements may be concluded incident to such recognition. Although the *Belmont* and *Pink* cases appear to sustain the Litvinov Agreement principally on the basis of the President’s general foreign affairs powers as Chief Executive or “sole organ” of the government in the field of international relations, the Court also seemed to emphasize that the agreement accorded American “recognition” to the Soviet Union. Thus, in *Belmont* the Court stated that:

We take judicial notice of the fact that coincident with the assignment [of Soviet claims against American nationals to the United States government], the President recognized the Soviet Government, and normal diplomatic relations were established between that government and the government of the United States, followed by an exchange of ambassadors * * * The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted * * * [I]n respect of what was done here, the Executive had authority to speak as the sole organ of [the] government.¹⁵¹

Similarly, in *Pink* the Court declared that:

“What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government” * * * That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition * * * Recognition is not always absolute; it is sometimes conditional * * * Power to remove such obstacles to full recognition as settlement of claims of our nationals * * * Unless such a power exists, the power of recognition might be thwarted or seriously impaired. No such obstacles can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of

¹⁴⁹ 301 U.S. at 330–331.

¹⁵⁰ See *Goldwater v. Carter*, 617 F. 2d 697, 707–708 (D.C. Cir. 1979), *jud. vac. and rem. with directions to dismiss complaint*, 444 U.S. 996 (1979). Professor Henkin observes that “[r]ecognition is indisputably the President’s sole responsibility, and for many it is an ‘enumerated’ power implied in the President’s express authority to appoint and receive ambassadors.” Henkin 1996, p. 220. See also Wright, *Control of Foreign Relations*, p. 133; Mathews, pp. 365–366; and McDougal and Lans, pp. 247–248.

¹⁵¹ 301 U.S. at 330.

the powers and responsibilities of the president in the conduct of foreign affairs *** is to be drastically revised.¹⁵²

A fifth source of Presidential power under Article II possibly supporting the conclusion of sole executive agreements is the President's duty to "take care that the laws be faithfully executed" (Article II, Section 3). Although there appear to be no cases holding that the take care clause is specific authority for such agreements, legal commentators have asserted that the clause sanctions the conclusion of agreements in implementation of treaties.¹⁵³ Moreover, it was early opined by Attorney General Wirt in 1822 that the President's duty under this constitutional provision extends not only to the Constitution, statutes, and treaties of the United States but also to "those general laws of nations which govern the intercourse between the United States and foreign nations."¹⁵⁴ This view appears to have been accepted subsequently by the Supreme Court in *In re Neagle*,¹⁵⁵ where it was suggested in dictum that the President's responsibility under the clause includes the enforcement of "rights, duties, and obligations growing out of *** our international relations ***"¹⁵⁶ Accordingly, it has been argued that the clause "sanctions agreements which are necessary to fulfill [non-treaty] international obligations of the United States."¹⁵⁷

Sole executive agreements validly concluded pursuant to one or more of the President's independent powers under Article II of the Constitution may be accorded status as Supreme Law of the Land for purposes of superseding any conflicting provisions of state law. As explained by the Supreme Court in *Belmont*:

Plainly, the external powers of the United States are to be exercised without regard to the state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning *** And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.¹⁵⁸

¹⁵² 315 U.S. at 229-230. See also *Dole v. Carter*, 444 F. Supp. 1065 (D. Kan. 1977), *motion for injunction pending appeal denied*, 569 F. 2d 1108 (10th Cir. 1977), where the district court relied on the President's recognition power and his general "sole organ" executive authority to validate a Presidential agreement transferring Hungarian coronation regalia to the Republic of Hungary. On appeal, however, the Court of Appeals "decline[d] to enter into any controversy relating to distinctions which may be drawn between executive agreements and treaties" and adjudged the issue a nonjusticiable political question.

¹⁵³ See McDougal and Lans, p. 248, and Mathews, p. 367. See also Henkin 1996, pp. 219-220.

¹⁵⁴ 1 Op. Atty. Gen. 566, 570 (1822).

¹⁵⁵ 135 U.S. 1 (1890).

¹⁵⁶ *Ibid.* at 64.

¹⁵⁷ McDougal and Lans, p. 248. McDougal and Lans state that the "take care" clause provides an alternate source of authority for the Boxer Indemnity Protocol of 1901 following cessation of the Boxer Rebellion in China. *Ibid.*, p. 248, n. 150. The text of the protocol may be found in Malloy, *Treaties*, v. 2, p. 2006. Concerning the use of the "take care" clause as authority for executive implementation of international law, Professor Henkin notes that— *** Writers have not distinguished between (a) authority to carry out the obligations of the United States under treaty or customary law (which can plausibly be found in the 'take care' clause); (b) authority to exercise rights reserved to the United States by international law or given it by treaty; and (c) authority to compel other states to carry out their international obligations to the United States. Henkin 1996, p. 347, n. 54.

¹⁵⁸ 301 U.S. at 331. See also *Pink*, 315 U.S. at 230-234.

However, notwithstanding that treaties and Federal statutes are treated equally by the Constitution with legal primacy accorded the measure which is later in time,¹⁵⁹ the courts have been reluctant to enforce Presidential agreements in the face of prior congressional enactments. Judicial uncertainty was early evidenced in *Watts v. United States*, supra, where the Supreme Court of the Territory of Washington, after affirming on the basis of the President's "executive power" the validity of an agreement with Great Britain providing for the joint occupation of San Juan Island, tentatively enforced the agreement against a prior Federal law defining the government of the territory. According to the court:

Such conventions are not treaties within the meaning of the Constitution, and, as treaties supreme law of the land, conclusive on the court, but they are provisional arrangements, rendered necessary by national differences involving the faith of the nation and entitled to the respect of the courts. They are not a casting of the national will into the firm and permanent condition of law, and yet in some sort they are for the occasion an expression of the will of the people through their political organ, touching the matters affected; and to avoid unhappy collision between the political and judicial branches of the government, both which are in theory inseparably all one, such an expression to a reasonable limit should be followed by the courts and not opposed, though extending to the temporary restraint or modification of the operation of existing statutes. Just as here, we think, this particular convention respecting San Juan should be allowed to modify for the time being the operation of the organic act of this Territory (Washington) so far forth as to exclude to the extent demanded by the political branch of the government of the United States, in the interest of peace, all territorial interference for the government of that island.¹⁶⁰

Decisions by lower Federal courts of more recent date, however, have voided sole executive agreements which were incompatible with pre-existing Federal laws. Thus, in *United States v. Guy W. Capps, Inc.*,¹⁶¹ a U.S. Circuit Court of Appeals refused to enforce a Presidential agreement concerning the importation of Canadian potatoes into the United States inasmuch as the agreement contravened the requirements of the Agricultural Act of 1948.¹⁶² According to the court, " * * * whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress."¹⁶³ The court's rationale for this conclusion was grounded upon Congress' expressly delegated authority under Article I, Section 8, Clause 3, of the Constitution to regulate foreign commerce (as reflected in the statute in the present case) and upon the following statement

¹⁵⁹ *Whitney v. Robertson*, 124 U.S. 190 (1888).

¹⁶⁰ 1 Wash. Terr. at 294. Elsewhere the court "presumed" that Congress had been "fully apprised" of the situation and noted tacit congressional acquiescence for a long term of years. *Ibid.*, p. 293.

¹⁶¹ 204 F. 2d 655 (4th Cir. 1953), *aff'd* on other grounds, 348 U.S. 296 (1955).

¹⁶² Agricultural Act of 1948, § 3, 62 Stat. 1247, 1248-1250.

¹⁶³ 204 F. 2d at 659-660.

from Justice Jackson's frequently quoted concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁶⁴

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.¹⁶⁵

Similar holdings have occurred in subsequent cases on the authority of *Guy Capps*. In *Seery v. United States*,¹⁶⁶ for example, the U.S. Court of Claims denied enforcement of a Presidential agreement settling post-World War II claims with Austria¹⁶⁷ in the face of prior Federal law authorizing suit against the United States on constitutional claims.¹⁶⁸ The court declared that:

*** It would indeed be incongruous if the Executive Department alone, without even the limited participation by Congress which is present when a treaty is ratified, could not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the constitutional right of a citizen. In *United States v. Guy W. Capps* *** the court held that an executive agreement which conflicted with an Act of Congress was invalid.¹⁶⁹

Reference may also be made to *Swearingen v. United States*¹⁷⁰ where a Federal District Court treated the Agreement in Implementation of Article III of the Panama Canal Treaty of 1977¹⁷¹ as a sole executive agreement, and, as such, void for purposes of conferring an income tax exemption on American employees of the Panama Canal Commission in derogation of Section 61(a) of the Internal Revenue Code.¹⁷² The rule of the *Guy Capps* case is also reflected in the Department of State's Circular 175 procedure governing the making of international agreements,¹⁷³ as well as in the American Law Institute's current Restatement (Third) of the Foreign Relations Law of the United States.¹⁷⁴

Notwithstanding that the rule of the *Guy Capps* case appears to enjoy general acceptance, contrary arguments have been advanced by other authorities, including the just cited Restatement (Third).¹⁷⁵ The latter thus states that:

¹⁶⁴ 343 U.S. 579 (1952).

¹⁶⁵ *Ibid.* at 659, quoting Justice Jackson's concurring opinion in *Youngstown*, 343 U.S. at 637-638.

¹⁶⁶ 127 F. Supp. 601 (Ct. Cl. 1955).

¹⁶⁷ Agreement Respecting the Settlement of Certain War Accounts and Claims, United States-Austria, June 21, 1947, 61 Stat. 4168.

¹⁶⁸ 28 U.S.C. § 1491.

¹⁶⁹ 127 F. Supp. at 607.

¹⁷⁰ 565 F. Supp. 1019 (D. Colo. 1983).

¹⁷¹ Agreement in Implementation of Article III of the Panama Canal Treaty, with Annexes, Agreed Minute and Related Notes, signed Sept. 7, 1977, 33 U.S.T. 141, TIAS 10031.

¹⁷² 26 U.S.C. § 61(a). Compare *Corliss v. United States*, 567 F. Supp. 162 (1983), holding, on the basis of the legislative history of the agreement in the U.S. Senate, that the agreement was not intended to exempt American employees from Federal income tax liability.

¹⁷³ 11 For. Aff. Man. § 721.2b(3).

¹⁷⁴ Rest. 3d, § 115, Reporters' Note 5.

¹⁷⁵ *Ibid.*

*** it has been argued that a sole executive agreement within the President's constitutional authority is federal law, and United States jurisprudence has not known federal law of different constitutional status. "All Constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature." The Federalist No. 64 (Jay), cited in *United States v. Pink*, supra, 315 U.S. at 230 *** See Henkin, *Foreign Affairs and the Constitution* 186, 432-33 (1972). Of course, even if a sole executive agreement were held to supersede a statute, Congress could reenact the statute and thereby supersede the intervening executive agreement as domestic law.¹⁷⁶

The precedential effect of the *Guy Capps* rule may also be somewhat eroded by judicial dicta suggesting that the circuit court's opinion in the case was "neutralized" by the Supreme Court's affirmance on other grounds¹⁷⁷ and that the question as to the effect of a Presidential agreement upon a prior conflicting act of Congress has "apparently not yet been completely settled."¹⁷⁸ Moreover, in the two cases which have specifically adhered to the *Guy Capps* rule—*Seery* and *Swearingen*—the courts, respectively, were either strongly influenced by Bill of Rights considerations or failed to consider the possibility that the agreement in issue may have effectively received the sanction of the Senate as an agreement pursuant to an existing treaty. It appears, therefore, that the law on this point may yet be in the course of further development.

¹⁷⁶ Ibid.

¹⁷⁷ *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F. 2d 622, 634, n. 16 (Ct. Cl. 1964).

¹⁷⁸ *American Bitumils & Asphalt Co. v. United States*, 146 F. Supp. 703, 708 (Ct. Cl. 1956), citing both *Guy Caps* and *Seery*.

Exhibit “3”

HOUSE CONCURRENT RESOLUTION

ESTABLISHING A JOINT LEGISLATIVE INVESTIGATING COMMITTEE TO INVESTIGATE THE STATUS OF TWO EXECUTIVE AGREEMENTS ENTERED INTO IN 1893 BETWEEN UNITED STATES PRESIDENT GROVER CLEVELAND AND QUEEN LILI'UOKALANI OF THE HAWAIIAN KINGDOM, CALLED THE LILI'UOKALANI ASSIGNMENT AND THE AGREEMENT OF RESTORATION.

1 WHEREAS, on December 19, 1842, United States President John
2 Tyler recognized the Hawaiian Kingdom as an independent and
3 sovereign State, extended full and complete diplomatic
4 recognition to the Hawaiian Government, and entered into
5 treaties and conventions with the Hawaiian government in 1849,
6 1875, and 1887; and

7
8 WHEREAS, on January 14, 1893, John L. Stevens (hereinafter
9 referred to as the "United States minister"), the United States
10 minister plenipotentiary assigned to the Hawaiian Kingdom
11 government, conspired with a small group of insurgents of
12 diverse nationalities to overthrow the Hawaiian Kingdom
13 government; and

14
15 WHEREAS, in pursuance of the conspiracy, the United States
16 Minister and naval representatives of the United States caused
17 armed naval forces to invade the Hawaiian Kingdom on January 16,
18 1893, and to position themselves near government buildings and
19 Iolani Palace in order to provide protection to the insurgents;
20 and

21
22 WHEREAS, on the afternoon of January 17, 1893, this small
23 group of insurgents declared themselves to be a Provisional
24 Government; and

25
26 WHEREAS, the United States minister thereupon extended
27 diplomatic recognition to the insurgents in violation of



1 treaties between the United States and the Hawaiian Kingdom and
2 in violation of international law; and
3

4 WHEREAS, because the police force was unable to apprehend
5 the insurgents for violating the law of treason without the risk
6 of bloodshed between the police and the United States troops,
7 Queen Lili'uokalani issued the following protest temporarily,
8 conditionally yielding her executive power to the United States
9 government:

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"I Liliuokalani, by the Grace of God and under
the Constitution of the Hawaiian Kingdom, Queen, do
hereby solemnly protest against any and all acts done
against myself and the Constitutional Government of
the Hawaiian Kingdom by certain persons claiming to
have established a Provisional Government of and for
this Kingdom.

19

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That I yield to the superior force of the United
States of America whose Minister Plenipotentiary, His
Excellency John L. Stevens, has caused United States
troops to be landed at Honolulu and declared that he
would support the Provisional Government.

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Now to avoid any collision of armed forces, and
perhaps the loss of life, I do this under protest and
impelled by said force yield my authority until such
time as the Government of the United States shall,
upon facts being presented to it, undo the action of
its representatives and reinstate me in the authority
which I claim as the Constitutional Sovereign of the
Hawaiian Islands.

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Done at Honolulu this 17th day of January, A.D.
1893"; and

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WHEREAS, under Article 31 of the Constitution of the
Kingdom of Hawaii, as the constitutional monarch of the
Hawaiian islands, the Queen was vested with the executive
power to faithfully execute and administer Hawaiian law:
"To the King belongs the Executive power"; and

43

44

WHEREAS, on March 9, 1893, President Grover Cleveland
accepted the temporary and conditional assignment of executive



1 power from the Queen and investigated the circumstances of the
2 overthrow of the Hawaiian Kingdom government; and
3

4 WHEREAS, on October 18, 1893, the investigation concluded
5 that the United States violated international law and the
6 Hawaiian Kingdom government must be restored to its status
7 before the landing of United States troops; and
8

9 WHEREAS, negotiations for settlement and restoration took
10 place between Queen Lili'uokalani and United States minister
11 plenipotentiary, Albert Willis, between November 13, 1893, and
12 December 18, 1893, at the United States Embassy in Honolulu; and
13

14 WHEREAS, a settlement was reached on December 18, 1893,
15 whereby Queen Lili'uokalani signed the following declaration
16 that was dispatched to the United States State Department by the
17 United States minister on December 20, 1893:
18

19 "I, Liliuokalani, in recognition of the high
20 sense of justice which has actuated the President of
21 the United States, and desiring to put aside all
22 feelings of personal hatred or revenge and to do what
23 is best for all the people of these Islands, both
24 native and foreign born, do hereby and herein solemnly
25 declare and pledge myself that, if reinstated as the
26 constitutional sovereign of the Hawaiian Islands, that
27 I will immediately proclaim and declare,
28 unconditionally and without reservation, to every
29 person who directly or indirectly participated in the
30 revolution of January 17, 1893, a full pardon and
31 amnesty for their offenses, with restoration of all
32 rights, privileges, and immunities under the
33 constitution and the laws which have been made in
34 pursuance thereof, and that I will forbid and prevent
35 the adoption of any measures of proscription or
36 punishment for what has been done in the past by those
37 setting up or supporting the Provisional Government.
38

39 I further solemnly agree to accept the
40 restoration under the constitution existing at the
41 time of said revolution and that I will abide by and
42 fully execute that constitution with all the
43 guaranties as to person and property therein
44 contained.



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I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.

Witness my hand this 18th of December, 1893"; and

WHEREAS, there exist two agreements:

- (1) The Lili'uokalani Assignment, whereby President Grover Cleveland accepted the obligation of administering Hawaiian Law in an assignment of executive power; and
- (2) The Agreement of Restoration, whereby the Queen agreed to grant amnesty after return of executive power and restoration of the government; and

WHEREAS, President Cleveland and his successors in office have violated these agreements by not administering Hawaiian Kingdom Law and not restoring the Hawaiian Kingdom government; and

WHEREAS, for the past one hundred eighteen years the Office of President has retained the temporary and conditional assignment of Hawaiian executive power from the Queen; and

WHEREAS, these agreements are called sole executive agreements under United States constitutional law and the basis of a federal lawsuit in Washington, D.C., filed by Dr. David Keanu Sai against President Barack Obama, Secretary of State Hillary Clinton, Secretary of Defense Robert Gates, Admiral Robert Willard, and Governor Linda Lingle (case no. 1:10-CV-00899CKK) on June 1, 2010; and

WHEREAS, on November 13, 2010, the Association of Hawaiian Civic Clubs at its 51st Convention at Keauhou, Island of Hawaii, unanimously passed Resolution No. 10-15, "Acknowledging Queen Lili'uokalani's Agreements with President Grover Cleveland to Execute Hawaiian Law and to Restore the Hawaiian Government"; and



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WHEREAS, under the Supremacy Clause of the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding"; and

WHEREAS, the United States Supreme Court declared in United States v. Belmont, 301 U.S. 324 (1937), that executive agreements arising out of the President's sole authority over foreign relations does not require ratification by the Senate or the approval of Congress, and has the force and effect of a treaty; and

WHEREAS, statutes enacted by the Legislature of the State of Hawaii that conflict with valid executive agreements would be considered void under the Supremacy Clause; and

WHEREAS, a joint legislative investigating committee would settle the issue of whether certain statutes enacted by the Hawaii State Legislature violate the United States Constitution; and

WHEREAS, section 21-3, Hawaii Revised Statutes, authorizes the establishment of a legislative investigating committee by resolution, and Rule 14 of the Rules of the House of Representatives and Rule 14(3) of the Rules of the Senate allow for the establishment of special committees; now, therefore,

BE IT RESOLVED by the House of Representatives of the Twenty-sixth Legislature of the State of Hawaii, Regular Session of 2011, the Senate concurring, that:

- (1) The Legislature hereby establishes a joint legislative investigating committee to investigate the status of two executive agreements entered into between President Grover Cleveland of the United States and Queen Lili'uokalani of the Hawaiian Kingdom in 1893, called the Lili'uokalani Assignment and the Agreement of Restoration;
- (2) The purpose and duties of the joint investigating committee shall be to inquire into the status of the

1 executive agreements by holding meetings and hearings
2 as necessary, receiving all information from the
3 inquiry, and submitting a final report to the
4 Legislature;

5
6 (3) The joint investigating committee shall have every
7 power and function allowed to an investigating
8 committee under the law, including without limitation
9 the power to:

10
11 (A) Adopt rules for the conduct of its proceedings;

12
13 (B) Issue subpoenas requiring the attendance and
14 testimony of the witnesses and subpoenas duces
15 tecum requiring the production of books,
16 documents, records, papers, or other evidence in
17 any matter pending before the joint investigating
18 committee;

19
20 (C) Hold hearings appropriate for the performance of
21 its duties, at times and places as the joint
22 investigating committee determines;

23
24 (D) Administer oaths and affirmations to witnesses at
25 hearings of the joint investigating committee;

26
27 (E) Report or certify instances of contempt as
28 provided in section 21-14, Hawaii Revised
29 Statutes;

30
31 (F) Determine the means by which a record shall be
32 made of its proceedings in which testimony or
33 other evidence is demanded or adduced;

34
35 (G) Provide for the submission, by a witness's own
36 counsel and counsel for another individual or
37 entity about whom the witness has devoted
38 substantial or important portions of the
39 witness's testimony, of written questions to be
40 asked of the witness by the chair; and

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42 (H) Exercise all other powers specified under chapter
43 21, Hawaii Revised Statutes, with respect to a
44 joint investigating committee; and



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BE IT FURTHER RESOLVED that the joint investigating committee shall consist of the following ten members:

- (1) The Chairperson of the House Committee on Finance;
- (2) The Chairperson of the House Committee on Water, Land, and Ocean Resources;
- (3) The Chairperson of the House Committee on Hawaiian Affairs;
- (4) One member of the majority leadership from the House of Representatives who shall be appointed by the Speaker of the House of Representatives;
- (5) One member of the minority leadership from the House of Representatives who shall be appointed by the House Minority Leader;
- (6) The Chairperson of the Senate Ways and Means Committee;
- (7) The Chairperson of the Senate Committee on Water, Land, and Agriculture;
- (8) The Chairperson of the Senate Hawaiian Affairs Committee;
- (9) One member of the majority leadership from the Senate who shall be appointed by the President of the Senate; and
- (10) One member of the minority leadership from the Senate who shall be appointed by the Senate Minority Leader; and

BE IT FURTHER RESOLVED that the joint investigating committee shall submit its findings and recommendations to the Legislature no later than twenty days prior to the convening of the Regular Session of 2012 and shall dissolve upon submission of its report; and

1 BE IT FURTHER RESOLVED that certified copies of this
2 Concurrent Resolution be transmitted to the President of the
3 United States, members of Hawaii's congressional delegation, the
4 Governor, the President of the Hawaii State Senate, the Speaker
5 of the Hawaii State House of Representatives, the Director of
6 Finance, the Attorney General, and the Auditor.

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OFFERED BY: Mel Carroll

MAR 11 2011



Doc #2

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Attorneys for Plaintiff

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE IN TRUST FOR THE
BENEFIT OF THE CERTIFICATEHOLDERS FOR ARGENT SECURITIES INC., ASSET-
BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-W2

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE IN TRUST FOR
THE BENEFIT OF THE
CERTIFICATEHOLDERS FOR ARGENT
SECURITIES INC., ASSET-BACKED
PASS-THROUGH CERTIFICATES,
SERIES 2006-W2,

Plaintiff,

vs.

DIANNE DEE GUMAPAC; KALE
KEPEKAIO GUMAPAC; JOHN DOES 1-
50; AND JANE DOE 1-50

Defendants.

CIVIL NO. 11-1-0590
(Other Civil Action)
(Hilo)

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT KALE
KEPEKAIO GUMAPAC'S MOTION TO
DISMISS COMPLAINT PURSUANT TO
HRCP 12(B)(1) FILED JANUARY 13, 2012;
CERTIFICATE OF SERVICE

Hearing:

Date: February 14, 2012

Time: 8:00 a.m.

Judge: Honorable Greg K. Nakamura

No Trial Date Set.

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT KALE KEPEKAIO GUMAPAC'S MOTION TO DISMISS
COMPLAINT PURSUANT TO HRCP 12(B)(1) FILED JANUARY 13, 2012**

Comes now Plaintiff, DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE IN TRUST FOR THE BENEFIT OF THE CERTIFICATEHOLDERS FOR ARGENT SECURITIES INC., ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-W2 ("Plaintiff"), by and through its attorneys RCO Hawaii, LLLC, and hereby submits its memorandum in opposition to Defendant Kale Kepekaio Gumapac's ("Defendant") Motion to Dismiss Complaint Pursuant to HRCP 12(B)(1), filed on January 13, 2012.

I. INTRODUCTION

Plaintiff filed its Complaint for Ejectment on December 15, 2011. Defendant filed the instant Motion in response.

II. THE "AUTHORITIES" CITED BY DEFENDANT ARE NOT PERSUASIVE

As set forth in Baker v. Stehura, 2010 WL 3528987 at *4, the Hawaii State courts have rejected claims premised on the asserted sovereignty laws of the Kingdom of Hawaii, finding that the Kingdom of Hawaii is no longer recognized as a sovereign state by either the federal government or by the State of Hawaii. *see* State v. Lorenzo, 77 Hawai'i 219, 221 (Haw.App.1994); *accord* State v. French, 77 Hawai'i 222, 228 (Haw.App.1994) ("[P]resently there is no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature") (quotations omitted). Further, the Ninth Circuit as well as the United States District Court for the District of Hawaii have repeatedly rejected this type of jurisdictional argument made by Defendant. *See* United States v. Lorenzo, 995 F.2d 1448, 1456 (9th Cir.1993) (holding that the Hawai'i district court has

jurisdiction over Hawai'i residents claiming they are citizens of the Sovereign Kingdom of Hawaii); Wang Foong v. United States, 69 F.2d 681, 682 (9th Cir.1934).

Defendant also cites to Nishitani v. Baker, 82 Haw. 281, 289 (1996) in support of his motion. Yet, the Intermediate Court of Appeals of Hawaii, in *Nishitani*, expressly rejected the argument that "birth descendants of Native Hawaiians" are not subject to the government and the courts of the State of Hawaii. Baker, supra at *5, citing to Nishitani, 82 Haw. at 289 (citing State v. Lorenzo, 77 Hawaii 219, 221 (Haw. App. 1994).

III. THIS COURT CANNOT FIND THAT HAWAII IS NOT A STATE

In his Motion, Defendant is basically asking this Court to find that Hawaii is not a part of the United States of America. Simply put, this Court does not have jurisdiction to consider such an issue. The status of the State of Hawaii as part of the United States of America is a nonjusticiable political question.

On June 1, 2010, Defendant's "expert" Dr. David Keanu-Sai filed a complaint in the United States District Court for the District of Columbia as Civil No. 10-899 (CKK) against, among others, President Barack Hussein Obama, II and Secretary of State Hillary Rodhma Clinton. The Complaint contained three counts and was basically an attempt to prove that the United States Government lacked jurisdiction over Dr. Sai and was based on the same arguments and documents presented to the Court in the instant Motion.

On March 9, 2011, the United States District Court for the District of Columbia dismissed the complaint finding that it presented a nonjusticiable political question. "The principle that the courts lack jurisdiction over political questions that are by their nature 'committed to the political branches to the exclusion of the judiciary' is as old as the fundamental principle of judicial review." Sai v. Clinton, 778 F. Supp. 2d 1, 6 (D.D.C. 2011)

aff'd sub nom. Sai v. Obama, 11-5142, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011) (internal citations omitted).

The court's reasoning is cited extensively below:

The federal courts have long recognized that the determination of sovereignty over a territory is fundamentally a political question beyond the jurisdiction of the courts. As the Supreme Court recognized in 1890:

Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.

Jones v. United States, 137 U.S. 202, 212, 11 S.Ct. 80, 34 L.Ed. 691 (1890). This principle was recently reaffirmed by the D.C. Circuit, which ruled that claims requiring the determination of sovereignty over Taiwan under federal and international law presented a political question requiring dismissal for lack of subject matter jurisdiction. See Lin v. United States, 561 F.3d 502, 505–08 (D.C.Cir.), *cert. denied*, — U.S. —, 130 S.Ct. 202, 175 L.Ed.2d 128 (2009).

Analysis of the Baker v. Carr factors confirms that Plaintiff's claims present this Court with a nonjusticiable political question. Plaintiff's lawsuit challenges the United States's recognition of the Republic of Hawaii as a sovereign entity and the United States's exercise of authority over Hawaii following annexation. However, “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” Oetjen v. Cent. Leather Co., 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1918). In addition, the Constitution vests Congress with the “Power to dispose of an make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. Const., Art. IV, § 3, cl. 2. Therefore, there is a textually demonstrable constitutional commitment of these issues to the political branches. Furthermore, it would be impossible for this Court to grant the relief requested by Plaintiff without disturbing a judgment of the legislative and executive branches that has remained untouched by the federal courts for over a century. Since its annexation in 1898 and admission to the Union as a State in 1959, Hawaii has been firmly established as part of the United States. The passage of time and the significance of the issue of sovereignty present an unusual need for unquestioning adherence to a political decision already made.

Id. at 6-7.

This decision was upheld by the United States Court of Appeals, District of Columbia Circuit. “The district court correctly held that the claims in appellant's first amended complaint and his proposed supplemental complaint were barred by the political question doctrine.” Sai v. Obama, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011). There is no reason for this Court to reach a different conclusion.

IV. **CONCLUSION**

In light of the foregoing, Plaintiff respectfully requests that this court deny *Defendant Kale Kepekaio Gumapac's Motion to Dismiss Complaint Pursuant to HRCF 12(B)(1)*, filed on January 13, 2012.

DATED: Honolulu, Hawaii, February 6, 2012.



CHARLES R. PRATHER
SOFIA M. HIROSANE

Attorneys for Plaintiff
DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE IN TRUST
FOR THE BENEFIT OF THE
CERTIFICATEHOLDERS FOR ARGENT
SECURITIES INC., ASSET-BACKED
PASS-THROUGH CERTIFICATES,
SERIES 2006-W2

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE IN TRUST FOR
THE BENEFIT OF THE
CERTIFICATEHOLDERS FOR ARGENT
SECURITIES INC., ASSET-BACKED
PASS-THROUGH CERTIFICATES,
SERIES 2006-W2,

Plaintiff,

vs.

DIANNE DEE GUMAPAC; et al.,

Defendants.

CIVIL NO. 11-1-0590
(Other Civil Action)
(Hilo)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served on the following party via U.S. Mail, postage pre-paid to his last known address as indicated below:

KALE KEPEKAIO GUMAPAC
HC2 Box 9607
Keaau, Hawaii, 96749
Pro Se Defendant

DATED: Honolulu, Hawaii, February 6, 2012.



CHARLES R. PRATHER
SOFIA M. HIROSANE

Attorneys for Plaintiff
DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE IN TRUST FOR THE BENEFIT OF THE
CERTIFICATEHOLDERS FOR ARGENT SECURITIES
INC., ASSET-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2006-W2

Doc #3

KALE KEPEKAIO GUMAPAC
HC2 BOX 9607
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FILED
CIRCUIT COURT OF
THE THIRD CIRCUIT
STATE OF HAWAII

2012 FEB -9 PM 1:57

Defendant
Pro se

CLERK L. CLAGGOW

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

DEUTSCHE BANK NATIONAL TRUST	)	CIVIL NO. 11-1-0590
COMPANY, AS TRUSTEE IN TRUST FOR THE)	
BENEFIT OF THE CERTIFICATE HOLDERS	)	REPLY TO PLAINTIFF'S
FOR ARGENT SECURITIES INC., ASSET-	)	MEMORANDUM IN OPPOSITION TO
BACKED PASS-THROUGH CERTIFICATES,	)	DEFENDANT'S MOTION TO
SERIES 2006-W2,	)	DISMISS COMPLAINT PURSUANT TO
	)	HRCP 12(B)(1) FILED JANUARY 13, 2012;
Plaintiff,	)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
DIANNE DEE GUMAPAC; KALE KEPEKAIO	)	Hearing:
GUMAPAC; JOHN DOES 1-50; AND JANE	)	Date: February 14, 2012
DOES 1-50,	)	Time: 8:00 a.m.
	)	Judge: Greg K. Nakamura
Defendants.)	
	)	(No Trial Date)

**REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS COMPLAINT
PURSUANT TO HRCP 12(B)(1) FILED JANUARY 13, 2012**

I. BACKGROUND

On January 13, 2012, Defendant Kale Kepekaio Gumapac (hereinafter referred to as "DEFENDANT") filed his Motion to Dismiss Complaint Pursuant to HRCP 12(b)(1) (hereinafter referred to as "DEFENDANT'S MTD"). By his motion DEFENDANT moved for a Court Order dismissing PLAINTIFF'S complaint on grounds that this Honorable Court lacks subject matter jurisdiction as more fully set forth in DEFENDANT'S MTD.

By DEFENDANT'S MTD, pursuant to Rule 201(d) and 902(5) of the Hawai'i Rules of Evidence and 29 Am. Jur.2d Evidence, Sec. 83 (2008), DEFENDANT requested the Court take judicial notice of the following documents:

- Presidential Message, December 18, 1893 comprising of an exchange of diplomatic notes acknowledging the *Lili'uokalani assignment* of executive power and conclusions of a Presidential investigation (United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office, 443-465, 1895);
- Presidential Message, January 13, 1894 comprising an exchange of diplomatic notes that acknowledged negotiations and settlement of the illegal overthrow of the Hawaiian Kingdom government called the *Agreement of restoration* (United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office, 1241-1284, 1895);
- Statements made on the floor of the House of Representatives by Representative Thomas Ball are copies from the 55th Cong. 2nd Sess., 5975-5976 (1898);
- Statements made on the floor of the Senate by Senator Augustus Bacon are copies from the 55th Cong., 2nd Sess., 6148-6150 (1898).
- House Concurrent Resolution no. 107 (State of Hawai'i House of Representatives, Twenty-sixth Legislature, 2011).

By the instant submission, DEFENDANT files its Reply to PLAINTIFF'S Memorandum in Opposition and in support of DEFENDANT'S MTD and REQUEST FOR JUDICIAL NOTICE. DEFENDANT hereby incorporates by reference, as though fully set forth herein, DEFENDANT'S MTD.

II. ARGUMENT

- PURSUANT TO HAWAII RULES OF EVIDENCE RULES 902, 201(d) AND ESTABLISHED AUTHORITIES, TAKING JUDICIAL NOTICE OF DEFENDANT'S DOCUMENTS IS MADATORY.**

Rule 201(d) of the Hawai'i Rules Evidence provides in pertinent part:

Rule 201. Judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially notice fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(d) **when mandatory**. A court shall take judicial notice if requested by a party and supplied with the necessary information. [Emphasis added].

Concerning the instant request for Judicial Notice HRE Rule 902 further provides in relevant part as follows:

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility **is not required** with respect to the following:

(5) **Official publications.** Books, pamphlets, or other publications purporting to be issued by public authority.
[Emphasis added].

In the instant case, the requested documents for Judicial Notice in DEFENDANT’S MTD *are all copies of official government publications.*

The Presidential Messages dated December 18, 1893 (aka *Lili’uokalani Assignment*) and January 13, 18943 (aka *Agreement of Restoration*) are copies made under the seal of the United States Department of State’s government printing office, 1895.

Statements made by Representative Thomas Ball (copies from the 55th Cong. 2nd Sess., 5975-5976 (1898)) and Senator August Bacon (copies from the 55th Cong., 2nd Sess., 6148-6150 (1898)) are copies from the United States Congress government printing office, 1898. Finally, House Concurrent Resolution No. 107) is a copy from the State of Hawai‘i House of Representatives, Twenty-sixth Legislature, 2011, which is an official government publication.

Rule 902 of the Hawai‘i Rules of Evidence states that “extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to ...*(5) Official publications.*” Further supporting the admissibility of DEFENDANT’S documents, according to 3 Wigmore (Evidence) §1684 (1904):

In general, then, where an official printer is appointed, his printed copies of official documents are admissible. It is not necessary that the printer should be an officer in the strictest sense, nor that he should be exclusively concerned with official work; it is enough that he is appointed by the Executive to print official documents. As for authentication of his copies, it is enough that the copy offered purports to be printed by authority of the government; its genuineness is assumed without further evidence.

“All courts are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government, and that extent and boundaries of the territory under which they

can exercise jurisdiction.” See 29 Am.Jur.2d Evidence, §83 (2008). “State and federal courts must judicially notice all treaties [executive agreements] of the United States.” Id., §123. “When considering a treaty [executive agreement], courts must take judicial notice of all facts connected therewith which may be necessary for its interpretation or enforcement, such as the historical data leading up to the making of the treaty [executive agreement].” Id., §126.

Given the authorities cited above, and the necessary information supplied through DEFENDANT’S MTD and his instant Reply Memorandum, DEFENDANT respectfully submits that taking Judicial Notice of the requested documents (all attached to DEFENDANT’S MTD) is appropriate in all aspects and mandatory under Rule 201(d) of the Hawai‘i Rules of Evidence.

Additionally, DEFENDANT requests the Court to take Judicial Notice of the following U.S. Supreme Court cases regarding sole executive agreements, which have been referenced and cited in DEFENDANT’S MTD:

- U.S. v. Belmont, 301 U.S. 324 (1937)
- U.S. v. Pink, 315 U.S. 203 (1942)
- American Insurance Association v. Garamendi, 539 U.S. 396, (2003)

b. PLAINTIFF’S Opposition Mis-Characterizes The Relief Sought By DEFENDANT’S MTD and is Contrary to Established Case Law.

PLAINTIFF’S Opposition to DEFENDANT’S MTD rests on the argument that “Defendant is basically asking this Court to find that the Hawai‘i is not a part of the United States of America. Simply put, this Court does not have jurisdiction to consider such an issue. The status of the State of Hawai‘i as part of the United States of America is a nonjusticiable political question.” PLAINTIFF’S Opp. to Def. Motion, at 3. DEFENDANT’S MTD **IS NOT** based on the “status of the State of Hawai‘i,” but rather answers the threshold question of the Intermediate Court of Appeals (ICA) in State of Hawai‘i v. Lorenzo, 77 Haw. 219 (1994), of whether or not the Hawaiian Kingdom continues to exist as a state in accordance with recognized attributes of a state’s sovereign nature.

PLAINTIFF also attempts to support its argument that DEFENDANT’S MTD presents a political question by referencing the decision by the United States Court of Appeals, District of Columbia Circuit, in Sai v. Clinton, 2011 WL 4917030 (D.C. Cir. Sept. 26, 2011). In Sai, the Complaint relied on the jurisdiction of the District Court for the District of Columbia under the

Alien Action for Tort, 28 U.S.C. §1350, and sought to sue for damages for violations of the 1893 Executive Agreements. In her Memo. Opinion at 9 (March 9, 2010),¹ Judge Kollar-Kotelly of the U.S. District Court for the District of Columbia, in Sai v. Clinton, dismissed the action for lack of subject matter jurisdiction by stating:

Plaintiff argues that he is not challenging the legality of the State of Hawai‘i ... But is merely asserting a claim for a violation of the Lili‘uokalani Assignment ... However, in order to find Defendants have violated the Lili‘uokalani Assignment as alleged by Plaintiff—....—**the Court would have to determine that the annexation of Hawai‘i by the United States was unlawful and void.** As described above, that is a political question that this Court cannot decide. The fact that the answer might be gleaned through a straightforward analysis of federal and international law does not matter; “[t]he political question doctrine deprives federal courts of jurisdiction based on prudential concerns, over cases which would normally fall within their purview.” Lin, 561 F.3d at 506; see id. (“We do not disagree with Appellants’ assertion that we could resolve this case through treaty analysis and statutory construction; we merely decline to do so as this case presents a political question which strips us of jurisdiction to undertake that otherwise familiar task.”) (internal citations omitted). Therefore, the Court must dismiss Plaintiff’s First Amended Complaint for lack of subject matter jurisdiction.

The political question invoked in Sai centered on “Count One” of Plaintiff’s Amended Complaint that specifically requested that, “the Court declare that the Joint Resolution to provide for annexing the Hawaiian Islands to the United States is unconstitutional and void.” (Amend. Compl., at para. 72). In Sai, Plaintiff relied on the jurisdiction of the federal court to repeal the annexation resolution as stated in Plaintiff’s Amended Complaint, para. 69:

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §901 (1987), provides that “Under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury.” §901(c) clarifies that the “obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative, or judicial) that caused the violation; abstention from further violation; or performance of an act that the state was obligated but

¹ The pleadings are available on-line through the PACER system of the United States federal courts.

failed to perform. For instance, there is an obligation to repeal a law illegally annexing a foreign territory (emphasis added)."

DEFENDANT'S MTD is not requesting this Court to declare that the Joint Resolution is unconstitutional and void pursuant to RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §901(c), but rather DEFENDANT'S argument centers on the threshold question posed by the ICA in Lorenzo regarding the continuity of the Hawaiian Kingdom as a state, which has been the standard for Defendants to meet for the past 18 years. The continuity of the Hawaiian Kingdom as a state is a "legal question" and not a "political question."

1. Whether the Hawaiian Kingdom exists as a state is a "legal question" and not a "political question"

In Lorenzo, Judge Heen stated that, "Lorenzo presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature." See DEFENDANT'S Memo In Supp., at 2. DEFENDANT recited Lorenzo, where the ICA correctly cited attributes of a state's sovereign nature to be "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." See, Id., at 5.

A factual or legal basis for concluding the Kingdom exists is dependent on evidence together with recognized legal theory, which is precisely what DEFENDANT'S MTD provides pursuant to evidentiary standards set in Lorenzo and Nishitani v. Baker, 82 Haw. 289 (1996), 921 P.2d 1182. And in State of Hawai'i v. Lee, 90 Haw. 130, 142; 976 P.2d 444, 456 (1999), the Hawai'i Supreme Court stated, "**it is an open legal question whether the 'Kingdom of Hawai'i' still exists.**" In light of Lee, PLAINTIFF'S argument that "whether the 'Kingdom of Hawai'i' still exists" is a "political question" is in direct conflict with the Hawai'i Supreme Court.

The reason why the Hawai'i Supreme Court affirmatively stated in Lee that "it is an open legal question," is because since Lorenzo was decided by the ICA in 1994, State of Hawai'i Courts have consistently used Lorenzo to deny motions to dismiss because **defendants failed to provide evidence that the Hawaiian Kingdom continues to exist as a state.** See, State v.

Rodenhurst, 2010 Haw. App. LEXIS 588, (Haw. Ct. App. Oct. 29, 2010); State v. Makekau, 2009 Haw. App. LEXIS 633 (Haw. Ct. App. Sept. 29, 2009); State v. Ampong, 2009 Haw. App. LEXIS 72 (Haw. Ct. App. Feb. 27, 2009); State v. Ball, 2007 Haw. App. LEXIS 267 (Haw. Ct. App. Apr. 19, 2007); State v. Spinney, 2005 Haw. App. LEXIS 43 (Haw. Ct. App. Feb. 4, 2005); State v. Fergerstrom, 106 Haw. 43, 101 P.3d 652, 2004 Haw. App. LEXIS 349 (Haw. Ct. App. 2004); State v. Keliikoa, 2004 Haw. App. LEXIS 227 (Haw. Ct. App. July 21, 2004); Betsill Bros. Constr., Inc. v. Akahi, 2004 Haw. App. LEXIS 205 (Haw. Ct. App. June 28, 2004); State v. Araujo, 2004 Haw. App. LEXIS 3 (Haw. Ct. App. Jan. 14, 2004); Makapono Partners, LLC v. Simeona, 2003 Haw. App. LEXIS 108, p. 17 (Haw. Ct. App. Apr. 14, 2003); State v. Lindsey, 2002 Haw. App. LEXIS 32, p. 8 (Haw. Ct. App. Mar. 8, 2002); State v. Sherman, 2000 Haw. App. LEXIS 218, p. 4 (Haw. Ct. App. Dec. 11, 2000); Chalon Int'l of Haw., Inc. v. Makuaole, 2000 Haw. App. LEXIS 192, p. 7 (Haw. Ct. App. Oct. 24, 2000); and Nishitani v. Baker, 82 Haw. 281, 921 P.2d 1182, 1996 Haw. App. LEXIS 76 (Haw. Ct. App. 1996).

Even Federal District Courts cited Lorenzo for denying motions to dismiss on the same grounds that defendants failed to provide evidence of Hawaiian Kingdom state continuity. See Epperson v. Hawaii, 2009 U.S. Dist. LEXIS 100045, p. 3 (D. Haw. Oct. 27, 2009); Simeona v. United States, 2009 U.S. Dist. LEXIS 59107, p. 3 (D. Haw. July 10, 2009); Kupihea v. United States, 2009 U.S. Dist. LEXIS 59023, p. 4 (D. Haw. July 10, 2009); United States v. Goo, 2002 U.S. Dist. LEXIS 2919, p. 3, 93 A.F.T.R.2d (RIA) 2097 (D. Haw. 2002); First Interstate Mortgage Co. v. Lindsey, 1995 U.S. Dist. LEXIS 18172, p. 16 (D. Haw. Nov. 15, 1995).

When PLAINTIFF cited State v. French, 77 Haw. 222, 228 (Haw.App. 1994), that “[P]resently there is ‘no factual (or legal) basis for concluding that the [Hawaiian] Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature,’” (PLAINTIFF’S Opp. to Def. Motion, at 2), they conveniently omitted the Court’s reasoning, which was made pursuant to Lorenzo. In French, the defendant claimed to be a member of the Kingdom of Hawai‘i since he was an “adoptive” Hawaiian and that jurisdiction over his lies with the Hawaiian Kingdom and not the district court. The Court rejected the defendant’s claim because pursuant to Lorenzo he “presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state’s sovereign nature.” DEFENDANT’S argument that the Court lacks subject matter jurisdiction is “**evidenced based**,” which meets the evidentiary standard set by Lorenzo.

After 18 years of denying motions to dismiss pursuant to Lorenzo at both the State of Hawai'i and Federal levels, this Court cannot entertain PLAINTIFF'S argument that DEFENDANT'S MTD presents a nonjusticiable political question. After DEFENDANT has met his burden and provided the evidence that the "Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature," the ICA's standard set by Lorenzo clearly prohibits the position asserted by PLAINTIFF in its Opposition. Surely, PLAINTIFF is not arguing that the aforementioned cases were all for naught because the matter was always a political question and the Courts have erred for the last 18 years. The matter of Hawaiian state continuity remains an open legal question that requires evidence, whether factual and/or legal.

2. DEFENDANT has met the applicable standard for dismissing case for lack of subject matter jurisdiction

In Nishitani v. Baker, 82 Haw. 289 (1996), 921 P.2d 1182, the ICA affirmed Lorenzo, but clarified the decision. The ICA stated, "In retrospect, our statement in Lorenzo that a criminal defendant has the burden of proving his or her defense of lack of jurisdiction may have generated some confusion. HRS § 701-114(1) (c) (1993) specifically provides that in a criminal case, a defendant may not be convicted unless the State Proves beyond a reasonable doubt 'facts establishing jurisdiction.' The burden of proving jurisdiction thus clearly rests with the prosecution (citation omitted)." Id., at 289, 1190.

PLAINTIFF has not met its burden of proving beyond a reasonable doubt facts establishing jurisdiction. Instead, PLAINTIFF attempts to obfuscate the facts through misrepresentation and manipulation. Though given the time and opportunity, PLAINTIFF has presented no evidence countering the evidence provided by DEFENDANT'S MTD. Accordingly, PLAINTIFF has failed to refute the evidence provided by DEFENDANT pursuant to the standard set by the ICA in Lorenzo and Baker.

DEFENDANT'S MTD specifically answers the "open legal question" (see State of Hawai'i v. Lee, 90 Haw. 130, 142; 976 P.2d 444, 456 (1999)) of whether or not the Hawaiian Kingdom continues to exist as a state, and not whether or not the State of Hawai'i exists as part of the United States.

According to the U.S. Supreme Court in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936), "the President alone has the power to speak or listen as a

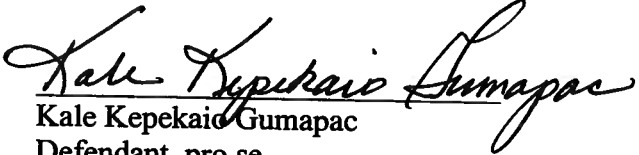
representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.”

“The Constitution makes the President [not Congress] the Nation’s ‘guiding organ in the conduct of our foreign affairs...He...was entrusted with...vast powers in relation to the outside world...” Ludecke v. Watkins, 335 U.S. 160, 173 (1948). Pursuant to his inherent powers, the President has made executive agreements with other countries, not submitted to the Senate for its advice and consent or to Congress for its approval, including agreements that regulated the use of military forces.” See Schroeder, “Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligation Under An Existing Treaty.” 20 Op. Off. Legal Counsel 396 (1996).

III. CONCLUSION

Based upon the foregoing, DEFENDANT request this Honorable Court take judicial notice of the documents requested and thereafter grant DEFENDANT’S MTD and dismiss PLAINTIFF’S Complaint for lack of subject matter jurisdiction.

DATED: Kea’au, Hawai’i, February 9th, 2012.


Kale Kepekaio Gumapac
Defendant, pro se

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAI'I

DEUTSCHE BANK TRUST)	CIVIL NO. 11-1-389
COMPANY AMERICAS,)	
)	
Plaintiff,)	
)	
vs.	)	ORIGINAL
)	
HARRIS BRIGHT, et al.,)	
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE JUDGE GREG K. NAKAMURA, Judge
presiding, First Division, on Thursday, February 2,
2012. Motion to Dismiss Complaint and for Judicial
Notice.

APPEARANCES:

For Plaintiff:	MICHAEL G. K. WONG, ESQ. RCO Hawaii, LLLC 900 Fort Street Mall, #800 Honolulu, Hawai'i 96813
For Defendant Harris Bright	DEXTER K. KAIAMA, ESQ. 500 Ala Moana Blvd., #400 Honolulu, Hawai'i 96813

REPORTED BY: SABINA WERY, CSR 337

SABINA WERY, CSR 337, RPR
Official Court Reporter
Third Circuit Court, State of Hawai'i

1 THURSDAY, FEBRUARY 2, 2012 A.M. SESSION

2 ---oOo---

3 THE CLERK: Civil Number 11-1-389,
4 Deutsche Bank National Trust Americas versus Harris
5 Bright, et al. Motion to Dismiss Complaint and for
6 Judicial Notice.

7 MR. WONG: Good morning, Your Honor.
8 Michael Wong on behalf of the plaintiff.

9 MR. KAIAMA: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. KAIAMA: Dexter Kaiama on behalf of
12 Mr. Bright. Your Honor, Mr. Bright is present in
13 the courtroom as well.

14 THE COURT: Good morning.

15 HARRIS BRIGHT: Good morning, Your
16 Honor.

17 THE COURT: Okay. So, Mr. Kaiama,
18 anything else to add with respect to the motion?

19 MR. KAIAMA: Yes. Yes, Your Honor. I
20 will -- I will try to be brief. We did make the
21 request and the first order of business is making
22 the request that the Court take judicial notice of
23 the documents referred to in the motion itself, that
24 being what we referred to as the Liliuokalani
25 assignment and the agreement of restoration. Those

SABINA WERY, CSR 337, RPR
Official Court Reporter
Third Circuit Court, State of Hawai'i

1 were attached as Exhibit A to the expert memorandum
2 of Keanu Sai as well as, uh, the statements made by
3 Representative Thomas Ball and Senator Augustin
4 Bacon -- August -- Augustus, excuse me. They were
5 attached as Exhibits C and D to the expert
6 memorandum opinion of Doctor Keanu Sai as well as
7 House Concurrent Resolution Number 107, uh, which
8 was attached as Exhibit 2 to my declaration.

9 Your Honor, I believe we did provide the
10 Court with the, uh, appropriate authority for the
11 taking of judicial notice. We received no
12 opposition to that, and we'd ask that as a predicate
13 to our argument that the Court take judicial notice
14 of these documents.

15 THE COURT: Mr. Wong?

16 MR. WONG: Your Honor, I would object to
17 the Court taking judicial notice of the documents
18 Mr. Kaiama is referring to. I don't think it
19 complies with the rule. He cites Rule 201D, uh, and
20 I don't think those documents fall under that.

21 Uh, he's asking the Court to take
22 judicial notice of something that is in dispute.
23 It's a political question. Uh, I ask the Court not
24 take judicial notice.

25 THE COURT: Okay, the Court will take

1 judicial notice of the documents, not necessarily
2 take into -- uh, accept as true the contents of the
3 documents but just judicial notice of the documents.

4 MR. KAIAMA: Thank you, Your Honor. Uh,
5 that being said, Your Honor, again, I would -- I
6 will be brief.

7 Our motion does speak for itself and --
8 and, uh, the, uh, the plaintiff having had the
9 opportunity but failing to provide any documents or
10 affidavits which would rebut the evidence that now
11 has been judicially noticed, Your Honor, we would
12 ask that the Court dismiss plaintiff's complaint
13 pursuant to U.S. versus Belmont, U.S. versus Pink,
14 and the Supreme Court decision in Garamendi.

15 Thank you, Your Honor.

16 THE COURT: Mr. Wong?

17 MR. WONG: Your Honor, uh, taking
18 judicial notice that those documents exist doesn't,
19 uh, prove anything.

20 Uh, that's all I got, Your Honor.

21 THE COURT: Okay. So Court will deny
22 the motion. Court believes that it has jurisdiction
23 under Article 6 of the Hawaii Constitution and under
24 HRS Section 603-21 point 5.

25 And, uh, Mr. Wong, please submit a form

SABINA WERY, CSR 337, RPR
Official Court Reporter
Third Circuit Court, State of Hawai'i

1 of the order.

2 MR. KAIAMA: Thank you, Your Honor.
3 Just a matter of clarification and I think we
4 addressed it in the case previously before the
5 Court, uh, am I allowed to file Mr. Bright's answer
6 to the complaint within 20 days after the filing of
7 the order?

8 THE COURT: Uh, that's my general
9 practice.

10 Do you have any objection to that, Mr.
11 Wong?

12 MR. WONG: No.

13 THE COURT: Okay.

14 MR. WONG: If he needs more time, he can
15 call us, too.

16 THE COURT: Okay.

17 MR. KAIAMA: Okay.

18 THE COURT: All right. So please set
19 forth the time frame in the form of the order.

20 MR. KAIAMA: Thank you, Your Honor.

21 MR. WONG: Thank you, Your Honor.

22 THE BAILIFF: All rise. Court is in
23 recess.

24 ---oOo---

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C E R T I F I C A T E

STATE OF HAWAI'I)
)
COUNTY OF HAWAI'I)

I, SABINA WERY, CSR 337, RPR, and an
Official Court Reporter for the Third Circuit Court,
State of Hawai'i, do hereby certify that the
foregoing comprises a full, true, and correct
transcription of my stenographic notes taken in the
above-entitled cause.

Dated this 13th day of February, 2012.

OFFICIAL COURT REPORTER


SABINA WERY

SABINA WERY, CSR 337, RPR
Official Court Reporter
Third Circuit Court, State of Hawai'i

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MOTION TO DISMISS COMPLAINT PURSUANT TO HRC
12(B)(1) FILED JANUARY 13, 2012

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Doc #6

**THE AMERICAN OCCUPATION OF THE HAWAIIAN KINGDOM:
BEGINNING THE TRANSITION FROM OCCUPIED TO RESTORED STATE**

A DISSERTATION SUBMITTED TO THE GRADUATE DIVISION OF THE
UNIVERSITY OF HAWAII IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

IN

POLITICAL SCIENCE

DECEMBER 2008


By
David Keanu Sai

Dissertation Committee:

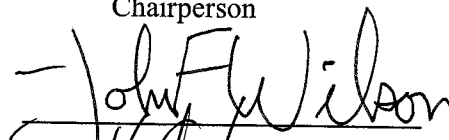
Neal Milner, Chairperson
Matthew Craven
John Wilson
Katharina Heyer
Aviam Soifer
Jonathan K. Osorio

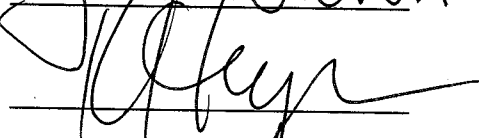
We certify that we have read this dissertation and that, in our opinion, it is satisfactory in scope and quality as a dissertation for the degree of Doctor of Philosophy in Political Science.

DISSERTATION COMMITTEE

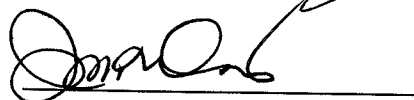


Chairperson











ABSTRACT

On January 17th 2007, a bill was re-introduced by Senator Daniel Akaka (D-Hawai`i) to provide a process of granting tribal sovereignty to Native Hawaiians as the indigenous people of Hawai`i, a similar status afforded Native American tribes on the continental United States. The difference, however, is that Native Hawaiians are citizens of an internationally recognized sovereign, but occupied State, whereas Native Americans are a dependent nation within the sovereign State of the United States. Great Britain and France were the first to recognize Hawai`i's sovereignty on November 28th 1843 by joint proclamation, and the United States followed on July 6th 1844 by letter of United States Secretary of State John C. Calhoun. This dissertation reframes the legal status of the Hawaiian Islands by employing legal and political theories that seek to explain Hawaiian modernity and international relations since the 19th century to the present. As an alternative to the view of U.S. sovereignty exercised by virtue of the plenary power of Congress over indigenous peoples, this dissertation challenges the core assumptions about the history of law and politics in the Hawaiian Islands by providing a legal analysis of Hawaiian sovereignty under international law that clearly explicates Hawai`i's occupation by the United States since the Spanish American War. In terms of law, this study looks at the origin and development of the Hawaiian Kingdom as a constitutional monarchy, the events that led to the illegal overthrow of its government, the prolonged occupation of its territory, and a strategy to impel the United States to comply with the international laws of occupation with the ultimate goal of ending the prolonged occupation.

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PREFACE

This dissertation is intended to provide, within reasonable range, a historical and legal account of the Hawaiian Kingdom from its origin under the reign of Kamehameha I in the eighteenth century; through its status as an independent and sovereign State in the nineteenth century; through its prolonged occupation by the United States in the twentieth century; and finally to the prospect of ending the occupation in the twenty-first century. This is a legal analysis of the Hawaiian Kingdom that draws from legal and political theories, both at the national and international levels. Through this analysis, Hawai'i's legal status is reframed in order to understand the political maneuvering that took place since Kamehameha I to the present in the maintenance of the country and its current status as a neutral State that has been under prolonged occupation since the Spanish-American war. The exposition of this legal status also provides the foundation for future political maneuvering that will seek to bring the prolonged occupation to an ultimate end. In these times, we must not forget the words of Queen Lili'uokalani honoring Joseph Nawahi, a Hawaiian statesman and patriot. In her book *Hawaii's Story by Hawaii's Queen*, she wrote, "The cause of Hawaii and independence is larger and dearer than the life of any man connected with it. Love of country is deep-seated in the breast of every Hawaiian, whatever his station."

CHAPTER 1

INTRODUCTION: CURRENT LEGAL CHALLENGES FACING THE NATIVE HAWAIIAN COMMUNITY

When the Senate opened its 2007 session, Senator Daniel Akaka (D-Hawai`i) re-introduced a bill entitled “The Native Hawaiian Government Reorganization Act of 2007” (S. 310). This piece of legislation was brought before the Senate on January 17 to mark the one hundred and fourteenth anniversary of the United States’ overthrow of the Hawaiian Kingdom government. The bill’s purpose is to form a native Hawaiian governing entity in order to negotiate with the State of Hawai`i and the Federal government on behalf of the native people of the Hawaiian Islands. According to Senator Akaka, the bill, “would provide parity in federal policies that empower other indigenous peoples, American Indians, and Alaskan Natives, to participate in a government-to-government relationship with the United States.”¹ An earlier version of the bill (S. 147) failed to receive enough votes in the Senate in June 2006. The act, otherwise known as the “Akaka bill”, is a by-product of a 1993 resolution passed by Congress in apology to native Hawaiians for the 1893 overthrow of the Hawaiian Kingdom.²

The Akaka bill provides that the “Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States,” and that native Hawaiians are “the native people of the Hawaiian archipelago that is now part of the United States, [and] are indigenous, native people of the United States.”³ The bill, like

¹ Press release from the office of Senator Daniel Akaka, January 17, 2007 (visited October 2, 2008) <http://akaka.senate.gov/public/index.cfm?FuseAction=pressreleases.home&month=1&year=2007&release_id=1491>.

² 107 U.S. STAT. 1510. Reprinted at *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 290.

³ S. 310, 110th Congress (2007).

the 1993 resolution, assumes the native Hawaiian population to be an indigenous people *within* the United States similar to Native Americans. The bill also served as the foundation of political thought regarding native Hawaiians' relationship with the Federal and State governments. In the seminal case *Cherokee Nation v. Georgia* (1832), the United States Supreme Court recognized Native American tribes as “domestic dependent nations,” and not independent and sovereign States.⁴ The Court explained:

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.⁵

CHALLENGING HISTORICAL AND LEGAL ASSUMPTIONS

This dissertation challenges standard assumptions about the history of law and politics in the Hawaiian Islands. It does so by providing an analysis of Hawaiian sovereignty under international law since the nineteenth century. This includes analysis of the current erroneous identification of native Hawaiians as an indigenous group of people within the United States, rather than as nationals of an extant sovereign, but occupied, State. Following this introductory chapter, the dissertation will be carried out

⁴ *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1832).

⁵ *Id.*

under four chapter headings: the Road from Chiefly to British to Hawaiian Governance: Kamehameha I to III; the Rise of Constitutional Governance and the Unitary State: Kamehameha III to Kalakaua; the Prolonged Occupation of the Hawaiian Kingdom: Lili`uokalani to the Present; and, Righting the Wrong: Beginning the Transition from Occupied to Restored State. The dissertation concludes by urging scholars and practitioners in the fields of political science, history and law to engage the subject of Hawaiian sovereignty without being confined to apologist formalities or political leanings.

The Hawaiian Kingdom, of which the native Hawaiian population comprised the majority of the citizenry, has consistently been portrayed in contemporary scholarship as a vanquished aspirant that ultimately succumbed to United States power through colonization and superior force. Recent works such as Professor Lilikala Kame`eleihiwa's *Native Land and Foreign Desires: Pehea La e Pono Ai?* (1992), Professor Sally Engel Merry's *Colonizing Hawai`i: the Cultural Power of Law* (2000), Professor Jonathan Osorio's *Dismembering Lahui [the Nation]* (2002), Robert Stauffer's *Kahana: How the Land was Lost* (2004), and Professor Noenoe Silva's *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (2004) evidence this paradigmatic view and portrays the Hawaiian Kingdom as a failed experiment that could not compete with nor survive against dominant western powers.⁶ This point of view frames the takeover of the Hawaiian Islands as *fait accompli*—a history not significantly different

⁶ Lilikala Kame`eleihiwa, *Native Land and Foreign Desires: Pehea La E Pono Ai?* (Bishop Museum Press 1992); Sally Merry, *Colonizing Hawai`i: The Cultural Power of Law* (Princeton University Press 2000); Jonathon Osorio, *Dismembering Lahui: A History of the Hawaiian Nation to 1887* (University of Hawai`i Press 2002); Robert Stauffer, *Kahana: How the Land Was Lost* (University of Hawai`i Press 2004); and Noenoe Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (Durham; London: Duke University Press, 2004). See also David Keanu Sai, "Kahana: How the Land Was Lost (bookreview)," *The Contemporary Pacific: A Journal of Island Affairs* 15(1) (2005): 237.

from other western colonial takeovers of indigenous peoples and their lands throughout the world. Kame`eleihiwa, who viewed historical events through a constructed model of Hawaiian metaphors, concluded that the “real loss of Hawaiian sovereignty began with the 1848 Mahele, when the Mo`i (King) and Ali`i Nui (High Chiefs) lost ultimate control of the `Aina (Land).”⁷ Merry, whose theoretical framework is colonial/post-colonial, fashions the nineteenth century Hawaiian Kingdom into an imperialistic dichotomy of conflicting cultures and people. Osorio concludes that the Hawaiian Kingdom “never empowered the Natives to materially improve their lives, to protect or extend their cultural values, nor even, in the end, to protect that government from being discarded,” because the system itself was foreign and not Hawaiian.⁸ Stauffer states that, “the government that was overthrown in 1893 had, for much of its fifty-year history, been little more than a *de facto* unincorporated territory of the United States...[and] the kingdom’s government was often American-dominated if not American-run.”⁹ And Silva concludes that the overthrow “was the culmination of seventy years of U.S. missionary presence.”¹⁰ These views serve to bolster a history of domination by the United States that further relegates native Hawaiians, as an indigenous group of people, to a position of inferiority and at the same time elevates the United States to a position of political and legal superiority, notwithstanding the United States’ recognition of the Hawaiian Kingdom as a co-equal sovereign State and a subject of international law. Indigenous sovereignty, being a subject of United States domestic law, has become the lens through

⁷ *Id.*, Kame`eleihiwa, 15.

⁸ *Id.*, Osorio, 257.

⁹ *Id.*, Stauffer, 73.

¹⁰ *Id.*, Silva, 202.

which Hawai`i's legal and political history is filtered. I cover this contemporary view of colonialism and Hawaiian indigeneity in Chapter 4.

Impact of International Arbitration: Larsen v. Hawaiian Kingdom

Since the hearing of the Lance Larsen vs. Hawaiian Kingdom arbitration at the Permanent Court of Arbitration (1999-2001),¹¹ however, scholarship has begun to shift this paradigm from an intrastate—within the context of U.S. law and politics—to an interstate point of view—as between two internationally recognized political units.¹² It is through this shift that scholars are now revisiting contemporary assumptions regarding the history of the Hawaiian Kingdom. As the Hawaiian State gains more attention as a subject of international law, a comprehensive overview of the history of the Hawaiian Islands since the nineteenth century is necessary. In 2001, the Permanent Court of Arbitration in The Hague acknowledged that the Hawaiian Kingdom “existed as an independent State recognized as such by the United States of America, the United

¹¹ Lance Larsen vs. Hawaiian Kingdom, 119 International Law Reports 566 (2001). Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 299.

¹² Works on this topic include: David Bederman & Kurt Hilbert, “Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii” *American Journal of International Law* 95 (2001): 927; Patrick Dumberry, “The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law,” *Chinese Journal of International Law* 2(1)(2002): 655; D. Keanu Sai, “American Occupation of the Hawaiian State: A Century Gone Unchecked,” *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 46; Kanalu Young, “An Interdisciplinary Study of the term ‘Hawaiian,’” *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 23; Matthew Craven, “Hawai`i, History, and International Law,” *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 6; Jonathan Osorio, “Ku`e and Ku`oko`a: History, Law, And Other Faiths,” (Sally Engle Merry and Donald Brenneis, ed.s), *Law & Empire in the Pacific, Fiji and Hawai`i* (2003), 213; Kanalu Young, “Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780-2001,” *Hawaiian Journal of Law and Politics* 2 (Summer 2006): 1; Kamana Beamer, “Mapping the Hawaiian Kingdom: A Colonial Venture?,” *Hawaiian Journal of Law and Politics* 2 (Summer 2006): 34; and Umi Perkins, “Teaching Land and Sovereignty—A Revised View,” *Hawaiian Journal of Law and Politics* 2(Summer 2006): 97.

Kingdom, and various other States.”¹³ Furthermore, in 2004, the Ninth Circuit Court of Appeals also acknowledged the status of the Hawaiian Kingdom as a “coequal sovereign alongside the United States.”¹⁴

State, Sovereignty and Government

In order, though, to appreciate and understand the terms “independent State” and “coequal sovereign,” we need to know these terms, as they were understood in the nineteenth century. According to Sir Robert Phillimore, an independent State in the nineteenth century may be defined as “a people permanently occupying a fixed territory, bound together by common laws, habits, and customs into one body politic, exercising, through the medium of an organized Government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into all International relations with the other communities of the globe.”¹⁵ In 1895, Professor Freeman Snow states that a “State must be an organization of people for political ends; it must permanently occupy a fixed territory; it must possess an organized government capable of making and enforcing law within the community; and, finally, to be a sovereign State it must not be subject to any external control.”¹⁶ By 1933, the definition of the State was codified in Article 1 of the Montevideo Convention on Rights and Duties of States, which provided that the “state as a person of international law

¹³ See Larsen, *supra* note 10, at 581.

¹⁴ *Kahawaiola`a v. Norton*, 386 F.3d 1271, at 1282 (9th Cir. 2004).

¹⁵ Sir Robert Phillimore, *Commentaries upon International Law*, vol. 1, 3rd ed. (Hodges, Foster, & Co. 1879), 81.

¹⁶ Freeman Snow, *International Law: Lectures Delivered at the Naval War College*, (Government Printing Office, 1895), 19.

should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) capacity to enter into relations with other states.”

Sovereignty was understood to be of two essential forms—internal and external. Henry Wheaton’s renowned 1836 treatise of international law, for example, offered the following definition:

Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies.¹⁷

In the sixteenth century, French jurist and political philosopher Jean Bodin stressed that it was important that “a clear distinction be made between the form of the state, and the form of the government, which is merely the machinery of policing the state.”¹⁸ At this time, however, the State, according to Professor John Wilson, was an abstract or a “state of being comprehending every aspect of existence from the spiritual and metaphysical to the material.”¹⁹ Since then, the State evolved and it wasn’t until the early 19th century that German philosophers, such as Carl Friedrich von Gerber and Otto Gierke, began to transform the State from a moral concept grounded in natural law to a

¹⁷ Henry Wheaton, *Elements of International Law* (Clarendon Press 1936), 27.

¹⁸ Jean Bodin, *Six Books of the Commonwealth* (B. Blackwell 1955), 56.

¹⁹ Wilson, John F., “Royal Monarchy: ‘Absolute’ Sovereignty in Jean Bodin’s *Six Books of the Republic*,” *Interpretation: A Journal of Political Philosophy* 35(2) (Summer 2008): 242.

juristic person capable of having legal rights.²⁰ Gerber “maintains that in monarchy is incorporated the supreme power of the State, but that the king holds his authority only as an organ of the State.”²¹ Political philosopher Frank Hoffman also emphasized that a government “is not a State any more than a man’s words are the man himself,” but “is simply an expression of the State, an agent for putting into execution the will of the State.”²² Quincy Wright, a twentieth century American political scientist, also concluded that, “international law distinguishes between a government and the state it governs.”²³ Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Two contemporary examples illustrate this principle of international law, the overthrow of the Taliban (Afghanistan) in 2001 and of Saddam Hussein (Iraq) in 2003. The former has been a recognized sovereign State since 1919,²⁴ and the latter since 1932.²⁵ Dr. Martin Dixon explains:

If an entity ceases to possess any of the qualities of statehood...this does not mean that it ceases to be a state under international law. For example, the absence of an effective government in Afghanistan and Iraq following the intervention of the USA did not mean that there were no such states, and the same is true of Sudan where there still appears to be no entity governing the country effectively.

²⁰ C.E. Merriam, Jr., *History of the Theory of Sovereignty Since Rousseau* (Ams Press 1968), 113.

²¹ *Id.*, 114.

²² Frank Sargent Hoffman, *The Sphere of the State or the People as a Body-Politic* (G.P. Putnam’s Sons 1894), 19.

²³ Quincy Wright, “The Status of Germany and the Peace Proclamation,” *American Journal of International Law* 46(2) (Apr. 1952): 307.

²⁴ Manley O. Hudson, “Afghanistan, Ecuador, and the Soviet Union in the League of Nations,” 29 *American Journal of International Law* 29 (1935): 110.

²⁵ Manley O. Hudson, “The Admission of Iraq to Membership in the League of Nations,” *American Journal of International Law* 27 (1933): 133.

Likewise, if a state is allegedly ‘extinguished’ through the illegal action of another state, it will remain a state in international law.²⁶

Often times the term State has been personified as if it is capable of behavioral qualities. This no doubt comes from the influence of Max Weber who defines a State as having the monopoly on the legitimate use of violence, but this is a sociological definition, not legal. If this were true in a legal sense, Weber’s definition would fail miserably in attempting to explain how the Iraqi and Afghan State would continue to exist after their governments, who held the monopoly on the use of violence, were overthrown. In other words, governments have the monopoly of violence, not States, and not all governments are violent.

With regard to the recognition of external sovereignty, there are two aspects—recognition of sovereignty and the recognition of government. External sovereignty cannot be recognized without initial recognition of the government representing the State. Once such recognition of external sovereignty is granted, Professor Lassa Oppenheim asserts that it “is incapable of withdrawal”²⁷ by the recognizing States. Professor Georg Schwarzenberger also asserts, that “recognition estops the State which has recognized the title from contesting its validity at any future time.”²⁸ Recognition of a sovereign State is thus a political act with legal consequences.²⁹ The recognition of governments, which could change form through constitutional or revolutionary means, is a purely political act

²⁶ Martin Dixon, *Textbook on International Law*, 6th ed. (Oxford University Press 2007), 119.

²⁷ Lassa Oppenheim, *International Law*, 3rd ed., (Longmans, Green and Company 1920), 137.

²⁸ Georg Schwarzenberger, “Title to Territory: Response to a Challenge,” *American Journal of International Law* 51(2) (1957): 316.

²⁹ Gerhard von Glahn’s, *Law Among Nations*, 6th ed., (Macmillan Publishing Company 1992), 85.

and can be retracted by another government for strictly political reasons. Cuba is a clear example of this principle, in that the U.S. withdrew its recognition of Cuba's government under Fidel Castro, but at the same time this political act did not mean Cuba ceased to exist as a sovereign State. In other words, sovereignty of an independent State, once established, is not dependent upon the political will of other governments, but rather on the rules of international law. According to Wheaton,

The recognition of any State by other States, and its admission into the general society of nations, may depend...upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever be its ruler, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State.³⁰

The terms State, government and sovereignty are not synonymous in international law, but rather are distinct from each other. In other words, sovereignty, both external and internal, is an attribute of an independent State, while the government exercising sovereignty is the State's physical agent. The elements of the Hawaiian State are: (a) its permanent population that constitutes its citizenry, Hawaiian subjects; (b) its defined territory being the Hawaiian Islands; (c) its government being a constitutional monarchy, called the Hawaiian Kingdom; and (d) its ability to enter into international relations through its diplomatic corps.

³⁰ Wheaton, *supra* note 14, 15.

HAWAIIAN SOVEREIGNTY AND INTERNATIONAL LAW

Because Hawai'i existed as a co-equal sovereign alongside the United States of America in the nineteenth century, international laws and not United States domestic laws regarding indigenous people should provide the basis upon which to determine whether the Hawaiian State continues to exist, despite the illegal overthrow of its government on January 17th 1893. International law in the nineteenth century provided that only by way of conquest, formalized by treaty or subjugation,³¹ or by a treaty of cession could an independent State's complete sovereignty be extinguished, thereby merging the former State into that of a successor State. The establishment of the United States is a prime example of this principle at work through a voluntary merger of sovereignty. After the American Revolution, Great Britain recognized the former thirteen British colonies as "free Sovereign and independent States" in a confederation by the 1782 Treaty of Paris,³² but these States later relinquished their sovereignties in 1789 into a single federated State, which was to be thereafter referred to as the United States of

³¹ See Oppenheim, *supra* note 22, 394. Oppenheim defines subjugation as ancillary to the conquest of a State during war. "Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. And such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives title, and is a mode of acquiring territory." The United States was not at war with Hawai'i, only Spain, but seized Hawai'i's territory as a base for military operations against Spain. Subjugation, as a mode of acquiring territory in the nineteenth century, could only be applied to countries at war with each other and not applied to neutral countries occupied by one belligerent State in order to wage the war against the other belligerent State.

³² William MacDonald, *Documentary Source Book of American History* (The Macmillan Company 1923), 205. Article I of the 1782 Treaty of Paris provided that, "His Britannic Majesty acknowledges the said United States, Viz New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free Sovereign and independent States; That he treats with them as such; And for himself, his Heirs and Successors, relinquishes all Claims to the Government, Propriety, and territorial Rights of the same, and every part thereof; and that all Disputes which might arise in future, on the Subject of the Boundaries of the said United States, may be prevented, It is hereby agreed and declared that the following are, and shall be their Boundaries, viz."

America. The United States was the successor State of the thirteen former sovereign States by voluntary merger or cession.

As the U.S. Congress in 1993 admitted that its involvement in the overthrow of the Hawaiian government was indeed illegal, the quintessential question that should be asked is: “What was the legal status of the Hawaiian Kingdom in 1893, and did that status change in the aftermath of the overthrow of its government?” This question should be answered before discussing the creation of a new nation, which otherwise would only exist under the mandate of U.S. sovereignty. In other words, given that a recognized State has legal sovereignty, how did the United States alienate Hawaiian sovereignty under international law? This answer is critical to determining whether one should act upon a sovereignty already achieved and employ international law as nationals of the Hawaiian State for redress, or seek autonomy within the U.S. and employ domestic laws as an “indigenous people.” To answer this question we need to step aside from indigenous politics and enter the realm of international law and politics, which, in Political Science, is commonly referred to as International Relations. In this realm, established States are the primary actors and the domestic laws of the United States have no bearing because they can only apply to U.S. territory.

Confusing Indigenous Peoples with Hawaiian Sovereignty

One year following the 1993 Apology Resolution, Professor James Anaya published a law review article concerning the illegal overthrow of the Hawaiian Kingdom and the legal status of 20th century native Hawaiian self-determination. He concluded, “Despite the injustice and illegality of the United States’ forced annexation of Hawaii, it

arguably was confirmed pursuant to the international law doctrine of effectiveness. In its traditional formulation, the doctrine of effectiveness confirms *de jure* sovereignty over territory to the extent it is exercised *de facto*, without questioning the events leading to the effective control.”³³ Anaya cited two international law scholars,³⁴ Oppenheim and Hall, to support his contention. A more careful reading, though, shows that Oppenheim explains that the doctrine of effectiveness only applies when a recognized State occupies territories not under the dominion of another State, and Hall concurs with this description of the doctrine. If the Hawaiian Kingdom was an internationally recognized State at the time of the unilateral annexation, Anaya’s assertion is a misreading of Oppenheim and Hall. Oppenheim clarifies that “[o]nly such territory can be the object of occupation as is no State’s land, whether entirely uninhabited, as e.g. an island, or inhabited by natives whose community is not to be considered as a State.”³⁵ These native communities that Oppenheim makes reference to had become the subjects of colonization, and are known today as *indigenous peoples* or *populations*. Anaya states:

the rubric of indigenous peoples or populations is generally understood to refer to culturally cohesive groups that...suffer inequities within the states in which they live as the result of historical patterns of empire and conquest and that, despite the contemporary absence of colonial structures in the classical form, suffer impediments or threats to their ability to live and develop freely in their original homelands.³⁶

³³ James Anaya, “The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs,” *Georgia Law Review* 28 (1994): 329.

³⁴ See Lassa Oppenheim, *International Law*, 3rd Ed., (Longmans, Green & Co. 1920), 384; and William Hall, *A Treatise on International Law*, (Clarendon Press 1924), 125-6.

³⁵ *Id.*, Oppenheim, 383.

³⁶ Anaya, *supra* note 28, 339.

Many writers³⁷ have relied upon Anaya's article on native Hawaiian self-determination, which is one of the reasons why the Hawaiian situation has not been understood within the framework of international law, but rather has been pigeon-holed in colonial/post-colonial discourse concerning the rights of indigenous peoples, which

³⁷ See; ARTICLE: "With a Very Great Blame on Our Hearts": n1 Reparations, Reconciliation, and an American Indian Plea for Peace with Justice, *American Indian Law Review* 27(2002): 1; COMMENT: "Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims," *American Indian Law Review* 22 (1998): 509; ARTICLE: "Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act," *Arizona State Law Journal* 29 (1997): 25; COMMENT: "Ho'olohui: The Rebirth of A Nation," *Asian Law Journal* 5 (1998): 247; ARTICLE: "The New Deal Origins of American Legal Pluralism," *Florida State University Law Review* 29 (2001): 189; NOTE: "Irreconcilable Rights and the Question of Hawaiian Statehood," *Georgia Law Journal* 89 (2001): 501; ARTICLE: "Property Rights of Returning Displaced Persons: The Guatemalan Experience," *Harvard Human Rights Journal* 9 (1996): 145; ARTICLE: "Property Rights of Returning Displaced Persons: The Guatemalan Experience," *Harvard Human Rights Journal* 9 (1996): 145; Recent Developments: "Not because they are Brown, but because of Ea n1: Rice v. Cayetano, 528 U.S. 495 (2000)," *Harvard Journal of Law and Public Policy* 24 (2001): 921; NOTE: "International Law as an Interpretive Force in Federal Indian Law," *Harvard Law Review* 116 (2003): 1751; ARTICLE: "People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law," *Indian Law Journal* 71 (1996): 673; ARTICLE: "Law, Language and Statehood: The Role of English in the Great State of Puerto Rico," *Law and Inequality Journal of Theory and Practice* 17 (1999): 359; ARTICLE: "Pluralisms: The Indian New Deal As A Model," *Margins* 1 (2001): 393; ARTICLE: "What is a Community? Group Rights and the Constitution: The Special Case of African Americans," *Margins* 1 (2001): 51; ARTICLE: "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec," *McGill Law Journal* 45 (2000): 155; ARTICLE: "Not Because They are Brown, But Because of Ea: Why the Good Guys Lost in Rice v. Cayetano, and Why They Didn't Have to Lose," *Michigan Journal of Race and Law* 7 (2002): 317; NOTE: "Ua Mau Ke Ea O Ka Aina: Voting Rights and the Native Hawaiian Sovereignty Plebiscite," *Michigan Journal of Race and Law* 3 (1998): 475; NOTE: "Rice v. Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status," *North Carolina Law Review* 79 (2001): 812; ARTICLE: "Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations," *New York University Annual Survey of American Law* 58 (2003): 659; Part Three: "'Traditional' Legal Perspective: State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization," *Oklahoma City University Law Review* 23 (1998): 353; COMMENT: "Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy," *Santa Clara Law Review* 41 (2001): 509; "Fifth Annual Tribal Sovereignty Symposium: 'Save the Whales' v. Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order," *St. Thomas Law Review* 13 (2000): 155; COMMENT: "Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments," *Tulane Journal of International and Comparative Law* 10 (2002): 307; ARTICLE: "Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations," *University of Detroit Mercy Law Review* 76 (1999): 745; COMMENT: "Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual, n1," *University of Hawai'i Law Review* 24 (2002): 693; RECENT DEVELOPMENT: "The Akaka Bill: The Native Hawaiians' Race For Federal Recognition," *University of Hawai'i Law Review* 23 (2001): 857; ARTICLE: "Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i," *University of Hawai'i Law Review* 18 (1996): 623; ARTICLE: "Cultures In Conflict In Hawai'i: The Law and Politics of Native Hawaiian Water Rights," *University of Hawai'i Law Review* 18 (1996): 71; ARTICLE: "The Kamehameha Schools/Bishop Estate and the Constitution," *University of Hawai'i Law Review* 17 (1995): 413; SYMPOSIUM: "Native Americans and the Constitution: Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society?," *University of Pennsylvania Journal of Constitutional Law* 5 (2003): 357; ARTICLE: "Rethinking Alliances: Agency, Responsibility and Interracial Justice," *UCLA Asian Pacific American Law Journal* 3 (1995): 33; "SYMPOSIUM RACE AND THE LAW AT THE TURN OF THE CENTURY: Righting Wrongs," *UCLA Law Review* 47 (2000): 1815; ARTICLE: "Empire Forgotten: The United States's Colonization of Puerto Rico," *Villanova Law Review* 42 (1997): 1119; ARTICLE: "The Political Status of the Native Hawaiian People," *Yale Law & Policy Review* 17 (1998): 95.

only serves to reify U.S. sovereignty over the Hawaiian Islands—a claim that international law and Hawaiian history fails to support.

Hawaiian Sovereignty Maintained Under International Law

Despite the illegal overthrow of the Hawaiian government on January 17th 1893, the Hawaiian Kingdom continues to exist as a sovereign and independent State, which has been under prolonged occupation since the Spanish-American War. There were two illicit attempts by the U.S. to acquire Hawaiian sovereignty by a treaty of annexation, after the Hawaiian government was illegally overthrown, but both failed because of protests from Queen Lili'uokalani and loyal Hawaiian subjects organized into political organizations. The Hawaiian Kingdom is a small State that has been held firmly in the grip of the United States for over a century, and hidden from the international community. The most practical way for the Hawaiian Kingdom to compel the U.S. to release its grip is to excite scholarly inquiry. As the illegal overthrow of the Hawaiian Kingdom government and the subsequent occupation is now at 115 years, this dissertation is a study of the legal and political combustion required to bring the prolonged occupation to an end. The next chapter begins with the origin of the Hawaiian Kingdom under the reign of Kamehameha I.

CHAPTER 2

THE ROAD FROM CHIEFLY TO BRITISH TO HAWAIIAN GOVERNANCE: KAMEHAMEHA I TO III

After the unification of the island Kingdom of Hawai`i by Kamehameha I in 1791, his subsequent acquisitions of the Kingdom of Maui by conquest in 1795, and the Kingdom of Kaua`i by cession in 1810, the realm had its fair share of experience that fashioned Hawaiian governance. From 1782 to 1887, the kingdom experienced three forms of governance—Chiefly, British, and Hawaiian. These changes in governance were not brought about as a result of internal revolt or revolution, but rather by changing circumstances and influences, both foreign and domestic.

Hawaiian constitutionalism was an eclectic process drawing on political ideas and experiments of other countries as well as from the trials and tribulations of Hawaiian rulers. Manly Hopkins observed that the first Hawaiian constitution in 1840 appeared to be a combination of “the Pentateuch, the British government, and the American Declaration of Independence.”¹ While it is true that Hawaiian constitutionalism may have drawn from British and American political experience, its history and circumstances were unique. Hawai`i did not undergo the firebrand of revolution that escalated to regicide in Great Britain and France, and Hawaiian history finds no comparison to Locke and Rousseau’s social contract theory recognizing popular sovereignty resident in the people. What is apparent, though, was that the political leadership borrowed and/or was influenced by legal cultures throughout Europe and the United States, especially in the formative years of its transformation from autocratic rule to constitutional governance.

¹ Manly Hopkins, *Hawaii: The Past, Present and Future of Its Island Kingdom* (Kegan Paul 2003), 478.

Thomas Cooley’s 1868 treatise on *Constitutional Limitations*, often cited in Hawaiian Kingdom court decisions,² distinguishes between a *constitution* and a *constitutional government*. According to Cooley, a *constitution* is “that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.”³ But a *constitutional government* applies “only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights and shield them against the exercise of arbitrary power.”⁴ Therefore, all nations have constitutions, in which some leading principles have “prevailed in the administration of its government, until it has become an understood part of its system, to which obedience is expected and habitually yielded.”⁵ But not all nations have constitutional governments.

The history from absolute *constitution* to a *constitutional government* is a narrative of the interplay of internal and external forces that shaped the government of the Hawaiian Kingdom. Throughout 19th century Europe, there were two main strands of constitutional development—liberalizing a monarchy as advocated in Great Britain, and

² *Hyman Brothers v. John M. Kapena, Collector-General of Customs*, 7 Haw. 76 (1887); *The King v. Young Tang*, 7 Haw. 49 (1887); *Harriet A. Coleman v. Charles C. Coleman*, 5 Haw. 300 (1885); *Aliens and Denizens*, 5 Haw. 167 (1884); *C.T. Gulick, Minister of the Interior, v. William Flowerdew*, 6 Haw. 414 (1883); *In Re Petition of Clarence W. Ashford, for admission to the Bar*, 4 Haw. 614 (1883); *The King v. Tong Lee*, 4 Haw. 335 (1880); *A.S. Cleghorn v. Bishop and Al., Administrators of the Estate of His Late Majesty Kamehameha V*, 3 Haw. 483 (1873); *In Re Wong Sow on Habeas Corpus—Appeal from Decree of Hartwell, J.*, 3 Haw. 503 (1873); *James A. Burdick v. Godfrey Rhodes and James S. Lemon, Executors, &c.*, 3 Haw. 250 (1871); *In Re Gib Ah Chan*, 6 Haw. 25 (1870).

³ Thomas Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union* (Little, Brown, and Company 1868), 2.

⁴ *Id.*, 3.

⁵ *Id.*, 2.

enlightening despotism that took place on the European continent.⁶ Both strands sought to limit the monarch's authority, and monarchs rarely were willing participants. And to this Hawai'i can add a third strand of constitutional development—paragon of virtue. Neither the threat of internal revolt nor the curtailing of powers was the driving force of Hawaiian constitutionalism. Rather, it was the collective endeavor of the Chiefs, under the sanction of Kamehameha III and the tutelage of their instructor of political science, William Richards, to establish a constitutional government whereby all people, whether Chiefs or commoners, were equal before the law. Both foreign intervention and the threat of more served as a driving force for government reform, but reform itself was a national matter and ultimately left to the deliberations and work of the King and Chiefs. In the eighteenth century, there were four distinct kingdoms in the archipelago: Hawai'i under Kamehameha I; Maui and its dependent islands of Lanai and Kaho'olawe under Kahekili; Kaua'i and its dependent island of Ni'ihau under Ka'eo;⁷ and O'ahu and its dependent island of Molokai⁸ under Kahahana. The latter kingdom was conquered in 1783 by the Maui king, who thereafter made Waikiki the residence of his court.

In a manner resembling that of King Egbert of Wessex and his consolidation in 829 A.D. of the seven Anglo-Saxon kingdoms of southeast Britain that later came to be known as England,⁹ Kamehameha, King of Hawai'i Island, consolidated three kingdoms into the Kingdom of the Sandwich Islands in 1810. The term *Hawaiian* was not known at

⁶ John A. Hawgood, *Modern Constitutions Since 1787* (D. Van Nostrand Company, Inc. 1939), 2.

⁷ Ka'eo was also the brother of Kahekili, the Maui King.

⁸ The island of Molokai was once an independent and autonomous kingdom, but was subjugated by the O'ahu King, Peleioholani, and made a dependent island under the O'ahu kingdom.

⁹ F.M. Stenton, *Anglo-Saxon England* (Clarendon Press 1943), 230.

the time and did not come into use until the reign of Kamehameha III, brother to the late Kamehameha II. Like the people of the Anglo-Saxon kingdoms who migrated to the British Isle from Germany, the people in these kingdoms shared the same language, religion, culture, and genealogies that were part of the much larger Polynesian people of the south Pacific.

The first Polynesians to settle the islands appears to have taken place between A.D. 0-300 from the Marquesan Islands,¹⁰ and later migrations came from the Society group of islands until the 14th century. Traditional society was advanced and complex, with a “centralized monarchy, a political bureaucracy, the systematic collection of taxes, an organized priesthood, and hierarchically ordered social system.”¹¹ Throughout the island kingdoms, it was common practice for Chiefs to leave one court and be received in another depending upon newfound loyalty or departure necessitated by royal disfavor or failed rebellion. The commoner class, though, were not so transient as the chiefs, but resided on lands held under a chief, which “bore a remarkable resemblance to the feudal system that prevailed in Europe during the Middle Ages.”¹²

Kamehameha I, like his counterparts, fashioned government according to ancient tradition and strict religious protocol. But subsequent to his voluntary cession of the island Kingdom of Hawai`i to Great Britain in 1794, Kamehameha and his Chiefs considered themselves British subjects and recognized King George III as their liege and lord. Traditional governance was not radically changed by the cession, but augmented

¹⁰ Ross Cordy, *Exalted Sits the Chief* (Mutual Publishing 2000), 109.

¹¹ Eli Sagan, *At the Dawn of Tyranny: The Origins of Individualism, Political Oppression, and the State* (Alfred A. Knopf 1985), xxi.

¹² W.D. Alexander, “A Brief History of Land Titles in the Hawaiian Kingdom,” *Interior Department, Appendix to Surveyor General’s Report to the 1882 Hawaiian Legislature*, 3.

with principles of English governance and titles, e.g. prime minister and governors, which was expected of an adopted kingdom into the British Empire. For a national ensign, Kamehameha adopted a flag very similar to the British East India Company¹³ with the same Union Jack in the canton, but replacing the thirteen red and white stripes with seven alternating colored stripes of white, blue and red. British governance would last until 1829 when Kamehameha III, together with his Council of Chiefs, took political steps asserting the kingdom's comity with the British, rather than its dependency, and achieved the formal recognition of the Hawaiian Islands as an independent and sovereign State by proclamation from the British and French on November 28, 1843, and the United States on July 6th 1844 by letter of Secretary of State J.C. Calhoun.

CHIEFLY GOVERNANCE OF THE KINGDOM OF HAWAI`I

Chiefly governance was a mixture of religious and chiefly law. The separation between these laws was indistinct during the eighteenth century while their source of authority emanated from the person of the King. Government was absolute with a highly defined and ordered hierarchy of Chiefs. According to Hawaiian historian David Malo,

The king was the real head of the government; the chiefs below the king, the shoulders and chest. The priest of the king's idol was the right hand, the minister of interior (*kanaka kalaimoku*) the left, of the government. This was the theory on which the ancients worked. The soldiery were the right foot of the government, while the farmers and fishermen were the left foot. The people who performed the miscellaneous offices represented the fingers and toes.¹⁴

¹³ "The Hawaiian Flag," *Hawaiian Almanac and Annual* (Thos. G. Thrum 1880), 24.

¹⁴ David Malo, *Hawaiian Antiquities* (Bishop Museum 1951), 187.

The King's agents were his chiefs and priests, and to these agents the commoner held strict obedience. As stated by Malo, the King was compared to a house, "the chiefs below him and the common people throughout the whole country were his defense."¹⁵ Outside influences, whether political, social or religious, were met and dealt with by the King and his principal Chiefs in council with laws or edicts to follow. The religious laws both organized and stratified Hawaiian society, while the Chiefly laws served to administer governance under and by virtue of the King. According to Hawaiian historian Sheldon Dibble,

As a general mark the chiefs were regarded as the only proprietors. They were admitted to own not only the soil but also the people who cultivated it; not only the fish of the sea but also the time, services, and implements of the fisherman. Everything that grew or had life on the land or in the sea; also things inanimate, and everything formed or acquired by the skill or industry of the people was admitted to be owned by the chiefs.¹⁶

The constitution was unwritten and comprised of two basic *kanawai* (laws), "the *kanawai akua*, or gods' laws; and the *kanawai kapu ali`i*, or sacred chiefly laws."¹⁷ Religious laws were closely interwoven with chiefly laws and it was the duty of the King "to consecrate the temples, to oversee the performance of the religious rites in the temples of human sacrifice," and to preside "over such other ceremonies as he might be pleased to appoint."¹⁸ Sovereignty was consolidated in the person of the King in whose

¹⁵ *Id.*, 191.

¹⁶ Sheldon Dibble, *A History of the Sandwich Islands* (Thomas G. Thrum, Publisher 1909), 72.

¹⁷ Samuel Manaiakalani Kamakau, *Ka Po`e Kahiko: The People of Old* (The Bishop Museum Press 1964), 11.

¹⁸ Malo, *supra* note 14, 53.

hands controlled life and death, and consequently, he also could adjust the form of governance. Religion constituted the organic law of the country while, administratively, governance resided solely with the King and his Chiefs. Hawaiian Justice Walter Frear noted:

The system of government was of a feudal nature, with the King as lord paramount, the chief as mesne lord and the common man as tenant paravail—generally three or four and sometimes six or seven degrees. Each held land of his immediate superior in return for military and other services and the payment of taxes or rent. Under this system all functions of government, executive, legislative and judicial, were united in the same persons and were exercised with almost absolute power by each functionary over all under him, subject only to his own superiors, each function being exercised not consciously as different in kind from the others but merely as a portion of the general powers possessed by a lord over his own.¹⁹

The Kingdom of Hawai`i Divided: Ascension of Kamehameha I

Upon the death of Kalaniopu`u in January of 1782, King of the island of Hawai`i, his son, Kiwala`o became his successor.²⁰ While the late King's nephew, Kamehameha, was "heir to the redoubtable war-god of Kalaniopu`u,"²¹ his son Kiwala`o held the reigns of state. According to tradition and usage, all landed property held by the *tenants in chief*

¹⁹ Walter Frear, "The Evolution of the Hawaiian Judiciary," *Papers of the Hawaiian Historical Society* (June 29, 1894), 1.

²⁰ Abraham Fornander, *Ancient History of the Hawaiian People to the Times of Kamehameha I* (Mutual Publishing 1996), 204.

²¹ *Id.*, 303.

of Kalaniopu`u would revert to Kiwala`o for redistribution to the latter's most trusted chiefs. His short reign, though, was marred with turmoil and rebellion by his father's former chiefs of the leeward side of the island—otherwise known as the “Kona chiefs.” These chiefs, who looked to Kamehameha for leadership, were deeply concerned in “the coming division of their lands,” and worried that “their possessions, which they held under Kalaniopu`u, would be greatly shorn or entirely loss.”²²

The fealty of the Kona chiefs was tenuous and fighting broke out between these chiefs and the King's brother, Keoua, after he led a raiding party into the land of Kamehameha. Keoua killed some of Kamehameha's people and when he cut down coconut trees, which was a traditional symbol of war, he started a chain of events that would ultimately fracture the island kingdom.²³ The raid happened “without the command or sanction of Kiwala`o,” but the new King “was gradually drawn into it in support of his brother.”²⁴ This began a civil war and triggered the rising of Kamehameha and the Kona chiefs.

Both sides gathered their troops and a great battle ensued on the leeward side of the island in an area called Ke`ei, which came to be known as the *Battle of Mokuohai*. At the onset of battle, all of the Kona chiefs were engaged except for Kamehameha, who was still performing a religious rite for the occasion with his high priest. It first appeared that Kiwala`o would be victorious, but with the arrival of Kamehameha and his men the battle violently turned against the King. The royal forces were finally routed after

²² *Id.*, 302.

²³ Samuel M. Kamakau, *Ruling Chiefs of Hawaii* (Kamehameha Schools Press 1992), 120.

²⁴ Fornander, *supra* note 20, 308.

Kiwala`o was slain by one of the Kona chiefs, Ke`eaumoku, who survived though severely wounded.²⁵ Kamehameha’s army captured Kiwala`o’s chief counselor, Keawemauhili, but Keoua, who instigated the battle, retreated with his army and took refuge in Ka`u—the southern district of the island. Keawemauhili later escaped and he sought refuge on the windward side of the island. Fornander describes the results of the battle of Mokuohai as:

to render the island of Hawai`i into three independent and hostile factions. The district of Kona, Kohala, and portions of Hamakua acknowledged Kamehemeha as their sovereign. The remaining portion of Hamakua, the district of Hilo, and a part of Puna, remained true to and acknowledged Keawemauhili as their Mo`i [sovereign]; while the lower part of Puna and the district of Kau, the patrimonial estate of Kiwalao, ungrudgingly and cheerfully supported Keoua Kuahuula against the mounting ambition of Kamehameha.²⁶

The warfare for ascension to the throne would continue for the next five years. An alliance would later be established between Keawemauhili and Keoua, and skirmishes took place between Kamehameha and these two Chiefs, but none was decisive enough to alter the equilibrium established after the battle of *Moku`ohai*. At the close of his last campaign in 1785 against the Ka`u and Hilo forces, Kamehameha returned to Kohala, “where he turned his attention to agriculture, himself setting an example in work and

²⁵ Kamakau, *supra* note 23, 121.

²⁶ Fornander, *supra* note 20, 311.

industry.”²⁷ He also married Ka`ahumanu who would later “fill so prominent a place in modern Hawaiian history, after the death of Kamehameha.”²⁸

Foreign Trade Throughout the Island Kingdoms

Between 1787 and 1790 an increasing number of English, American, French, Spanish, and Portuguese ships visited the islands and actively traded with the people. So widespread was the trading, that during this period there are no records of any battles taking place throughout the islands. No longer were the foreigners looked upon with wonder, as was the case before Captain James Cook’s death in 1778 at the hands of the chiefs of Kalaniopu`u, but rather as partners in trade that bolstered aspirations of glory by the Chiefs. Fornander explained:

To the natives it was an era of wonder, delight, and incipient disease; to the chiefs it was an El Dorado of iron and destructive implements, and visions of conquest grew as iron, and powder, and guns accumulated in the princely storerooms. The blood of the first discoverer had so rudely dispelled the illusion of the “Haole’s” [foreigner’s] divinity that now the natives, not only not feared them as superior beings, but actually looked upon them as serviceable, though valuable, materials to promote their interests and to execute their commands.²⁹

Circumstances benefited Kamehameha. First a very high ranking former Maui chief, Ka`iana, joined Kamehameha’s ranks in January of 1789 with a large cache of weapons and ammunition, which he had acquired during “three years in China and other

²⁷ *Id.*, 320.

²⁸ *Id.*

²⁹ *Id.*

lands.”³⁰ After a failed rebellion against Kahekili, the Maui King, Ka`iana sought refuge under Ka`eo, King of Kaua`i. In 1787, he departed Kaua`i and was the first chief to leave the islands on a foreign trading vessel, the *Nootka*, accompanying Captain Meares to Canton. On his way to Kauai the following year, he realized he fell into disfavor with Ka`eo and requested that he disembark on the Island of Hawai`i at the court of Kamehameha instead. Ka`iana was favorably received by Kamehameha due to his high aristocratic status, his renowned bravery, and for his cache of weapons that enlarged Kamehameha’s own. Kamehameha had also detained two Englishmen, John Young and Isaac Davis³¹ Both men were skilled in the use of muskets and artillery. He “was anxious to secure foreigners to teach him to handle the muskets which it had been his first object to obtain.”³² Fornander states:

These two captive foreigners...finding their lives secure and themselves treated with deference and kindness, were soon reconciled to their lot, accepted service under Kamehameha, and contributed greatly by their valor and skill to the conquests that he won, and by their counsel and tact to the consolidation of those conquests.³³

³⁰ Kamakau, *supra* note 23, 144.

³¹ Thomas Thrum, “John Young: Companion of Kamehameha, a Brief Sketch of His Life in Hawaii,” *Hawaiian Almanac and Annual* (Thos. G. Thrum 1910), 96. During Captain Vancouver’s second trip to the islands in 1793 he identifies John Young to be “about forty-four years of age, born at Liverpool, and Isaac Davis, then thirty-six years old, born at Milford.”

³² *Id.*, 146.

³³ Fornander, *supra* note 20, 235.

Kamehameha Attempts to Conquer the Kingdom of Maui

Keawemauhili and Kamehameha reconciled their differences and in the spring of 1790, the former had “sent a substantial contingent of canoes and warriors to aid” the latter in his invasion of the Maui kingdom, which at the time included the islands of Maui, Lanai, Molokai, and the former Kingdom of Oahu.³⁴ Kahekili held his court at Waikiki on the island of O`ahu, while his son, Kalanikupule, governed the islands of Maui, Lanai and Molokai. When Kamehameha’s forces landed on Maui they overwhelmed the Maui chiefs and the decisive battle, known as *Kepaniwai* (damning of the waters) and also *Kauwaupali* (clawed off the cliff), was fought in the valley of Iao. Kalanikupule and some of his men escaped capture and fled to O`ahu after the battle. Kamehameha soon overran Lanai and Molokai.

Angered by Keawemauhili’s support of Kamehameha’s Maui campaign, Keoua invaded Hilo and slew Keawemauhili in battle while adding Hilo to his dominion.³⁵ Taking advantage of Kamehameha’s absence, Keoua then proceeded to invade the districts of Hamakua and Kohala and lay waste to Kamehameha’s lands. Word of Keoua’s pillage soon reached Kamehameha while he was preparing to invade O`ahu from Molokai. He was forced to abandon his pursuit of complete victory over the Maui kingdom and returned to Hawai`i to deal with his sole remaining archrival for control of Hawai`i island. The islands of Maui and Molokai were later reclaimed without incident by the combined forces of an avenging Kahekili and his brother Ka`eo, King of Kaua`i,

³⁴ Ralph S. Kuykendall, *The Hawaiian Kingdom: 1778-1854, Foundation and Transformation*, vol. 1 (University of Hawai`i Press 1938), 35.

³⁵ Kamakau, *supra* note 23, 151.

while Kalanikupule remained on O`ahu to govern in his father's absence. The two leeward Kings then prepared to launch an invasion against Kamehameha from Maui.

Before Kamehameha returned from his leeward campaign, he sent one of his chiefs to consult with a renowned *kilokilo* (seer) resident on the island of O`ahu “to find out by what means he could make himself master of the whole of Hawaii island.”³⁶ The answer given was that Kamehameha must “build a large Heiau (temple) for his god at Pu`ukohola, adjoining the old Heiau of Mailekini near Kawaihae, Hawai`i; that done, he would be supreme over Hawai`i without more loss of life.”³⁷ Two unsuccessful battles with Keoua since his return—where neither chief could claim victory, resulted in a stalemate, and Kamehameha refocused his energy and labor into the building of the grand *heiau*. It was an enormous task that involved the physical labor of not just his people, but also Kamehameha himself. His attention, though, would soon be diverted to the invading force of the two leeward Kings departing from Maui.

Kahekili and Ka`eo embarked from Maui on a large fleet of canoes and invaded the northern coast of Hawai`i committing “serious depredations before Kamehameha could interpose to stop them.”³⁸ Kamehameha responded by organizing his forces into a large fleet of schooners and double hull canoes fixed with cannons, and sailed for Waipi`o Valley to battle the leeward invaders.³⁹ The leeward force also had cannons and foreigners to handle them, but it would prove no match against Kamehameha's fleet. The invading force was engaged in a naval battle, “and when the two fleets came together not

³⁶ Kuykendall, *supra* note 34, 36.

³⁷ Fornander, *supra* note 20, 240.

³⁸ Kuykendall, *supra* note 34, 37.

³⁹ Kamakau, *supra* note 23, 161.

far from Waipio...the battle was long and sanguinary.”⁴⁰ Kamehameha defeated the leeward force, which came to be known as the Battle of *Kepuwahaulaula* (red-mouth gun), but the two leeward kings managed to escape with but a remnant of their forces and returned to their kingdoms.

Unification of the Kingdom of Hawai`i

Refocusing his attention on the prophesy, Kamehameha returned to labor at Pu`ukohola and the great temple was finally completed and consecrated with full religious rites in the summer of 1791. Thereafter, with an undeterred vision of consolidating his dominion over the fractured Hawai`i island kingdom, he sent two of his Chiefs, Keaweaheulu and Kamanawa, to meet with Keoua. The latter received Kamehameha’s ambassadors with all the customary formalities and was urged to accompany them to Pu`ukohola “to meet Kamehameha face to face and to make peace with him.”⁴¹ Keoua consented. When Keoua’s retinue entered the bay at Pu`ukohola by canoe, his party came under attack by Ke`eaumoku, one of Kamehameha’s trusted advisers, and his men. Keoua was killed before he could set foot on the shoreline fronting the grand temple. Whether by circumstance or design, the death of Kamehameha’s rival in 1791 was the final step of consolidating Hawai`i’s dominion in the person of Kamehameha—the Kingdom of Hawai`i had been reunited after nine years of civil war.

Kamehameha “devoted the next few years to works of peace, the organization and administration of his government, and the normal development of the resources of his

⁴⁰ Kuykendall, *supra* note 34, 37.

⁴¹ *Id.*, 37.

territory.”⁴² The Hawai`i king had grand designs of conquering the leeward kingdoms, but these plans were held in abeyance by request of Kahekili. While Kamehameha was on the island of Molokai a year earlier, he sent an envoy to Kahekili’s court at Waikiki to arrange in a courteous and chiefly manner the place of battle. After consideration of the various plans proposed by Kamehameha’s messenger, Kahekili replied,

Go, tell Kamehameha to return to Hawai`i, and when he learns that the black kapa covers the body of Kahekili and the sacrificial rites have been performed at his funeral, then Hawai`i shall be the Maika-stone that will sweep the course from here to Tahiti; let him then come and possess the country.⁴³

FROM CHIEFLY TO BRITISH GOVERNANCE

Captain George Vancouver, who commanded three English vessels, the *Discovery*, the *Chatham*, and the *Daedalus*, visited the islands on three separate occasions—March 1792, February-March 1793, and January-March 1794. By order of the British Admiralty, Captain Vancouver was to complete the exploration of the northwest coast of the American continent begun by the late Captain James Cook. In 1778, Cook named the island group the Sandwich Islands in honor of his superior the First Lord of the British Admiralty, John Montagu, 4th Earl of Sandwich. Captain Vancouver was on good terms with all three kingdoms and even attempted to broker peace between them, but it was with Kamehameha that a close relationship developed. Kamehameha and Captain Vancouver became close friends and an affinity soon developed between the Hawai`i King and the British. Kamehameha remained fully aware

⁴² *Id.*, 38.

⁴³ Fornander, *supra* note 20, 239.

of how tenuous relations were with the leeward kingdoms, especially in the aftermath of the *Battle of Kepuwahaulaula*, and that only time could tell when another invasion would be attempted.

With an objective toward security for the kingdom from both the leeward kings and foreign nations, Kamehameha ceded the Island Kingdom of Hawai'i to Great Britain and recognized King George III as his liege and lord on February 25th 1794. The cession, though, was a conditional mutual agreement recorded in the ship's log. The meeting of the cession took place on the HBMS *Discovery*, and present were "Kamehameha, his brothers Keliimaika'i, and Kalaimamahu, the latter of whom Vancouver styles as 'chief of Hamakua;' Keeaumoku, chief of Kona; Keaweaeulu, chief of Kau; Kaiana, chief of Puna; Kameeiamoku, chief of Kohala; and Kalaiwohi, who is styled a half-brother of Kamehameha."⁴⁴ It was agreed that the British government would not interfere with the kingdom's religion, government, and domestic economy, and "the chiefs and priests, were to continue as usual to officiate with the same authority as before in their respective stations."⁴⁵ Kamehameha and his Chiefs understood themselves to be a part of the British Empire and subjects of King George III. According to Hopkins, Kamehameha also "requested of Vancouver that on his return to England he would procure religious instructors to be sent to them from the country of which they now considered themselves subjects."⁴⁶ After the ceremony, the British ships fired a salute and a copper plaque, with the following inscription, was placed at Kamehameha's residence.

⁴⁴ *Id.*, 342.

⁴⁵ George Vancouver, *Voyage of Discovery to the North Pacific Ocean and the round the World*, vol. 3 (Da Capo Press 1967), 56.

⁴⁶ Hopkins, *supra* note 1, 133.

On the 25th of February, 1794, Tamaahmaah [Kamehameha], king of Owhyhee [Hawai`i], in council with the principal chiefs of the island assembled on board His Britannic Majesty's sloop Discovery in Karakakooa [Kealakekua] bay, and in the presence of George Vancouver, commander of the said sloop; Lieutenant Peter Puget, commander of his said Majesty's armed tender the Chatham; and the other officers of the Discovery; after due consideration, unanimously ceded the said island of Owhyhee [Hawai`i] to His Britannic Majesty, and acknowledged themselves to be subjects of Great Britain."⁴⁷

*Kamehameha Conquers the Kingdom of Maui and
Acquires the Kingdom of Kaua`i by Cession*

Captain Vancouver's squadron left the islands on March 3rd 1794, returning to Great Britain, and the calm between the kingdoms remained undisturbed until the death of Kahekili in July 1794, which caused a war between the kingdoms of Maui and Kaua`i. His son, Kalanikupule, "was recognized as the Moi [King] of Maui and its dependencies, Lanai, Molokai, and Oahu."⁴⁸ Ka`eo, though, would govern Maui and the adjacent islands, while Kalanikupule governed and held court at Waikiki, island of O`ahu. This arrangement of a shared kingdom became a source of tension between the Kaua`i and Maui chiefs and a battle later took place on O`ahu between the two factions. While Ka`eo, with an army of soldiers, prepared to depart from the leeward side of O`ahu to his Kingdom of Kaua`i, a plan was contrived by his chiefs to overthrow Kalanikupule at Waikiki and bring the entire leeward islands under Kaua`i rule. To do this, the Kaua`i

⁴⁷ *Id.*

⁴⁸ Fornander, *supra* note 20, 262.

chiefs assumed their King would not have supported an overthrow of his nephew, and made preparations to kill Ka`eo by throwing him overboard while the fleet was deep in the channel between the islands of O`ahu and Kaua`i.⁴⁹

Ka`eo uncovered the plot, but instead of rounding up and seizing the conspirators, the Kaua`i King decided to give in to the impulsive endeavors of his chiefs and plan the invasion himself. The two armies met on the plains of Honolulu just above Pearl Harbor, and with the assistance of two British ships, the *Jackall* and the *Prince Lee Boo* commanded by Captain Brown, Kalanikupule defeated the invaders and Ka`eo was killed in battle in December of 1794.⁵⁰ The islands of Maui, Lanai and Molokai were forsaken by the Kaua`i chiefs, and the Kingdom of Kaua`i descended to Kaumuali`i, son of the late king. The success of the battle soon had Kalanikupule and his chiefs entertaining ideas of avenging their defeat at the hands of Kamehameha four years earlier, and they prepared for an invasion of the Kingdom of Hawai`i. According to Kuykendall:

Success inflated the ambition of Kalanikupule and his chiefs and they began to dream of conquering Kamehameha. They thought perhaps that possession of foreign ships would make them invincible...A cunning plot was formed and on the first day of January, 1795, the *Jackall* and the *Prince Lee Boo* were captured, the two captains, Brown and Gordon, were killed, and the surviving members of the crews were made prisoners.⁵¹

Kalanikupule's invasion plans, though, were foiled when the surviving crew managed to retake control of the ships off of Waikiki on January 12th 1795, and

⁴⁹ *Id.*, 263.

⁵⁰ *Id.*, 343.

⁵¹ Kuykendall, *supra* note 34, 46.

immediately sailed for the Island Kingdom of Hawai`i. While on Hawai`i, the ships were refurbished with supplies and before they departed for Canton, China, Kamehameha was notified of the murders of the two British Captains and Kalanikupule's plan to invade. He was also given the leeward king's arms and ammunition that were stored on the ships.⁵² Two situations presented themselves to Kamehameha—as a British subject, his duty to atone the deaths of the two British captains, and an opportunity for a pre-emptive strike against the Kingdom of Maui whose alliance with the Kingdom of Kaua`i was now severed. In February of 1795, Kamehameha departed Hawai`i with an army of 16,000 men and quickly overran Maui, Lanai and Molokai. The victors sojourned on the latter island to prepare for the invasion of O`ahu where the bulk of Kalanikupule's army were stationed.⁵³ The final planning of the invasion did not include Ka`iana, for this chief fell into disfavor by Kamehameha—an issue reminiscent of the former's relationship with Ka`eo upon his return from Canton, China, in 1788. It has been speculated by Hawaiian historians that Kamehameha's disfavor of Ka`iana was attributed to Ka`iana's intimacy with Ka`ahumanu, one of the wives of Kamehameha, and he and his army was left with no alternative but to break ranks with the Hawai`i King and join forces with Kalanikupule on O`ahu.

In April 1795, Kamehameha landed his forces on O`ahu, and “for a while the victory was hotly contested; but the superiority of Kamehameha's artillery, the number of his guns, and the better practice of soldiers, soon turned the day in his favor, and the

⁵² Fornander, *supra* note 20, 343.

⁵³ *Id.*, 84.

defeat of the O`ahu forces became an accelerated rout and a promiscuous slaughter.”⁵⁴ Ka`iana was killed by artillery and Kalanikupule temporarily escaped capture, but was later found by Kamehameha’s forces and killed. This battle is known as the *Battle of Nu`uanu*. The defeat of the Maui kingdom rendered Kamehameha master of Hawai`i, Maui, Lanai, Molokai and O`ahu. By April of 1810 the Sandwich Islands came under the complete control and dominion of one king after the Kingdom of Kaua`i and its dependency, the island of Ni`ihau, was voluntarily ceded by Kaumuali`i who thereafter recognized Kamehameha as his liege and lord. Kaumuali`i was permitted to govern Kaua`i with his own chiefs, but paid an annual tribute to Kamehameha as his feudatory lord. Kamehameha was now King of the Sandwich Islands.

Communiqués of Kamehameha to King George III

Before Kaua`i was ceded, Kamehameha I sent a letter to King George III dated March 3rd 1810, together with a feathered cloak as a royal gift to the King. Captain Spence, Master of the ship Duke of Portland, would deliver the letter and gift when he left the island of O`ahu the following day. Captain Spence penned the letter on behalf of Kamehameha, which stated:

Having had no good opportunity of writing to you since Capt. Vancouver left here has been the means of my Silence. Capt. Vancouver Informed me you would send me a small vessel am sorry to say I have not yet received one.⁵⁵

⁵⁴ Fornander, *supra* note 20, 348.

⁵⁵ James Jackson Jarves, *History of the Hawaiian Islands*, 3rd ed. (Charles Edwin Hitchcock 1847), 117. This schooner was finally delivered to Kamehameha’s successor on May 1, 1822, by Captain Kent on behalf of King George IV. The name of the schooner was the Prince Regent.

Am sorry to hear your being at War with so many powers and I so far off cannot assist you. Should any of the powers which you are at War with molest me I shall expect your protection, and beg you will order your Ships of War & Privateer not to Capture any vessel whilst laying at Anchor in our Harbours, as I would thank you to make ours a neutral port as I have not the means of defence.

I am in particular need of some Bunting having no English Colours also some brass Guns to defend the Islands in case of Attack from your Enemies. I have built a few small vessels with an Intent to trade on the North West of America with Tarro [taro] root the produce of these Islands for fur skins but am told by the White men here I cannot send them to sea without a Register. In consequence of which beg you will send me a form of a Register & seal with my Name on it.⁵⁶

In order for Kamehameha to begin trading taro on the northwest coast of America, the ships needed registration papers proving British nationality in accordance with admiralty law. British ships doing trade at the time fell under the jurisdiction of admiralty law that covered “contracts made upon land but relative solely to shipping and naval affairs, particularly with respect to material men, i.e. such as furnish tackle, furniture, or provisions, for the repairing of ships, or setting them out to sea; as well as to freight, charter-parties, and other marine contracts, though made upon land.”⁵⁷ According to Arthur Brown, the substance of 18th century admiralty law, “made the exercitor or owner answerable for the contracts of the master, and it is said they also make the ship liable to

⁵⁶ Rhoda E.A. Hackler, “Alliance or Cession? Missing Letter from Kamehameha I to King George III of England Casts Light on 1794 Agreement,” *The Hawaiian Journal of History* 20 (1986): 7.

⁵⁷ Arthur Brown, *A Compendious View of the Civil Law, and of the Law of the Admiralty*, 2nd ed. (G. Woodfall 1802), 75.

the same.”⁵⁸ The seal with Kamehameha’s name was intended to authenticate the registration of the ships as a commissioned officer of the British Crown. Under British law, “important posts in government are conferred by the Crown by delivery of the seals of office and surrendered by delivery up of the seals.”⁵⁹ Seals, according to Professor Frederic W. Maitland, were not “mere ceremonial symbols like the crown and the scepter; they are real instruments of government. Without a great seal, England could not be governed.”⁶⁰ Without a seal Kamehameha would not be able to register the ship’s nationality for trading purposes with the northwest coast of America, and, therefore, unable to qualify the merchant ships’ rights and protection under admiralty or maritime law. Of particular interest is in the postscript of the letter, whereby Kamehameha explained that the invasion of the Kingdom of Maui and the change in royal residence from Hawai`i to O`ahu “was in consequence of their [Kalanikupule’s men] having put to death Mr. Brown & Mr. Gordon, Masters, (of the Jackall & Prince Le Boo, two of you[r] merchant ships.)”⁶¹

A second communication by Kamehameha I dated August 6, 1810, apprised King George III of the recent consolidation of the entire Sandwich Island group, and reiterated his former request for a *seal*. With salutations to the British King, Kamehameha stated:

Kamehameha, King of the Sandwich Islands, wishing to render every assistance to the ships of his most sacred Majesty’s subjects who visit these seas, have sent a letter by Captain Spence, ship “Duke of Portland,” to his Majesty, since which

⁵⁸ *Id.*, 35.

⁵⁹ David M. Walker, *The Oxford Companion to Law* (Clarendon Press 1980), 1122.

⁶⁰ F.W. Maitland, *The Constitutional History of England* (University Press 1926), 393.

⁶¹ Hackler, *supra* note 56.

Timoree [Kaumuali'i], King of Atooi [Kaua'i], has delivered his island up, and we are now in possession of the whole of the Sandwich Islands. We, as subjects to his most sacred Majesty, wish to have a seal and arms sent from Britain, so as there may be no molestation to our ships or vessels in those seas, or any hindrance whatever.⁶²

In 1811, the Prince of Wales and son of King George III became Prince Regent and ruled the British Empire after his father had a relapse of insanity the year before. Captain Spence arrived in England during the royal transition and was unable to deliver Kamehameha's letter to King George III. The letter and gift of Kamehameha I was instead delivered to the Prince Regent. In a communication from London dated April 30th 1812, Kamehameha I was notified of the change in government by the Secretary of State for Foreign Affairs, Earl of Liverpool. The Secretary of State assured Kamehameha I that the Prince Regent would "promote the Welfare of the Sandwich Islands, and that He will give positive Orders to the Commanders of His Ships to treat with proper respect, all Trading Vessels belonging to you, or to Your subjects."⁶³ He also stated that the Prince Regent was "confident that the Complete Success which He has gained over His Enemies in every Quarter of the Globe, will have the Effect of securing [Kamehameha's] Dominions from any attack or Molestation on their part."⁶⁴ What was left unanswered, though, was Kamehameha's request for a register form and seal, which would prevent his ability to trade with merchants on the northwest coast of the American continent. Instead, Kamehameha found that he could trade the kingdom's lucrative and vast amounts of

⁶² Hopkins, *supra* note 1, 131.

⁶³ *Liverpool to Kamehameha, April 30, 1812*, Hawai'i Archives, F.O.E.X., Series 402 Box 2.

⁶⁴ *Id.*

sandalwood with merchant ships coming to his homeports, for which the seal and register form were not needed.⁶⁵ According to Kuykendall, this expansion of trade in the islands “afforded a convenient base of operation,” and by “1812 we find at least one agent established in Honolulu to coordinate the operations of several ships and to handle the business in the islands.”⁶⁶

Establishing a British form of Governance

With the acquisition of the leeward islands under one kingdom, Kamehameha incorporated and modified aspects of English governance to his own, but “with only such modifications as were required by new conditions or suggested by his own experience.”⁶⁷ These modifications included the office of a Prime Minister and the establishment of Governors. Aligned with adopted English custom, Kamehameha established three earldoms over the former kingdoms of Hawai`i, Maui and O`ahu, and Governors to preside over them.⁶⁸ These Governors served as viceroys over the lands of the former kingdoms “with legislative and other powers almost as extensive as those kings whose places they took.”⁶⁹ *Kalaimoku* (carver of lands) was the ancient name given to a King’s chief counselor, and became the native equivalent in title to that of Prime Minister.

⁶⁵ Kuykendall, *supra* note 34, 84-89.

⁶⁶ *Id.*, 85.

⁶⁷ Kuykendall, *supra* note 34, 51.

⁶⁸ Walter Frear, “Hawaiian Statute Law,” *Thirteenth Annual Report of the Hawaiian Historical Society* (Hawaiian Gazette Co., Ltd. 1906). Frear mistakenly states Kamehameha established four earldoms that included the Kingdom of Kaua`i. Kaumuali`i was not a governor, but remained a King. A governor was not established until July 1821 after Kamehameha II removed Kaumuali`i to O`ahu and appointed Ke`eaumoku, the junior of one of Kamehameha I’s Kona Chiefs, as governor of Kaua`i.

⁶⁹ *Id.*

Kamehameha appointed Kalanimoku as his Prime Minister and he thereafter took on the name of his title—Kalaimoku. Foreigners also commonly referred to him as Billy Pitt, who was the younger Pitt who served as Britain’s Prime Minister under the third of the Hanoverian Kings, George. Like the British Prime Minister, Kalaimoku’s duty was to manage day to day operations of the national government, as well as to be commander-in-chief of all the military and head of the kingdom’s treasury. Kamakau explained:

By this appointment Kamehameha waived the privilege of giving anything away without the consent of the treasurer. Should that officer fail to confirm a gift it would not be binding. Kamehameha could not give any of the revenues of food or fish on his own account in the absence of this officer. If he were staying, not in Kailua but in Kawaihae or Honaunau, the treasurer had to be sent for, and only upon his arrival could things be given away to chiefs, lesser chiefs, soldiers, to the chief’s men, or to any others. The laws determining life or death were in the hands of this treasurer; he had charge of everything. Kamehameha’s brothers, the chiefs, the favorites, the lesser chiefs, the soldiers, and all who were fed by the chief, anyone to whom Kamehameha gave a gift, could secure it to himself only by informing the chief treasurer.⁷⁰

Kamehameha, through his Prime Minister, established a national council for the kingdom that was comprised of the three governors, other high chiefs, and the King’s trusted foreign advisors—John Young and Isaac Davis. In effect, Kamehameha established a federal system not by theory, but in practice. A two-tier government was formed, whereby at the higher level a national government with dominion over the four former kingdoms concerned itself with matters of national interests and foreign policy,

⁷⁰ Kamakau, *supra* note 23, 175.

while at the lower level Kamehameha's vassals governed day to day matters among their tenants under a feudal tenure. National and regional authorities were mutually independent of each other save for their common allegiance to Kamehameha. A Prime Minister now headed the national government, while the sovereignty resided in the person of the King. This was an experiment that came about through British relations with Kamehameha as well as the advise of his trusted British advisors, John Young and Isaac Davis. In 1794, Captain Vancouver made the following comments regarding the two men, who no doubt were influential in forming the government of the Sandwich Islands along English custom. He stated:

I likewise beg leave to recommend Messrs. John Young and Isaac Davis, to whose services not only the persons, &c., under my command have been highly indebted for their good offices, but am convinced that through the uniformity of their conduct and unremitting good advise to Tamaahmaah [Kamehameha] and the different chiefs, that they have been materially instrumental in causing the honest, civil and attentive behavior lately experienced by all visitors from the inhabitants of this island.⁷¹

As a feudal monarchy, the lands of the kingdom, with the exception of Kaua'i,⁷² were divided between Kamehameha and his four principal chiefs, Keaweaheulu, Ke'eaumoku, Kame'eiamoku and Kamanawa, who were each given "large tracts of lands from Hawai'i to O'ahu in payment for their services."⁷³ Kamehameha and these chiefs

⁷¹ Thomas Thrum, "John Young: Companion of Kamehameha, a Brief Sketch of His Life in Hawaii," *Hawaiian Almanac and Annual* (Thos. G. Thrum 1910), 99.

⁷² On 8 August 1824, the Kaua'i chiefs unsuccessfully rebelled under Humehume, son of Kaumuali'i, King of Kaua'i. Humehume was removed to O'ahu under the watch of Kalanimoku, and all of the Kaua'i chiefs were dispersed throughout the other islands and their lands replaced with Hawai'i island chiefs.

⁷³ Kamakau, *supra* note 23, 175.

then divided their lands anew to their lesser chiefs, until it reached the common tenant by subsequent divisions—each person in the chain bearing fealty to their superior from the lowest class of tenants, through the levels of chiefs, to Kamehameha. In return for the lands, the chiefs owed military service when called upon, while the commoners owed labor and the produce of the soil and ocean.

Although each principal chief was practically independent to govern his own newly acquired districts as he saw fit, “the ancient traditionary laws of the kingdoms were so arranged and executed as to have all the force of a written code.”⁷⁴ Kamehameha “put an end to wars, erected a strong central government, checked the oppression of the lesser chiefs, appointed officers more for merit than rank, improved the laws, made them more uniform, rigidly enforced them, and generally brought about a condition of comparative peace and security.”⁷⁵ Native religion organized and stratified the regional authorities, while British principles of governance at the national level organized and stratified the roles of the King, Prime Minister and Governors.

Ascension of Kamehameha II

In 1809, Kamehameha decreed his son Liholiho (Kamehameha II) heir to the throne, but according to his last will, Ka`ahumanu would serve as Kamehameha II's minister, replacing Kalanimoku. The use of the term Prime Minister would hereafter be replaced with Premier, and the native term *Kalaimoku* with *Kuhina Nui*. After the passing of Kamehameha I on May 8th 1819, the kingdom experienced a radical change in

⁷⁴ Jarves, *supra* note 55, 86.

⁷⁵ Frear, *supra* note 50, p. 19.

its governance. No longer would there be a duality of religious and chiefly laws, but rather the religion would be overthrown by edict of Kamehameha II. The most prominent law that separated religious law from chiefly law was the *`ai kapu* (eating restriction). Accordingly, men and women ate separately, and the latter were forbidden to eat pork, bananas, coconuts, and particular types of fish, shark, turtle, porpoise and whale.⁷⁶ If there was any infraction of this kapu (taboo), the punishment was death.

Kamakau explained that, “free eating followed the death of the ruling chief,” but “after the period of mourning was over the new ruler placed the land under a new tabu following old lines.” Of the eleven degrees of rank within the Chiefly class, Kamehameha II had the rank of a *pi`o* Chief, second highest in rank through his mother, Keopuolani. “The kapu [taboo] of a god was superior to the kapu of a chief, but the kapus of the *ni`aupi`o* and *pi`o* chiefs were equal to the gods.”⁷⁷ According to Kamakau, the overthrow of the religion was warranted, and “in this case Kamehameha II merely continued the practice of free eating.”⁷⁸ The repudiation of the eating kapu (taboo) set in motion a chain of events that culminated in the order to destroy all religious temples and idols throughout the realm. The overthrow of the religion not only created a political vacuum to be filled with more Chiefly edicts, but it also threw into question the organization and stratification of Hawaiian society that religion had dictated for centuries.

⁷⁶ Malo, *supra* note 68, 29.

⁷⁷ Kamakau, *supra* note 23, 10.

⁷⁸ *Id.*, 222.

Professor Juri Mykkanen points out that the abolition of the religion “allowed people more flexibility in their dealings with the increasing numbers of foreigners.”⁷⁹

Introduction of Christianity

When the American missionaries arrived in the kingdom in March of 1820, the religion recently had been overthrown and the country had been “modified by contact with traders, explorers, and foreign residents during a third of a century.”⁸⁰ But these were not the “religious instructors whom the King and chiefs expected from England,” and when it was discovered “that they were not, there was much opposition to their landing; and it was only on the assurance of the English settler, John Young, that these missionaries came to preach to the same religion as those whom they expected, that they were permitted to come on shore.”⁸¹ The missionaries were granted a license of one-year residency by Kamehameha II, which he later extended. For the next four years the missionaries would reduce the Hawaiian language into written form, provide instruction on reading and writing, and through this medium teach the Christian religion. This teaching was limited to the chiefly class. If the missionaries “could not win the Chiefs they had little chance of success with the common people,”⁸² because the “condition of the common people was that of subjection to the chiefs.”⁸³ The overthrow of the

⁷⁹ Juri Mykkanen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom*, (University of Hawai'i Press 2003), 35.

⁸⁰ Kuykendall, *supra* note 34, 100.

⁸¹ Hopkins, *supra* note 1, 133.

⁸² *Id.*, 104.

⁸³ Malo, *supra* note 14, 60.

Hawaiian religion did not ease this relationship; rather, it reinforced it through the consolidation of authority in the chiefly class and was the cause of much burden and oppression.⁸⁴ The Chiefs would be the ones to decide whether or not the missionaries would have access to the common people, a mainstay of authority that was not diminished by the overthrow of the religion.

On November 27th 1823, Kamehameha II departed on a diplomatic mission to England and the Kingdom came under the administration of Ka`ahumanu as Regent and Kalanimoku her Premier. The purpose of the King's trip was to confirm the cession of his father's kingdom to Great Britain in 1794, which later included the former kingdoms of Maui and Kaua`i. After Kamehameha II departed the islands, Ka`ahumanu, as Regent, formally declared Christianity to be the new religion of the country on December 21st 1823, by requiring strict observance of the Sabbath.⁸⁵ Six months later she proclaimed by crier laws prohibiting murder, theft of any description, boxing or fighting among the people, work or play on the Sabbath, and added that "when schools are established, all the people shall learn the palapala [reading and writing]."⁸⁶ On April 13th 1824, Ka`ahumanu met with the Chiefs in council in Honolulu "to make known their decision to extend the teaching of *palapala* and the word of God to the common people."⁸⁷

These events not only paved the way for universal literacy throughout the country, but they also filled the void left by the abolition of religion in 1819 with Christianity. The missionaries thereafter entered into a role similar to that held by the

⁸⁴ *Id.*

⁸⁵ Kuykendall, *supra* note 34, 117.

⁸⁶ *Id.*, 118.

⁸⁷ Mykkanen, *supra* note 79, 49.

priests under the old religion, where “it was the duty of the high priest to urge the king most strenuously to direct his thoughts to the gods; to worship them without swerving; [and] to be always obedient to their commands with absolute sincerity and devotedness.”⁸⁸ Thenceforth, the use of Jehovah in the chiefly laws was reminiscent of the use of the deities of Ku, Kane, Lono and Kanaloa in Kamehameha I’s time. As the old religion “organized and stratified Hawaiian society,” the Christian religion would do the same. It served as the unwritten constitution of the country. Mosaic law in theory became the foundational or organic law for the Chiefs and natives, which was supplemented by native customary law and edicts of the Chiefs.

Under this new federal system, the four principal Chiefs and their successor children were the regional administrators of governance over the lands given to them by Kamehameha I, but these laws were not uniformly enforced throughout the islands, save for the laws proclaimed by the King or Regent at the national level. Compounding the problem was the duplicity of governance—regional governance for the native, national governance for the foreigner. Governance over the latter was extremely problematic for the Governors and Premier because foreigners viewed themselves as immune and not subject to the King, but subject to the laws of their own particular countries. It soon became apparent that this system was completely inadequate to deal with the increased presence and demands of the foreign population, and a move toward a unitary State and the establishment of a “common law” over the entire country was not only necessary, as a practical matter, but also imperative for the survival of the Kingdom.

⁸⁸ Malo, *supra* note 14, 188.

Sandwich Island Delegation Meets with King George IV

Before Kamehameha II could meet with King George IV, he and the Queen, Kamamalu, contracted measles in London. Kamamalu was the first to die on July 8th 1824, followed by the King only six days later. In the month before Kamehameha II died, he wrote a letter to Kalanimoku, Ka`ahumanu, and his younger brother, Kauikeaouli.⁸⁹ He explained that when the delegation arrived in London a representative of King George IV told them “he was to see to all of [their] needs and...will pay all expenses,” and that the “King of England has taken a great liking to us.”⁹⁰ After stating that his delegation had yet to meet the King, he disclosed his own sickness and that of his wife and of one of the chiefs, Kapihe. But his letter concluded that “we will remain until we see the King,” for “when we obtain that which will be of great benefit to us, then we will return.”⁹¹ The benefit that he alluded to appears to be the assurance of British protection from foreign powers, which was the subject of a letter he sent to King George IV on August 21st 1822. In that correspondence, Kamehameha II stated:

I avail myself of this opportunity of acquainting your Majesty of the death of my father, Kamehameha, who departed this life the 8th of May, 1819, much lamented by his subjects; and, having appointed me his successor, I have enjoyed a happy reign ever since that period; and I assure your Majesty it is my sincere wish to be thought as worthy of your attention as my father had the happiness to be, during the visit of Captain Vancouver. The whole of these

⁸⁹ Kamehameha II’s letter was addressed to Pa`alua, Ka`akumu and his younger brother. Pa`alua was another name for Kalanimoku and there is no record of a chief or chiefess named Ka`akumu. It may be a misspelling of Ka`ahumanu instead.

⁹⁰ *King Kamehameha II letter to from London*, (translation), F.O. & Ex, Hawai`i Archives.

⁹¹ *Id.*

islands having been conquered by my father, I have succeeded to the government of them, and beg leave to place them all under the protection of your most excellent Majesty; wishing to observe peace with all nations, and to be thought worthy the confidence I place in your Majesty's wisdom and judgement.

The former idolatrous system has been abolished in these islands, as we wish the Protestant religion of your Majesty's dominions to be practiced here. I hope your Majesty may deem it fit to answer this as soon as convenient; and your Majesty's counsel and advice will be most thankfully received by your Majesty's most obedient and devoted servant.⁹²

On September 11th 1824, the Sandwich Island delegation, headed by the group's ranking Chief and brother to Kalanimoku, Boki, met with King George IV. Accompanying Boki was his wife, Liliha, and four remaining Chiefs of the delegation, Kapihe, Naukana, Kekuanao`a, and James Young Kanehoa. In attendance with King George IV were his Prime Minister Robert Jenkinson and the Foreign Secretary George Canning. Boki explained to the British King that the Royal Court in London wished to "confirm the words which Kamehameha I gave in charge to Vancouver" in 1794, and by that agreement Kamehameha acknowledged King George III as his "superior."⁹³ In response, King George IV reiterated the position he held in his communication with Kamehameha I as Prince Regent in 1812: that the Sandwich Islands were considered a British protectorate.⁹⁴ Kekuanao`a recalled King George IV's statement:

⁹² Jarves, *supra* note 55, 118.

⁹³ "Reverend William Richards Record of Kekuanao`a's Testimony of What Was Said at the Court of Saint James, 1824," Archives of Hawai'i; also printed in the Polynesian Newspaper, October 18, 1851. In his recounting of what took place Kekuanao`a mistakenly referred to Mr. Canning as the Kalaimoku, a native term synonymous with Prime Minister.

⁹⁴ Liverpool, *supra* note 63.

I have heard these words, I will attend to the evils from without. The evils within your Kingdom it is not for me to regard; they are with yourselves. Return and say to the King, to Ka`ahumanu and to Kalaimoku, I will watch over it, lest evils should come from others to the Kingdom. I therefore will watch over him agreeably to those ancient words.⁹⁵

According to William Edward Hall, “States may acquire rights by way of protectorate over...imperfectly civilized countries, which do not amount to full rights of property or sovereignty, but which are good as against other civilized states, so as to prevent occupation or conquest by them.”⁹⁶ And while the relationship between protector and protectorate is a matter of the protecting State’s municipal laws and its agreement with the protected, rather than international law, the practice itself was “extremely elastic,” and varied amongst the protecting States of Europe.⁹⁷ Because of the dissimilarity of practice, Hall explains that a protecting State itself “must be left to judge how far it can go at a given time, and through what form of organization it is best to work,” whether it “may set up a complete hierarchy of officials and judges; or, if it prefers, it may spare the susceptibilities of the natives and exercise its authority informally by means of residents or consuls.”⁹⁸ It appears that Great Britain chose to exercise the latter when King George IV appointed Richard Charlton as British consul to both the Kingdom of the Sandwich Islands and the Society Group. Charlton arrived with his wife in Honolulu on April 16th 1825.

⁹⁵ Richards, *supra* note 93.

⁹⁶ William Edward Hall, *A Treatise on International Law*, 8th ed. (Oxford University Press 1924), 150.

⁹⁷ *Id.*, 152.

⁹⁸ *Id.*

The following month, HBMS Blonde, under the command of Lord Bryon, arrived at Lahaina with the bodies of Kamehameha II and Kamamalu on May 4th 1825. In his possession, Lord Byron held secret instructions from the British Crown regarding the native government of the Sandwich Islands and specific actions to be taken with foreign powers should they exert sovereignty over the islands. It was not only plausible, but also expected, that Lord Byron also apprised the British Consul Charlton of the secret instructions. The following instructions are reprinted in full so it is possible to grasp the full scope of Britain's view of the Sandwich Islands, which specifically adheres to the conditions of the 1794 cession entered into between Vancouver and Kamehameha whereby "the chiefs and priests, were to continue as usual to officiate with the same authority as before in their respective stations."⁹⁹

[Open with the announcement of Mr. Charlton's being authorized to look after and protect British subjects in the Friendly, Society, and Sandwich Islands. Orders to Lord Byron to land the bodies of the King and Queen,] with such marks of respect as may be proper and acceptable to the Natives, you proceed to make yourself acquainted with the existing government, and the internal state of this group of Islands, as well as with the influence and interests which any foreign Powers may have in them.

If any Disputes as to the Succession on the Death of the late King should unhappily arise, you will endeavour to maintain a strict Neutrality, and if forced to take any Part, you will espouse that which you shall find to be most consistent with established Laws and Customs of that People.

⁹⁹ Vancouver, *supra* note 45.

You will endeavor to cultivate a good Understanding with the Government, in whatever native Hands it may be, and to secure, by kind Offices and friendly Intercourse, a future and lasting Protection for the Persons and Property of the Subjects of the United Kingdom.

As my Lords have directed that you should be furnished with the voyages of Captains Cooke and Vancouver, and that of Captain Kotzebue of the Russian Navy, and an essay on the commerce of the Pacific by Captain Macconochie, you will be apprized of the position in which these Islands stand with regard to the Crown of Great Britain, and that His Majesty might claim over them a right of sovereignty not only by discovery, but by a direct and formal Cession by the Natives, and by the virtual acknowledgement of the Officers of Foreign Powers.

The right of His Majesty does not think it necessary to advance directly in opposition to, or in controul of, any native Authority:—with such the question should not be raised, and, if proposed, had better be evaded, in order to avoid any differences or Sentiment on an occasion so peculiar as your present Mission to those Islands; but if any Foreign Power or its Agents should attempt, or have attempted, to establish any Sovereignty or possession (of which a remarkable instance is mentioned, with disapprobation, by Captain Kotzebue), you are then to assert the prior rights of His Majesty, but in such a manner as may leave untouched the actual relations between His Majesty and the Government of the Sandwich Islands; and if by circumstances you should be obliged to come to a specific declaration, you are to take the Islands under His Majesty's protection, and to deny the right of any other Power to assume any Sovereignty, or to make any exclusive settlement in any of that group.

In all matters of this nature, so much must depend on the actual state of affairs, which at this distance of time and place cannot be foreseen, that my Lords can give you no more particular instructions; but their Lordships confide in your Judgement and Discretion in treating unforeseen Circumstances according to the Principles of Justice and Humanity which actuate H[is] M[ajesty]'s Councils, and They recommend to You, that while You are ready to assert and vindicate H[is] M[ajesty]'s Rights, you will pay the greatest Regard to the Comfort, the Feelings, and even the Prejudices of the Natives, and will shew the utmost Moderation towards the Subjects of any other Powers, whom you may meet in those Islands.

H[is] M[ajesty]'s Rights you will, if necessary, be prepared to assert, but considering the Distance of the Place, and the Infant State of political Society there, You will avoid, as far as may be possible, the bringing these Rights into Discussion, and will propose that any disputed Point between Yourself and any Subjects of other Powers shall be referred to your respective Governments.¹⁰⁰

This passage is quoted at length because it explicates the essential basis for British sovereignty over the Sandwich Islands. After the funeral and time of mourning had passed, there was a meeting of the Council of Chiefs on June 6th in Honolulu, with Lord Byron and the British Consul in attendance. At this meeting it was confirmed that Liholiho's brother, Kauikeaouli, was to be Kamehameha III, but being only eleven years of age, Ka'ahumanu would continue to serve as Regent and Kalanimoku her Premier. Kalanimoku addressed the council "setting forth the defects of many of their laws and customs, particularly the reversion of lands" to a new King for redistribution and

¹⁰⁰ Secret Instructions to Lord Byron, September 14, 1824, BPRO, Adm. 2/1693, pages 241-245, printed in Report of the Historical Commission of the Territory of Hawai'i for the two years ending December 31, 1926, p. 19.

assignment.¹⁰¹ The Chiefs collectively agreed to forgo this ancient custom, and the lands were maintained in the hands of the original *tenants in chief* and their successors, subject to reversion only in times of treason.¹⁰² Lord Byron was then invited to address the Council, and without violating his specific orders of non-intervention in the political affairs of the kingdom, he prepared eight recommendations on paper and presented it to the Chiefs for their consideration.

1. That the king be head of the people.
2. That all the chiefs swear allegiance.
3. That the lands descend in hereditary succession.
4. That taxes be established to support the king.
5. That no man's life be taken except by consent of the king or regent and twelve chiefs.
6. That the king or regent grant pardons at all times.
7. That all the people be free and not bound to one chief.
8. That a port duty be laid on all foreign vessels.¹⁰³

Lord Byron introduced the fundamental principles of British governance to the Chiefs and set them on a course of national consolidation and uniformity of governance. His suggestions referred “to the form of government, and the respective and relative rights of the king, chiefs, and people, and to the tenure of lands,”¹⁰⁴ but not to a uniform code of laws. Since the death of Kamehameha I in 1819, the Hawaiian Kingdom, as a

¹⁰¹ Jarves, *supra* note 55, 122.

¹⁰² *Id.*

¹⁰³ Voyage of H.M.S. Blonde, 155; reprinted in Kuydendall, *supra* note 34, 120.

¹⁰⁴ C.S. Stewart, *A Visit to the South Seas, in the U.S. Ship Vincennes, during the years 1829 and 1830*, (New York: Sleight & Robinson, 1831), 148.

feudal autocracy, had no uniformity of law systematically applied throughout the islands. Rather it fell on each of the *tenants in chief* and their designated vassals to be both lawmaker and arbiter over their own particular tenants resident upon the granted lands from the King.

FROM BRITISH GOVERNANCE TO HAWAIIAN GOVERNANCE

It is not clear whether Ka`ahumanu and the Council of Chiefs clearly understood their relationship with Great Britain as a protecting State, but it was evident that the lines of communication between Great Britain and the Sandwich Islands, through its resident Consul Charlton, had become strained, if not problematic. This could account for the action taken by Ka`ahumanu and the Council of Chiefs when they entered into a treaty with Captain Thomas Jones, on behalf of the United States. According to Professor W.D. Alexander,

On the 22d of December, 1826, a great council of chiefs was convoked by the queen regent, at which Captain Jones and the British consul were present. At this council Mr. Charlton declared that the islanders were subjects of Great Britain, and denied their right to make treaties, to which Captain Jones replied that Charlton's own commission as consul recognized the independence of the islands. The council then proceeded to business, and soon agreed to the terms of the commercial treaty with the United States, the first between the Hawaiian Government and any foreign power.¹⁰⁵

The treaty was a direct challenge to British sovereignty over the Sandwich Islands by not just Ka`ahumanu and the Council of Chiefs, but now by the United States. In

¹⁰⁵ W.D. Alexander, *A Brief History of the Hawaiian People* (American Book Company 1891), 197.

particular, article two read, “The ships and vessels of the United States, (as well as their Consuls and all other citizens,) within the territorial jurisdiction of the Sandwich Islands, together with all their property, shall be inviolably protected against all enemies of the United States in time of war.”¹⁰⁶ An apparent conflict would arise if Great Britain, as the protecting State, became an enemy of the United States as it had as recently as 1812-1815. Despite the failure of the United States Senate to ratify the treaty, Ka`ahumanu and the Council of Chiefs adhered to its terms in its relations with United States ships and citizens.

Code of Laws

Ka`ahumanu called a meeting of the Council of Chiefs on December 7th 1827, to discuss “the act of Kamehameha in giving up the islands to the protection of Great Britain,”¹⁰⁷ which was on the minds of the Chiefs since November, and the prospect of drafting a national code of laws for the kingdom. The Chiefs were still yet unclear as to the meaning of the words spoken by King George IV to the Sandwich Island delegation in 1824, and whether they might draft a code of laws on their own or would they need British approval first. Ka`ahumanu and the Council of Chiefs were not aware of the secret instructions given to Lord Byron asserting that the Sandwich Islands were British. After an emphatic debate on the topic, during which Ka`ahumanu accused the British consul of being “a liar and that no confidence is to be placed in anything that he says,”¹⁰⁸

¹⁰⁶ *Treaties and Conventions Concluded between the Hawaiian Kingdom and other Powers, since 1825* (Elele Book, Card and Job Print 1887), 1.

¹⁰⁷ Chamberlain Journal, November 3, 1827.

¹⁰⁸ Chamberlain to Whitney and Ruggles, Dec. 17-27, MS in HMCS Library.

it appeared that the Chiefs came to understand the British relationship to be that of comity rather than vassalage. And in the end, the chiefs were “fully convinced that it would not do to send to England for laws; but that they must make them themselves.”¹⁰⁹

The first national code of laws was a penal code of three laws enacted by Kamehameha III with the advice and consent of the Council of Chiefs prohibiting murder, theft and adultery. Guilt of murder was punishable by death, and guilt of the latter two were punishable by imprisonment in irons. Three additional laws prohibiting the selling of rum, prostitution, and gambling were later added to the code, and proclaimed together as the first penal laws of the kingdom on December 8th 1827. The enforcement of these penal laws, however, resided within the multi-tiered feudal structure of various *mesne lords* who ruled over the people. The “rule of law” had not yet been laid as the cornerstone of constitutional governance and enforcement of the law was not sufficient across the realm, but it was the beginning of modernity and the move from a federal to a unitary form of governance.

Ascension of Kamehameha III

By 1829, Kamehameha III, though only fifteen years of age, began to take an active role in the affairs of government,¹¹⁰ and together with Ka`ahumanu, as Premier, and the Council, proceeded to assert that the kingdom was not a British dependency, as previously thought, but a separate and autonomous nation. Captain Finch of the U.S.S. Vincennes, while visiting the island group in 1829, heard for the first time the use of the

¹⁰⁹ *Id.*

¹¹⁰ Jarves, *supra* note 55, p. 134.

word *Hawaiian*, and took notice of a deliberate movement by the government of the islands to form a distinct national identity that was not British. Captain Finch reported:

The Government and Natives generally have dropped or do not admit the designation of Sandwich Islands as applied to their possessions; but adopt and use that of Hawaiian; in allusion to the fact of the whole Groupe having been subjugated by the first Tamehameha [Kamehameha], who was the Chief of the principal Island of Owhyhee, or more modernly Hawaii.¹¹¹

Upon the death of Ka`ahumanu in 1832, Kamehameha III assumed full control of government and appointed Kina`u as his Premier and the successor to Ka`ahumanu. In 1834, a more impressive penal code was enacted with five chapters, and “each chapter was discussed and ratified by the council of chiefs according to ancient custom before receiving the King’s signature and becoming law.”¹¹²

Facing Religious Tolerance

Religious tolerance did not enter the political scene until 1827 when a Catholic missionary party arrived in Honolulu on July 7th on the ship *Comete* from the French port city of Bordeaux.¹¹³ Unlike the American Protestants who received a conditional license from Kamehameha II in 1820, the Catholic missionary party made no request for a license to stay, and for the next two years they were able to establish a small following of the native population. By order of Ka`ahumanu on January 3rd 1830, the teaching of the

¹¹¹ “Capt. Finch’s Cruise in the U.S.S. Vincennes,” U.S. Navy Department Archives.

¹¹² W.D. Westervelt, “Hawaiian Printed Laws Before the Constitution,” *Sixteenth Annual Report of the Hawaiian Historical Society and Papers, December 31, 1908* (Hawaiian Gazette Co., Ltd. 1909), 48.

¹¹³ Kuykendall, *supra* note 34, 139.

Catholic religion was forbidden throughout the kingdom, and the Catholic priests, one of whom was a British subject, were expelled from the country on December 24th 1831.¹¹⁴ Since time immemorial, religion was as much a part of chiefly governance as governance was an extension of religion, where “religion constituted the organic law of the country, while, administratively, governance resided solely with the King and his Chiefs.” The only change that took place was the form of religion—from the strict religious kapu to Christianity as decreed by Ka`ahumanu, but that did not change the governing principle of the Chiefs. Therefore, to Ka`ahumanu and the Council of Chiefs, Catholicism represented not only a challenge to the Protestant faith, but a direct challenge to their authority. Native Catholics were routinely subjected to persecution and punishment at the hands of the Chiefs.

On September 30th 1836, another Catholic priest, who was British, arrived in the islands by direction of the *Order of the Sacred Hearts*, and the government’s anti-Catholic policy was again the subject of dispute by foreigners. This prompted Kamehameha III to issue the following ordinance on December 18th 1837, which stated, in part:

As we have seen the peculiarities of the Catholic religion and the proceedings of the priests of the Roman faith, to be calculated to set man against man in our kingdom, and as we formerly saw the disturbance was made in the time of Ka`ahumanu I. and as it was on this account that the priests of the Romish faith were at that time banished and sent away from this kingdom, and as from that time they have been under sentence of banishment until within this past year when we have been brought into new and increased trouble on account of the

¹¹⁴ *Id.*, p. 142.

request of foreigners that we make it known in writing, Therefore, I, with my chiefs, forbid...that anyone should teach the peculiarities of the Pope's religion nor shall it be allowed to anyone who teaches those doctrines of those peculiarities to reside in this kingdom; nor shall the ceremonies be permitted to land on these shores; for it is not proper that two religions be found in this small kingdom. Therefore we utterly refuse to allow anyone to teach those peculiarities in any manner whatsoever. We moreover prohibit all vessels whatsoever from bringing any teacher of that religion into this kingdom.¹¹⁵

A French warship was dispatched to the islands under the command of Captain Laplace and arrived at Honolulu on July 9th 1839. But a month before the ship's arrival, Kamehameha III already issued "orders that no more punishments should be inflicted; and that all who were then in confinement, should be released" on June 17th, and within a week, the last of the native prisoners were freed from the Honolulu Fort.¹¹⁶ When the French warship arrived, Laplace informed Kamehameha III, "the formal intention of France that the king of the Sandwich Islands be powerful, independent of foreign power, and that he consider her his ally; but she also demands that he conform to the usages of civilized nations."¹¹⁷ Far from treating the Hawaiian Kingdom as a French ally, Captain Laplace issued the following five demands:

1. That the Catholic worship be declared free throughout all the islands subject to the king.
2. That a site at Honolulu for a Catholic church be given by the government.

¹¹⁵ Jarves, *supra* note 55, 390.

¹¹⁶ *Id.*, 317.

¹¹⁷ *Id.*, 321.

3. That all Catholics imprisoned on account of their religion be immediately set at liberty.
4. That the king place in the hands of the captain of the “Artemise” the sum of twenty thousand dollars as a guarantee of his future conduct toward France; to be restored when it shall be considered that the accompanying treaty will be faithfully complied with.
5. That the treaty, signed by the king, as well as the money, be brought on board of the frigate “Artemise” by a principal chief; and that the French flag be saluted with twenty-one guns.

These are the equitable conditions at the price of which the king of the Sandwich Islands shall preserve friendship with France...If contrary to expectation, and misled by bad advisers, the king and chiefs refuse to sign the treaty I present, war will immediately commence, and all the devastations and calamities which may result shall be imputed to them alone, and they must also pay damages which foreigners injured under these circumstances will have a right to claim.¹¹⁸

Before the threat of hostilities could be carried out by Captain Laplace, the Premier, Kekauluohi, and the Governor of O`ahu, Kekuanao`a, were forced to sign the French treaty on behalf of Kamehameha III who was still en route to Honolulu from the kingdom’s capital city of Lahaina, Maui. The Hawaiian government managed to borrow \$20,000 from foreign merchants in Honolulu. The funds filled four boxes and were sealed by the government’s wax seal. On the morning of June 14, 1839, Kamehameha III arrived in Honolulu, and Captain Laplace, not feeling satisfied, compelled the King to sign an additional convention of eight articles on June 16th that imposed jury selection benefits to Frenchmen and a fixed duty on French wine or brandy not to exceed five per

¹¹⁸ Alexander, *A Brief History of the Hawaiian People* (American Book Company, 1891), 226.

cent *ad valorem*. Undeterred by foreign aggression, Kamehameha III and his chiefs pursued government reform that sought to establish as well as protect rights of its people.

CHAPTER 3

THE RISE OF CONSTITUTIONAL GOVERNANCE AND THE UNITARY STATE: KAMEHAMEHA III TO KALAKAUA

With the implied recognition of the autonomy of the Hawaiian Kingdom by the United States in 1826 and the French in 1839, Great Britain could no longer assert its claim of “sovereignty not only by discovery, but by a direct and formal Cession by the Natives,”¹ without attracting trouble for itself from the United States and France. It was during this time that the Hawaiian Kingdom began to evolve from absolute rule under a multi-tiered federal system of governance to a unitary State under a constitutional monarchy. During this period three constitutions can be identified, namely in the years of 1840, 1852 and 1864, but it would be unwise to treat each constitution as if it were entirely separate and distinct from the others. This would infer a severance in the chain of *de jure* governance and complicate matters. Instead, these constitutions were crucial links in an evolutionary chain—a *de jure* progression of constitutionalism that culminated into eighty articles in the 1864 constitution.

Kamehameha III’s government stood upon the crumbling foundations of a feudal autocracy that could no longer handle the weight of geo-political and economic forces sweeping across the islands. Uniformity of law across the realm and the centralization of authority had become a necessity. Foreigners were the source of many of these difficulties that centered on questions relating to their entry into “the country, to reside there, to engage in business (trade, agriculture, missionary work, etc.), to acquire house

¹ Secret Instructions to Lord Byron, September 14, 1824, BPRO, Adm. 2/1693, pages 241-245, printed in Report of the Historical Commission of the Territory of Hawai`i for the two years ending December 31, 1926, p. 19.

lots and land by lease or otherwise, to build houses on the land so acquired, and to transfer their property either by sale, lease, will, or inheritance.”² Just as Great Britain was forced to adjust its old governing order to the new social system brought about by the industrial revolution in the First Reform Act of 1832, for example, the governing order of the Hawaiian Kingdom would also have to adjust to the change in its social system as a result of increased commercial trade and resident foreigners. In 1831, General William Miller, an Englishman, made the following observation about the Hawaiian governing order.

If then the natives wish to retain the government of the islands in their own hands and become a nation, if they are anxious to avoid being dictated to by any foreign commanding officer that may be sent to this station, it seems to be absolutely necessary that they should establish some defined form of government, and a few fundamental laws that will afford security for property; and such commercial regulations as will serve for their own guidance as well as for that of foreigners; if these regulations be liberal, as they ought to be, commerce will flourish, and all classes of people will be gainers.³

In order to address such vexing problems, Kamehameha III turned to his religious advisors—the missionaries—for advice on the matter. William Richards, one of the missionaries own, volunteered to travel to the United States in search of someone who would instruct the chiefs on government reform. Unable to secure an instructor in this way, Richards committed himself at the urging of Kamehameha III to instruct the Chiefs on political economy and governance. Commenting on the change in Great Britain

² Ralph S. Kuykendall, *The Hawaiian Kingdom: 1778-1854, Foundation and Transformation*, vol. 1 (University of Hawai'i Press, 1938), 137.

³ *Id.*, 122.

brought about by the Industrial Revolution, Professor K.B. Smellie states, that when “population was so rapidly increasing and when trade and industry were expanding faster than they had ever done before, two problems were always to the fore: to understand the scope and nature of the changes which were taking place, and to adjust the machinery of government to a new social order.”⁴ Richards, who had no formal education in political science, relied on the work of Professor Francis Wayland, President of Brown University. Wayland was interested in “defining the limits of government by developing a theory of contractual enactment of political society, which would be morally and logically binding and acceptable to all its members.”⁵

Richards developed a curriculum based upon Hawaiian translations of Wayland’s two books, “Elements of Moral Science (1835)” and “Elements of Political Economy (1837).” According to Richards, the “lectures themselves were mere outlines of general principles of political economy, which of course could not have been understood except by full illustration drawn from Hawaiian custom and Hawaiian circumstances.”⁶ Through his instruction, Richards sought to theorize governance from a foundation of Natural Rights within an agrarian society based upon capitalism that was not only cooperative in nature, but also morally grounded in Christian values. In Richards translation of Wayland’s *Elements of Political Economy*, he stated, “Peace and tranquility are not

⁴ K.B. Smellie, *A Hundred Years of English Government* (Gerald Duckworth & Co., Ltd., 1950), 8.

⁵ Juri Mykkanen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom*, (University of Hawai‘i Press, 2003), 154.

⁶ William Richards, “William Richard’s Report to the Sandwich Islands Mission on His First Year In Government Service, 1838-1839,” *Fifty-first Annual Report of the Hawaiian Historical Society for the Year 1942* (Hawaiian Printing Company, Limited, 1943), 66.

maintained when righteousness is not maintained. The righteousness of the chiefs and the people is the only basis for maintaining the laws of the government.”⁷

From the premise that governance could be formed and established to acknowledge and protect the rights of all the people and their property, it was said to follow that laws should be enacted to maintain a society for the benefit of all and not the few. Richards asserted, “God did not establish man as servants for the government leaders and as a means for government leaders to become rich. God provided for the occupation of government leaders in order to bless the people and so that the nation benefits.”⁸ Wayland’s theory of cooperative capitalism, which presupposed private ownership of land and a free market as the foundation of political economy, was hindered at the time because the Kingdom was still in a feudal state of ownership as it had been since Kamehameha I. So the full application of Wayland’s political economy, at this point, could not be fully realized until the people could possess freehold titles, e.g. fee-simple and life estates. In the mean time, personal property and agriculture formed the basis of the Hawaiian economy. According to an 1840 statute, making direct reference to Richards’ 1839 instructional book that translated Wayland’s *Political Economy* into the Hawaiian language:

The business of the Governors, and land agents [Konohiki], and tax officers of the general tax gatherer, is as follows: to read frequently this law to the people on

⁷ William Richards, *No ke Kalai`aina* (Lahaina: Lahainaluna High School Press, 1840), 123. “Aole hoi e mau ka malu ana a me ka kuapapa nui ana o ka aina ke malama ole ia ka pono. O ka pono o na `lii a me na kanaka, o ia wale no ke kumu e paa ai na kanawai a me ke aupuni.” Translation by Keao NeSmith, University of Hawai`i at Manoa.

⁸ *Id.*, 64. “Aole i honoho mai ke Akua in a kanaka i poe hana na na `lii a i mea e waiwai ai na `lii. Ua haawi mai ke Akua i ka oihana alii mea e pomaikai ai na kanaka i mea hoi e pono ai ka aina.” Translation by Keao NeSmith, University of Hawai`i at Manoa.

all days of public work, and thus shall the landlords do in the presence of their tenants on their working days. Let every one also put his own land in a good state, with proper reference to the welfare of the body, according to the principles of Political Economy. The man who does not labor enjoys little happiness. He cannot obtain any great good unless he strives for it with earnestness. He cannot make himself comfortable, not even preserve his life unless he labor for it. If a man wish to become rich, he can do it in no way except to engage with energy in some business. Thus Kings obtain kingdoms by striving for them with energy.”⁹

1840 CONSTITUTION

On June 7th 1839, Kamehameha III proclaimed an expanded uniform code of laws for the kingdom that was preceded by a “Declaration of Rights.” The Declaration formally acknowledged and vowed to protect the *natural rights* of life, limb, and liberty for both chiefs and people. The code provided that “no chief has any authority over any man, any farther than it is given him by specific enactment, and no tax can be levied, other than that which is specified in the printed law, and no chief can act as a judge in a case where he is personally interested, and no man can be dispossessed of land which he has put under cultivation except for crimes specified in the law.”¹⁰ The following year on October 8th, Kamehameha III granted the first Constitution incorporating the Declaration of Rights as its preamble.

⁹ William Richards, *Translation of the Constitution and Laws of the Hawaiian Islands, established in the reign of Kamehameha III* (Lahainaluna, 1842), 28. The quoted text is a translation from the Hawaiian text of Richards’ *No Ke Kalaaina*, 127.

¹⁰ *Id.*, 68.

The purpose of a written constitution “is to lay down the general features of a system of government and to define to a greater or less extent the powers of such government, in relation to the rights of persons on the one hand, and on the other...in relation to certain other political entities which are incorporated in the system.”¹¹ The first constitution did not provide for separation of powers, e.g. executive, legislative and judicial, and the prerogatives of the Crown permeated every facet of governance. The Crown’s duty was to execute the laws of the land, serve as chief judge of the Supreme Court, and sit as a member of the House of Nobles who would enact laws together with representatives chosen from the people. The granting of the first constitution by Kamehameha III was not a limitation, per se, of abusive power, but an incorporation of sharing power. By that instrument he “declared and established the equality before the law of all his subjects, chiefs and people alike. By that Constitution, he voluntarily divested himself of some of his powers and attributes as an absolute Ruler, and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government.”¹² According to Justice Robertson, on behalf of the entire Supreme Court,

King Kamehameha III originally possessed, in his own person, all the attributes of absolute sovereignty. Of his own free will he granted the Constitution of 1840, as a boon to his country and people, establishing his Government upon a declared plan or system, having reference not only to the permanency of his Throne and Dynasty, but to the Government of his country according to fixed laws and

¹¹ Edward S. Corwin, “Constitution v. Constitutional Theory,” *The American Political Science Review* 19(2) (1925): 291.

¹² *In the Matter of the Estate of His Majesty Kamehameha IV*, 3 Hawai‘i 715, 720 (1864).

civilized usage, in lieu of what may be styled the feudal, but chaotic and uncertain system, which previously prevailed.¹³

Evolution of Prime Minister

The role of the Prime Minister established by Kamehameha I in 1794 was for all intents and purposes a misnomer. There were no other ministers that ran government by direction of a primary minister appointed by the Crown until 1845, when a cabinet ministry was established for the first time by statute.¹⁴ Prior to 1845, Hawaiian governance did not experience, as the British did, the function of ministers in administering government separate from the Crown. According to Bryum Carter, the first prototype of the modern Prime Minister emerged during reigns of the first two Hanoverian Kings, George I and II.¹⁵ George I had little interest in English politics nor a grasp of the English language, and often returned to Hanover and left the country to be run by his cabinet ministers who were led by Sir Robert Walpole and Lord Townsend. Shortly after the ascension of George II, Townsend resigned, and Walpole was able to gain full control of the cabinet ministry, thereby creating the “office of Prime Minister” that “made possible the evolution of the modern system of ministerial responsibility.”¹⁶ The role of the Hawaiian Prime Minister (Kalaimoku) under Kamehameha I, was primarily as an agent at will of the Crown on matters of national governance. It was an idiosyncrasy of Hawaiian governance, that the title Prime Minister would be replaced

¹³ *Rex v. Joseph Booth*, 3 Hawai'i 616, 630 (1863).

¹⁴ *Statute Laws of His Majesty Kamehameha III, vol. 1* (Government Press, 1846), 2.

¹⁵ Bryum Carter, *The Office of Prime Minister* (Princeton University Press, 1956), 22.

¹⁶ A.B. Keith, *The King and the Imperial Crown* (Longman, Green and Co., 1936), 64.

with Premier (Kuhina Nui) after the death of Kamehameha I. According to the First Act of Kamehameha III passed by the Hawaiian Legislature in 1845, the Premier, in addition to the duties enumerated in the constitution, headed the cabinet ministry as Minister of the Interior and from this point on was a prime minister in the truest sense of the title.

The duties of the Premier, as provided by constitutional provision include:

All business connected with the special interests of the kingdom, which the King wishes to transact, shall be done by the Premier under the authority of the King. All documents and business of the kingdom executed by the Premier, shall be considered as executed by the King's authority. All government property shall be reported to him (or her) and he (or she) shall make it over to the King. The Premier shall be the King's special counselor in the great business of the kingdom. The King shall not act without the knowledge of the Premier, nor shall the Premier act without the knowledge of the King, and the veto of the King on the acts of the Premier shall arrest the business. All important business of the kingdom which the King chooses to transact in person, he may do it but not without the approbation of the Premier.¹⁷

Hawaiian Independence and the Question of British Sovereignty

Since the meeting of the Sandwich Islands delegation with King George IV in 1824, the only British policy regarding the kingdom appears to have been the secret instructions given to Lord Byron. But these instructions apparently were not communicated either to Kamehameha III or to the successors of the British Crown, namely King William IV and Queen Victoria. After the temporary occupation by French

¹⁷ 1840 HAWN. CONST.

troops under the command of Captain Laplace in 1839, a member of the British House of Commons, Lord Ingestrie, called upon the Secretary of State for Foreign Affairs, Lord Palmerston, to provide an official response on the matter. He also “desired to be informed whether those islands which, in the year 1794, and subsequently in the year 1824,...had been declared to be under the protection of the British Government, were still considered...to remain in the same position.”¹⁸ In response, Lord Palmerston acknowledged there was no report on the situation with the French, and with regard to the protectorate status of the Islands “he was non-committal and seemed to indicate that he knew very little about the subject.”¹⁹ To the Hawaiian government, Lord Palmerston’s report politically dispelled the notion of British dependency and admitted Hawaiian independence.²⁰ A clearer British policy toward the Hawaiian Islands by Lord Palmerston’s successor, Lord Aberdeen, two years later reinforced the position of the Hawaiian government. In a letter to the British Admiralty on October 4th 1842, Viscount Canning, on behalf of Lord Aberdeen, wrote:

Lord Aberdeen does not think it advantageous or politic, to seek to establish a paramount influence for Great Britain in those Islands, at the expense of that enjoyed by other Powers. All that appears to his Lordship to be required, is, that no other Power should exercise a greater degree of influence than that possessed by Great Britain.²¹

¹⁸ Kuykendall, *supra* note 2, 185.

¹⁹ *Id.*

²⁰ *Report of the Minister of Foreign Affairs*, May 21st, 1845 (Polynesian Press 1845), 7.

²¹ *Report of the Historical Commission of the Territory of Hawai`i for the two years ending December 31, 1824* (Star-Bulletin, Ltd 1925), 36.

In the summer of 1842, Kamehameha III moved forward to secure the position of the Hawaiian Kingdom as a recognized independent state under international law. He sought the formal recognition of Hawaiian independence from the three naval powers of the world at the time—Great Britain, France, and the United States. To accomplish this, Kamehameha III commissioned three envoys, Timoteo Ha`alilio, William Richards, and Sir George Simpson, a British subject. Of all three powers, it was the British that had a legal claim over the Hawaiian Islands through cession by Kamehameha I, but for political reasons could not openly exert its claim over and above the other two naval powers. Due to the islands prime economic and strategic location in the middle of the north Pacific, the political interest of all three powers was to ensure that none would have a greater interest than any other. This caused Kamehameha III “considerable embarrassment in managing his foreign relations, and...awakened the very strong desire that his Kingdom shall be formally acknowledged by the civilized nations of the world as a sovereign and independent State.”²²

British Occupation

While the envoys were on their diplomatic mission, a British Naval ship, HBMS *Carysfort*, under the command of Lord Paulet, entered Honolulu harbor in February 1843, making outrageous demands on the Hawaiian government. Basing his actions on certain complaints made to him in letters from the British Consul Richard Charlton, who was absent from the kingdom at the time. Paulet eventually seized control of the Hawaiian government on February 25th 1843, after threatening to level Honolulu with

²² United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, 42 (Government Printing Office 1895) [hereafter Executive Documents].

cannon fire.²³ Kamehameha III was forced to surrender the kingdom, but did so under written protest and pending the outcome of the mission of his diplomats in Europe. News of Paulet's action reached Admiral Thomas of the British Admiralty, and the latter sailed from the Chilean port of Valparaiso and arrived in the islands in July 1843. After a meeting with Kamehameha III, Admiral Thomas determined that Charlton's complaints did not warrant a British takeover and ordered the restoration of the Hawaiian government, which took place in a grand ceremony on July 31st 1843.²⁴ At a thanksgiving service after the ceremony, Kamehameha III proclaimed before a large crowd, *ua mau ke `ea o ka `aina i ka pono* (the life of the land is perpetuated in righteousness). The King's statement became the national motto of the country.

International Recognition of Hawaiian Independence

By 1843, the Hawaiian envoys succeeded in their mission of securing international recognition of the Hawaiian Islands "as a sovereign and independent State." Great Britain and France explicitly and formally recognized Hawaiian sovereignty on November 28th 1843 by joint proclamation at the Court of London, and the United States followed on July 6th 1844 by letter of Secretary of State John C. Calhoun to the Hawaiian envoys.²⁵ The Hawaiian Islands was the first Polynesian and non-European nation to be recognized as an independent and sovereign State. The Anglo-French proclamation stated:

²³ Kuykendall, *supra* note 2, 214.

²⁴ *Id.*, 220.

²⁵ Foreign Affairs Report, *supra* note 20, 4.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich Islands [Hawaiian Islands] as an *Independent State*, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed (emphasis added).²⁶

As a recognized State, the Hawaiian Islands became a full member of the Universal Postal Union on January 1st 1882, maintained more than ninety legations and consulates throughout the world,²⁷ and entered into extensive diplomatic and treaty relations with other States that included Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States.²⁸ Regarding the United States, the Hawaiian Kingdom entered into four treaties: 1849 Treaty of Friendship, Commerce and Navigation;²⁹ 1875 Treaty of Reciprocity;³⁰ 1883 Postal Convention

²⁶ Executive Documents, *supra* note 22, 120. Reprinted in *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 114.

²⁷ Thomas Thrum, "Hawaiian Register and Directory for 1893," *Hawaiian Almanac and Annual* (1892): 140.

²⁸ These treaties, except for the 1875 Hawaiian-Austro/Hungarian treaty, which is at the Hawai'i Archives, can be found in *Treaties and Conventions Concluded Between the Hawaiian Kingdom and other Power, since 1825* (Elele Book, Card and Job Print 1887): Belgium (Oct. 4, 1862) at 71; Bremen (March 27, 1854) at 43; Denmark (Oct. 19, 1846) at 11; France (July 17, 1839, March 26, 1846, September 8, 1858), at 5, 7 and 57; French Tahiti (Nov. 24, 1853) at 41; Germany (March 25, 1879) at 129; Great Britain (Nov. 13, 1836 and March 26, 1846) at 3 and 9; Great Britain's New South Wales (March 10, 1874) at 119; Hamburg (Jan. 8, 1848) at 15; Italy (July 22, 1863) at 89; Japan (Aug. 19, 1871, January 28, 1886) at 115 and 147; Netherlands (Oct. 16, 1862) at 79; Portugal (May 5, 1882) at 143; Russia (June 19, 1869) at 99; Samoa (March 20, 1887) at 171; Spain (Oct. 9, 1863) at 101; Sweden and Norway (April 5, 1855) at 47; and Switzerland (July 20, 1864) at 83.

²⁹ 9 U.S. Stat. 977. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 115.

Concerning Money Orders;³¹ and the 1884 Supplementary Convention to the 1875 Treaty of Reciprocity.³² The Hawaiian Kingdom was also recognized within the international community as a neutral State as expressly stated in treaties with the Kingdom of Spain in 1863 and the Kingdom of Sweden and Norway in 1852. Article XXVI of the 1863 Hawaiian-Spanish treaty, for example, provides:

All vessels bearing the flag of Spain, shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, *in time of war the neutrality of the Hawaiian Islands*, and to use her good offices with all the other powers having treaties with the same, to induce them to adopt the same policy toward the said Islands.³³ (emphasis added)

The British government lauded Admiral Thomas' action and by its act of formal recognition of Hawaiian independence, the British government relinquished any and all legal claims over the Hawaiian Islands, whether by discovery or by formal cession from Kamehameha I. As an independent State, the Hawaiian Kingdom continued to evolve as a constitutional monarchy as it kept up with the rapidly changing political, social and economic tides that showed no signs of receding from its shores.

³⁰ 19 U.S. Stat. 625. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 126.

³¹ 23 U.S. Stat. 736. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 129.

³² 25 U.S. Stat. 1399. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 134.

³³ 1863 Spanish Treaty, *supra* note 28, 108.

Formalizing Hawaiian Law

In 1845 Kamehameha III refocused his attention toward domestic affairs and the organization and maintenance of the newly established constitutional monarchy. This was a critical time for the Kingdom to maintain its independence. On October 29th of that year, he commissioned Robert Wyllie of Scotland to be Minister of Foreign Affairs, G.P. Judd, a former missionary, as Minister of Finance, William Richards as Minister of Education, and John Ricord, the only attorney in the kingdom, as Attorney General. All were granted patents of Hawaiian citizenship prior to their appointments. These appointments sparked controversy in the kingdom and renewed concerns of foreign takeover. Responding to a slew of appeals to remove these foreign advisors who replaced native Chiefs, Kamehameha III penned the following letter that was communicated throughout the realm—a letter that speaks to the time and circumstance the kingdom faced:

Kindly greetings to you with kindly greetings to the old men and women of my ancestors' time. I desire all the good things of the past to remain such as the good old law of Kamehameha that "the old women and the old men shall sleep in safety by the wayside," and to unite with them what is good under these new conditions in which we live. That is why I have appointed foreign officials, not out of contempt for the ancient wisdom of the land, but because my native helpers do not understand the laws of the great countries who are working with us. That is why I have dismissed them. I see that I must have new officials to help with the new system under which I am working for the good of the country and of the old men and women of the country. I earnestly desire to give places to the commoners and to the chiefs as they are able to do the work connected with

the office. The people who have learned the new ways I have retained. Here is the name of one of them, G.L. Kapeau, Secretary of the Treasury. He understands the work very well, and I wish there were more such men. Among the chiefs Leleiohoku, Paki, and John Young [Keoni Ana] are capable of filling such places and they already have government offices, one of them over foreign officials. And as soon as the young chiefs are sufficiently trained I hope to give them the places. But they are not now able to become speakers in foreign tongues. I have therefore refused the letters of appeal to dismiss the foreign advisors, for those who speak only the Hawaiian tongue.³⁴

John Ricord arrived in the Hawaiian Islands in 1844 from Oregon and was retained as Special Law Advisor to Kamehameha III. He was an attorney by trade and by all accounts a very able and professional attorney well versed in both the civil law of continental Europe and the common law of both Britain and the United States. Chief Justice Judd stated that Ricord “seems to have been learned in the civil as well as the common law, as a consequence, no doubt, of his residence in Louisiana.”³⁵ When Ricord arrived in the Islands, the kingdom was only in its fourth year of constitutional governance and the shortcomings of the first constitution began to show. One of his first tasks was establishing a diplomatic code for Kamehameha III and the Royal Court, based on the principles of the 1815 Vienna Conference. “Besides prescribing rank orders,” according to Mykkanen, “the mode of applying for royal audience, and the appropriate

³⁴ Samuel M. Kamakau, *Ruling Chiefs of Hawai`i* (Kamehameha Schools Press 1992), 401.

³⁵ A.F. Judd, “Early Constitution of the Judiciary of the Hawaiian Islands,” *Maile Wreath*, February 1875, reprinted in *Hawaiian Almanac and Annual* (Press Publishing Company Steam Print, 1888), 65.

dress code, the new court etiquette set the Hawaiian standard for practically everything that constituted the royal symbolism.”³⁶

His second and more important task was to draft a code that better organized the executive and judicial departments, which was submitted to the Legislature for sanction and approval. In a report to the Legislature, Ricord concluded that, “there is an almost total deficiency of laws, suited to the Hawaiian Islands as a recognized nation in reciprocity with others so mighty, so enlightened and so well organized as Great Britain, France, the United States of America, and Belgium. These Powers having received His Majesty into fraternity, it will become your duty to prepare [the King’s] Government to concert in some measure with theirs.”³⁷ Ricord observed that, “the Constitution had not been carried into full effect [and] its provisions needed assorting and arranging into appropriate families, and prescribed machinery to render them effective.”³⁸ The underlying issue, however, was what system of law should one “prepare the King’s Government” under? France and Belgium’s government was based on a Civil or Roman law tradition, while the tradition in Great Britain and the United States was the Common law. On this topic, Kamakau recounted Ricord’s view:

The laws of Rome, that government from which all other governments of Europe, Western Asia and Africa descended, could not be used for Hawai`i, nor could those of England, France or any other country. The Hawaiian people must have laws adapted to their mode of living. But it is right to study the laws of other

³⁶ Juri Mykkanen, *Inventing Politics: A New Political Anthropology of the Hawaiian Kingdom*, (University of Hawai`i Press 2003), 161.

³⁷ *Report of the Attorney General Read Before His Majesty, to the Hawaiian Legislature*, Wednesday, May 21st, 1845 (The Polynesian Press 1845), 5.

³⁸ *Id.*, 3.

peoples, and fitting that those who conduct laws offices in Hawai'i should understand these other laws and compare them to see which are adapted to our way of living and which are not.³⁹

Complying with the resolution of the legislature, Attorney General Ricord “submitted at intervals portions of the succeeding code to His Majesty in cabinet council of ministers, where they have first undergone discussion and careful amendment; they have next been transferred to the Rev. William Richards, for faithful translation into the native language, after which, as from a judiciary committee, they have been reported to the legislative council for criticism, discussion, amendment, adoption or rejection.”⁴⁰ These organic laws were based on a hybrid of both civil and common law principles that spanned four hundred forty seven pages and subdivided into parts, chapters, articles and sections. Because the Hawaiian Islands sat at the international crossroads of trade and commerce that spanned across the Pacific Ocean, merchants, from both the civil and common law countries, had influenced the evolution of Hawaiian law since Kamehameha I. Governmental organization leaned toward the principles of English and American common law, infused with some civil law reasoning, but at the very core the was to be Hawaiian.

Distinguishing Dominium from Real Property

There is a distinction between title to the territory of a state and title to real property. Title to territory, according to Hugo Grotius, is what jurists called *dominium*,

³⁹ Kamakau, *supra* note 34, 402.

⁴⁰ *Compilers Preface*, Statute Laws of His Majesty Kamehameha III (Government Press 1846), 6.

being the origin of property or ownership.⁴¹ This derived from the principle that the “state had an original and absolute ownership of the whole property possessed by the individual members of it, antecedent to their possession, and that their possession and enjoyment of it being subsequently derived from a grant by the sovereign.”⁴² Real property, on the other hand, derived from the feudal law, whereby the King granted out the use and profits of the land to his vassals on certain conditions, but retained ownership over them. Any breach of the conditions would cause dispossession and the land would be reallocated to someone else. These feudal possessions came to be known as real property—i.e. fee-simple, life estate and leasehold—and the conditions imposed on real property by the person of the King were gradually replaced by legislative enactments of a modern State—e.g. allegiance, taxes, eminent domain. According to Hawaiian constitutional law, the *dominium* was described as follows.

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. *It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.* Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom (emphasis added).⁴³

⁴¹ Hugo Grotius, *Grotius on the Rights of War and Peace*, translated by William Whewell (Oxford University Press 1853), 69.

⁴² *Ruling Case Law as Developed and Established by the Decisions and Annotations*, edited by William M. McKinney and Burdett A. Rich, vol. 10 (Bancroft-Whitney company 1915), 13.

⁴³ 1840 HAWN. CONST.

By statute in 1846, this constitutional provision was interpreted as establishing “three classes of persons having vested rights in the lands—1st, the government, 2nd, the landlord [Konohikis], and 3rd, the tenant [native commoner], it next [became] necessary to ascertain the proportional rights of each.”⁴⁴ When rights are constitutionally vested “they are not subject to be defeated or cancelled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare.”⁴⁵ The government held both the *dominium* and original fee-simple title to all the lands, subject to the vested undivided rights of the chiefly and native tenant classes. In order to verify private claims to property since the reign of Kamehameha I, a Board of Commissioners to Quiet Land Titles (Land Commission) was established on December 10th 1845 to investigate, confirm or reject all private claims to fee-simple titles, life estates or leases acquired “anterior” to date of the establishment of the Land Commission to the reign of Kamehameha I.⁴⁶ If the title was confirmed to have been lawfully acquired from Kamehameha I, his successors or agents, whether in fee, for life or for years, it received a Land Commission Award subject to the rights of native tenants.

⁴⁴ *Statute Laws of His Majesty Kamehameha III, vol. II* (Government Press 1847), 83.

⁴⁵ *Black's Law*, 4th ed. (West Publishing Company 1968), 1753.

⁴⁶ *Statute Laws of His Majesty Kamehameha III, vol. I* (Government Press 1846), 107.

The Great Mahele (Division)

In 1848, the King in Privy Council initiated the Great Mahele (Division), or land division, in order to “ascertain the proportional rights” of the government, chiefly and native tenant classes. It was agreed upon that in lieu of quitclaiming their undivided right in the *dominium*, each chief would receive a freehold life estate, capable of being converted into a fee-simple, from the government over large tracts of land called ahupua`a and `ili kupono.⁴⁷ During this division, it was understood that the King would participate in his private capacity and not as head of the government. This was reflected in the Privy Council minutes, where it notes the “King now claims to be Konohiki (Chief) of a great portion of the lands. He therefore makes known to the other Konohikis, that they are only holders of Lands under him, but he will only take a part and leave them a part. ...subject only to the rights of the Tenants.”⁴⁸ On December 18th 1847, the following resolution was unanimously passed by the Privy Council, which would not only guide the division process, but also contractually bind the King and the Konohikis to adhere to the rules of the division.⁴⁹

Whereas, it has become necessary to the prosperity of our Kingdom and
the proper physical, mental and moral improvement of our people that the

⁴⁷ W.D. Alexander, *Surveyor General's Report: A Brief History of Land Titles in the Hawaiian Kingdom* (P.C. Advertiser Co. Steam Print 1882), 4-5. An ahupua`a varies in size and shape, but a typical ahupua`a “is a long narrow strip, extending from the sea to the mountain, so that its chief may have his share of all the various products of the *uka* or mountain region, the cultivated land, and the *kai* or sea.” And an ili kupono held the same traits as an ahupua`a despite its origin.

⁴⁸ *Minutes of the Privy Council*, December 11, 1847, 87.

⁴⁹ *Id.*, 129. Before the chiefs received lands they had to first relinquish all claims to lands previously held by them in the following form and signed. “Ke ae aku nei au i keia mahele, ua maika`i. No ka Mo`i is kakau ia maluna. Aohe ou kuleana maloko.” Translation: “I consent to this division it is good. Belonging to the King the lands written above. I have no more rights within.” The signature of the Konohiki signified the evidence of consent and bound the Konohiki and his successors to the rules and conditions of the division between themselves and the Government as well as the division with the native tenants.

undivided rights at present existing in the lands our Kingdom, shall be separated, and distinctly defined;

Therefore, We Kamehameha III., King of the Hawaiian Islands and His Chiefs, in Privy Council Assembled, do solemnly resolve, that we will be guided in such division by the following rules:

1—His Majesty, our Most Gracious Lord and King, shall in accordance with the Constitution and Laws of the Land, retain all his private lands, as his own individual property, subject only to the rights of the Tenants, to have and to hold to Him, His heirs and successors forever.

2—One-third of the remaining lands of the Kingdom shall be set aside, as the property of the Hawaiian Government subject to the direction and control of His Majesty, as pointed out by the Constitution and Laws, one-third to the chiefs and Konohiki(s) in proportion to their possessions, to have and to hold, to them, their heirs and successors forever, and the remaining third to the Tenants, the actual possessors and cultivators of the soil, to have and to hold, to them, their heirs and successors forever.

3—The division between the Chiefs or Konohiki(s) and their Tenants, prescribed by Rule 2nd shall take place, whenever any Chief, Konohiki or Tenant shall desire such division, subject only to confirmation by the King in Privy Council.

4—The Tenants of His Majesty's private lands, shall be entitled to a fee-simple title to one-third of the lands possessed and cultivated by them; which shall be set off to the said Tenants in fee-simple, whenever His Majesty or any of said Tenants shall desire such division.

5—The division prescribed in the foregoing rules, shall in no wise interfere with any lands that may have been granted by His Majesty or His

Predecessors in fee-simple, to any Hawaiian subject or foreigner, nor in any way operate to the injury of the holders of unexpired leases.

6—It shall be optional with any Chief or Konohiki, holding lands in which the Government has a share, in the place of setting aside one-third of the said lands as Government property, to pay into the Treasury one-third of the unimproved value of said lands, which payment shall operate as a total extinguishment of the Government right in said lands.

7—All the lands of His Majesty shall be recorded in a Book entitled “Register of the lands belonging to Kamehameha III., King of the Hawaiian Islands,” and deposited with the Registry of Land Titles in the Office of the Minister of the Interior, and all lands set aside, as the lands of the Hawaiian Government, shall be recorded in a Book entitled “Register of the lands belonging to the Hawaiian Government,” and fee-simple titles shall be granted to all other allottees upon the Award of the Board of Commissioners to quiet Land Titles.

The granting of freeholds in fee or for life to the Konohiki class did not diminish the government’s title to the *dominium* that remained with the state. The *dominium*, however, no longer possessed the undivided vested rights of the chiefly class, but now only the vested rights of the native tenant class.⁵⁰ Native tenants who desired a fee-simple title to land and sought to divide their interest out of the *dominium* could approach the King, in his private capacity as a Konohiki, or any other Konohiki whenever they “desire such division” as prescribed by rules 3 and 4. By virtue of the 1850 Kuleana Act, the

⁵⁰ For an expanded discussion on the Great Mahele and the vested rights of native tenants, see Surveyor General’s Report, *supra* note 47; Umi Perkins, “Teaching Land and Sovereignty—A Revised View,” *Hawaiian Journal of Law and Politics* 2(Summer 2006): 97; and David Keanu Sai, “Kahana: How the Land Was Lost (bookreview),” *The Contemporary Pacific: A Journal of Island Affairs* 15(1) (2005): 237.

Land Commission was empowered by the government and Konohiki class to grant fee-simple titles to native tenants who were encouraged to submit their claims to divide out their interest when the Mahele was being discussed in Privy Council.⁵¹ This Act also defined the division for native tenants to be one quarter acre for a house lot and whatever lands lie in actual cultivation.⁵² When the Land Commission statutorily ceased to exist in 1854, the duty of dividing out native tenant rights was resumed by the Government and Konohikis, including the Crown. For those native tenants who were unable to file a claim with the Land Commission, they could divide out their interest on lands held by the government “in lots from one to fifty acres, in fee-simple” by applying to special agents appointed by the Minister of the Interior.⁵³ The prescribed division was regulated by rule 5. In other words, a native tenant could not divide out their interest within lands already conveyed by the government or Konohikis, whether in fee, for life or for years, unless the lands have reverted to the same by treason,⁵⁴ remainder,⁵⁵ or want of heirs.⁵⁶

⁵¹ By Privy Council resolution, December 21, 1849, the Government and Konohiki classes waived their commutation fee of one-third of the unimproved value that would have been payable by the native tenant class in order to acquire their fee-simple title to their entire lands claimed, as well as authorizing the Land Commission to act on their behalf in the division as prescribed by the Mahele rules 3 and 4.

⁵² Sections 5 & 6, *An Act Confirming Certain Resolutions of the King and Privy Council, passed on the 21st day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges* (also known as the Kuleana [Freehold] Act), August 6, 1850

⁵³ *Id.*, Section 4; and, *An Act to Provide for the Appointment of Agents to Sell Government Lands to the People*, June 16, 1851.

⁵⁴ “Whoever shall commit the crime of treason, shall suffer the punishment of death; and all his property shall be confiscated to the government.” Section 9, Chapter VI, Penal Code.

⁵⁵ A remainderman is a person who inherits the property in fee upon the death of the owner of a life estate.

⁵⁶ *Compiled Laws of the Hawaiian Kingdom* (Hawaiian Gazette 1884), 477. “Upon the decease of any person owning, possessed of, or entitled to any estate of inheritance or kuleana in any land or lands in this Kingdom, leaving no kindred surviving, all such land and lands shall thereupon escheat and revert to the owner of the Ahupuaa, Ili or other denomination of land, of which such escheated kuleana had originally formed a part.”

According to the registry book there were only two hundred fifty-three recognized Konohikis, who bound themselves and their successors to the rules and conditions of the Great Mahele. As a class, the Konohikis made up a finite number affixed to those who were recognized chieftains in the Hawaiian Kingdom, but the native tenant class is ever increasing and is comprised of all natives who were not Konohikis. Native tenants who divided out their interests from the dominium did not affect the vested rights of native tenants who did not divide; *a priori* the right is vested in a class and not a finite number of individuals like the Konohiki class. Therefore, the rights of native tenants exist in perpetuity, and according to Chief Justice William Lee, these rights are “secured to them by the Constitution and laws of the Kingdom, and no power can convey them away, not even that of royalty itself.”⁵⁷ This is the reason why all conveyances in the Hawaiian Islands have the uniform clause in deeds “reserving the rights of native tenants,” or in the Hawaiian language, “koe nae na kuleana o na Kanaka ma loko.” By 1893, native tenants acquired in excess of 150,000 acres of land by purchase of government grants pursuant to the 1850 Kuleana Act.⁵⁸ In fact, the Surveyor General reported to the Legislative Assembly that between “the years 1850 and 1860, nearly all the desirable Government land was sold, generally to natives.”⁵⁹

Non-aboriginal Hawaiian subjects were able to acquire freehold estates and leases through government grants and awards by the Land Commission, or by purchase from freeholders themselves. Foreign nationals were initially barred from acquiring fee-simple

⁵⁷ *Kekiekie v. Edward Dennis*, 1 Hawai`i 69, 70 (1851); see also *Kuki`iahu v. William Gill*, 1 Hawai`i 90 (1851).

⁵⁸ Umi Perkins, “Teaching Land and Sovereignty,” *Hawaiian Journal of Law and Politics* 2 (Summer 2006): 100.

⁵⁹ Alexander, *supra* note 47, 24.

titles under the 1845 Organic Acts, but this law was later repealed under the “Alien Disability Act” of July 10th 1850. All titles to real property were subject to the following conditions:

1. To punish for high treason by forfeiture, if so the law decrees.
2. To levy taxes upon every tax yielding basis, and among other lands, if so the law decrees.
3. To encourage and even enforce the usufruct of lands for the common good.
4. To provide public thoroughfares and easements, by means of roads, bridges, streets, &c., for the common good.
5. To resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it.⁶⁰

These acts effectively brought to a close the feudal state of land tenure in the Hawaiian Islands, and Richards’ teachings laid the foundation for a new political economy and constitutional change.

The Hawaiian rulers have learned by experience, that regard must be had to the immutable law of property, in things real, as lands, and in things personal as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article, to which he and his children can lay no intrinsic claim.⁶¹

⁶⁰ Statute Laws (vol. I), *supra* note 44, 85.

⁶¹ *Id.*, 86.

1852 CONSTITUTION

In 1851, the Legislature passed a resolution calling for the appointment of three commissioners, one to be chosen by the King, one by the Nobles, and one by the Representatives, to propose amendments to the constitution, whose duty was to revise the Constitution of 1840. The commission, headed by William Lee from the House of Representatives, followed the structure and organization provided for by the Massachusetts Constitution of 1780. The Massachusetts constitution was the most advanced of any constitution of the time and was organized into four parts: a preamble; a declaration of rights; a framework of government describing the legislative, executive and judicial organs; and an amendment article. The draft of the revised Constitution was submitted to the Legislature and approved by both the House of Nobles and the House of Representatives and signed into law by the King on June 14th 1852.⁶²

Provisions to Address Imminent Threats to the Realm

The amended constitution did not have a preamble, but was organized in the same manner as the Massachusetts constitution, with the exception of the order of the form of government: a declaration of rights; a framework of government that described the functions of the executive subdivided into five sections, the legislative, and judicial powers; and an article describing the mode of amending the constitution. According to Hegel's theory of a constitutional monarchy, the "three powers of a modern [constitutional monarchy] have distinct functions, but are not completely separate. As part of an interdependent whole, each power is defined not only by its own particular

⁶² Robert C. Lydecker, *Roster Legislatures of Hawai'i, 1841-1918* (The Hawaiian Gazette Co., Ltd. 1918), 36.

function, but also by the other powers which limit and interact with it.”⁶³ The constitution, though, retained remnants of absolutism as a carryover of the former constitution. In other words, by constitutional provision, the Crown was capable of altering the constitution or even cession of the kingdom to a foreign state without legislative approval. These provisions would allow the King to act swiftly in a dire situation should circumstances demand. In particular, these provisions included:

Article 39. The King, by and with the approval of His Cabinet and Privy Council, in case of invasion or rebellion, can, place the whole Kingdom, or any part of it under martial law; and he can ever alienate it, if indispensable to free it from the insult and oppression of any foreign power.

Article 45. All important business for the Kingdom which the King chooses to transact in person, he may do, but not without the approbation of the Kuhina Nui. The King and Kuhina Nui shall have a negative on each other’s public acts.

Tensions with France

These provisions were retained particularly because there had been tenuous relations with France since 1839, when French Captain Laplace exacted \$20,000.000 from Kamehameha III as surety to prevent the persecution of Catholics. Laplace also forced the King to sign another treaty imposing jury selection benefits to Frenchmen and a fixed duty on French wine and brandies. On March 21st 1846, French Rear Admiral Hamelin who arrived in the islands on the 22nd on the frigate *Virginie*, returned the four

⁶³ Bernard Yack, “The Rationality of Hegel’s Concept of Monarchy,” *The American Political Science Review* 74(3) (1980): 713.

boxes containing the \$20,000.00 to the Hawaiian government.⁶⁴ Three days later, Kamehameha III reluctantly signed two identical treaties with the French and British that reiterated the Laplace treaty's provision of jury selection and a cap on duties on "wines, brandies, and other spirituous liquors" from both countries. These treaties superseded the British 1836 treaty and the French 1839 treaty, and contained "two objectionable clauses, which proved to be a fruitful source of trouble in subsequent years."⁶⁵

ARTICLE III. No British [French] subject accused of any crime whatever shall be judged otherwise than by a jury composed of native or foreign residents, proposed the British [French] Consul and accepted by the Government of the Sandwich Islands.

ARTICLE VI. British [French] merchandise or goods recognized as coming from the British [French] dominions, shall not be prohibited, nor shall they be subject to an import duty higher than five per cent ad valorem. Wines, brandies, and other spirituous liquors are however excepted from the stipulation, and shall be liable to such reasonable duty as the Hawaiian Government may think; fit to lay upon them, provided always that the amount of duty shall not be so high as absolutely to prohibit the importation of the said articles.

Tension again arose with the French in August 1849, when Consul Dillon accused the Hawaiian government of violating the 1846 French treaty. Admiral De Tromelin, who arrived in the islands on August 12th on board the French frigate *Poursuivante*, "sent the king a peremptory dispatch containing ten demands which had been drawn up by Mr.

⁶⁴ W.D. Alexander, *A Brief History of the Hawaiian People* (American Book Company 1891), 261.

⁶⁵ *Id.*

Dillon.”⁶⁶ These again centered on the treatment of Catholics, the duty on spirituous liquors, and the unequal treatment of Frenchmen. The Hawaiian government sent a courteous, yet firm, reply explaining that it had not violated the treaty and that if any rights of French citizens have been violated,

the courts of the kingdom were open for the redress of all such grievances, and that until justice had been denied by them there could be no occasion for diplomatic interference. The government offered to refer any dispute to the mediation of a neutral power, and informed the admiral that no resistance would be made to the force at his disposal, and that in any event the persons and property of French residents would be scrupulously guarded.⁶⁷

Undeterred by reason and fairness, De Tromelin landed a fully armed force in Honolulu and took possession of the government fort, “the customhouse and other government buildings, and seized the king’s yacht, together with seven merchant vessels in port.”⁶⁸ The fort had previously been abandoned and the Hawaiian government provided no opposition to the landing of French troops. By proclamation of the Admiral on the 30th, the ten day occupation and the destruction of the fort was justified under France’s international right of reprisal, but private property would be restored. The two French warships left Honolulu for San Francisco on September 5th 1849, with the French consul Dillon and his family. Louis Perrin replaced Dillon as French consul and arrived in Honolulu on December 13th 1850. To the government’s surprise, the French consul presented the same demands as had Dillon and resumed his “policy of an annoying

⁶⁶ *Id.*, 266.

⁶⁷ *Id.*, 267.

⁶⁸ *Id.*, 268.

diplomatic interference with the internal affairs of the kingdom.”⁶⁹ As a result, the King and Premier placed the kingdom temporarily under the protection of the United States, which greatly diminished the annoyance exhibited by the French consul.⁷⁰

These events and other threats to the safety of the kingdom caused great trepidation amongst the King and other governmental officials and constituted the driving force behind the prospect of ceding the Hawaiian Islands to the United States. By 1853, the topic of annexation to the United States was a subject of serious deliberation by the King who “was tired of demands made upon him by foreign powers, and of threats by filibusters from abroad and by conspirators at home to overturn the government.”⁷¹ On February 16th 1854, the King “commanded Mr. Wyllie [Minister of Foreign Affairs] to ascertain on what terms a treaty of annexation could be negotiated, to be used as a safeguard to meet any sudden emergency.”⁷² Negotiations between Wyllie and the American commissioner David L. Gregg were not successful and the prospect of annexation came to a close upon the death of Kamehameha III on December 15th 1854. Despite open threats to the kingdom, Kamehameha III successfully transformed Hawaiian governance from a feudal autocracy to the edifice of constitutional government that recognized a uniform rule of law, and acknowledged and protected the rights of its citizenry.

The age of Kamehameha III was that of progress and of liberty—of schools and of civilization. He gave us a Constitution and fixed laws; he secured the people in

⁶⁹ *Id.*, 270.

⁷⁰ *Id.*

⁷¹ *Id.*, 277.

⁷² *Id.*, 278.

the title to their lands, and removed the last chain of oppression. He gave them a voice in his councils and in the making of the laws by which they are governed. He was a great national benefactor, and has left the impress of his mild and amiable disposition on the age for which he was born.⁷³

Ascension of Kamehameha IV

Alexander Liholiho succeeded to the throne as Kamehameha IV. He was the adopted son of the King, and was confirmed successor on April 6th 1853, in accordance with Article 25 of the Constitution of 1852.⁷⁴ Article 25 provided that the “successor [of the Throne] shall be the person whom the King and the House of Nobles shall appoint and publicly proclaim as such, during the King's life.” The first year of his reign he approved an Act to separate the office of Kuhina Nui from that of Minister of Interior Affairs. The legislature reasoned that the “Kuhina Nui is invested by the Constitution with extraordinary powers, and whereas the public exigencies may require his release from the labor, and responsibilities of the office of Minister of Interior Affairs, now by law imposed upon him.”⁷⁵ In 1855, the Department of Public Instruction was established, by statute, replacing the ministry of Public Instruction whose minister formerly served as a member of the cabinet council. This independent department was headed by a President who presided over a five member Board of Education that was “superintended and directed by a committee of the Privy Council.”⁷⁶ From this point, the cabinet consisted of

⁷³ *Speeches of His Majesty Kamehameha IV* (Government Press 1861), 5.

⁷⁴ Lydecker, *supra* note 62, 49.

⁷⁵ *An Act to separate the office of Kuhina Nui from that of Minister of Interior Affairs*, January 6, 1855.

⁷⁶ *Compiled Laws*, *supra* note 56, 199.

the Minister of the Interior, Minister of Finance, Minister of Foreign Affairs, and the Attorney General.⁷⁷ It was also the “duty of the Board of Education, every sixth year, counting from the year 1860, to make a complete census of the inhabitants of the Kingdom, to be laid before the King and Legislature for their consideration.”⁷⁸ The constitution was also amended in 1856, which changed legislative sessions from annual to biennial. Regarding those sovereign prerogatives of absolutism retained in the constitution, Kamehameha IV sought to rid these prerogatives by constitutional amendment, but was unsuccessful. The responsibility for such change would fall on his successor and brother, Lot Kapuaiwa.

Ascension of Kamehameha V

On November 30th 1863, Kamehameha IV died unexpectedly, and left the Kingdom without a successor.⁷⁹ On the very same day, the Premier, Victoria Kamamalu, in Privy Council, proclaimed Lot Kapuaiwa to be the successor to the Throne in accordance with Article 25 of the Constitution of 1852, and received confirmation by the Nobles. He was thereafter styled Kamehameha V. Article 47, of the Constitution of 1852, provided that “whenever the throne shall become vacant by reason of the King's death the Kuhina Nui shall perform all the duties incumbent on the King, and shall have and

⁷⁷ After John Ricord left the kingdom in 1847, the office of Attorney General was not filled until 1862 with the appointment of Charles C. Harris. During this period the District Attorneys throughout the islands performed the functions of the office.

⁷⁸ Compiled Laws, *supra* note 56, 211.

⁷⁹ On October 3, 1859, in an Extraordinary Session of the House of Nobles, Kamehameha IV received confirmation from the Nobles that his minor son, Prince Albert, was to be the successor of the Hawaiian Throne in accordance with Article twenty-five of the 1852 constitution. The young Prince died August 19th 1862, leaving the Kingdom without a successor to the throne.

exercise all the powers, which by this Constitution are vested in the King.” In other words, Victoria Kamamalu provided continuity for the office of the Crown pending the appointment and confirmation of Kapuaiwa. Upon his ascension, Kamehameha V refused to take the oath of office until the 1852 Constitution was altered in order to remove those sovereign prerogatives that ran contrary to the principles of a constitutional monarchy, namely Articles 45 and 94.⁸⁰

Apparently, Kamehameha V knew that his refusal to take the oath was constitutionally authorized by Article 94 of the Constitution, which provided that the “King, after approving this Constitution, shall take the following oath.” This provision implied a choice as to whether to take the oath, which Kamehameha V felt should be constitutionally altered and made mandatory. Kamehameha V was convinced that these anomalous provisions, which needed altering, were not just problematic to him, but also a source of great difficulty for his late brother Kamehameha IV and the Legislative Assembly. If he did take the oath, he would have bound himself to the constitution whereby any change or amendment to the constitution was vested solely with the Legislative Assembly. By not taking the oath, he reserved to himself the responsibility of change, which ironically was authorized by the very constitution he sought to amend.

1864 CONSTITUTION

Kamehameha V and his predecessor recognized these two articles as a hindrance to responsible government, and this formed the main basis for the King to convene the first constitutional convention whose duty was to draft a new constitution. In Privy

⁸⁰ Lydecker, *supra* note 62, 99.

Council, the King resolved to look into the legal means of convening the first Constitutional Convention under Hawaiian law, and on July 7th 1864 the convention convened.⁸¹ Between July 7th and August 8th 1864, each article in the proposed Constitution was read and discussed until the convention arrived at Article 62. In this article, the King and Nobles wanted to insert property qualifications for representatives and their electorate, but the elected delegates refused. After days of debate over this article, the Convention arrived at an absolute deadlock. The elected delegates could not come to agree on this article. As a result, Kamehameha V dissolved the convention and exercising his sovereign prerogative by virtue of Article 45, he annulled the 1852 constitution and proclaimed a new constitution on August 20th 1864.

Legislature Acknowledges Lawfulness of Kamehameha's Actions

In his speech at the opening of the Legislative Assembly of 1864, Kamehameha V explained his action of abrogating the 1852 Constitution and proclaiming a new constitution by making specific reference to the “forty-fifth article [that] reserved to the Sovereign the right to conduct personally, in cooperation with the Kuhina Nui (Premier), but without the intervention of a Ministry or the approval of the Legislature, such portions of the public business as he might choose to undertake.”⁸² The constitution he now proclaimed was not new, but rather the same draft that was before the convention with the exception of the property qualifications for representatives⁸³ and their

⁸¹ *Id.*

⁸² *Id.*

⁸³ Article 61: “No person shall be eligible for a Representative of the People, who is insane or an idiot; nor unless he be a male subject of the Kingdom, who shall have arrived at the full age of Twenty-One years—

electorate.⁸⁴ The legislature later repealed the property qualifications in 1874, but maintained literacy as the only qualification. The office of Premier was eliminated, and the constitution provided that no act of the Monarch was valid unless countersigned by a responsible Minister from the Cabinet, who was answerable to the Legislative Assembly regarding matters of removal by vote of a lack of confidence or impeachment proceedings. The function of the Privy Council was greatly reduced, and a Regency replaced the function of Premier should the King die, leaving a minor heir, who would “administer the Government in the name of the King, and exercise all the powers which are Constitutionally vested in the King.”⁸⁵ The Crown, by constitutional provision, was bound to take the oath of office upon ascension to the throne, and the sole authority to amend or alter the constitution was the Legislative Assembly, which was now a unicameral body comprised of appointed Nobles and Representatives elected by the people sitting together. The constitution also provided that the “Supreme Power of the

who shall know how to read and write—who shall understand accounts—and shall have been domiciled in the Kingdom for at least three years, the last of which shall be the year immediately preceding his election; and who shall own Real Estate, within the Kingdom, of a clear value, over and above all incumbrances, of at least Five Hundred Dollars; or who shall have an annual income of at least Two Hundred and Fifty Dollars; derived from any property, or some lawful employment.”

⁸⁴ Article 62: “Every male subject of the Kingdom, who shall have paid his taxes, who shall have attained the age of twenty years, and shall have been domiciled in the Kingdom for one year immediately preceding the election; and shall be possessed of Real Property in this Kingdom, to the value over and above all incumbrances of One Hundred and Fifty Dollars of a Lease-hold property on which the rent is Twenty-five Dollars per year—or of an income of not less than Seventy-five Dollars per year, derived from any property or some lawful employment, and shall know how to read and write, if born since the year 1840, and shall have caused his name to be entered on the list of voters of his District as may be provided by law, shall be entitled to one vote for the Representative or Representatives of that District. Provided, however, that no insane or idiotic person, nor any person who shall have been convicted of any infamous crime within this Kingdom, unless he shall have been pardoned by the King, and by the terms of such pardon have been restored to all the rights of a subject, shall be allowed to vote.”

⁸⁵ 1864 HAWN. CONST., Article 33.

Kingdom in its exercise, is divided into the Executive, Legislative, and Judicial; these shall always be preserved distinct.”⁸⁶

The constitution, and the method by which it came about, has been erroneously labeled as a *coup d'état* that sought to increase the power of the Crown.⁸⁷ Nothing could be further from the truth. In fact, the 1864 Legislative Assembly appointed a special committee, which was comprised of Godfrey Rhodes, John I'i, and J.W.H. Kauwahi to respond to Kamehameha V's speech opening the new legislature. The committee recognized the constitutionality of the King's prerogative under the former constitution and acknowledged that this “prerogative converted into a right by the terms of the [1852] Constitution, Your Majesty has now parted with, both for Yourself and Successors, and this Assembly thoroughly recognizes the sound judgment by which Your Majesty was actuated in the abandonment of a privilege, which, at some future time might have been productive of untold evil to the nation.”⁸⁸ In other words, the Crown was not only authorized by law to do what had been done, but the action of Kamehameha V further limited his own authority under the former constitution. He was the last Monarch to have exercised a remnant of absolutism.

Ascension of the Elected Monarchs: Lunalilo and Kalakaua

On December 11th 1872, Kamehameha V died without naming a successor to the Throne, and the Legislative Assembly, being empowered to elect a new monarch in

⁸⁶ 1864 HAWN. CONST., Article 20.

⁸⁷ Ralph S. Kuykendall, *The Hawaiian Kingdom: 1854-1874, Twenty Critical Years*, vol. II (University of Hawaii Press, 1953), 133.

⁸⁸ *Reply to His Majesty's 1864 Address at the Opening of the Legislature*. Hawaiian Archives.

accordance with the 1864 constitution, elected William Charles Lunalilo on January 8th 1873. The Hawaiian Kingdom's first elected King died a year later without a named successor, and the Legislature once again convened and elected David Kalakaua as King on February 12th 1874. On April 11th 1877, Kalakaua appointed his sister, Lili'uokalani, as heir apparent and received confirmation from the Nobles.

1887 REVOLUTION

During the summer of 1887, while the Legislature remained out of session, a minority of subjects of the Hawaiian Kingdom and foreign nationals met to organize a takeover of the political rights of the native population. The driving motivation for these revolutionaries was their belief that the “native [was] unfit for government and his power must be curtailed.”⁸⁹ A local volunteer militia, whose members were predominantly United States citizens, called themselves the Hawaiian League, and held a meeting on June 30th 1887 in Honolulu at the Armory building of the Honolulu Rifles. Before this meeting, large caches of arms were brought in by the League from San Francisco and dispersed amongst its members.⁹⁰

The group made certain demands on Kalakaua and called for an immediate change of the King's cabinet ministers. Under threat of violence, the King reluctantly agreed on July 1st 1887 to have this group form a new cabinet ministry made up of League members. The purpose of the league was to seize control of the government for their economic gain, and to neutralize the power of the native vote. On that same day the

⁸⁹ Executive Documents, *supra* note 22, 574.

⁹⁰ *Id.*, 579.

new cabinet comprised of William L. Green as Minister of Finance, Godfrey Brown as Minister of Foreign Affairs, Lorrin A. Thurston as Minister of the Interior, and Clarence W. Ashford as Attorney General, took “an oath to support the Constitution and Laws, and faithfully and impartially to discharge the duties of his office.”⁹¹ Under strict secrecy and unbeknownst to Kalakaua, the new ministry also invited two members of the Supreme Court, Chief Justice Albert F. Judd and Associate Justice Edward Preston, “to assist in the preparation of a new constitution,”⁹² which now implicated the two highest ranking judicial officers in the revolution.

Hawaiian constitutional law provided that any proposed change to the constitution must be submitted to the “Legislative Assembly, and if the same shall be agreed to by a majority of the members thereof”⁹³ it would be deferred to the next Legislative session for action. Once the next legislature convened, and the proposed amendment or amendments have been “agreed to by two-thirds of all members of the Legislative Assembly, and be approved by the King, such amendment or amendments shall become part of the Constitution of this country.”⁹⁴ As a minority, these individuals had no intent of submitting their draft constitution to the legislature, which was not scheduled to reconvene until 1888. Instead, they embarked on a criminal path of treason. The Hawaiian Penal Code defines *treason* “to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King’s government...the same being done by a person owing allegiance to this kingdom. Allegiance is the obedience and

⁹¹ Compiled Laws, *supra* note 56, 8.

⁹² Merze Tate, *The United States and the Hawaiian Kingdom* (Greenwood Press 1980), 91.

⁹³ 1864 HAWN. CONST., Article 80.

⁹⁴ *Id.*

fidelity due to the kingdom from those under its protection.”⁹⁵ The statute goes on to state that in order to

constitute the levying of war, the force must be employed or intended to be employed for the dethroning or destruction of the King or in contravention of the laws, or in opposition to the authority of the King’s government, with an intent or for an object affecting some of the branches or departments of said government generally, or affecting the enactment, repeal or enforcement of laws in general, or of some general law; or affecting the people, or the public tranquility generally; in distinction from some special intent or object affecting individuals other than the King, or a particular district.⁹⁶

The Bayonet Constitution

The draft constitution was completed in just five days. The King was forced to sign on July 6th, and thereafter the 1887 Constitution presumably annulled the former constitution, and was declared to be the new law of the land. The King’s sister and heir-apparent, Lili`uokalani, discovered later that her brother had signed the constitution “because he had every assurance, short of actual demonstration, that the conspirators were ripe for revolution, and had taken measures to have him assassinated if he refused.”⁹⁷ Gulick, who served as Minister of the Interior from 1883 to 1886, also concluded:

⁹⁵ *Penal Code of the Hawaiian Islands*, (Government Press 1869), 8.

⁹⁶ *Id.*

⁹⁷ Lili`uokalani, *Hawai`i’s Story by Hawai`i’s Queen* (Charles E. Tuttle Co., Inc. 1964), 181.

The ready acquiescence of the King to their demands seriously disconcerted the conspirators, as they had hoped that his refusal would have given them an excuse for deposing him, and a show of resistance a justification for assassinating him. Then everything would have been plain sailing for their little oligarchy, with a sham republican constitution.⁹⁸

This so-called constitution has since been known as the *bayonet* constitution and was never submitted to the Legislative Assembly or to a popular vote of the people. It was drafted by a select group of twenty-one individuals⁹⁹ that effectively placed control of the Legislature and Cabinet in the hands of individuals who held foreign allegiances. The constitution reinstated a bi-cameral legislature and an election of Nobles replaced appointments by the King. Property qualifications were reinstated for candidates of both Nobles and Representatives. And the cabinet could only be removed by the legislature on a question of want of confidence. The new property qualifications had the purpose of ensuring that Nobles remained in the hands of non-natives, which would serve as a controlling factor over the House of Representatives. Blount reported:

For the first time in the history of the country the number of nobles is made equal to the number of representatives. This furnished a veto power over the representatives of the popular vote to the nobles, who were selected by persons

⁹⁸ Executive Documents, *supra* note 26, 760.

⁹⁹ In the William O. Smith Collection at the Hawaiian Archives there is a near finished version of the 1887 draft with the following endorsement on the back that read: "Persons chiefly engaged in drawing up the constitution were—L.A. Thurston, Jonathan Austin, S.B. Dole, W.A. Kinney, W.O. Smith, Cecil Brown, Rev. [W.B.] Oleson, N.B. Emerson, J.A. Kennedy, [John A.] McCandless, Geo. N. Wilcox, A.S. Wilcox, H. Waterhouse, F. Wundenburg, E.G. Hitchcock, W.E. Rowell, Dr. [S.G.] Tucker, C.W. Ashford." Added to this group of individuals were Chief Justice A.F. Judd and Associate Justice Edward Preston.

mostly holding foreign allegiance, and not subjects of the Kingdom. The election of a single representative by the foreign element gave to it the legislature.¹⁰⁰

So powerful was the native vote that resident aliens of American or European nationality were allowed to cast their vote in the election of the new legislature without renouncing their foreign citizenship and allegiance. Included in this group were the contract laborers from Portugal's Madeira and Azores Islands who emigrated to the kingdom after 1878 under labor contracts for the sugar plantations. League members owned these plantations. Despite the fact that very few, if any, of these workers could even read or write, league members utilized this large voting block specifically to neutralize the native vote. According to Blount:

These ignorant laborers were taken before the election from the cane fields in large numbers by the overseer before the proper officer to administer the oath and then carried to the polls and voted according to the will of the plantation manager. Why was this done? In the language of the Chief Justice Judd, "to balance the native vote with the Portuguese vote." This same purpose is admitted by all persons here. Again, large numbers of Americans, Germans, English, and other foreigners unnaturalized were permitted to vote...¹⁰¹

Leading up to the elections that were to be held on September 12th, there was public outcry on the manner in which the constitution was obtained through the King and not through the Legislature as provided for by the 1864 constitution.¹⁰² On August 30th 1887, British Consul Wodehouse reported to the British Government the new Cabinet's

¹⁰⁰ Executive Documents, *supra* note 26, 579.

¹⁰¹ *Id.*

¹⁰² Ralf Kuykendall, *The Hawaiian Kingdom: 1874-1893, The Kalakaua Dynasty*, vol. III (University of Hawai'i Press 1967), 407.

response to these protests. He wrote, “The new Administration which was dictated by the “Honolulu Rifles” now 300 strong does not give universal satisfaction, and...Attorney General Ashford is reported to have said ‘that they, the Administration, would carry the elections if necessary at the point of the bayonet.’”¹⁰³ The election “took place with the foreign population well armed and the troops hostile to the crown and people.”¹⁰⁴ James Blount also concluded that foreign ships anchored in Honolulu harbor during this time “must have restrained the native mind or indeed any mind from a resort to physical force,” and the natives’ “means of resistance was naturally what was left of political power.”¹⁰⁵

Revolution and the Rule of Law

If it was a rebellion, or as Judd stated a “successful revolution,”¹⁰⁶ what was the measurement of its success or its failure? According to Lord Reid, “it is [international law] which defines the conditions under which a government should be recognized *de jure* or *de facto*, and it is a matter of judgment in each particular case whether a regime fulfills the conditions.”¹⁰⁷ He continues to state that the “conditions under international law for the recognition of a new regime as the *de facto* government of a state are that the

¹⁰³ Wodehouse to FO, no. 29, political and confidential, Aug. 30, 1887, BPRO, PO 58/220, Hawaiian Archives.

¹⁰⁴ Executive Documents, *supra* note 26, p. 579.

¹⁰⁵ *Id.*, 580.

¹⁰⁶ *Id.*, 576. As a participant in the revolution, Chief Justice Judd cannot serve as a judge of his own crime. Article 10 of the 1864 constitution provides, “No person shall sit as a judge...in any case...which the said judge...may have...any pecuniary interest”—*nemo iudex in causa sua* (no one can be a judge in his own cause).

¹⁰⁷ *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd.*, 2 All England Reports 536, 548 (1966).

new regime has in fact effective control over most of the state's territory and that this control seems likely to continue.” According to Chief Justice Hugh Beadle, there are two parts in the definition of *de facto* and *de jure* governments.

The first part requires that a regime should be “in effective control over the territory” and this requisite is common to both a *de facto* and a *de jure* Government. The second part of the definition deals with the likelihood of the regime continuing in “effective control.” If it “seems likely” so to continue, then it is a *de facto* Government. When, however, it is “firmly established,” it becomes a *de jure* Government.¹⁰⁸

A successful revolution creates a *de facto* government, but the success of the revolution is measured by the maintenance of effective control and not merely the fact of effective control. In other words, success is time sensitive whereby the law breaker has been transformed into a law creator by virtue of effective permanency. This space of time is the revolution itself where the opposing forces between lawful and criminal are engaging, and determination of the victor is a pure question of fact and not law. In order to answer the second condition of “seems likely to continue” in the affirmative, Beadle states that the likelihood of

continuing in effective control of the territory depends on the likelihood of its being “overthrown,” and “overthrown” here means being *displaced*, and not merely being *replaced* by another Government elected in terms of the new revolutionary Constitution. It is the new Constitution which must be overthrown, not merely the persons who govern by virtue of it. This is so because a mere change of the personnel of the Government, if that change is effected in terms of

¹⁰⁸ “Judgment of the High Court of Rhodesia, Appellate Division,” 39 *International Law Reports* 184 (1970).

the revolutionary Constitution, still leaves a revolutionary Government in control.¹⁰⁹

Professor Hans Kelson states that if “the revolutionaries fail, if the order they have tried to establish remains inefficacious, then on the other hand, their undertaking is interpreted, not as legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution.”¹¹⁰ According Green Hackworth, a successful revolution must fulfill three factual conditions: (1) possess the machinery of the State; (2) operate with the assent of the people and without substantial resistance to its authority; and (3) fulfill international obligations.¹¹¹ Professor Karl Olivecrona explains that “victory of the revolution corresponds to the constitutional form in ordinary law-giving. New rules are then given in accordance with the new constitution and are soon being automatically accepted as binding. The whole machinery is functioning again, more or less difference in regard to the aims and the means of those in power.”¹¹² Lord Lloyd further expounds on the second condition of “assent of the people” and no “substantial resistance.” He states:

Certainly in this sense an operative legal system necessarily entails a high degree of regular obedience to the existing system, for without this there will be anarchy or confusion rather than a reign of legality. And where revolution or civil war has supervened it may even be necessary in the initial stages, when power and authority is passing from one person or body to another, to interpret legal power

¹⁰⁹ *Id.*, 225.

¹¹⁰ Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945), 118.

¹¹¹ Green Haywood Hackworth, *Digest of International Law*, vol. I (Government Printing Office, 1940), 175.

¹¹² Karl Olivecrona, *Law as Fact* (Stevens 1971), 66.

in terms of actual obedience to the prevailing power. When however this transitional stage where law and power are largely merged is passed, it is no longer relevant for the purpose of determining what is legally valid to explore the sources of ultimate de facto power in the state. For by this time the constitutional rules will again have taken over and the legal system will have resumed its regular course of interpreting its rules on the basis of its own fundamental norms of validity.”¹¹³

From a municipal law standpoint, however, the terms *de jure* and *de facto* are not applied to revolution or civil war, but rather to offices in government. According to Justice Thomas Cooley, an “officer *de jure* is one who not only is invested with the office, but who has been lawfully appointed or chosen, and therefore has a right to retain the office and receive its perquisites and emoluments. An officer *de facto* is defined to be one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.”¹¹⁴ He further explains that a *de facto* officer “comes in by claim and color of right, or he exercises the office with such circumstances of acquiescence on the part of the public, as at least afford a strong presumption of right, but by reason of some defect in his title, or of some informality, omission or want of qualification, or by reason of the expiration of his term of service, he is unable to maintain his possession.”¹¹⁵

A *de facto* officer is recognizable under municipal law, and according to Chief Justice Joseph Steere, the “doctrine of a *de facto* officer is said to have originated as a rule of public necessity to prevent public mischief and protect the rights of innocent third

¹¹³ Dennis Lloyd, *The Idea of Law* (MacGibbon & Kee, Ltd. 1966), 162.

¹¹⁴ Thomas M. Cooley, *A Treatise on the Law of Taxation* (Callaghan and Company, 1876), 185.

¹¹⁵ *Id.*

parties who may be interested in the acts of an assumed officer apparently clothed with authority and the courts have sometimes gone far with delicate reasoning to sustain the rule where threatened rights of third parties were concerned.”¹¹⁶ If a person seizes office and is neither *de jure* or *de facto*, Cooley calls him a usurper or intruder, which he defined “as one who attempts to perform the duties of an office without authority of law, and without support of public acquiescence.” He adds that “no one is under an obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void.”¹¹⁷ And “the party himself who had usurped a public office,” states Cooley, “is never allowed to build up rights, or to shield himself from responsibility on no better basis than his usurpation.”¹¹⁸

Throughout the revolution, there was active opposition to the minority of revolutionaries by the Hawaiian citizenry that ranged from peaceful organized resistance to an unsuccessful armed attack against the usurpers. On November 22nd 1888, the Hawaiian Political Association (Hui Kalai`aina) was established with the purpose of the “restoration of the constitutional system existing before June 30th 1887.”¹¹⁹ For the next five years this organization would be the most persistent and influential group opposing the small group of revolutionaries by maintaining that the constitution of 1864, as amended, was the legal constitution of the country. During this period, the Hawaiian

¹¹⁶ *Carpenter v. Clark*, 217 Michigan 63, 71 (1921).

¹¹⁷ Thomas M. Cooley, *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*, 7th ed. (Little, Brown, and Company 1903), 898.

¹¹⁸ *Auditors of Wayne Co. v. Benoit*, 20 Michigan 176 (1870).

¹¹⁹ Kuykendall, *supra* note 102, 448.

Kingdom was in a state of revolution, whereby the insurgents could neither claim success *de facto* under international law nor as *de facto* officers under municipal law.

A Failed Attempt of Citizen's Arrest

In June 1889, another organization was formed as a secret society called the Liberal Patriotic Association, whose purpose was “to restore the former system of government and the former rights of the king.”¹²⁰ The following month on July 30th, the organization’s leader, Robert Wilcox with eighty men, led an unsuccessful armed attack against the cabinet ministry on the grounds of `Iolani Palace. Wilcox was initially indicted for treason, “but it became clear that...no native jury would convict him of that crime. The treason charge was dropped and he was brought to trial on an indictment for conspiracy.”¹²¹ He was tried by a native jury, which found him not guilty. What is of significance is that a native jury not only found Robert Wilcox not guilty, but their verdict represented the native sentiment throughout the kingdom, which comprised eighty five percent of the Hawaiian citizenry. In a dispatch to U.S. Secretary of State Blaine on November 4th 1889, U.S. Minister Stevens from the American legation in Honolulu acknowledged the significance of the verdict. Stevens stated:

This preponderance of native opinion in favor of Wilcox, as expressed by the native jury, fairly represented the popular native sentiment throughout these islands in regard to his effort to overthrow the present ministry and to change the

¹²⁰ *Id.*, 425.

¹²¹ *Id.*, 429.

constitution of 1887, so as to restore to the King the power he possessed under the former constitution.¹²²

There is a strong argument that the actions taken by Wilcox and other members of the Liberal Patriotic Association fell under the law as an unsuccessful citizen's arrest, and not a counter-revolution as called by the cabinet ministry. In theory, a counter-revolution can only take place if the original revolution was successful. But if the original revolution was not successful, or in other words, the country was still in a state of revolution or unlawfulness, any actions taken to apprehend or to hold to account the original perpetrators is not a violation of the law, but rather law abiding. Under the common law, every private "person that is present when any felony is committed, is bound by the law to arrest the felon."¹²³ According to the Hawaiian Penal Code, the "terms felony and crime, are...synonymous, and mean such offenses as are punishable with death," which makes treason a felony. Therefore, Wilcox's attack should be considered a failed attempt to apprehend revolutionaries who were serving in the cabinet ministry. Wilcox reinforced the theory of citizen's arrest, himself, when he lashed out at Lorrin Thurston on the floor of the Legislative Assembly in 1890. Thurston, being one of the organizers of the 1887 revolution, was an insurgent and served at the time as the so-called Minister of the Interior. Wilcox argued:

Yes, Mr. Minister, with your heart ever full of venom for the people and country which nurtured you and your fathers, I say, you and such as you are the murderers. The murderers and the blood of the murdered should be placed where

¹²² *Id.*, 298.

¹²³ William Blackstone, *Commentaries of the Laws of England*, vol. 4 (The University of Chicago Press 1979), 289

it belongs, with those who without warrant opened fire upon natives trying to secure a hearing of their grievances before their King. ...Our object was to restore a portion of the rights taken away by force of arms from the King. ... Before the Living God, I never felt this action of mine to be a rebellion against my mother land, her independence, and her rights, but (an act) for the support and strengthening of the rights of my beloved race, the rights of liberty, the rights of the Throne and the good of the beautiful flag of Hawai`i; and if I die as a result of this my deed, it is a death of which I will be most proud, and I have hope I will never lack the help of the Heavens until all the rights are returned which have been snatched by the self-serving migrants of America.¹²⁴

At the close of this tumultuous legislative session, where Hawaiian subjects were making their objections heard, the King's health had deteriorated, and he planned to travel to the city of San Francisco for a period of respite. On November 25th, he departed on board the U.S.S. Charleston and he designated Lili'uokalani, his heir apparent, as Regent during his absence.

Judicial Remedies Available

According to James Blount, "none of the legislation complained of would have been considered a cause for revolution in any one of the United States, but would have been used in the elections to expel the authors from power. The alleged corrupt action of the King could have been avoided by more careful legislation and would have been a complete remedy for the future."¹²⁵ Reinforcing Blount's observation that there were

¹²⁴ *Speech of Robert W. Wilcox before the Hawaiian Legislative Assembly*, June 10, 1890.

¹²⁵ Executive Documents, *supra* note 26, 574.

judicial remedies available to the ordinary citizen under Hawaiian law to hold account government officials, if they violated the law as alleged, was clearly pointed out by the Hawaiian Supreme Court in *Castle vs. Kapena, Minister of Finance*.¹²⁶ The plaintiffs in this case were W.R. Castle, Sanford B. Dole, and William O. Smith who were also the leaders of the 1887 coup. These individuals sought to “enjoin the Minister [of Finance] from taking silver half-dollars for gold par bonds” by petitioning for a writ of mandamus. Although the court denied the writ on substantive grounds, it did maintain the remedy for tax paying citizens to hold to account governmental officials at the seat of government. The proper remedy was mandamus or injunction, which could be applied for by tax paying citizens in any court of equity in the Kingdom, and, if the circumstances were warranted, private citizens could “bring it in the name of the Attorney-General, and permission to do so [by the court] is accorded as of course.”¹²⁷ The court also declared that:

the Constitution provides that the Ministers are responsible. It would be an intolerable doctrine in a constitutional monarchy, to extend the inviolability of the Sovereign to his Ministry; to claim that what is directed to be done by the King in Cabinet Council, and is done by any of his Ministers, is to be treated as the personal act of the Sovereign. Art. 42. “No act of the King shall have any effect unless it be countersigned by a Minister, who by that signature makes himself responsible.”¹²⁸

¹²⁶ *Castle v. Kapena*, 5 Hawai'i 27 (1883).

¹²⁷ *Id.*, 34.

¹²⁸ *Id.*, 36.

The principle of necessity legitimizes a revolutionary act—otherwise a capital crime of treason—and renders lawful what would otherwise be unlawful. George Williams states that in order to legitimize a revolutionary act under the principle of necessity there “must be a transient and proportionate response to the crisis,” and the response “may be invoked only to uphold the rule of law and the existing legal order, and, therefore, cannot be applied to uphold the legality of a new revolutionary regime.”¹²⁹ Necessity cannot be applied in this case, because the revolutionaries sought to consolidate their power devoid of any rule of law or maintenance of the existing legal order in order to benefit a “little oligarchy, with a sham republican constitution.”¹³⁰ Where a written constitution is the supreme law of the land, the doctrine of necessity calls for its temporary suspension and not its termination, for the necessity principle is designed to uphold the rule of law and the existing constitution, and not to abrogate it. Hawaiians had long understood this principle as evidenced in a resolution read before the 1864 constitutional convention by Delegates Parker and Gulick:

We do not deny that there may occur a crisis in a nation’s history, when Revolution is justifiable, when a Constitution may be violated, and a government resolved back into its constituent elements. But this doubtful and dangerous right is to be exercised only in those terrible emergencies, when the very existence of a nation is at stake, and when all Constitutional methods have been tried and found wanting.¹³¹

¹²⁹ George Williams, “The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji,” *Oxford University Commonwealth Law Journal*, 1 (2001): 80.

¹³⁰ Executive Documents, *supra* note 26, 760.

¹³¹ “Resolution read before the Constitutional Convention on July 22, 1864, Mr. Parker and Mr. Gulick,” *The Convention*, July 27, 1864, vol. 6, (The Polynesian Press 1864).

THE HAWAIIAN CONSTITUTIONAL ORDER

Unlike Kamehameha V, Kalakaua, as the chief executive, did not have the constitutional authority to abrogate and then subsequently promulgate a new constitution without legislative approval. The constitution of 1864 no longer had the sovereign prerogative—Article 45, and, furthermore, the enactment of law, whether organic or statutory, resided solely with the Legislative Assembly together with the Crown. The 1864 Constitution, as amended, the Civil Code, Penal Code, and the Session laws of the Legislative Assemblies enacted before the 1887 revolution, comprised the legal order of the Hawaiian state. Article 78 of the 1864 Constitution provided that all “laws now in force in this Kingdom, shall continue and remain in full effect, until altered or repealed by the Legislature; such parts only excepted as are repugnant to this Constitution. All laws heretofore enacted, or that may hereafter be enacted, which are contrary to this Constitution, shall be null and void.” For the next four years, the insurgents would struggle to maintain their control of the seat of government over the protests and opposition of Hawaiian subjects organized into political organizations. Notwithstanding the state of revolution, the legal order of the Hawaiian Kingdom remained intact and continued to serve as the basis of Hawaiian constitutional law.

Territory

On March 16th 1854, Robert Wyllie, Hawaiian Minister of Foreign Affairs, made the following announcement to the British, French and U.S. diplomats stationed in Honolulu.

I have the honor to make known to you that that the following islands, &c., are within the domain of the Hawaiian Crown, viz:

Hawai'i, containing about, 4,000 square miles;

Maui, 600 square miles;

O'ahu, 520 square miles;

Kaua'i, 520 square miles;

Molokai, 170 square miles;

Lana'i, 100 square miles;

Ni'ihau, 80 square miles;

Kaho'olawe, 60 square miles;

Nihoa, known as Bird Island,

Molokini)

Lehua) Islets, little more than barren rocks:

Ka'ula)

and all Reefs, Banks and Rocks contiguous to either of the above, or within the compass of the whole.¹³²

Four additional Islands were annexed to the Hawaiian Kingdom under the doctrine of discovery since the above announcement. Laysan Island was annexed to the Hawaiian Kingdom by discovery of Captain John Paty on May 1st 1857.¹³³ Lisiansky Island also was annexed by discovery of Captain Paty on May 10th 1857.¹³⁴ Palmyra Island, a cluster of low islets, was taken possession of by Captain Zenas Bent on April

¹³² *Islands of the Hawaiian Domain*, prepared by A.P. Taylor, Librarian (January 10, 1931), 5.

¹³³ *Id.*, 7.

¹³⁴ *Id.*

15th 1862, and proclaimed as Hawaiian Territory.¹³⁵ And Ocean Island, also called Kure atoll, was acquired September 20th 1886, by proclamation of Colonel J.H. Boyd.¹³⁶ Territorial jurisdiction extends “to the distance of one marine league (three miles), surrounding each of Our Islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau, commencing at low water mark on each of the respective coasts, of said Islands, and includes all the channels passing between and dividing said Islands, from Island to Island.”¹³⁷

The Islands that comprised the territory of the Hawaiian Kingdom on January 16th 1893 are located in the Pacific Ocean between 5° and 23° north latitude and 154° and 178° west longitude.

<u>Island:</u>	<u>Location:</u>	<u>Square Miles/Acreage:</u>
Hawai'i	19° 30' N 155° 30' W	4,028.2 / 2,578,048
Maui	20° 45' N 156° 20' W	727.3 / 465,472
O'ahu	21° 30' N 158° 00' W	597.1 / 382,144
Kaua'i	22° 03' N 159° 30' W	552.3 / 353,472
Molokai	21° 08' N 157° 00' W	260.0 / 166,400
Lana'i	20° 50' N 156° 55' W	140.6 / 89,984
Ni'ihau	21° 55' N 160° 10' W	69.5 / 44,480
Kaho'olawe	20° 33' N 156° 35' W	44.6 / 28,544
Nihoa	23° 06' N 161° 58' W	0.3 / 192
Molokini	20° 38' N 156° 30' W	0.04 / 25.6

¹³⁵ *Id.*

¹³⁶ *Id.*, 8.

¹³⁷ March 16, 1854 Proclamation of Hawaiian Neutrality by His Majesty King Kamehameha III.

Lehua	22° 01' N 160° 06' W	0.4 / 256
Ka'ula	21° 40' N 160° 32' W	0.2 / 128
Laysan	25° 50' N 171° 50' W	1.6 / 1,024
Lisiansky	26° 02' N 174° 00' W	0.6 / 384
Palmyra	05° 52' N 162° 05' W	4.6 / 2,944
Ocean (a.k.a. Kure atoll)	28° 25' N 178° 25' W	0.4 / 256

Citizenship

On January 21st 1868, Ferdinand Hutchison, Hawaiian Minister of the Interior, stated the criteria for Hawaiian nationality. He announced that “In the judgment of His Majesty’s Government, no one acquires citizenship in this Kingdom unless he is born here, or born abroad of Hawaiian parents, (either native or naturalized) during their temporary absence from the kingdom, or unless having been the subject of another power, he becomes a subject of this kingdom by taking the oath of allegiance.” According to the law of naturalization, the Minister of the Interior:

shall have the power in person upon the application of any alien foreigner who shall have resided within the Kingdom for five years or more next preceding such application, stating his intention to become a permanent resident of the Kingdom, to administer the oath of allegiance to such foreigner, if satisfied that it will be for the good of the Kingdom, and that such foreigner owns without encumbrance taxable real estate within the Kingdom, and is not of immoral character, nor a refugee from justice of some other country, nor a deserting sailor, marine, soldier or officer.¹³⁸

¹³⁸ Compiled Laws, *supra* note 56, 104.

The Monarch

The executive authority was vested in the Crown, who was advised by a Cabinet of Ministers and a Privy Council of State. The Crown exercised his executive powers upon the advice of his Cabinet and Privy Council of State, and no act of the Crown would have any effect unless countersigned by a Cabinet Minister, who made himself responsible. With the advice of the Privy Council, the Crown had the power to grant reprieves and pardons, after conviction, for all offences, except in cases of impeachment. The Crown was also represented by an appointed Governor on each of the main islands of Hawai`i, Maui, O`ahu, and Kaua`i. The Crown opens each new session of the Legislature by reading a Speech from the Throne, which sets out the vision of the government for the country and the policies and actions it plans to undertake. No law can be enacted without the signature of the Crown and countersigned by one of the Ministers of the Cabinet.

CABINET. The Cabinet consists of the Minister of Foreign Affairs, the Minister of the Interior, the Minister of Finance, and the Attorney General of the Kingdom. The Cabinet is the Monarch's Special Advisers in the Executive affairs of the Kingdom, and are *ex officio* members of the Privy Council of State. The Ministers are appointed and commissioned by the Monarch, and hold office during the Monarch's pleasure, subject to impeachment. No act of the Monarch has any effect unless countersigned by a Minister, who by that signature makes himself responsible. Each member of the Cabinet keeps an office at the seat of Government, and is accountable for the conduct of his/her deputies and clerks. The Ministers also hold seats *ex officio*, as Nobles, in the Legislative Assembly.

On the first day of the opening of the Legislative Assembly, the Minister of Finance presents the Financial Budget in the Hawaiian and English languages.

PRIVY COUNCIL OF STATE. The Monarch, by Royal Letters Patent, can appoint any of his subjects, who have attained the age of majority, a member of the Privy Council of State. Every member of the Privy Council of State, before entering upon the discharge of his/her duties as such, takes an oath to support the Constitution, to advise the Monarch honestly, and to observe strict secrecy in regard to matters coming to his/her knowledge as a Privy Counselor. The duty of every Privy Counselor is: to advise the Monarch according to the best of his knowledge and discretion; to advise for the Monarch's honor and the good of the public, without partiality through friendship, love, reward, fear or favor; and, finally, to avoid corruption—and to observe, keep, and do all that a good and true counselor ought to observe, keep, and do to his Sovereign.

Legislative Assembly

The Legislative Department of the Kingdom is composed of the Monarch, the Nobles, and the Representatives, each of whom has a negative on the other, and in whom is vested full power to make all manner of wholesome laws. They judge for the welfare of the nation, and for the necessary support and defense of good government, provided it is not repugnant or contrary to the Constitution. The Nobles sit together with the elected Representatives of the people in what is referred to as the House of the Legislative Assembly.

NOBLES. The Nobles sit together with the elected Representatives of the people and cannot exceed thirty in number. Nobles also have the sole power to try impeachments made by the Representatives. Nobles are appointed by the

Monarch for a life term and serve without pay. A person eligible to be a Noble must be a Hawaiian subject or denizen, resided in the Kingdom for at least five years, and attained the age of twenty-one years. Nobles can introduce bills and serve on standing or special Committees established by the Legislative Assembly. Each Noble is entitled to one vote in the Legislative Assembly.

REPRESENTATIVES. The Representatives sit together with the appointed Nobles and cannot exceed forty in number. Each Representative is entitled to one vote in the Legislative Assembly. Representatives have the sole power to impeach any Cabinet Minister, officer in government or Judge, but the Nobles reserve the power to try and convict an impeached officer. A person eligible to be a Representative of the people must be a Hawaiian subject or denizen, at least twenty-five years, must know how to read and write, understand accounts, and have resided in the Kingdom for at least one year immediately preceding his election. The people elect representatives from twenty-five districts in the Kingdom. Elections occur biennially on even numbered years, and each elected Representative has a two-year term. Unlike the Nobles, Representatives are compensated for their term in office. Representation of the People is based upon the principle of equality, and is regulated and apportioned by the Legislature according to the population, which is ascertained from time to time by the official census.

PRESIDENT OF THE LEGISLATIVE ASSEMBLY. The President is the Chair for conducting business in the House of the Legislative Assembly. He is elected by the members of the Legislative Assembly at the opening of the Session and appoints members to each of the select or standing committees. The President preserves order and decorum, speaks to points of order in preference to other

members, and decides all questions of order subject to an appeal to the House by any two members.

The Judiciary

The judicial power of the Kingdom is vested in one Supreme Court and in such inferior courts as the Legislature may, from time to time, establish. The Supreme Court is the highest court in the land. It is the final court of appeal at the top of the Hawaiian Kingdom's judicial system. The Supreme Court considers civil, criminal and constitutional cases, but normally only after the cases have been heard in appropriate lower circuit, district or police courts. The Supreme Court consists of a Chief Justice and four (4) Associate Justices. All judges are appointed by the Monarch upon advise of the Privy Council of State. Any person can have their case heard by the Supreme Court, but first, permission or leave must be obtained from the court. Leave is granted for cases that involve a matter of public importance, or a law or fact concerning the Hawaiian Constitution. The Supreme Court sits for four terms a year on the first Mondays in the months of January, April, July and October. The Court may however hold special terms at other times, whenever it shall deem it essential to the promotion of justice. Decisions by the Court are decided by majority.

Rule of Law.

Hawaiian governance is based on respect for the Rule of Law. Hawaiian subjects rely on a society based on law and order, and are assured that the law will be applied equally and impartially. Impartial courts depend on an independent judiciary. The independence of the judiciary means that Judges are free from outside influence, and

notably from influence from the Crown. Initially, the first constitution of the country in 1840 provided that the Crown serve as Chief Justice of the Supreme Court, but this provision was ultimately removed by amendment in 1852 in order to provide separation between the executive and judicial branches. Article 65 of the 1864 Constitution of the country provides that only the Legislative Assembly, although appointed by the Crown, can remove Judges by impeachment. The Rule of Law precludes capricious acts on the part of the Crown or by members of the government over the just rights of individuals guaranteed by a written constitution. According to Hawaiian Supreme Court Justice Alfred S. Hartwell:

The written law of England is determined by their Parliament, except in so far as the Courts may declare the same to be contrary to the unwritten or customary law, which every Englishman claims as his birthright. Our Legislature, however, like the Congress of the United States, has not the supreme power held by the British Parliament, but its powers and functions are enumerated and limited, together with those of the Executive and Judicial departments of government, by a written constitution. No act of either of these three departments can have the force and dignity of law, unless it is warranted by the powers vested in that department by the Constitution. Whenever an act purporting to be a statute passed by the Legislature is an act which the Constitution prohibits, or does not authorize, and such act is sought to be enforced as law, it is the duty of the Courts to declare it null and void.¹³⁹

¹³⁹ *In Re Gip Ah Chan*, 6 Hawai'i 25, 34 (1870).

Separation of Powers

Although the constitution provided that the executive, legislative and judicial branches be distinct, they are nevertheless component agencies of a constitutional monarchy that exercises, together the “Supreme Power of the Kingdom.” Unlike the United States theory of separation of power where the branches of government are assumed independent of each other with “certain discretionary rights, privileges, prerogatives,”¹⁴⁰ the Hawaiian theory views the branches as coordinate in function, but distinct in form. Hawaiian constitutional law provides the following interactions of the three powers in the administration of governance.

The King “shall never proclaim war without the consent of the Legislative Assembly;”¹⁴¹ the “King has the power to make Treaties,” but when treaties involve “changes in the Tariff or in any law of the Kingdom [it] shall be referred for approval to the Legislative Assembly;”¹⁴² the King’s “Ministers are responsible,”¹⁴³ and “hold seats *ex officio*, as Nobles, in the Legislative Assembly;”¹⁴⁴ the “Legislative power of the Three Estates of this Kingdom is vested in the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives of the People, sitting together;”¹⁴⁵ the Chief Justice of the Supreme Court “shall be *ex officio*

¹⁴⁰ Charles Grove Haines, “Ministerial Responsibility Versus the Separation of Powers,” *The American Political Science Review* 16(2) (1922): 194, 199.

¹⁴¹ 1864 HAWN. CONST., Article 26

¹⁴² *Id.*, Article 29

¹⁴³ *Id.*, Article 31.

¹⁴⁴ *Id.*, Article 43.

¹⁴⁵ *Id.*, Article 45.

President of the Nobles in all cases of impeachment, unless when impeached himself;”¹⁴⁶ and the “King, His Cabinet, and the Legislative Assembly, shall have authority to require the opinions of the Justices of the Supreme Court, upon important questions of law, and upon solemn occasions.”¹⁴⁷

¹⁴⁶ *Id.*, Article 68.

¹⁴⁷ *Id.*, Article 70.

CHAPTER 4

THE PROLONGED OCCUPATION OF THE HAWAIIAN KINGDOM: LILUOKALANI TO THE PRESENT

King Kalakaua died in San Francisco on January 20th 1891, and his body returned to Honolulu on board the USS Charleston on the 29th. That afternoon in a meeting of the Privy Council, Lili`uokalani took the oath of office, where she swore “in the presence of Almighty God, to maintain the Constitution of the Kingdom whole and inviolate, and to govern in conformity therewith.” Chief Justice Albert F. Judd administered the oath from the 1887 constitution, but its wording was the exact same as the constitution of 1864. Lili`uokalani was thereafter proclaimed Queen. Upon entering office, the legislative and judicial branches of government were compromised by the revolution. The Nobles were an elected body of men whose allegiance was to the foreign element of the population, and three of the justices of the Supreme Court, including the Chief Justice, himself, participated in the revolution by assisting in drafting the 1887 constitution. The Queen was also prevented from confirming her niece, Ka`iulani Cleghorn, as heir-apparent, because the Nobles had been prevented from sitting in the Legislative Assembly since 1887 when they were replaced by an elected body beholden to foreign interests. Article 22 provides that “the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King's life.” Nevertheless, Ka`iulani, by nomination of the Queen, could be considered as a *de facto* heir-apparent, subject to confirmation by the Nobles when reconvened.

UNITED STATES' VIOLATION OF HAWAIIAN STATE SOVEREIGNTY

Lili`uokalani's reign was fraught with political power struggles and rumors of overthrow, mainly due to the U.S. McKinley Tariff Act that created an economic depression. Taking heed to calls by the people and political organizations, in particular the Hui Kalai`aina (Hawaiian Political Association), to reinstate the lawful constitution, the Queen proclaimed her intention to do so on January 14th 1893. This caused the leader of the 1887 revolution, Lorrin Thurston, to organize the revolutionaries into a group calling themselves the Committee of Safety to plan for the ultimate takeover of the government and secure annexation to the U.S. Being a minority, they sought active support from U.S. resident Minister John L. Stevens on January 16th, who, as part of the plan, would order the landing of U.S. troops to protect the insurgents while they prepare for the annexation of the Hawaiian Islands to the United States by a treaty of cession and not conquest. On January 17th the group declared themselves to be the provisional government headed by Sanford Dole as president. A treaty was signed on February 14th 1893, between a provisional government established as a result of U.S. intervention, and Secretary of State James Blaine. President Benjamin Harrison thereafter submitted the treaty to the United States Senate for ratification in accordance with the U.S. constitution. The election for the U.S. Presidency already had taken place in 1892 and resulted in Grover Cleveland defeating the incumbent Benjamin Harrison, but Cleveland's inauguration was not until March 1893. After entering office, Cleveland received notice by a Hawaiian envoy commissioned by Queen Lili`uokalani that the overthrow and so-called revolution derived from illegal intervention by U.S. diplomats and military personnel. He withdrew the treaty from the Senate, and appointed James H. Blount, a

former U.S. Representative from Georgia and former Chairman of the House Committee on Foreign Affairs, as special commissioner to investigate the terms of the so-called revolution and to report his findings.

First Attempt to Illegally Annex Hawaiian Islands by Treaty

The Blount investigation found that the United States Legation assigned to the Hawaiian Kingdom, together with United States Marines and Naval personnel, were directly responsible for the illegal overthrow of the Hawaiian government with the ultimate goal of transferring the Hawaiian Islands to the United States from an installed government.¹ Blount reported that, “in pursuance of a prearranged plan, the Government thus established hastened off commissioners to Washington to make a treaty for the purpose of annexing the Hawaiian Islands to the United States.”² The report also detailed the culpability of the United States government in violating international laws, as well as Hawaiian State territorial sovereignty. On December 18th 1893, President Grover Cleveland addressed the Congress and he described the United States’ action as an “act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress.”³ Thus he acknowledged that through such acts the government of a peaceful and friendly people was overthrown. Cleveland further stated that a “substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to

¹ United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office 1895), 567, [hereafter Executive Documents]. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 136.

² *Id.*, 587.

³ *Id.*, 456. Reprinted at 1 *Hawaiian Journal of Law & Politics* 201 (Summer 2004).

repair,”⁴ and committed to Queen Lili`uokalani that the Hawaiian government would be restored. According Professor Krystyna Marek:

It is a well-known rule of customary international law that third States are under a clear duty of non-intervention and non-interference in civil strife within a State. Any such interference is an unlawful act, even if, far from taking the form of military assistance to one of the parties, it is merely confined to premature recognition of the rebel government.⁵

President Cleveland refused to resubmit the annexation treaty to the Senate, but he failed to follow through in his commitment to re-instate the constitutional government as a result of partisan wrangling in the U.S. Congress.⁶ In a deliberate move to further isolate the Hawaiian Kingdom from any assistance of other countries and to reinforce and protect the puppet government installed by U.S. officials, the Senate and House of Representatives each passed similar resolutions in 1894 strongly warning other countries “that any intervention in the political affairs of these islands by any other Government will be regarded as an act unfriendly to the United States.”⁷ The Hawaiian Kingdom was thrown into civil unrest as a result. Five years passed before Cleveland’s presidential successor, William McKinley, entered into a second treaty of cession with the same individuals who participated in the illegal overthrow with the U.S. legation in 1893, and were now calling themselves the Republic of Hawai`i. This second treaty was signed on

⁴ *Id.*

⁵ Krystyna Marek, *Identity and Continuity of States in Public International Law*, 2nd ed., (Librairie Droz 1968), 64.

⁶ Ralf Kuykendall, *The Hawaiian Kingdom: 1874-1893, The Kalakaua Dynasty*, vol. III (Honolulu: University of Hawai`i Press 1967), 647.

⁷ Senate Resolution, May 31, 1894, 53rd Congress, 2nd Session, vol. 26.

June 17th 1897 in Washington, D.C., but would “be taken up immediately upon the convening of Congress next December.”⁸

Protests Prevent Second Attempt to Annex Hawaiian Islands by Treaty

Queen Lili`uokalani was in the United States at the time of the signing of the treaty and protested the second annexation attempt of the country. While in Washington, D.C., the Queen filed a diplomatic protest with the United States Department of State on June 17th 1897. The Queen stated, in part:

I, Lili`uokalani of Hawai`i, by the will of God named heir apparent on the tenth day of April, A.D. 1877, and by the grace of God Queen of the Hawaiian Islands on the seventeenth day of January, A.D. 1893, do hereby protest against the ratification of a certain treaty, which, so I am informed, has been signed at Washington by Messrs. Hatch, Thurston, and Kinney, purporting to cede those Islands to the territory and dominion of the United States. I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and, finally, an act of gross injustice to me.⁹

Hawaiian political organizations in the Islands filed additional protests with the Department of State in Washington, D.C. These organizations were the Men and

⁸ “Hawaiian Treaty to Wait—Senator Morgan Suggests that It Be Taken Up at This Session Without Result.” *The New York Times*, 3 (July 25, 1897).

⁹ Liliuokalani, *Hawaii’s Story by Hawaii’s Queen* (Charles E. Tuttle Co., Inc. 1964), 354. Reprinted at 1 *Hawaiian Journal of Law & Politics* 227 (Summer 2004).

Women’s Hawaiian Patriotic League (Hui Aloha `Aina), and the Hawaiian Political Association (Hui Kalai`aina).¹⁰ In addition, a petition of 21,169 signatures of Hawaiian subjects protesting annexation was filed with the Senate when it convened in December 1897.¹¹ The Senate was unable to garner enough votes to ratify the so-called treaty, but events would quickly change as war loomed. The Queen and her people would find themselves at the mercy of the United States military once again, as they did when U.S. troops disembarked the U.S.S. Boston in Honolulu harbor without permission from the Hawaiian government on January 16th 1893. The legal significance of these protests creates a fundamental bar to any future claim the United States may assert over the Hawaiian Islands by acquisitive *prescription*. “*Prescription*,” according to Professor Gerhard von Glahn, “means that a foreign state occupies a portion of territory claimed by a state, encounters no protest by the ‘owner,’ and exercises rights of sovereignty over a long period of time.”¹²

An example of a claim to “*prescription*” can be found in the *Chamizal* arbitration, in which the United States claimed prescriptive title to Mexican land. The Rio Grande River that separated the U.S. city of El Paso and the Mexican city of Juarez moved, through natural means, into Mexican territory, thereby creating six hundred acres of dry land on the U.S. side of the river.¹³ Over the protests of the Mexican government

¹⁰ Tom Coffman, *Nation Within: The Story of America’s Annexation of the Nation of Hawai`i* (Tom Coffman/Epicenter 1999), 268.

¹¹ Noenoe Silva, *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (Duke University Press 2004), 145-159. See also Coffman, *supra* note 10, 273-287.

¹² Gerhard von Glahn’s, *Law Among Nations*, 6th ed., (Macmillan Publishing Company 1992), 371.

¹³ “El Chamizal’ Dispute Between the United States and Mexico,” *American Journal of International Law* 4(4) (1910): 925.

who called for the renegotiation of the territorial boundaries established since the 1848 treaty of Guadalupe Hidalgo that ended the Mexican American war, the State of Texas granted land titles to

American citizens; the United States Government...erected...a custom-house and immigration station; the city authorities of El Paso...erected school houses; the tracks as well as stations and warehouses, of American owned railroads and street railway have been placed thereon.¹⁴

In 1911, an arbitral commission established by the two States rejected the United States' claim to prescriptive title and ruled in favor of Mexico. Professor Ian Brownlie, drawing from the 1911 award, confirmed that, "possession must be peaceable to provide a basis for prescription, and, in the opinion of the Commissioners, diplomatic protests by Mexico prevented title arising." Brownlie further concluded that, "failure to take action which might lead to violence could not be held to jeopardize Mexican rights."¹⁵ In other words, protests by the Queen and Hawaiian subjects loyal to their country had a significant legal effect in barring the U.S. from any possible future claim over Hawai'i by *prescription*—failure to continue the protests, which could lead to violence, would not jeopardize vested rights.

Breakout of the Spanish-American War

On April 25th 1898, Congress declared war on Spain. On the following day, President McKinley issued a proclamation that stated, "It being desirable that such war

¹⁴ *Id.*, 926.

¹⁵ Ian Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press 1990), 157; see also "Chamizal Arbitration Between the United States and Mexico," *American Journal of International Law* 5 (1911): 782.

should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice.”¹⁶ The Supreme Court later explained that “the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.”¹⁷ Clearly, the McKinley administration sought to proclaim before the international community that the war would be conducted in compliance with international law.

Battles were fought in the Spanish colonies of Puerto Rico and Cuba, as well as the Spanish colonies of the Philippines and Guam. After Commodore Dewey defeated the Spanish Fleet in the Philippines on May 1st 1898, the *U.S.S. Charleston*, a protected cruiser, was re-commissioned on May 5th, and ordered to lead a convoy of 2,500 troops to reinforce Dewey in the Philippines and Guam. These troops were boarded on the transport ships of the *City of Peking*, the *City of Sidney* and the *Australia*. In a deliberate violation of Hawaiian neutrality during the war as well as of international law, the convoy, on May 21st, set a course to the Hawaiian Islands for re-coaling purposes. The convoy arrived in Honolulu on June 1st, and took on 1,943 tons of coal before it left the islands on the 4th of June.¹⁸ A second convoy of troops bound for the Philippines, on the transport ships the *China*, *Zelandia*, *Colon*, and the *Senator*, arrived in Honolulu on June

¹⁶ 30 U.S. Stat. 1770.

¹⁷ *The Paquete Habana*, 175 U.S. 712 (1900).

¹⁸ U.S. Minister to Hawai'i Harold Sewall to U.S. Secretary of State William R. Day, No. 167, (June 4, 1898), Hawai'i Archives.

23rd and took on 1,667 tons of coal.¹⁹ During this time, the supply of coal for belligerent ships entering a neutral port was regulated by international law.

Hawaiian Neutrality Intentionally Violated

Major General Davis, Judge Advocate General for the U.S. Army, notes that “during the American Civil War, the British Government (on January 31, 1862) adopted the rule that a belligerent armed vessel was to be permitted to receive, at any British port, a supply of coal sufficient to enable her to reach a port of her own territory, or nearer destination.”²⁰ The Philippine Islands were not U.S. territory, but the territory of Spain. As soon as it became apparent that the so-called Republic of Hawai‘i, a puppet government of the U.S. since 1893, had welcomed the U.S. naval convoys and assisted in re-coaling their ships, a formal protest was lodged on June 1st 1898 by H. Renjes, Spanish Vice-Counsel in Honolulu. Minister Harold Sewall, from the U.S. Legation in Honolulu, notified Secretary of State William R. Day of the Spanish protest in a dispatch dated June 8th.²¹ Renjes declared:

In my capacity as Vice Consul for Spain, I have the honor today to enter a formal protest with the Hawaiian Government against the constant violations of Neutrality in this harbor, while actual war exists between Spain and the United States of America.²²

¹⁹ *Id.*, No. 175 (27 June 1898).

²⁰ George B. Davis, *The Elements of International Law* (Harper & Brothers Publishers 1903), 430, note 3.

²¹ Sewall to Day, *supra* note 18, No. 168 (8 June 1898).

²² *Id.*

The 1871 Treaty of Washington between the United States and Great Britain addressed the issue of State neutrality during war, and provided that a “neutral government is bound...not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purposes of the renewal or augmentation of military supplies or arms, or the recruitment of men.”²³ Consistent with the 1871 Treaty, Major General Davis, stated that as “hostilities in time of war can only lawfully take place in the territory of either belligerent, or on the high seas, it follows that neutral territory, as such, is entitled to an entire immunity from acts of hostility; it cannot be entered by armed bodies of belligerents, because such an entry would constitute an invasion of the territory, and therefore of the sovereignty, of the neutral.”²⁴ In an article published in the *American Historical Review* in 1931, T.A. Bailey stated, “although the United States had given formal notice of the existence of war to the other powers, in order that they might proclaim neutrality, and was jealously watching their behavior, she was flagrantly violating the neutrality of Hawaii.”²⁵ Bailey continued:

The position of the United States was all the more reprehensible in that she was compelling a weak nation to violate the international law that had to a large degree been formulated by her own stand on the Alabama claims. Furthermore, in line with the precedent established by the Geneva award, Hawaii would be liable for every cent of damage caused by her dereliction as a neutral, and for the United States to force her into this position was cowardly and ungrateful. At the end of the war, Spain or cooperating power would doubtless occupy Hawaii,

²³ 17 U.S. Stat. 863.

²⁴ Davis, *supra* note 20, 429.

²⁵ T.A. Bailey, “The United States and Hawaii During the Spanish-American War,” *The American Historical Review* 36(3) (April 1931): 557.

indefinitely if not permanently, to insure payment of damages, with the consequent jeopardizing of the defenses of the Pacific Coast.²⁶

Due to U.S. intervention in 1893 and the subsequent creation of a puppet government, the United States took complete advantage of its own creation in the islands during the Spanish-American war and violated Hawaiian neutrality. Marek argues that:

Puppet governments are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements, however correct in form; failing a genuine contracting party, such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant.²⁷

Newlands Submits Resolution to Annex Hawaiian Islands

After the defeat of the Spanish Pacific Squadron in the Philippines, Congressman Francis Newlands (D-Nevada), submitted a joint resolution for the annexation of the Hawaiian Islands to the House Committee on Foreign Affairs on May 4th 1898. Six days later, hearings were held on the Newlands resolution, and in testimony submitted to the committee, U.S. Naval Captain Alfred Mahan explained the military significance of the Hawaiian Islands to the United States. Captain Mahan stated:

It is obvious that if we do not hold the islands ourselves we cannot expect the neutrals in the war to prevent the other belligerent from occupying them; nor can the inhabitants themselves prevent such occupation. The commercial value is not

²⁶ *Id.*

²⁷ Marek, *supra* note 5, 114.

great enough to provoke neutral interposition. In short, in war we should need a larger Navy to defend the Pacific coast, because we should have not only to defend our own coast, but to prevent, by naval force, an enemy from occupying the islands; whereas, if we preoccupied them, fortifications could preserve them to us. In my opinion it is not practicable for any trans-Pacific country to invade our Pacific coast without occupying Hawaii as a base²⁸

General John Schofield of the Army also provided testimony to the committee that justified the seizure of the Islands. He stated:

We got a preemption title to those islands through the volunteer action of our American missionaries who went there and civilized and Christianized those people and established a Government that has no parallel in the history of the world, considering its age, and we made a preemption which nobody in the world thinks of disputing, provided we perfect our title. If we do not perfect it in due time, we have lost those islands. Anybody else can come in and undertake to get them. So it seems to me the time is now ripe when this Government should do that which has been in contemplation from the beginning as a necessary consequence of the first action of our people in going there and settling those islands and establishing a good Government and education and the action of our Government from that time forward on every suitable occasion in claiming the right of American influence over those islands, absolutely excluding any other foreign power from any interference.²⁹

On May 17th 1898, Congressman Robert Hitt (R-Illinois) reported the Newlands resolution out of the House Committee on Foreign Affairs, and debates ensued in the

²⁸ 31 United States Congressional Records, 55th Congress, 2nd Session, at 5771.

²⁹ *Id.*

House until the resolution was passed on June 15th.³⁰ But even before the resolution reached the Senate on June 16th, the Senators were already engaging the topic of annexation by resolution on May 31st. During a debate on the Revenue Bill for the maintenance of the war, the topic of the annexation caused the Senate to go into secret executive session. Senator David Turpie (D-Indiana) made a motion to have the Senate enter into secret session and according to Senate rule thirty-five, the galleries were ordered cleared and the doors closed to the public. These session transcripts, however, would later prove to be important.³¹

The Great Charade: Annexation by Congressional Resolution

From June 16th to July 6th, the resolution of annexation was in the Senate chambers, and would be the final test of whether or not the annexationists could succeed in their scheme. Only by treaty, whether by cession or conquest, can an owner State, as the grantor, transfer its territorial sovereignty to another State, the grantee, “since cession is a bilateral transaction.”³² A joint resolution of Congress, on the other hand, is not only a unilateral act, but also municipal legislation about which international law has imposed “strict territorial limits on national assertions of legislative jurisdiction.”³³ Therefore, in order to give the impression of conformity to cessions recognizable under international law, the House resolution embodied the text of the failed treaty. On this note, Senator

³⁰ *Id.*, 6019.

³¹ Associated Press, “Secret Debate on U.S. Seizure of Hawaii Revealed,” *Honolulu Star-Bulletin*, A1 (February 1, 1969).

³² Lassa Oppenheim, *International Law*, 3rd ed., (Longmans, Green and Company 1920), 376.

³³ Gary Born, *International Civil Litigation in United States Courts*, 3rd ed., (Kluwer Law International 1996), 493.

Bacon (D-Georgia) sarcastically remarked, the “friends of annexation, seeing that it was impossible to make this treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House.”³⁴ Regarding Congressional authority to annex, the proponents relied on Article IV, section 3 of the U.S. Constitution, which provides that “New States may be admitted by the Congress into this Union.” Annexationists in both the House and Senate relied on the precedent set by the 28th Congress when it annexed Texas by joint resolution on March 1, 1845.³⁵ Opponents argued that the precedence was misplaced because Texas was admitted as a State, whereas Hawai‘i was not being annexed as a State, but as a territory. Supporters of annexation, like Senator Elkin (R-West Virginia), reasoned that if Congress could annex a State, why could it not annex territory?³⁶ On July 6th 1898, the United States Congress passed the joint resolution purporting to annex Hawaiian territory, and President McKinley signed the resolution on the following day, which proclaimed that the cession of the Hawaiian Islands had been “accepted, ratified, and confirmed.”³⁷

Like a carefully rehearsed play, the annexation ceremony of August 12th 1898, between the self-proclaimed Republic of Hawai‘i and the United States, was scripted to appear to have the semblance of international law.³⁸ On a stage fronting ‘Iolani Palace in

³⁴ Cong. Record, *supra* note 28, 6150.

³⁵ Congressional Globe, 28th Congress, 2nd Session (1845), 372.

³⁶ Cong. Record, *supra* note 28, 6149.

³⁷ 30 U.S. Stat. 750.

³⁸ 107 U.S. STAT. 1510. Reprinted at *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 290.

Honolulu, the following exchange took place between U.S. Minister Harold Sewell and Republic President Sanford Dole.³⁹

Mr. SEWELL: “Mr. President, I present to you a certified copy of a joint resolution of the Congress of the United States, approved by the President on July 7th, 1898, entitled “Joint Resolution to provide for annexing the Hawaiian Islands to the United States. This joint resolution accepts, ratifies and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii.”

Mr. DOLE: A treaty of political union having been made, and the cession formally consented to and approved by the Republic of Hawaii, having been accepted by the United States of America, I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice and friendship of the American people, yield up to you as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands.

Mr. SEWELL: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government.

Legal Interpretation of Annexation by Congressional Action

The event of annexation, through cession, is a matter of legal interpretation. According to Kelsen, a renowned legal scholar, what transforms an “event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation.”⁴⁰ He goes on to state

³⁹ Lorrin A. Thurston, *The Fundamental Law of Hawaii* (The Hawaiian Gazette Co., Ltd. 1904), 253.

⁴⁰ Hans Kelsen, *Pure Theory of Law* (University of California Press 1967), 3.

that, the “legal meaning of this act is derived from a ‘norm’ [standard or rule] whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation.”⁴¹ The norm, in this particular case, is U.S. constitutional and international law, and whether or not Congress could annex foreign territory.

It is a constitutional rule of American jurisprudence that the legislative branch, being the Congress, is not part of the treaty making power, only the Senate when convened in executive session.⁴² In other words, without proper ratification there can be no cession of territorial sovereignty recognizable under international law, and the joint resolution is but an example of the legislative branch attempting to assert its authority beyond its constitutional capacity. Douglas Kmiec, *acting* U.S. Assistant Attorney General, explained that because “the President—not the Congress—has the constitutional authority to act as the representative of the United States in foreign affairs, Congress may proclaim jurisdiction or sovereignty over the territorial sea for international law purposes if it possesses a specific constitutional power.”⁴³

United States governance is divided under three separate headings of the U.S. Constitution. Article I vests the legislative power in the Congress, Article II vests the executive power in the President, and Article III vests the judicial power in various national courts, the highest being the Supreme Court. Of these three powers, only the President has the ability to extend his authority beyond U.S. territory, as he is “the

⁴¹ *Id.*, 4.

⁴² U.S. CONST., Article II, section 2, clause 2.

⁴³ Douglas Kmiec, “Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea,” *Opinions of the Office of Legal Counsel of the U.S. Department of Justice* 12 (1988): 238, 250.

constitutional representative of the United States in its dealings with foreign nations.”⁴⁴ The joint resolution, therefore, was not only incapable of annexing the Hawaiian Islands because it had no extra-territorial force, but it also violated the terms of Article VII of the so-called treaty, which called for ratification to be done “by the President of the United States, by and with the advice and consent of the Senate.”⁴⁵ A *joint resolution* is a legislative action of Congress, while a Senate *resolution of ratification* is an executive action in concurrence with the President by virtue of his authority under Article II, not under Article I of the U.S. Constitution. Article II, section 2 provides that the President “shall have the power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.”⁴⁶ A clear and relevant example of a senate resolution in executive session took place in 1850, when the U.S. Senate ratified the Hawaiian-American treaty of friendship, commerce and navigation. Senator William King (D-Alabama) submitted the following resolution of ratification that passed by unanimous consent.

Resolved (two thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the treaty of friendship, commerce, and navigation between the United States of America and His Majesty the King of the Hawaiian Islands, concluded at Washington the 20th day of December, in the year eighteen hundred and forty-nine.⁴⁷

⁴⁴ United States v. Louisiana, 363 U.S. 1, 35 (1960).

⁴⁵ Henry E. Cooper, *Report of the Minister of Foreign Affairs to the President of the Republic of Hawaii* (Honolulu Star Press 1898), 3; see also Thurston, *supra* note 75, 245.

⁴⁶ *Id.*, 727.

⁴⁷ “Journal of the Executive Proceedings of the Senate of the United States of America,” Volume 8, p. 120.

Senator King's resolution was the standard form for ratification of international treaties, and it is clearly formatted so it could not be misconstrued to be a law or legislative action.⁴⁸ Although the joint resolution of annexation did incorporate the text of the treaty, it was, nevertheless, a Congressional law and not a resolution of ratification as proclaimed by Minister Sewell at the annexation ceremonies in Honolulu.⁴⁹ A Senate *resolution of ratification* is not a legislative act, but an executive act under the President's treaty making power. The resolution is the evidence of the "advise and consent of the senate" required under Article II, section 2 of the U.S. Constitution. Only the President and not the Congress, according to Kmiec, has the "constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States."⁵⁰

Texas was not Annexed by Congressional Action

Another blow to the annexation scheme was the reliance on Texas as a precedent for congressional authority to extend U.S. sovereignty and jurisdiction beyond U.S. territory. In fact, Congressman Hugh Dinsmore (D-Arkansas) correctly stated in the debates that Texas was never annexed by joint resolution.⁵¹ To clarify this, Professor William Adam Russ, Jr., a history scholar and political scientist, notes the manner in

⁴⁸ When the Senate Foreign Relations Committee reports out the treaty the committee also proposes a resolution of ratification usually in this form: *Resolved, (two-thirds of the Senators present concurring, therein), That the Senate advise and consent to the ratification of [or accession to] the [official treaty title].* See 1 Senate Report no. 106-71, at 122. (2001).

⁴⁹ Thurston, *supra* note 39.

⁵⁰ Kmiec, *supra* note 43, 242.

⁵¹ Cong. Record, *supra* note 28, 5778.

which Texas was admitted as a state, and concludes the annexationists' use of Texas was an "absurdity."⁵² Russ explains that,

The resolution merely signified the willingness of the United States to admit Texas as a state if it fulfilled certain conditions, such as acceptance of annexation. Obviously, if Texas refused, there would be neither annexation of a territory nor admission of a state. Moreover, there was a time limit that Texas had to present to Congress a duly ratified state constitution on or before January 1, 1846. The Texan Congress adopted the joint resolution on June 21, 1845, accepting the American offer. A special convention which met on July 4, 1845, accepted annexation and wrote a state constitution. In October, 1845, the people in a referendum not only ratified the constitution but also voted to accept annexation. Thus annexation was, in effect, accepted three times. On December 28, 1845, a bill to admit the new state was signed by President Polk, and formal admission took place on February 19, 1846, with the seating of Texan members in both houses of Congress."⁵³

If one were to look at this within the interpretive context of international law—a law between and not within independent states, there is serious doubt whether Texas was a State of the Union through Congressional legislation. On April 12th 1845, Texas entered into a treaty of annexation with the United States, but the Senate, like Hawai`i, failed to ratify the proposed cession.⁵⁴ The failure to ratify, no doubt, was attributed to the fact that Mexico did not recognize "the independence or separate existence of Texas," and

⁵² William Adam Russ, Jr., *The Hawaiian Republic, 1894-1898, And Its Struggle to Win Annexation* (Associated Universities Presses 1992), 327.

⁵³ *Id.*

⁵⁴ Hunter Miller, *Treaties and Other International Acts of the United States of America* (Government Printing Office 1934), 699.

maintained that Texas was still Mexican.⁵⁵ What followed in the eyes of international law, was the legislation of two separate Congresses conversing across the great divide of two separate territorial sovereignties, that of Texas via Mexico and the United States. It wasn't until the end of the Mexican American War that a peace treaty was signed on February 2nd 1848, whereby Mexico formally released its sovereignty over its northern territories, which included the Texan territory, and accepted the Rio Grande river to be the new boundary separating itself from Texas as a State of the American Union.⁵⁶ This raises a problem as to what was the legal status of the so-called State of Texas between its formal admission into the United States on February 19th 1846 and the final proclamation of the Treaty of Peace with Mexico on July 4th 1848. According to Russ, the solution to this paradox “is to say that Congress (precedent or no precedent) enacts into law whatever it can get a majority of its members, a majority of the people, and a majority of the Supreme Court, to believe is constitutional at any one time. In other words, legality or constitutionality consists in what the Congress and/or the Court may believe is legal or constitutional today; tomorrow the decision may be different.”⁵⁷

⁵⁵ *Id.*

⁵⁶ *Id.*, at 213. Article V of the 1848 Treaty of Peace provides: “The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or Opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico...”

⁵⁷ Russ, *supra* note 52, 330.

Government Officials and Scholars Unclear as to how Hawai`i was Annexed

Many government officials and constitutional scholars were at a loss in explaining how a joint resolution could have extra-territorial force in annexing Hawai`i, a foreign and sovereign State, because during the 19th century, as Gary Born states, “American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction.”⁵⁸ In *The Apollon* (1824), the U.S. Supreme Court illustrated this view by asserting, “that the legislation of every country is territorial,”⁵⁹ and that the “laws of no nation can justly extend beyond its own territory” for it would be “at variance with the independence and sovereignty of foreign nations.”⁶⁰ The court also explained, “however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction.”⁶¹ Consequently, Congressman Thomas H. Ball (D-Texas) characterized the annexation of the Hawaiian State by joint resolution as “a deliberate attempt to do unlawfully that which can not be lawfully done.”⁶² From the U.S. Justice Department’s Office of Legal Counsel, Kmiec also concluded that it was “unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution.”⁶³ And Westel

⁵⁸ Born, *supra* note 33, 493.

⁵⁹ *Rose v. Himely*, 8 U.S. 241, 279 (1807).

⁶⁰ *The Apollon*, 22 U.S. 362, 370 (1824).

⁶¹ *Id.*

⁶² Cong. Records, *supra* note 28, 5975.

⁶³ Kmiec, *supra* note 43, 262.

Willoughby, a constitutional scholar and political scientist, summed it all up when he stated:

The constitutionality of the annexation of Hawai'i, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act...Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted."⁶⁴

Some scholars, however, argued that the annexation of both Texas and Hawai'i did not take place by congressional action, but by congressional-executive agreement instead.⁶⁵ These are international agreements “made by the President as authorized in advance or approved afterwards by joint resolution of Congress.”⁶⁶ Other international agreements made by the President under his own constitutional authority are called sole executive agreements that do not require ratification from the Senate nor approval by the Congress, and the distinction between these “so-called ‘executive agreements’ and ‘treaties’ is purely a constitutional one and has no international significance.”⁶⁷ According to Professor Louis Henkin, “the constitutionality of the Congressional-Executive agreement seems established, [and] it is used regularly at least for trade and

⁶⁴ Westel Willoughby, *The Constitutional Law of the United States*, 2nd ed., (Baker, Voorhis 1929), 427.

⁶⁵ Wallace McClure, *International Executive Agreements: Democratic Procedure under the Constitution of the United States* (Columbia University Press 1941), 62-70; and Lawrence Margolis, *Executive Agreements and Presidential Power in Foreign Policy* (Praeger 1986), 7-9.

⁶⁶ Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed. (Clarendon Press 1996), 215.

⁶⁷ Harvard Research in International Law, “Draft Convention on the Law of Treaties,” *American Journal of International Law* 29 (1935): 697.

postal agreements, and remains available to Presidents for wide, even general use should the treaty process again prove difficult.”⁶⁸ The underlying problem, however, is that the joint resolution of annexation did not approve any executive agreement made by the President with the Republic of Hawai`i, whether before or after, but rather embodied the text of the failed treaty itself in statute form and used by the President as if it was a ratification of the treaty. If the Congress has no authority to negotiate with foreign governments, then how can it legislate the annexation of a foreign State that exists beyond its territorial borders. As a legislative body empowered to enact laws that are limited to governing U.S. territory, Congress could no more annex the Hawaiian Islands in 1898 as matter of military necessity during the Spanish American war than it could annex Afghanistan today as a matter of military necessity during the American war on terrorism. Without a treaty of cession or even a bona fide congressional-executive agreement, the sovereignty of the Hawaiian State remains unaffected by foreign legislation of any State. There remains no evidence in either the Presidential or Congressional records that a congressional-executive agreement was even contemplated or even discussed in the annexations of both Texas and Hawai`i. Instead, the congressional-executive agreement argument Wallace McClure made in his 1941 published work *International Executive Agreements* while he worked for the U.S. Department of State, was merely an apologist attempt to make sense of an incoherent act of arrogation.

⁶⁸ Henkin, *supra* note 66, 218.

Secret Senate Transcripts Reveal Intent of the Joint Resolution

The true intent and purpose of the 1898 joint resolution of annexation would not be known until the last week of January 1969, after a historian noted there were gaps in the congressional records. The transcripts of the Senate's secret session, 70 years earlier, were made public after the Senate passed a resolution authorizing the U.S. National Archives to open the records. The Associated Press in Washington, D.C., reported that "the secrecy was clamped on during a debate over whether to seize the Hawaiian Islands—called the Sandwich Islands then—or merely developing leased areas of Pearl Harbor to reinforce the U.S. fleet at Manila Bay."⁶⁹ Concealed by the debating rhetoric of congressional authority to annex foreign territory, the true intent of the Senate, as divulged in these transcripts, was to have the joint resolution serve merely as consent, on the part of the Congress, for the President to utilize his war powers in the occupation and seizure of the Hawaiian Islands as a matter of military necessity.

On May 31st 1898, just a few weeks after the defeat of the Spanish fleet in Manila Bay in the Philippines, and with the knowledge that Hawaiian neutrality had deliberately been violated by the McKinley administration, the Senate entered into its secret session. On this day, Senator Henry Cabot Lodge (R-Massachusetts) argued that, the "Administration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received and complications with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity."⁷⁰ According to Hall, "the rights of occupation may be

⁶⁹ Secret Debate, *supra* note 31.

⁷⁰ "Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898," *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 280.

placed upon the broad foundation of simple military necessity,”⁷¹ but occupation by necessity is a belligerent right limited to States at war with each other. Hall also states that “if occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war.”⁷² The Senate would take full advantage of the perceived right of belligerency in the war against Spain and justify the occupation of the Hawaiian Islands as a matter of necessity and self-preservation.⁷³

At the time of the Spanish American war, leading legal authority on U.S. military occupations included the seminal case *ex parte Milligan*, and U.S. Army 1st Lieutenant William E. Birkhimer’s publication “Military Government and Martial Law.” In 1892, Birkhimer wrote the first of three editions that distinguished between military government and martial law—the “former is exercised over enemy territory; the latter over loyal territory of the State enforcing it.”⁷⁴ Birkhimer sought to expound on what Chief Justice Salmon Chase noted in his dissenting opinion in *ex parte Milligan* regarding military government and martial law that exist under U.S. law.⁷⁵ According to Birkhimer, the distinction is important whereby “military government is...placed within

⁷¹ William Edward Hall, *A Treatise on International Law*, 8th Ed., (Oxford University Press, 1904), 559.

⁷² *Id.*

⁷³ Cong. Records, *supra* note 28.

⁷⁴ William E. Birkhimer, *Military Government and Martial Law* (James J. Chapman 1892), 1.

⁷⁵ *Ex parte Milligan*, 71 U.S. 2, 142 (1866).

the domain of international law, while martial law is within the cognizance of municipal law.”⁷⁶

After careful review of the transcripts of the secret session, it is very likely that the Senators, particularly Senator John Morgan (D-Alabama), were not only familiar with Birkhimer’s publication, but also with Chief Justice Chase’s statement regarding the establishment of a military government on foreign soil. Chase stated that military government is established “under the direction of the President, with the express or implied sanction of Congress.”⁷⁷ Relevant passages from Birkhimer on this subject include:

...The instituting military government in any country by the commander of a foreign army there is not only a belligerent right, but often a duty. It is incidental to the state of war, and appertains to the law of nations.

...The commander of the invading, occupying, or conquering army rules the country with supreme power, limited only by international law, and the orders of his government.

...As commander-in-chief the President is authorized to direct the movements of the naval and military forces, and to employ them in the manner he may deem most effectual to harass, conquer, and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States.

Senator Morgan, an ardent annexationist, knew first hand the limitation of exercising sovereignty beyond a State’s borders because of his service as a member of the

⁷⁶ Birkhimer, *supra* note 74.

⁷⁷ Ex parte Milligan, *supra* note 75.

Senate Foreign Relations Committee in 1884. In 1882, the American schooner *Daylight* was anchored outside the Mexican harbor of Tampico when a Mexican gunship collided with the schooner during a storm.⁷⁸ The Mexican authorities took the position that any claim for damages by the owners of the schooner should be prosecuted through Mexican tribunals and not through diplomatic channels, but the United States emphatically denied this claim.⁷⁹ U.S. Secretary of State Frelinghuysen explained to Senator Morgan in a letter that, it is the “uniform declaration of writers on public law [that] in an international point of view, either the thing or the person made the subject of jurisdiction must be within the territory, for no sovereignty can extend its process beyond its own territorial limits.”⁸⁰

As evidenced in Morgan’s exchange with Senator William Allen (P-Nebraska) in the secret session, the joint resolution was never intended to have any extra-territorial force, but was simply an “enabler” for the President to occupy the Hawaiian Islands.⁸¹ In other words, it was not a matter of U.S. constitutional law, but merely served as an “express sanction” of the Congress to support the President as their commander-in-chief in the war against Spain. Morgan, who was fully aware of the two failed attempts to annex Hawai`i by a treaty of cession, attempts to apply a perverse reasoning of military

⁷⁸ John Basset Moore, *Digest of International Law*, vol. 6, (U.S. Government Printing Office 1906), 679.

⁷⁹ *Id.*

⁸⁰ Letter concerning the Schooner *Daylight* from Secretary of State Frelinghuysen to Mr. Morgan, dated May 17, 1884, reprinted in *Foreign Relations of the United States* 358 (1885). It was later determined by a General Claims Commission (United States and Mexico) convened to hear the *Daylight Case*, docket no. 353 (1927), that the did occur “in Mexican waters and Mexican law is applicable. The law in force in Mexico at the time of the collision contained no presumption in favor of ships at anchor or in favor of sailing ships in collision with steamers.” “Judicial Decisions Involving Questions of International Law,” *The American Journal of International Law*, 21 (4) (Oct., 1927): 791.

⁸¹ Senate Transcripts, *supra* note 70.

jurisdiction over the Hawaiian Islands. The term annexation, as used in these transcripts, was not in the context of affixing or bringing together two separate territories. Instead, it was a matter of arrogating Hawaiian territory for oneself without right, but justified, in his eyes, under the principle of military necessity.

Mr. ALLEN. I do not desire to interrupt the Senator needlessly, but I want to understand his position. I infer the Senator means that Congress shall legislate and establish a civil government over territory before it is conquered and that that legislation may be carried into execution when the country is reduced by force of our arms?

Mr. MORGAN. What I mean is, the President having no prerogative powers, but deriving his powers from the law, that Congress shall enact a law to enable him to do it, and not leave it to his unbridled will and judgment.

Mr. ALLEN. Would it not be just as wise, then, to provide a code of laws for the government of a neutral territory in anticipation that within five or six months we might declare war against that power and reduce its territory?

Mr. MORGAN. I am not discussing the wisdom of that.

Mr. ALLEN. Would it not be exceptional because we have never before had a foreign war like this, or anything approximating to it. All I am contending for at this time, and all I intend to contend for at any time, is that the President of the United States shall have the powers conferred upon him by Congress full and ample, but that he shall understand that they come from Congress and do not come from his prerogative, or whatever his powers may be merely as the fighting agent of the United States, the Commander-in-Chief of the Army and Navy of the United States.

Mr. ALLEN. That would arise from his constitutional powers as Commander-in-Chief of the Army and the Navy.

Mr. MORGAN. No; his constitutional powers as Commander-in-Chief of the Army and the Navy are not defined in that instrument. When he is in foreign countries he draws his powers from the laws of nations, but when he is at home fighting rebels or Indians, or the like of that, he draws them from the laws of the United States, for the enabling power comes from Congress, and without it he cannot turn a wheel.⁸²

These transcripts are as integral to the Newlands Resolution as if it were written in the resolution itself. According to Justice Swayne of the U.S. Supreme Court in 1874, “The intention of the lawmaker is the law.”⁸³ The intent of the Senate was to utilize the President’s war powers and not congressional authority to annex. Ironically, it was the U.S. Supreme Court in *Territory of Hawai’i v. Mankichi* that underscored this principle and, in particular, referenced Swayne’s statement when the court was faced with the question of whether or not the Newlands Resolution extended the U.S. Constitution over the Hawaiian Islands.⁸⁴ Unfortunately, due to the injunction of secrecy imposed by the Senate in 1898 regarding these transcripts, the Supreme Court had no access to these records when it arrived at its decision in 1903. The Supreme Court did, however, create a legal fiction to be used as a qualifying source for the Newlands resolution’s extra-territorial effect. According to L.L. Fuller, a legal fiction “may sometimes mean simply a false statement having a certain utility, whether it was believed by its author or not,” and

⁸² *Id.*, 269.

⁸³ *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 380 (1874).

⁸⁴ *Territory of Hawai’i v. Mankichi*, 190 U.S. 197, 212 (1903).

“an expedient but false assumption.”⁸⁵ The utility of *Mankichi* would later prove useful when questions arose regarding the annexation of territory by legislative action.⁸⁶ Because Congressional legislation could neither annex Hawaiian territory, nor affect Hawaiian sovereignty, there is strong legal basis to believe that Hawai`i remained a sovereign State under international law when the U.S. unilaterally seized the Hawaiian Islands by way of a joint resolution. According to Professor Eyal Benvenisti, this legal basis stems from “the principle of inalienable sovereignty over a territory,” which “spring the constraints that international law imposes upon the occupant.”⁸⁷

THE MILITARY OCCUPATION OF THE HAWAIIAN ISLANDS

While Hawai`i was clearly not a participant in the hostilities of the Spanish-American War, the United States occupied the Hawaiian Islands for the purpose of waging the war against Spain, as well as to fortify the islands as a military outpost for the defense of the United States in future conflicts with the convenience of the puppet government it installed on January 17th 1893. “Though the resolution was passed July 7, [1898] the formal transfer was not made until August 12th, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States.”⁸⁸ Patriotic societies and

⁸⁵ L.L. Fuller, “Legal Fictions,” *Illinois Law Review* 25 (Dec. 1930): 369.

⁸⁶ Christopher Schroeder, “Validity of Congressional-Executive Agreements that Substantially Modify the United States’ obligations Under an Existing Treaty,” *Opinions of the Office of Legal Counsel of the U.S. Department of Justice* 20 (1996): 398, note 19.

⁸⁷ Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993), 5.

⁸⁸ *Mankichi*, *supra* note 84, 210.

many of the Hawaiian citizenry boycotted the ceremony, and “in particular they protested the fact that it was occurring against their will.”⁸⁹

The “power exercising effective control within another’s sovereign territory has only temporary managerial powers,” and during “that limited period, the occupant administers the territory on behalf of the sovereign.”⁹⁰ The actions taken by the McKinley administration, with the consent of the Congress by joint resolution, clearly intended to mask the violation of international law as if the annexation took place by treaty. As Marek states, “a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State.”⁹¹ In fact, President McKinley proclaimed that the Spanish-American war would “be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice,”⁹² and acknowledged the constraints and protection international laws provide to all sovereign states, whether belligerent or neutral. As noted by Senator Henry Cabot Lodge during the Senate’s secret session, Hawai`i, as a sovereign and neutral state, was no exception when it was occupied by the United States during its war with Spain.⁹³ Article 43 of the 1899 Hague Regulations, which remained the same under the 1907 amended Hague Regulations, delimits the power of the occupant

⁸⁹ Coffman, *supra* note 10, 322.

⁹⁰ Benvenisti, *supra* note 87, 6.

⁹¹ Marek, *supra* note 5, 110.

⁹² *The Paquete Habana*, 175 U.S. 677, 712 (1900).

⁹³ Senate Transcripts, *supra* note 70.

and serves as a fundamental bar on its free agency within an occupied neutral State.⁹⁴ Although the United States signed and ratified both Hague Regulations, which post-date the occupation of the Hawaiian Islands, the “text of Article 43,” according to Benvenisti, “was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law.”⁹⁵ Professor Doris Graber also states that “nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code.”⁹⁶ Consistent with this understanding of the international law of occupation during the Spanish-American war, Professor Munroe Smith reported that the “military governments established in the territories occupied by the armies of the United States were instructed to apply, as far as possible, the local laws and to utilize, as far as seemed wise, the services of the local Spanish officials.”⁹⁷ This instruction to apply the local laws of the occupied State is the basis of Article 43 of the Hague Regulations.

With specific regard to occupying neutral territory, the Arbitral Tribunal, in *Coenca Brothers vs. Germany* (1927), concluded “the occupation of Salonika by the

⁹⁴ The United States signed the 1899 Hague Regulations respecting Laws and Customs of War on Land at The Hague on July 29th 1899 and ratified by the Senate March 14th 1902; *see* 32(1) U.S. Stat. 1803. The 1907 Hague Regulations respecting Laws and Customs of War on Land was signed at The Hague October 18th 1907 and ratified by the Senate March 10th 1908; *see* 36 U.S. Stat. 2277. The United States also signed the 1907 Hague Regulations respecting the Rights and Duties of Neutral Powers at The Hague on October 18th 1907 and ratified by the Senate on March 10th 1908; *see* 36 U.S. Stat. 2310.

⁹⁵ Benvenisti, *supra* note 87, 8.

⁹⁶ Doris Graber, *The Development of the Law of Belligerent Occupation: 1863-1914*, (Columbia University Press 1949), 143.

⁹⁷ Munroe Smith, “Record of Political Events,” *Political Science Quarterly* 13(4) (Dec. 1898): 748.

Allies in the autumn of 1915 constituted a violation of Greek neutrality.”⁹⁸ Later, in the *Chevreau* case (1931), the Arbitrator concluded that the status of the British forces while occupying Persia (Iran)—a neutral State in the First World War—was analogous to “belligerent forces occupying enemy territory.”⁹⁹ Professor Lassa Oppenheim observes that an occupant State on neutral territory “does not possess such a wide range of rights with regard to the occupied country and its inhabitants as he possesses in occupied enemy territory.”¹⁰⁰ Although the Hague Regulations apply only to territory belonging to an enemy, Ernst Feilchenfeld states, “it is, nevertheless, usually held that the rules on belligerent occupation will also apply where a belligerent, in the course of the war, occupies neutral territory, even if the neutral power should have failed to protest against the occupation.”¹⁰¹ Despite Hawai`i being a neutral state at the time of its occupation during the Spanish American war, the law of occupation ought to be not only applied with equal force and effect, but that the occupier should be shorn of its belligerent rights in Hawaiian territory as a result of Hawai`i’s neutrality.

International Laws of Occupation

Since 1900, the U.S. migration to Hawai`i, predominantly including military personnel, has grown exponentially. Because of this military presence and its strategic

⁹⁸ *Coenca Brothers v. Germany*, (Greco-German Mixed Arbitral Tribunal, December 1st 1927, case no. 389). Annual Digest of Public International Law Cases, 1927 & 1928, (Longmans, Green and Co., 1931), 571.

⁹⁹ “*Chevreau case* (In the Matter of the Claim Madame Chevreau Against the United Kingdom),” *American Journal of International Law* 27 (1933): 160.

¹⁰⁰ Lassa Oppenheim, *International Law*, 7th ed., (David McKay Co. 1948-52), 241.

¹⁰¹ Ernst Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace 1942), 8.

location, Hawai`i has played a role in nearly every major U.S. armed conflict.¹⁰² In 1911, Brigadier General Macomb, U.S. Army Commander, District of Hawai`i, stated, “Oahu is to be encircled with a ring of steel, with mortar batteries at Diamond Head, big guns at Waikiki and Pearl Harbor, and a series of redoubts from Koko Head around the island to Waianae.”¹⁰³ U.S. Territorial Governor Wallace Rider Farrington in 1924 further stated, “Every day is national defense in Hawai`i.”¹⁰⁴ Most notably, Hawai`i has been the headquarters, since 1947, for the single largest combined U.S. military presence in the world, the U.S. Pacific Command.¹⁰⁵

One of the fundamental duties of an occupier is to maintain the *status quo ante* for the national population of the occupied State. This principle should apply particularly to those who possess the nationality or political status of the Hawaiian Kingdom. The U.S. is precluded from affecting the national population through mass migration and/or birth of U.S. citizens within Hawaiian territory. Hawaiian law recognizes three ways of acquiring citizenship: by application to the Minister of the Interior for naturalization;

¹⁰² U.S. Census, *infra* note 120.

¹⁰³ William Addleman, *History of the United States Army in Hawai`i, 1849-1939*, (Hawaii War Records Depository, Hamilton Library, University of Hawaii, Manoa), 9.

¹⁰⁴ Ian Lind, “Ring of Steel: Notes on the Militarization of Hawaii,” *Social Process in Hawaii* 31 (1984-85): 25.

¹⁰⁵ U.S. Pacific Command was established in the Hawaiian Islands as a unified command on 1 January 1947, as an outgrowth of the command structure used during World War II. Located at Camp Smith, which overlooks Pearl Harbor on the island of O`ahu, the Pacific Command is headed by a four star Admiral who reports directly to the Secretary of Defense concerning operations and the Joint Chiefs of Staff for administrative purposes. That Admiral is the Commander-in-Chief, Pacific Command. The Pacific Command’s responsibility stretches from North America’s west coast to Africa’s east coast and both the North and South Poles. It is the oldest and largest of the United States’ nine unified military commands, and is comprised of Army, Navy, Marine Corps, and Air Force service components, all headquartered in Hawai`i. Additional commands that report to the Pacific Command include U.S. Forces Japan, U.S. Forces Korea, Special Operations Command Pacific, U.S. Alaska Command, Joint Task Force Full-Accounting, Joint Interagency Task Force West, the Asia-Pacific Center for Security Studies, and the Joint Intelligence Center Pacific in Pearl Harbor. <<http://www.pacom.mil>> (last visited October 2, 2008).

citizenship by birth on Hawaiian territory (*jus soli*); and citizenship acquired by descent of Hawaiian subjects for children born abroad.¹⁰⁶ As a foreign government, the U.S. is prevented from exercising the first two means of acquiring Hawaiian citizenship. Von Glahn explains, that “the nationality of the inhabitants of occupied areas does not ordinarily change through the mere fact that temporary rule of a foreign government has been instituted, inasmuch as military occupation does not confer *de jure* sovereignty upon an occupant. Thus under the laws of most countries children born in territory under enemy occupation possess the nationality of their parents, that is, that of the legitimate sovereign of the occupied area.”¹⁰⁷ That being the case, any individual today who is a direct descendent of a person who lawfully acquired Hawaiian citizenship prior to the U.S. occupation that began at twelve noon on August 12th 1898, is a Hawaiian subject. Hawaiian law recognizes all others, who possess the nationality of their parents, a part of the alien population. This greatly affects the political position of aboriginal Hawaiians today, who according to the 1890 census, constituted nearly 85% of the Hawaiian citizenry, and who must still be considered so today despite being only approximately 20% of the current population in the Islands.

Notwithstanding the magnitude of the United States’ malfeasance that has taken place since the American occupation during the Spanish-American war, international laws mandates an occupying government to administer the laws of the occupied State during the occupation, in a role similar to that of a trustee (occupying State) and

¹⁰⁶ *Statute Laws of His Majesty Kamehameha III, vol. I* (Government Press, 1846), 76.

¹⁰⁷ Gerhard von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957), 60.

beneficiary (occupied State) relationship.¹⁰⁸ Thus, the occupier cannot impose its own domestic laws without violating international law. This principle is clearly laid out in article 43 of the Hague Regulations, which states, “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country.” Referring to the American occupation of Hawai`i, Patrick Dumberry states:

the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.¹⁰⁹

According to von Glahn, there are three distinct systems of law that exist in an occupied territory: “the indigenous law of the legitimate sovereign, to the extent that it has not been necessary to suspend it; the laws (legislation, orders, decrees, proclamations, and regulations) of the occupant, which are gradually introduced; and the applicable rules of customary and conventional international law.”¹¹⁰ Hawai`i’s sovereignty is maintained and protected as a subject of international law, in spite of the absence of a diplomatically recognized government since 1893. In other words, the United States should have

¹⁰⁸ Benvenisti, *supra* note 87, at 6; See von Glahn, *supra* note 12, at 785-794; and von Glahn, *supra* note 107, 95-221.

¹⁰⁹ Patrick Dumberry, “The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law,” *Chinese Journal of International Law* 2(1)(2002): 682.

¹¹⁰ von Glahn, *supra* note 12, 774.

administered Hawaiian Kingdom law as defined by its constitution and statutory laws, similar to the U.S. military's administration of Iraqi law in Iraq with portions of the law suspended due to military necessity.¹¹¹ U.S. Army regulations on the law of occupation recognize not only the sovereignty of the occupied State, but also bar the annexation of the territory during hostilities because of the continuity of the invaded State's sovereignty. In fact, U.S. Army regulations on the laws of occupation not only recognize the continued existence of the sovereignty of the occupied State, but

confers upon the invading force the means of exercising control for the period of occupation. *It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty.* The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress.¹¹² (emphasis added)

When appropriate legal and political theoretical frameworks are used it becomes clear that the United States cannot claim to be the successor State of the Hawaiian Kingdom under international law. Current scholarship on this subject has been plagued by *presentism* that reinforces the present with the past. Frederick Olafson warns that, “by tying interpretation so closely to the active and parochial interests of the interpreter” current scholarship has ironically “opened the door to a willful exploitation of the past in

¹¹¹ David J. Scheffer, “Beyond Occupation Law,” *American Journal of International Law* 97(4) (October 2003): 842-860.

¹¹² “The Law of Land Warfare”, *U.S. Army Field Manual 27-10*, (July 1956), §358.

the service of contemporary interests.”¹¹³ To break this cycle, legal scholars and political scientists should utilize alternative theoretical frameworks, which seek to explain Hawai‘i’s relationship with the United States and not limit the scholarship to mere critique. Furthermore, in the absence of any evidence extinguishing Hawai‘i’s sovereignty during or since the nineteenth century, international laws not only impose duties and obligations on an occupier, but also maintain and protect the international personality of the occupied State, notwithstanding the effectiveness and propaganda attributed to prolonged occupation.¹¹⁴ Professor James Crawford explains that, belligerent occupation “does not extinguish the State. And, generally, the *presumption*—in practice a strong one—is in favor of the continuance, and against the extinction, of an established State.”¹¹⁵ Therefore, as Craven states, “the continuity of the Hawaiian Kingdom, in other

¹¹³ Frederick Olafson, “Interpretation and the Dialectic of Action, *The Journal of Philosophy* 69 (20) (1972): 719.

¹¹⁴ Regarding the principle of effectiveness in international law, Marek explains, “A comparison of the scope of the two legal orders, of the occupied and the occupying State, co-existing in one and the same territory and limiting each other, throws an interesting light on one aspect of the principle of effectiveness in international law. In the first place: of these two legal orders, that of the occupied State is regular and ‘normal’, while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is, as has been strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness. It can produce legal effects outside the occupied territory and may even develop and expand, not be reason of its effectiveness, but solely on the basis of the positive international rule safeguarding its continuity. Thus, the relation between effectiveness and title seems to be one of inverse proportion: while a strong title can survive a period of non-effectiveness, a weak title must rely heavily, if not exclusively, on full and complete effectiveness. It is the latter which makes up for the weakness in title. Belligerent occupation presents an illuminating example of this relation of inverse proportion. Belligerent occupation is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned.” See Marek, *supra* note 5, at 102.

¹¹⁵ James Crawford, *The Creation of States in International Law*, 2nd ed., (Oxford Press 2006), 701. A presumption is a rule of law where the finding of a basic fact will give rise to the existence of a presumed fact, until it is rebutted.

words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States.¹¹⁶

Civilian Government Established in Violation of the Laws of Occupation

Notwithstanding the blatant violation of Hawai`i's sovereignty since January 16th 1893, the U.S. never intended to comply with international laws when it annexed Hawai`i by joint resolution, and proceeded to treat the Hawaiian Islands as if it were an incorporated territory by cession. On April 30th 1900, the U.S. Congress passed an Act establishing a civil government to be called the Territory of Hawai`i.¹¹⁷ Regarding U.S. nationals, section 4 of the 1900 Act stated:

all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii. And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii.¹¹⁸

¹¹⁶ Matthew Craven, Professor of International Law, Dean, University of London, SOAS, authored a legal opinion for the *acting* Hawaiian Government concerning the continuity of the Hawaiian Kingdom, and the United States' failure to properly extinguish the Hawaiian State under international law (12 July 2002). Reprinted at *Hawaiian Journal of Law & Politics* 1(Summer 2004): 512.

¹¹⁷ 31 U.S. Stat. 141.

¹¹⁸ *Id.*

In addition to this Act, the Fourteenth Amendment of the United States Constitution was applied to individuals born in the Hawaiian Islands.¹¹⁹ Under these U.S. laws, the putative population of U.S. “citizens” in the Hawaiian Kingdom exploded from a meager 1,928 (not including native Hawaiian nationals) out of a total population of 89,990 in 1890, to 423,174 (including native Hawaiians, who were now “citizens” of the U.S.) out of a total population of 499,794 in 1950.¹²⁰ The native Hawaiian population, which accounted for 85% of the total population in 1890, accounted for a mere 20% (only 86,091 of 423,174) of the total population by 1950.¹²¹

According to international law, the migration of U.S. citizens to these islands, which included both military and civilian immigration, is a direct violation of Article 49 of the Fourth Geneva Convention, which provides that the occupying power shall not “transfer parts of its own civilian population into the territory it occupies.”¹²² Benvenisti asserts that the purpose of Article 49 “is to protect the interests of the occupied population, rather than the population of the occupant.”¹²³ Benvenisti also goes on to state that civilian migration and settlement in an occupied State is questionable under Article 43 of the Hague Regulation, since it cannot be “deemed a matter of security of the

¹¹⁹ See Mankichi, *supra* note 80. The 14th Amendment states, “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”

¹²⁰ United States Bureau of the Census, *General characteristics—Hawai`i*, 18 (U.S. Government Printing Office 1952).

¹²¹ *Id.*

¹²² Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

¹²³ Benvenisti, *supra* note 87, 140.

occupation forces, and it is even more difficult to demonstrate its contribution to ‘public order and civil life.’”¹²⁴

Shortly after the 1900’s, when the American citizens who migrated to the Territory of Hawaii began to settle and reside there, they also began attempting to transform the Islands into a state of the American union. “For most people,” according to Tom Coffman, “the fiction of the Republic of Hawaii successfully obscured the nature of the conquest, as it does to this day. The act of annexation became something that just happened.”¹²⁵ The first statehood bill was introduced in Congress in 1919, but failed because Congress did not view the Hawaiian Islands as an incorporated territory.¹²⁶ This puzzled the advocates for statehood in the islands who assumed the Hawaiian Islands were a part of the United States since 1898, but they weren’t aware of the Senate’s secret session that clearly viewed Hawai`i to be an occupied state and not an incorporated territory acquired by a treaty of cession.¹²⁷ Ironically, the legislature of the imposed civil government in the Islands, without any knowledge of the Senate secret session transcripts, enacted a “Bill of Rights,” on April 26th 1923, asserting their perceived right of becoming an American State of the Union.¹²⁸ Beginning with the passage of this statute, a concerted effort was made by residents in the Hawaiian Islands to seek entry into the Federal union. The object of American statehood was finally accomplished

¹²⁴ *Id.*

¹²⁵ Coffman, *supra* note 10, 322.

¹²⁶ *Cessation of the transmission of information under Article 73 e of the Charter: communication from the Government of the United States of America*, September 24, 1959, United Nations Document A/4226, 100.

¹²⁷ Senate Transcript, *supra* note 70.

¹²⁸ Act 86 (H.B. No. 425), Territory of Hawai`i, 26 April 1923.

beginning in 1950, when two special elections were held in the occupied kingdom. As a result of the elections, 63 delegates were elected to draft a constitution that was ratified on November 7th 1950.¹²⁹

On March 12th 1959, the U.S. Congress approved the statehood bill and it was signed into law on March 15th 1959.¹³⁰ In a special election held on June 27th 1959, three propositions were submitted to vote. First, “shall Hawai`i immediately be admitted into the Union as a State?”; second, “the boundaries of the State of Hawai`i shall be as prescribed in the Act of Congress approved March 18, 1959, and all claims of this State to any areas of land or sea outside the boundaries prescribed are hereby irrevocably relinquished to the United States”; and third, “all provisions of the Act of Congress approved March 18, 1959, reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawai`i are consented to fully by said State and its people.”¹³¹ The residents in the Islands accepted all three propositions by 132,938 votes to 7,854. On July 28th 1959, two U.S. Hawai`i Senators and one Representative were elected to office, and on August 21st 1959, President Eisenhower proclaimed that the process of admitting Hawai`i as a State of the Federal union was complete.¹³²

In 1988, Kmiec working at the U.S. Justice Department raised questions concerning not only the legality of congressional action in annexing the Hawaiian Islands by joint resolution, but also Congress’ authority to establish boundaries for the State of

¹²⁹ Cessation of Info., *supra* note 126, 100.

¹³⁰ 73 U.S. Stat. 4.

¹³¹ Cessation of Info., *supra* note 126, 100.

¹³² *Id.*

Hawai`i that lie beyond the territorial seas of the United States' western coastline. Although Kmiec acknowledged Congressional authority to admit new states into the union and its inherent power to establish state boundaries, he did caution that it was the "President's constitutional status as the representative of the United States in foreign affairs," not Congress, "which authorizes the United States to claim territorial rights in the sea for the purpose of international law."¹³³ Reminiscent of the admission of Texas as a State through congressional legislation, but absent a treaty of cession, there is no legal basis for any U.S. claim of sovereignty over the Hawaiian Islands, even under acquisitive prescription.

United States Misrepresents Hawai`i before the United Nations

In 1946, prior to the passage of the Statehood Act, the United States further misrepresented its relationship with Hawai`i when the United States ambassador to the United Nations identified Hawai`i as a non-self-governing territory under the administration of the United States since 1898. In accordance with Article 73(e) of the U.N. Charter, the United States ambassador reported Hawai`i as a non-self-governing territory.¹³⁴ The problem here is that Hawai`i should have never been placed on the list in the first place, because it already achieved self-governance as a "sovereign independent State" beginning in 1843 — a recognition explicitly granted by the United States itself in 1849 and acknowledged by 9th Circuit Court of Appeals in 2004.¹³⁵ It can be argued that

¹³³ Kmiec, *supra* note 43, 252.

¹³⁴ *Transmission of Information under Article 73e of the Charter*, December 14, 1946, United Nations General Assembly Resolution 66(I).

¹³⁵ *Kahawaiola`a v. Norton*, 386 F.3d 1271, at 1282 (9th Cir. 2004).

Hawai`i was deliberately treated as a non-self-governing territory or colonial possession in order to conceal the United States' prolonged occupation of an independent and sovereign State for military purposes. The reporting of Hawai`i as a non-self-governing territory also coincided with the United States establishment of the headquarters for the Pacific Command (PACOM) on the Island of O`ahu.¹³⁶ If the United Nations had been aware of Hawai`i's continued legal status as an occupied neutral State, member States, such as Russian and China, would have prevented the United States from maintaining their military presence.

The initial Article 73(e) list comprised of non-sovereign territories under the control of sovereign States such as Australia, Belgium, Denmark, France, Netherlands, New Zealand, United Kingdom and the United States. In addition to Hawai`i, the U.S. also reported its territories of Alaska, American Samoa, Guam, Panama Canal Zone, Puerto Rico and the Virgin Islands.¹³⁷ The U.N. General Assembly, in a resolution entitled "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter," defined self-governance in three forms: a sovereign independent State; free association with an independent State; or integration with an independent State.¹³⁸ None of the territories on the list of non-self-governing territories, with the exception of Hawai`i, were recognized sovereign States.

¹³⁶ Pacific Command, *supra* note 105.

¹³⁷ See Resolution 66 (I), *supra* note 134.

¹³⁸ *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter*, December 15, 1960, United Nations Resolution 1541 (XV).

Notwithstanding past misrepresentations of Hawai`i before the United Nations by the United States, there are two facts that still remain. First, inclusion of Hawai`i on the United Nations list of non-self-governing territories was an inaccurate depiction of a sovereign state whose rights had been violated; and, second, Hawai`i remains a sovereign and independent State despite the illegal overthrow of its government in 1893 and the prolonged occupation of its territory for military purposes since 1898. International Relations, as a sub-discipline of political science, was not used as a tool to investigate and/or to understand the overthrow of the Hawaiian Kingdom government. Instead, the overthrow and the events that have transpired since then were confined to the framework of United States domestic politics and laws that systematically consigned the Hawaiian situation from an issue of State sovereignty under international law to a race-based political platform within the legal order of the United States. This situation has been maintained, until now, behind the reified veil of U.S. sovereignty over the Hawaiian Islands. Native Hawaiians are not an indigenous people within the United States with the right to internal self-determination, but rather comprise the majority of the citizenry of an occupied State with a right to end the prolonged occupation of their country.

HAWAIIAN INDIGENEITY AND THE SOVEREIGNTY MOVEMENT

The *Hawaiian sovereignty* movement appears to have grown out of a social movement in the islands in the mid 20th century. According to Lawrence Fuchs, a professor of American Studies, “the essential purpose of the haole [foreigner] elite for four decades after annexation was to control Hawaii; the major aim for the lesser haoles was to promote and maintain their privileged position.” “Most Hawaiians,” he continues,

“were motivated by a dominant and inclusive purpose—to recapture the past.”¹³⁹ Native Hawaiians at the time were experiencing a sense of revival of Hawaiian culture, language, arts and music—euphoria of native Hawaiian pride. Momi Kamahale states, that “the ancient form of hula experienced a strong revival as the Native national dance for our own cultural purposes and enjoyment rather than as a service commodity for the tourist industry.”¹⁴⁰ Professor Sam No’eau Warner points out that the movement also resulted in the revitalization of “the Hawaiian language through immersion education.”¹⁴¹ Michael Dudley and Keoni Agard credited John Dominis Holt and his 1964 book *On Being Hawaiian*, for igniting the resurgence of native Hawaiian consciousness.¹⁴² Holt asserted:

I am a part-Hawaiian who has for years felt troubled concern over the loss of Hawaianness or ethnic consciousness among people like ourselves. So much that came down to us was garbled or deliberately distorted. It was difficult to separate truth from untruth; to clarify even such simple matters for many among us as the maiden name of a Hawaiian grandmother, let alone know anything at all of the Hawaiian past.¹⁴³

¹³⁹ Lawrence H. Fuchs, *Hawaii Pono: A Social History*, (Harcourt, Brace & World 1961), 68.

¹⁴⁰ Momi Kamahale, “Ilio’ulaokalani: Defending Native Hawaiian Culture,” *Ameraisa Journal* 26(2) (2000): 40.

¹⁴¹ Sam L. No’eau Warner, “The Movement to Revitalize Hawaiian Language and Culture,” in *The Green Book of Language Revitalization in Practice*, edited by Leanne Hinton and Ken Hale, (Academic Press 2001), 133.

¹⁴² Michael Dudley & Keoni Agard, *A Call for Hawaiian Sovereignty* (Na Kane O Ka Malo Press 1993), 107.

¹⁴³ John Dominis Holt, *On Being Hawaiian*, 4th ed. (Ku Pa’a 1995), 7.

Hawaiian Renaissance

Tom Coffman explained that when he “arrived in Hawai‘i in 1965, the effective definition of history had been reduced to a few years. December 7th 1941, was practically the beginning of time, and anything that might have happened before that was prehistory.”¹⁴⁴ Coffman admits that when he wrote his first book in 1970 he used Statehood in 1959 as an important benchmark in Hawaiian history.¹⁴⁵ The first sentence in chapter one of this book read, the “year 1970 was only the eleventh year of statehood, so that as a state Hawaii’s was still young, still enthralled by the right to self-government, still feeling out its role as America’s newest state.”¹⁴⁶ He recollected in a subsequent book:

Many years passed before I realized that for Native Hawaiians to survive as a people, they needed a definition of time that spanned something more than eleven years. The demand for a changed understanding of time was always implicit in what became known as the Hawaiian movement or the Hawaiian Renaissance because Hawaiians so systematically turned to the past whenever the subject of Hawaiian life was glimpsed.¹⁴⁷

The native Hawaiian community had been the subject of extreme prejudice and political exclusion since the United States imposed its authority in the Hawaiian Islands in 1898, and the history books that followed routinely portrayed the native Hawaiian as passive and inept. After the overthrow of the Hawaiian Kingdom, according to Holt, the

¹⁴⁴ Coffman, *supra* note 10, xii.

¹⁴⁵ *Id.*

¹⁴⁶ Tom Coffman, *Catch a Wave: A Case Study of Hawaii’s New Politics* (University of Hawai‘i Press 1973), 1.

¹⁴⁷ Coffman, *supra* note 10, xxii.

self-respect of native Hawaiians had been “undermined by carping criticism of ‘Hawaiian beliefs’ and stereotypes concerning our being lazy, laughing, lovable children who needed to be looked after by more ‘realistic’ adult oriented caretakers came to be the new accepted view of Hawaiians.”¹⁴⁸ This stereotyping became institutionalized, and is evidenced in the writings by Gavan Daws, who, in 1974, wrote:

The Hawaiians had lost much of their reason for living long ago, when the kapus were abolished; since then a good many of them had lost their lives through disease; the survivors lost their land; they lost their leaders, because many of the chiefs withdrew from politics in favor of nostalgic self-indulgence; and now at last they lost their independence. Their resistance to all this was feeble. It was almost as if they believed what the white man said about them, that they had only half learned the lessons of civilization.¹⁴⁹

Although the Hawaiian Renaissance movement originally had no clear political objectives, it did foster a genuine sense of inquiry and thirst for an alternative Hawaiian history that was otherwise absent in contemporary history books. According to Political Science Professor Noenoe Silva, “When the stories can be validated, as happens when scholars read the literature in Hawaiian and make the findings available to the community, people begin to recover from the wounds caused by that disjuncture in their consciousness.”¹⁵⁰ As a result, Native Hawaiians began to draw meaning and political activism from a history that appeared to parallel other native peoples of the world who had been colonized, but the interpretive context of Hawaiian history was, at the time,

¹⁴⁸ Holt, *supra* note 143, 7.

¹⁴⁹ Gavan Daws, *Shoal of Time* (University of Hawai‘i Press 1974), 291.

¹⁵⁰ Silva, *supra* note 11, 3.

primarily historical and not legal. State sovereignty and international laws were perceived not as a benefit for native peoples, but were seen as tools of the colonizer. According to Professor James Anaya, who specializes in the rights of indigenous peoples, “international law was thus able to govern the patterns of colonization and ultimately to legitimate the colonial order.”¹⁵¹

Native Hawaiians Associate with Plight of Native Americans

Following the course Congress set in the 1971 Alaska Native Claims Settlement Act,¹⁵² under which “the United States returned 40 million acres of land to the Alaskan natives and paid \$1 billion cash for land titles they did not return,”¹⁵³ it became common practice for Native Hawaiians to associate themselves with the plight of Native Americans and other ethnic minorities throughout the world who had been colonized and dominated by Europe or the United States. The Hawaiian Renaissance gradually branched out to include a political wing often referred to as the “sovereignty movement,” which evolved into political resistance of U.S. sovereignty. As certain native Hawaiians began to organize, Professor Linda Tuhiwai Smith observed that this political movement “paralleled the activism surrounding the civil rights movement, women’s liberation, student uprisings and the anti-Vietnam War movement.”¹⁵⁴

¹⁵¹ James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2000), 22.

¹⁵² 43 U.S.C.S §1601.

¹⁵³ *Hawaiians: Organizing Our People*, a pamphlet produced by the students in “ES221—The Hawaiians” in the Ethnic Studies Program at the University of Hawai‘i’s, at Manoa, 37 (University of Hawai‘i 1974).

¹⁵⁴ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books Ltd. 1999), 113.

In 1972, an organization called A.L.O.H.A. (Aboriginal Lands of Hawaiian Ancestry) was founded to seek reparations from the United States for its involvement in the illegal overthrow of the Hawaiian Kingdom government in 1893.¹⁵⁵ Frustrated with inaction by the United States it joined another group called *Hui Ala Loa* (Long Road Organization) and formed *Protect Kaho'olawe 'Ohana* (P.K.O.) in 1975.¹⁵⁶ P.K.O. was organized to stop the U.S. Navy from utilizing the island of Kaho'olawe, off the southern coast of Maui, as a target range, by openly occupying the island in defiance of the U.S. military. The U.S. Navy had been using the entire island as a target range for naval gunfire since World War II, and, as a result of P.K.O.'s activism, the Navy terminated its use of the island in 1994. Another organization called *'Ohana O Hawai'i* (Family of Hawai'i), which was formed in 1974, even went to the extreme of proclaiming a declaration of war against the United States of America.¹⁵⁷

The political movement also served as the impetus for native Hawaiians to participate in the State of Hawai'i's Constitutional Convention in 1978, which created an Office of Hawaiian Affairs (O.H.A.).¹⁵⁸ O.H.A. recognizes two definitions of aboriginal Hawaiian: the term "native Hawaiian" with a lower case "n," and "Native Hawaiian"

¹⁵⁵ Dudley & Agard, *supra* note 142, 109.

¹⁵⁶ *Id.*, 113.

¹⁵⁷ *Id.*

¹⁵⁸ Article XII, section 5 of the State of Hawai'i Constitution states: "There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members." (visited October 2, 2008) < <http://hawaii.gov/lrb/con/conart12.html>>.

with an upper case “N,” both of which were established by the U.S. Congress.¹⁵⁹ The former is defined by the 1921 Hawaiian Homestead Commission Act as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778,”¹⁶⁰ while the latter is defined by the 1993 Apology Resolution as “any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai`i.”¹⁶¹ The intent of the Apology resolution was to offer an apology to all Native Hawaiians, without regard to blood quantum, while the Hawaiian Homes Commission Act’s definition was intended to limit those receiving homestead lots to be “not less than one-half.”¹⁶² O.H.A. states that it serves both definitions of Hawaiian.¹⁶³ As a governmental agency, O.H.A.’s mission is to:

malama (protect) Hawai`i’s people and environmental resources and OHA’s assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling

¹⁵⁹ Native Hawaiian Data Book 1996, Office of Hawaiian Affairs, Planning and Research Office, Appendix. (visited October 2, 2008) <http://www.oha.org/databook/databook1996_1998/go-app.98.html>.

¹⁶⁰ Section 201, Chapter 42—An Act To amend an Act entitled “An Act to provide a government for the Territory of Hawaii,” approved April 30, 1900, as amended, to establish an Hawaiian Homes Commission, granting certain powers to the board of harbor commissioners of the Territory of Hawaii, and for other purposes, 42 U.S. Stat. 108.

¹⁶¹ Apology, *supra* note 38.

¹⁶² Hawaiian Homestead Act, *supra* note 160.

¹⁶³ Since 2000, the Office of Hawaiian Affairs have been challenged on federal constitutional grounds that the program is race-based and violates the equal protection clause of the U.S. constitution. These cases included *Rice v. Cayetano*, 528 U.S. 495 (2000), *Carroll v. Nakatani* (*Barrett v. State of Hawai`i*), 188 F. Supp. 2d 1219 (D. Haw. 2001), *Arakaki v. State of Hawai`i*, 314 F.3d 1091 (9th Cir. 2002), and *Arakaki v. Lingle*, 305 F. Supp. 2d 1161 (D. Haw. 2004). Of these cases, only *Rice v. Cayetano* and *Arakaki v. State of Hawai`i* were successful in removing a racial qualification of native Hawaiian ancestry necessary for voting and running for office as a trustee of the Office of Hawaiian Affairs. The federal court dismissed the other two cases after determining that the plaintiffs did not have standing to sue the State of Hawai`i.

the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.

The sovereignty movement created a multitude of diverse groups, each having a separate agenda as well as varying interpretations of Hawaiian history. Operating within an ethnic or tribal optic stemming from the Native American movement in the United States, the sovereignty movement eventually expanded itself to become a part of the global movement of indigenous peoples who reject colonial “arrangements in exchange for indigenous modes of self-determination that sharply curtail the legitimacy and jurisdiction of the State while bolstering indigenous jurisdiction over land, identity and political voice.”¹⁶⁴ Professor Haunani Trask, an indigenous peoples rights advocate, argues that “documents like the Draft Declaration [of Indigenous Human Rights] are used to transform and clarify public discussion and agitation.” Specifically, Trask states that “legal terms of reference, indigenous human rights concepts in international usage, and the political linkage of the non-self-governing status of the Hawaiian nation with other non-self-governing indigenous nations move Hawaiians into a world arena where Native peoples are primary and dominant states are secondary, to the discussion.”¹⁶⁵

This political wing of the renaissance is not in any way connected to the legal position that the Hawaiian Kingdom continued to exist as a sovereign State under international law, but rather focuses on the history of European and American colonialism and the prospect of decolonization. Currently, sovereignty is not viewed as a legal reality, but a political aspiration. Professor Noel Kent states that, the “Hawaiian

¹⁶⁴ Duncan Ivison, Paul Patton & Will Sanders, *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press 2000), 89.

¹⁶⁵ Haunani-Kay Trask, “Settlers of Color and ‘Immigrant’ Hegemony: ‘Locals’ in Hawaii,” *Amerasia* 26(2) (2000): 17.

sovereignty movement is now clearly the most potent catalyst for change,” and “during the late 1980s and early 1990s sovereignty was transformed from an outlandish idea propagated by marginal groups into a legitimate political position supported by a majority of native Hawaiians.”¹⁶⁶ Nevertheless, the movement was not legal, but political in nature, and political activism relied on the normative framework of the developing rights of indigenous peoples within the United States and at the United Nations. At both these levels, indigenous peoples were viewed not as sovereign states, but rather “any stateless group” residing within the territorial dominions of existing sovereign states.¹⁶⁷

United States Apology and Introduction of the Akaka Bill

In 1993, the U.S. government, maintaining an indigenous and historically inaccurate focus, apologized only to the Native Hawaiian people, rather than the citizenry of the Hawaiian Kingdom, for the United States’ role in the overthrow of the Hawaiian government.¹⁶⁸ This implied that only ethnic Hawaiians constituted the kingdom, and fertilized the incipient ethnocentrism of the sovereignty movement. The resolution provided:

Congress...apologizes to the Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai`i on January 17, 1893

¹⁶⁶ Noel Kent, *Hawaii: Islands under the Influence* (University of Hawaii Press 1993), 198.

¹⁶⁷ Jeff J. Corntassel and Tomas Hopkins Primeau, “Indigenous ‘Sovereignty’ and International Law: Revised Strategies for Pursuing ‘Self-Determination,’” *Human Rights Quarterly* 17(2) (1995): 347.

¹⁶⁸ Apology, *supra* note 38.

with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.¹⁶⁹

The congressional apology rallied many Native Hawaiians, who were not fully aware of the legal status of the Hawaiian Islands as a sovereign state, in the belief that their situation had similar qualities to Native American tribes in the nineteenth century. The resolution reinforced the belief of a native Hawaiian nation grounded in Hawaiian indigeneity and culture, rather than an occupied State under prolonged occupation. Consistent with the Resolution in 2003, Senator Daniel Akaka (D-Hawai'i) submitted Senate Bill 344, also known as the Akaka Bill, to the 108th Congress, but the bill failed to reach the floor of the Senate for vote. It was re-introduced by Senator Akaka on January 17th 2007 (S. 310). According to Akaka, the bill's purpose is to provide "a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct, indigenous, native community to reorganize a single Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-determination and self-governance."¹⁷⁰

According to Professor Rupert Emerson, a political scientist, there are two major periods when the international community accepted self-determination as an operative right or principle.¹⁷¹ President Woodrow Wilson and others first applied the principle to nations directly affected by the "defeat or collapse of the German, Russian, Austro-Hungarian and Turkish land empires" after the First World War.¹⁷² The second period

¹⁶⁹ *Id.*, 1513.

¹⁷⁰ S. 310, 110th Congress (2007), §19.

¹⁷¹ Rupert Emerson, "Self-Determination," *American Journal of International Law* 65(3) (July 1971): 463.

¹⁷² *Id.*

took place after the Second World War and the United Nations' focus on disintegrating overseas empires of its member states, "which had remained effectively untouched in the round of Wilsonian self-determination."¹⁷³ These territories have come to be known as Mandate, Trust, and Article 73(e) territories under the United Nations Charter. By erroneously categorizing Native Hawaiians as a stateless people, the principle of self-determination would underlie the development of legislation such as the Akaka bill.

U.S. National Security Council Defines Indigenous Peoples

The Akaka bill's identification of Native Hawaiians as an indigenous people with a right to self-determination is informed by the U.S. National Security Council's position on indigenous peoples. On January 18th 2001, the Council made known its position to its delegations assigned to the "U.N. Commission on Human Rights," the "Commission's Working Group on the United Nations (UN) Draft Declaration on Indigenous Rights," and to the "Organization of American States (OAS) Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations." The Council directed these delegates to "read a prepared statement that expresses the U.S. understanding of the term internal 'self-determination' and indicates that it does not include a right of independence or permanent sovereignty over natural resources."¹⁷⁴ The Council also directed these delegates to support the use of the term *internal self-determination* in both the U.N. and O.A.S. declarations on indigenous rights, and defined

¹⁷³ *Id.*

¹⁷⁴ "U.S. National Security Council, *Position on Indigenous Peoples*," January 18, 2001, (visited October 2, 2008) <<http://www1.umn.edu/humanrts/usdocs/indigenoudoc.html>>.

Indigenous peoples as having “a right of internal self-determination.” By virtue of that right, “they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development.”¹⁷⁵

This resolution sought to constrain the growing political movement of indigenous peoples “who aspire to rule their territorial homeland, or who claim the right to independent statehood under the doctrine of self-determination of peoples.”¹⁷⁶

The Akaka Bill falsely identifies native Hawaiians and their right to self-determination through this definition given by the U.S. National Security Council, and after four generations of occupation, indoctrination has been so complete that the power relationship between occupier and occupied has become blurred if not effaced. Today, amnesia of the sovereignty of the Hawaiian State has become so pervasive that colonization and decolonization, as social and political theories, have dominated the scholarly work of lawyers and political scientists regarding Hawai`i.

Contrast between Hawaiian State Sovereignty and Hawaiian Indigeneity

International laws, as an interpretative context, provides an alternative view to the political and legal history of the Hawaiian Islands, which has been consigned under U.S. State sovereignty and the right to internal self-determination of indigenous peoples. By comparing and contrasting the two concepts of Hawaiian State sovereignty and Hawaiian Indigeneity, one can see inherent contradictions and divergence of thought and direction.

¹⁷⁵ *Id.*

¹⁷⁶ Milton J. Esman, “Ethnic Pluralism and International Relations,” *Canadian Review of Studies in Nationalism* 17(1-2) (1990): 88.

<u>Hawaiian State Sovereignty</u>	vs.	<u>Hawaiian Indigeneity</u>
Self-governing		Non-self-governing
Independent		Dependent
Sovereignty Established		Sovereignty Sought
Citizenship (multi-ethnic)		Indigenous (mono-ethnic)
Occupation		Colonization
De-Occupation		De-Colonization

The legal definition of a *colony* is “a dependent political economy, consisting of a number of citizens of the same country who have emigrated therefrom to people another, and remain subject to the mother country.”¹⁷⁷ According to Professor Albert Keller, who specialized in colonial studies, *colonization* is “a movement of population and an extension of political power,” and therefore must be distinguished from migration.¹⁷⁸ The former is an extension of sovereignty over territory not subject to the sovereignty of another State, while the latter is the mode of entry into the territory of another sovereign State. Keller goes on to state that the “so-called ‘interior colonization’ of the Germans [within a non-German State] would naturally be a misnomer on the basis of the definition suggested.”¹⁷⁹ This is the same as suggesting that the migration of United States citizens into the territory of the Hawaiian Kingdom constituted American colonization and somehow resulted in the creation of an American colony. The history of the Hawaiian Kingdom has fallen victim to the misuse of this term by contemporary scholars in the fields of post-colonial and cultural studies. These scholars have lost sight of the original

¹⁷⁷ *Black’s Law Dictionary*, 6th ed. (West Publishing Company 1990), 265.

¹⁷⁸ Albert Galloway Keller, *Colonization: A Study of the Founding of New Societies* (Ginn & Company 1908), 1.

¹⁷⁹ *Id.*, 2.

use and application of the terms colony and colonization, and have remained steadfast in their conclusion that the American presence in the Hawaiian Islands was and is currently colonial in nature. This has been the source of much confusion in the way of legal or political solutions. Professor Slavoj Žižek critically suggests that in post-colonial studies, the use of the term colonization “starts to function as a hegemonic notion and is elevated to a universal paradigm, so that in relations between the sexes, the male sex colonizes the female sex, the upper classes colonize the lower classes, and so on.”¹⁸⁰ In cultural studies he argues that it “effectively functions as a kind of *ersatz*-philosophy, and notions are thus transformed into ideological universals.”¹⁸¹

In the legal and political realm, the fundamental difference between the terms *colonization/de-colonization* and *occupation/de-occupation*, is that the colonized must negotiate with the colonizer in order to acquire state sovereignty, e.g. India from Great Britain, Rwanda from Belgium, and Indonesia from the Dutch. Under the latter, State sovereignty is presumed and not dependent on the will of the occupier, e.g. Soviet occupation of the Baltic States, and the American occupation of Afghanistan and Iraq. *Colonization/de-colonization* is a matter that concerns the internal laws of the colonizing State and presumes the colony is not sovereign, while *occupation/de-occupation* is a matter of international law relating to already existing sovereign States. Craven, a Professor of International Law who has done extensive research on the continuity of the Hawaiian State, concludes:

¹⁸⁰ Slavoj Žižek, *Interrogating the Real* (Continuum 2005), 92.

¹⁸¹ *Id.* *Erstaz* is German for an imitation or substitute.

For the Hawaiian sovereignty movement, therefore, acceding to their identification as an indigenous people would be to implicitly accede not only to the reality, but also to the legitimacy, of occupation and political marginalization. All they might hope for at that level is formal recognition of their vulnerability and continued political marginalization rather than the status accorded under international law to a nation belligerently occupied.¹⁸²

Thus, when Hawaiian scholars and sovereignty activists, in particular, consistently employ the terms and theories associated with colonization and indigeneity, they are reinforcing the very control they seek to oppose. Hawaiian State sovereignty and the international laws of occupation, on the other hand, not only presume the continuity of Hawaiian sovereignty, but also provides the legal framework for regulating the occupier, despite a history of its non-compliance. As a matter of State sovereignty, and not self-determination of a stateless people, international law is the appropriate legal framework to not only understand Hawai`i's prolonged occupation, but also provide the basis for resolution through reparations. It is abundantly clear that the U.S. government administered the Hawaiian Islands since 1898 as if it were a colonial possession, but it was for the purpose of concealing a gross violation of international law. Therefore, colonialism must be viewed as a tool of the occupant that was used to commit fraud in an attempt to destroy the memory of sovereignty and the legal order of the occupied State. Self-determination, inherent sovereignty and indigenous peoples are terms fundamentally linked to not just the concept, but to the political and legal process, of de-colonization, which presupposes sovereignty to be an aspiration and not a legal reality. The effects of

¹⁸² Matthew Craven, "Hawai`i, History, and International Law," *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 8.

colonization have no doubt affected the psychological and physiological being of many native Hawaiians, but these effects must be reinterpreted through the lens of international law whereby colonial treatment is the evidence of the violation of the law, and not the political basis of a sovereignty movement. As such, these violations serve as the measurement for reparations and compensation to a people who, against all odds, fought and continue to fight to maintain their dignity, health, language and culture.

CHAPTER 5

RIGHTING THE WRONG: BEGINNING THE TRANSITION FROM OCCUPIED TO RESTORED STATE

Occupation does not change the legal order of the occupied State, and according to Professor Marek, there is “nothing the occupant can legally do to break the continuity of the occupied State. He cannot annul its laws; he can only prevent their implementation. He cannot destitute judges and officials; he can merely prevent them from exercising their functions.”¹ These constraints upon the occupier, as formulated in Article 43 of the Hague Regulations, compel the occupying State “to respect the existing—and continuing—legal order of the occupied State.”² Chapter II, section 6 of the Hawaiian Civil Code, provides:

the laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws.³

The term obligatory does not import a choice, but rather a mandate or legal constraint to bind.⁴ According to Sir William R. Anson, “obligation is a power of control, exercisable by one person over another, with reference to future and specified acts or

¹ Krystyna Marek, *Identity and Continuity of States in Public International Law*, 2nd ed., (Librairie Droz 1968), 80.

² *Id.*

³ *Compiled Laws of the Hawaiian Kingdom* (Hawaiian Gazette 1884), 2.

⁴ The American Heritage Dictionary, 2nd College ed. (Houghton Mifflin Company 1982), 857.

forbearances.”⁵ It is a fundamental aspect of compliance that lays down the duty of all persons “while within the limits of this kingdom,” and forms the basis of the legal order of the Hawaiian Kingdom—allegiance. According to Bouvier, allegiance is the tie, “which binds the citizen to the government, in return for the protection which the government affords.”⁶ It is also the duty, “which the subject owes to the sovereign, correlative with the protection received.”⁷ A duty not just owed by the subjects of the state, but also by all persons within its territory to include aliens. Hawaiian penal law, in particular, defines allegiance to be “the obedience and fidelity due to the kingdom from those under its protection.”⁸ The statute also provides that an “alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein.”⁹ Intentional deviation of this mainstay of the Hawaiian legal order could be considered a treasonable act.

THE CIVIL POPULATION OF AN OCCUPIED STATE UNDER THE LAWS OF OCCUPATION

As allegiance is the essential tie between the government and the governed, without which there is anarchy, a question will naturally arise on whether or not the duty of a population’s allegiance is affected in any way when its government has been overthrown and replaced by a foreign occupational government. European practice in the

⁵ Sir William R. Anson, *Principles of the Law of Contract* (Callaghan and Company 1880), 4

⁶ John Bouvier, *Bouvier’s Law Dictionary and Concise Encyclopedia*, 8th ed., vol. 1 (West Publishing Company 1914), 179.

⁷ *Id.*

⁸ *Penal Code of the Hawaiian Islands*, (Government Press 1869), 8.

⁹ *Id.*

seventeenth and eighteenth century treated occupied territories as annexed territories, and, therefore, the inhabitants were forced to swear an oath of allegiance, but this practice would change as a result of the evolution of international law and the maintenance of the legal order of an occupied State. By the early nineteenth century, “Anglo-American courts defined the relationship of native inhabitants to the occupant as one of temporary allegiance.”¹⁰ According to Henry Halleck, “the duty of allegiance is reciprocal to the duty of protection,” and, therefore, when “a state is unable to protect...its territory from the superior force of an enemy, it loses, for the time, its claim to the allegiance of those whom it fails to protect, and the inhabitants of the conquered territory pass under a temporary or qualified allegiance to the conqueror.”¹¹ In recent times, however, von Glahn states, “there seems to have been a change in point of view, and it can be said that, at the most, the inhabitants should give an obedience equal to that previously given to the laws of their legitimate sovereign and that, at the least, they should obey the occupant to the extent that such result can be enforced through the latter’s military supremacy.”¹²

The next logical question would be whether or not the laws of occupation affect or modify the domestic laws of the occupied state, which the Hawaiian civil code holds as obligatory. Article 43 of the Hague Regulations provides that the laws of the occupied State must be administered. According to former U.S. Assistant Secretary of State David J. Hill, “the intention of the regulations is that the order and economy of civil life be disturbed as little as possible by the fact of military occupation; which is not directed

¹⁰ Gehard von Glahn, *The Occupation of Enemy Territory...A Commentary on the Law and Practice of Belligerent Occupation* (The University of Minnesota Press 1957), 56.

¹¹ Henry Wager Halleck, *International Law* (D.Van Nostrand 1861), 791.

¹² Gehard von Glahn, *Law Among Nations*, 6th ed. (Maxwell Macmillan Canada, Inc. 1992), 777.

against individuals or against society as an institution, but solely against armed resistance.”¹³ This requirement for the occupant to respect the laws of the occupied State, also means that the occupant does not have to respect the laws if there are extenuating circumstances that absolutely prevents it, e.g. military necessity.

Benvenisti states that, “the drafters of this phrase viewed military necessity as the sole relevant consideration that could ‘absolutely prevent’ an occupant from maintaining the old order.”¹⁴ Therefore, there must be a balance between the security interest of the occupant against hostilities by the forces of the occupied State, which they are at war with, and the protection of the interests of the occupied population by maintaining “public order and safety.” This was precisely stated in 1907 by a United States Court of Claims in *Ho Tung and Co. v. The United States* regarding the collection of duties by U.S. military authorities at the port of Manila during the Spanish-American War. The court held that “It is unquestioned that upon the occupation by our military forces of the port of Manila it was their duty to respect and assist in enforcing the municipal laws then in force there until the same might be changed by order of the military commander, called for by the necessities of war.”¹⁵ von Glahn, however, expands the occupant’s lawmaking capacity beyond war measures, and includes laws necessitated by the interests of the local population. He argues:

that the secondary aim of any lawful military occupation is the safeguarding of the welfare of the native population, and this secondary and lawful aim would

¹³ David J. Hill, “The Rights of the Civil Population in Territory Occupied by a Belligerent,” *The American Journal of International Law* 11(1) (1917): 134.

¹⁴ Benvenisti, *The International Law of Occupation* (Princeton University Press 1993), 14.

¹⁵ *Ho Tung and Co. v. The United States*, 42 Ct. Cls. 213, 227-228 (1907).

seem to supply the necessary basis for such new laws as are passed by the occupant for the benefit of the population and are not dictated by his own military necessity and requirements.¹⁶

Military Government

American practice has divided military jurisdiction into three parts—military law, military government and martial law. Military law is exercised over military personnel, whether or not the military bases are situated within U.S. territory or abroad; military government is exercised over occupied territories of a foreign State; and martial law is exercised over U.S. citizens and residents within U.S. territory during emergencies. Military government, therefore, is a matter of international law and the rules of war on land, while martial law is a matter of U.S. municipal law.¹⁷ According to American usage, martial law is declared when U.S. civil law has been suspended by necessity and replaced by the orders of a military commander. These orders, whether they are lawful or not, are judged after the civil authority has been reinstated. Legislation emanating from a military government in occupied States, however, is not judged by the restored civil authority of an occupied State, but by the international laws of occupation. This subject is fully treated by Benvenisti, who states:

The occupant may not surpass its limits under international law through extraterritorial prescriptions emanating from its national institutions: the legislature, government, and courts. The reason for this rule is, of course, the functional symmetry, with respect to the occupied territory, among the various

¹⁶ Von Glahn, *supra note* 10, 97.

¹⁷ William E. Birkhimer, *Military Government and Martial Law* (James J. Chapman 1892), 21.

lawmaking authorities of the occupying state. Without this symmetry, Article 43 could become almost meaningless as a constraint upon the occupant, since the occupation administration would then choose to operate through extraterritorial prescription of its national institutions.¹⁸

According to the U.S. Army and Navy manual of military government and civil affairs during the Second World War, “military government must be established either by reason of military necessity as a right under international law, or as an obligation under international law.”¹⁹ Orders and legislation from a military government can only be sustained so long as the military government remains in effective control of the occupied territory. However, these laws lose all effect once the occupation comes to a close, and it is the sole decision of the restored government on whether or not to maintain those laws. Unlike U.S. constitutional law that recognizes governmental acts of a failed rebellion so long as it “had no connection with the disloyal resistance to government,”²⁰ international law does not mandate a restored government to respect the legislation made by a military government because a returning sovereign has far-reaching rescinding powers.²¹

¹⁸ Benvenisti, *supra* note 14, 19.

¹⁹ “United States Army and Navy Manual of Military Government and Civil Affairs,” *U.S. Army Field Manual 27-5*, para. 3 (December 22, 1943)

²⁰ Thomas M. Cooley, *The General Principles of Constitutional in the United States of America* (Little, Brown, and Company 1898), 190.

²¹ Ernst Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace 1942), 145.

*Absence of a Legitimate Government since January 17th 1893
and the Stimson Doctrine of Non-recognition*

Three important facts resonate in the American occupation of the Hawaiian Kingdom. First, the Hawaiian Kingdom was never at war with the United States and as a subject of international law was a neutral state; second, there was never a military government established by the United States to administer Hawaiian law; and, third, all laws enacted by the Federal government and the State of Hawai'i, to include its predecessor the Territory of Hawai'i since 1900, stem from the lawmaking power of the United State Congress, which, by operation of United States constitutional constraints as well as Article 43, have no extraterritorial force. In other words, there has been no legitimate government, whether *de jure* or *de facto* under Hawaiian law or *military* under the executive authority of the U.S. President, operating within the occupied State of the Hawaiian Kingdom since the illegal overthrow of the Hawaiian government on January 17th 1893; nor has there been any Hawaiian government in exile. All laws emanating from the national institutions of the United States have no legal effect within the occupied territory, and while governments are matters of a state's domestic law, "international law nevertheless has some bearing on it where a government is created in breach of international law, or is the result of an international illegality."²²

In the 1930s, the international doctrine of non-recognition arose out of the principle that legal rights cannot derive from an illegal situation (*ex injuria jus non*

²² Stefan Talmon, "Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law," *The Reality of International Law: Essays in Honour of Ian Brownlie*, Guy S. Goodwin-Gill and Stephan Talmon, ed.'s (Clarendon Press 1999), p. 522.

oritur), which Professor Lassa Oppenheim calls “an inescapable principle of law.”²³ In particular, the doctrine came about as a result of the Japanese invasion of Manchuria in 1931 and the setting up of a puppet government. After the invasion, U.S. Secretary of State Henry Stimson declared that “the illegal invasion would not be recognized as it was contrary to the 1928 Pact of Paris (the Kellogg-Briand Pact) which had outlawed war as an instrument of national policy.”²⁴ The non-recognition doctrine came to be known as the Stimson doctrine, and according to Professor Malcolm Shaw:

The role of non-recognition as an instrument of sanction as well as a means of pressure and a method of protecting the wronged inhabitants of a territory was discussed more fully in the Advisory Opinion of the International Court of Justice in the Namibia case, 1971, dealing with South Africa’s presence in that territory. The Court held that since the continued South African occupancy was illegal, member states of the United Nations were obliged to recognize that illegality and the invalidity of South Africa’s acts concerning Namibia and were under a duty to refrain from any actions implying recognition of the legality of, or lending support or assistance to, the South African presence and administration.²⁵

Marek explains that puppet governments “commit, for the benefit of the occupying power, all unlawful acts which the latter does not want to commit openly and directly. Such acts may range from mere violations of the occupation regime in the

²³ Lassa Oppenheim, *International Law*, 7th ed., vol. 2 (Longmans 1952), 218.

²⁴ Malcolm Nathan Shaw, *International Law*, 5th ed. (Cambridge University Press 2003), 390.

²⁵ *Id.*, 392.

occupied, but still surviving State to a disguised annexation.”²⁶ In 1938, Maximilian Litvinov, reminded the League of Nations that there are cases of annexations “camouflaged by the setting-up of puppet ‘national’ governments, allegedly independent, but in reality serving merely as a screen for, and an agency of, the foreign invader.”²⁷ The very aim of establishing puppet governments is “to enable the occupant to act in *fraudem legis*, to commit violations of the international regime of occupation in a disguised and indirect form, in other words, to disregard the firmly established principle of the identity and continuity of the occupied State.”²⁸ The most prominent feature of puppet governments “is that they are in no way related to the legal order of the occupied State; in other words, they are neither its government, nor its organ of any sort, and they do not carry on its continuity.”²⁹ The U.S. Department of the Army affirms this understanding of puppet regimes. In its field manual on the law of land warfare, it provides that the “restrictions placed upon the authority of a [military] government cannot be avoided by a system of using a puppet government, central or local, to carry out acts which would be unlawful if performed directly by the occupant. Acts induced or compelled by the occupant are nonetheless its acts.”³⁰

The provisional government, Republic of Hawai`i, U.S. Territory of Hawai`i and the U.S. State of Hawai`i were all governments created out of an “international illegality.” In the investigation of the 1893 overthrow, President Cleveland concluded the

²⁶ Marek, *supra* note 1, 110.

²⁷ 19 League of Nations Official Journal 341 (1938).

²⁸ Marek, *supra* note 1, 115.

²⁹ *Id.*, 113.

³⁰ “The Law of Land Warfare”, *U.S. Army Field Manual 27-10* §366 (July 1956).

provisional government was “neither *de facto* nor *de jure*,”³¹ but self-declared, and the U.S. Congress also concluded that the provisional government’s successor, the Republic of Hawai`i, was also “self-declared.”³² The question, however, is what was the status of the Territorial government (1900-1959) and the State of Hawai`i government (1959-present), both of which were not self-declared, but established by Congressional statute? Clearly the creation of these surrogates circumvented the duty of administering Hawaiian Kingdom laws during the occupation, and as such they can be argued to be puppet regimes illegally imposed in the occupied territory of the Hawaiian Kingdom. In response to contemporary challenges regarding the failure to fulfill the duty to establish a direct system of administration in an occupied territory, Benvenisti argues:

any measures whatsoever introduced by the occupant or its illegal surrogates would merit no respect in international law. The illegality of the occupation regime would taint all its measures, and render them null and void. The occupant who fails to establish the required regime does not seek international protection for its policies in the occupied area, and, indeed, is not entitled to expect any deference for these policies.³³

THE CASE FOR REPARATIONS

States are subjects of international law and have rights and duties and the capacity of acting with legal consequences. Individuals, on the other hand, are subjects of national law whose rights are enshrined in the State’s organic, statutory and common law. These

³¹ United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office 1895), 453.

³² 107 U.S. STAT. 1510. Reprinted at *Hawaiian Journal of Law and Politics* 1 (Summer 2004): 290.

³³ Benvenisti, *supra* note 14, 212.

two legal systems are not the same and any “failure to grasp this crucial fact would inevitably entail a serious misinterpretation of the impact of law in this community.”³⁴ According to Werner Levi, “States are the foundation of the international political system,” and they “agree that international law shall be their tool, not their master. They achieve this goal by maintaining themselves as the mainspring of the creation and use of law.”³⁵ He explains:

International law was originally fashioned into one of the instruments for safeguarding the “personality” and existence of states. To be effective, this instrument had to offer a fairly comprehensive regulation for the identification and survival of states. It had to specify the manner in which states would arise, exist, and demise and in which, while in existence, they should behave toward each other.³⁶

According to international law, restitution in kind, compensation and satisfaction, are forms of reparations afforded to an injured party, and can be imposed either singularly or collectively depending on the circumstances of the case. There are two recognized systems that provide reparations to an injured party—*remedial justice* where the injured party is a State, and *restorative justice* where the injured party or parties are individuals within a State. Remedial justice addresses compensation and punitive actions, while restorative justice uses reconciliation that attends “to the negative consequences of one’s action through apology, reparation and penance.”³⁷ International law is founded on

³⁴ Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1986), 10.

³⁵ Werner Levi, *Contemporary International Law*, 2nd ed. (Westview Press 1991), 63.

³⁶ *Id.*

³⁷ Andrew Schaap, *Political Reconciliation* (Routledge 2005), 13.

remedial justice, whereas individual States, sometimes with the assistance of the United Nations, employ or facilitate varying forms of restorative justice within their territorial borders where “previously divided groups will come to agree on a mutually satisfactory narrative of what they have been through, opening the way to a common future.”³⁸ The Guatemalan Historical Clarification Commission is an example of a restorative justice system, which was “established in 1996 as part of the UN-supervised peace accord.” The Commission’s function was to describe “the nature and scope of human rights abuses during the 30-year civil war.”³⁹ An example of remedial justice is the 1927 seminal *Chorzow Factory* case (Germany v. Poland) heard before the Permanent Court of International Justice in The Hague, Netherlands, and described by Professor Dinah Shelton as “the cornerstone of international claims for reparation, whether presented by states or other litigants.”⁴⁰ In that case, the court set forth the basic principles governing reparations after breaching an international obligation. The court stated:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of

³⁸ JOHN TORPEY, *Politics and the Past: On Repairing Historical Injustices* (Rowman & Littlefield 2003), 25.

³⁹ Mark R. Amstutz, *The Healing of Nations: The Promise and Limits of Political Forgiveness* (Rowman & Littlefield Publishers 2005), 27.

⁴⁰ Dinah Shelton, “Righting Wrongs: Reparations in the Articles of State Responsibility,” *American Journal of International Law* 96(4) (Oct., 2003): 836.

damages for loss sustained which would be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁴¹

For the past century, scholars have viewed the overthrow of the Hawaiian government as irreversible and the annexing of the Hawaiian Islands as an extension of U.S. territory legally brought about by a congressional resolution. As a benign verb, the term annexation conjures up synonyms such as affix, append, incorporate or bring together. But careful study of the annexation reveals that it was not benign, but a malign act of arrogation on the part of the United States to seize the Hawaiian Islands without legal restraints. Hawai'i's territory was occupied for military purposes and in the absence of any evidence extinguishing Hawaiian sovereignty, e.g. a treaty of cession or conquest, international laws not only impose duties and obligations on an occupier, but maintains and protects the international personality of the occupied State, despite the overthrow of its government. As an operative agency of the United States, its government “is that part of a state which undertakes the actions that, attributable to the state, are subject to regulation by the application of the principles and rules of international law.”⁴²

Brownlie, a renowned scholar of international law, asserts that if “international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.”⁴³ *Restitutio in integrum* is the basic principle and primary right of redress for states whose rights have been

⁴¹ *Chorzow Factory* (Germany v. Poland), Indemnity, 1928 PCIJ (ser. A), no. 17, 47.

⁴² von Glahn, *supra* note 12, 94.

⁴³ Ian Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press 1990), 287.

violated,⁴⁴ for “it is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”⁴⁵ Gerald Fitzmaurice argues that the “notion of international responsibility would be devoid of content if it did not involve a liability to ‘make reparation in an adequate form.’”⁴⁶ When an international law has been violated, the American Law Institute’s *Restatement of the Foreign Relations Law of the United States* emphasizes the “forms of redress that will undo the effect of the violation, such as restoration of the *status quo ante*, restitution, or specific performance of an undertaking.”⁴⁷ “In the case...of unlawful annexation of a State,” according to Professor James Crawford, “the withdrawal of the occupying State’s forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution. Even so, ancillary measures (the return of persons and property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.”⁴⁸ The underlying function of reparations, through remedial justice, is to restore the injured State to that position as if the injury had not taken place.

Responsibility of States for Internationally Wrongful Acts

In 1948, the United Nations established the International Law Commission (ILC), comprised of legal experts from around the world that would fulfill the Charter’s mandate

⁴⁴ Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford University Press 1983), 211.

⁴⁵ See Chorzow, *supra* note 41, 29.

⁴⁶ Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius 1986), 6.

⁴⁷ Restatement (Third) of the Foreign Relations Law of the United States, §901 (1987).

⁴⁸ JAMES Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002), 215.

of “encouraging the progressive development of international law and its codification.”⁴⁹ State responsibility was one of fourteen topics selected for codification, and the I.L.C. began its work in 1956. Codification, according to Brownlie, “involves the setting down, in a comprehensive and ordered form, of rules or existing law and the approval of the resulting text by a law-determining agency.”⁵⁰ After nearly half a century, the I.L.C. finally completed the articles on *Responsibility of States for Internationally Wrongful Acts* on August 9th 2001, and was faced with two options for action by the United Nations. According to Crawford, the I.L.C.’s *Special Rapporteur* for the articles and member of the commission since 1992 as well as presiding arbitrator in the *Larsen* case, the articles could be the subject of “a convention on State responsibility and some form of endorsement or taking note of the articles by the General Assembly.”⁵¹

Members of the Commission were divided on the options and decided upon a two-stage approach that would first get the General Assembly to take note of the articles, which were annexed to a resolution. After some reflection, the commission also thought that maybe a later session of the General Assembly would be best to consider the appropriateness and feasibility of a convention.⁵² Crawford suggested that by having the General Assembly initially take note of the Articles by resolution, it could “commend it to States and to international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law.”⁵³ According

⁴⁹ *Id.*, 1.

⁵⁰ Brownlie, *supra* note 43, 30.

⁵¹ Crawford, *supra* note 48, at 58.

⁵² *Id.*, 59. See also G.A. Res. 59/35 of December 2, 2004.

⁵³ *Id.* See also Fourth Report, A/CN.4/517, para. 26.

to Professor David Caron, a legal scholar of international law, the significance of the “work of the ILC is similar in authority to the writings of highly qualified publicists,” which is a recognized source of international law.⁵⁴ In his fourth report on State Responsibility, Crawford stated, that “States, tribunals and scholars will refer to the text, whatever its status, because it will be an authoritative text in the field it covers.”⁵⁵ There are two conceptual premises that underlie the articles of State responsibility:

1. The importance of upholding the rule of law in the interest of the international community as a whole; and
2. Remedial justice as the goal of reparations for those injured by the breach of an obligation.⁵⁶

The codification of international law on State responsibility has been hailed as a major achievement “in the consolidation of the rule of law in international affairs.” This is especially true because it “ventured out into the ‘hard’ field of law enforcement and sanctions, which has been classically considered the Achillean heel of international law.”⁵⁷ Shelton also lauds, in particular, Article 41’s mandate that States not only cooperate in order to bring to an end a serious breach of international law, but that States shall not “recognize as lawful a situation created by a serious breach.”⁵⁸ Despite her view

⁵⁴ David D. Caron, “The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority,” *American Journal of International Law* 96 (2002): 867; see also Brownlie, *supra* note 33, 25.

⁵⁵ James Crawford, “Fourth Report on State Responsibility,” U.N. Doc. A/CN.4/517, para. 22 (2001).

⁵⁶ Caron, *supra* note 54, 838.

⁵⁷ Lauri Malksoo, “State Responsibility and the Challenge of the Realist Paradigm: The Demand of Baltic Victims of Soviet Mass Repressions for Compensation from Russia,” *Baltic Yearbook of International Law* 3 (2003): 58.

⁵⁸ See Shelton, *supra* note 40, 842.

that the articles represent “the most far-reaching examples of the progressive development of international law,”⁵⁹ she admits it also highlights “the need to identify the means to satisfy injured parties while ensuring the international community’s interest in promoting compliance.”⁶⁰ In 1991, though, the United Nations Security Council specifically addressed and established a means to satisfy injured parties who suffered from an international wrongful act by a State.

After the first Gulf war, the Security Council established the *United Nations Compensation Commission* as “a new and innovative mechanism to collect, assess and ultimately provide compensation for hundreds of thousands—or even millions—of claims against Iraq for direct losses stemming from the invasion and occupation of Kuwait.”⁶¹ According to United Nations’ Secretary General Kofi Annan, “the Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims; it is only in this last respect that a quasi-judicial function may be involved.”⁶² Iraq’s invasion and occupation of Kuwait was a violation of Kuwait’s territorial integrity and sovereignty, and therefore considered an international wrongful act. It wasn’t a dispute, so intervention of an international court or arbitral tribunal was not necessary.

⁵⁹ *Id.*

⁶⁰ *Id.*, 856.

⁶¹ John R. Crook, “The United Nations Compensation Commission—A New Structure to Enforce State Responsibility,” *American Journal of International Law* 87(1) (1993): 144.

⁶² The United Nations established a website for the *United Nations Compensation Commission*. The website is an excellent resource of information regarding the claims by states, individuals and businesses against Iraq as well as selected publications. (visited October 2, 2008) <<http://www2.unog.ch/uncc/>>.

An internationally wrongful act must be distinguished from a dispute between States. According to the *Responsibility of States for Internationally Wrongful Acts*, an international wrongful act consists of “an action or omission...attributable to the State under international law; and...constitutes a breach of an international obligation of the State.”⁶³ A dispute, on the other hand, is “a disagreement on a point of law or fact, a conflict of legal views or of interests”⁶⁴ between two States. Conciliation, arbitration and judicial settlement settle legal disputes that seek to assert existing law, while negotiation, enquiry and mediation provide for the settlement of political disputes that deal with competing political or economic interests.⁶⁵ A claim by a State⁶⁶ becomes a dispute, whether legal or political, once the respondent State opposes the claim; but an internationally wrongful act is not dependent on a State’s opposing claim, especially if the breach involves the violation of a peremptory norm or *jus cogens*.⁶⁷ Crawford explains:

Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility.

They have nothing to do with questions of the jurisdiction of a court or tribunal

⁶³ Crawford, *supra* note 48, at 81.

⁶⁴ Mavrommatis Palestine Concession case, PCIJ, Ser. A, no. 2, 11.

⁶⁵ U.N. CHART., Article 33.

⁶⁶ According to Brownlie, a “state presenting an international claim to another state, either in diplomatic exchanges or before an international tribunal, has to establish its qualifications for making the claim, and the continuing viability of the claim itself, before the merits of the claim come into question.” See Brownlie, *supra* note 43, at 477.

⁶⁷ Article 69 of the 1969 Vienna Convention on the Law of Treaties defines a “peremptory norm or general international law [as] a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol. 1155, p. 331.

over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself.⁶⁸

In similar fashion, Hawai`i could find satisfaction through a compensation commission established by the United Nations Security Council that would be capable of addressing the subject of reparations and the effects of a prolonged occupation. In these next sections, I will argue that Hawai`i does not have a dispute with the United States, and therefore, as an international wrongful act, the appropriate venue for remedy could be the Security Council and not an international court or arbitral tribunal.

Negotiating Settlement: 1893 Cleveland-Lili`uokalani Agreement of Restoration

When U.S. forces and its diplomatic corps overthrew the Hawaiian Kingdom government in 1893 with its aim towards extending its territory through military force, it constituted a serious breach of the Hawaiian State's dominion over its territory and the corresponding duty of non-intervention. Non-interference was a recognized general rule of international law, or peremptory norm, in the nineteenth century as it is now, unless the interference was justifiable under the right of the intervening State's self-preservation.⁶⁹ But in order to qualify a State's intervention, the danger to the intervening State "must be great, distinct, and imminent, and not rest on vague and uncertain

⁶⁸ Crawford, *supra* note 48, 162.

⁶⁹ Henry Wheaton, *Elements of International Law* (Clarendon Press 1936), 100; James Kent, *Commentaries on American Law*, 12th ed. (F.B. Rothman 1989), 21; William Edward Hall, *A Treatise on International Law*, 8th Ed., (Oxford University Press, 1904), 55; George B. Davis, *The Elements of International Law* (Harper & Brothers 1903), 99; Thomas D. Woolsey, *Introduction to the Study of International Law*, 4th ed. (F.B. Rothman 1981), 50.

suspicion.”⁷⁰ The Hawaiian Kingdom posed no threat to the preservation of the United States and after investigating the circumstances that led to the overthrow of the Hawaiian government on January 17th 1893, President Cleveland determined that “the military occupation of Honolulu by the United States...was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property.”⁷¹ He concluded that the “lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may be safely asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.”⁷² On the responsibility of State actors, Oppenheim states that “according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologize or express its regret for his behaviour, or to pay damages.”⁷³

On November 13th 1893, U.S. Minister Willis requested a meeting with the Queen at the U.S. Legation, “who was informed that the President of the United States had important communications to make to her.”⁷⁴ Willis explained to the Queen of the “President’s sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her

⁷⁰ *Id.*, Kent, 24.

⁷¹ United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office, 1895), 452 [hereafter Executive Documents].

⁷² *Id.*, 455.

⁷³ Lassa Oppenheim, *International Law*, 3rd ed., (Longmans, Green and Company 1920), 252.

⁷⁴ Executive Documents, *supra* note 71, 1242.

consent and cooperation, the wrong done to her and to her people might be redressed.”⁷⁵ The President concluded that the “members of the provisional government and their supporters, though not entitled to extreme sympathy, have been led to their present predicament of revolt against the Government...by the indefensible encouragement and assistance of our diplomatic representative.”⁷⁶ Thus being subject to the pains and penalties of treason under Hawaiian law. The Queen was then asked, “[s]hould you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government?”⁷⁷ She responded, “[t]here are certain laws of my Government by which I shall abide. My decision would be, as the law directs, that such persons should be beheaded and their property confiscated to the Government.”⁷⁸ The Queen referenced Chapter VI, section 9 of the Penal Code, which states, “[w]hoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government.” When asked again if she would reconsider the President’s request, she responded, “[t]hese people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated.”⁷⁹

⁷⁵ *Id.*

⁷⁶ *Id.*, 457.

⁷⁷ *Id.*, 1242.

⁷⁸ *Id.*

⁷⁹ *Id.*

In a follow-up instruction sent to Willis on December 3rd 1893, U.S. Secretary of State Gresham directed the U.S. Minister to continue to negotiate with the Queen.⁸⁰ Gresham acknowledged that the President had a duty “to restore to the sovereign the constitutional government of the Islands,” but it was dependent upon an unqualified agreement of the Queen to recognize the 1887 constitution, assume all administrative obligations incurred by the Provisional Government, and to grant full amnesty to those individuals instrumental in setting up or supporting the Provisional Government.⁸¹ Gresham directed Willis to convey to the Queen that should she “refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf.”⁸²

Constitutional Constraints upon the Agreement to Settle

In *Knote v. United States*, Justice Loring correctly stated that the word amnesty has no legal significance in the common law, but arises when applied to rebellions that bring about the rules of international law.⁸³ He adds that amnesty is the synonym for oblivion and pardon,⁸⁴ which is “an act of sovereign mercy and grace, flowing from the appropriate organ of the government.”⁸⁵ As Cleveland’s request for a grant of general amnesty from the Queen was essentially tied to the Hawaiian crime of treason, three

⁸⁰ *Id.*, 1192.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Knote v. The United States*, 10 Ct. Cl. 397, 407 (1875).

⁸⁴ *Id.*

⁸⁵ *Ex parte Law*, 85 Ga. 285, 296 (1866); see also *Davies v. McKeeby*, 5 Nev. 369, 373 (1870).

questions naturally arise. When did treason actually take place? Was the Queen constitutionally empowered to recognize the 1887 constitution as lawful? And was the Queen empowered under Hawaiian constitutional law to grant a pardon?

The leaders of the provisional government committed the crime of treason in 1887 when they forced a constitution upon the Queen's predecessor, King Kalakaua, at the point of a bayonet, and organized a new election of the legislature while the lawful legislature remained in term, but out of session. As Blount discovered in his investigation, the purpose of the constitution was to offset the native voting block by placing it in the controlling hands of foreigners where "large numbers of Americans, Germans, English, and other foreigners unnaturalized were permitted to vote..."⁸⁶ He concluded these elections "took place with the foreign population well armed and the troops hostile to the crown and people."⁸⁷ With the pending retake of the political affairs of the country by the Queen and loyal subjects, the revolutionaries of 1887 found no other alternative but to appeal to the U.S. resident Minister John Stevens to order the landing of U.S. troops in order to provide for their protection with the ultimate aim of transferring the entire territory of the Hawaiian Islands to the United States. By soliciting the intervention of the U.S. troops for their protection, these revolutionaries effectively rendered their 1887 revolution unsuccessful, and transformed the matter from a rebellion to an intervening state's violation of international law.⁸⁸ The 1864 Constitution, as

⁸⁶ See Executive Documents, *supra* note 71, at 579.

⁸⁷ *Id.*

⁸⁸ United States doctrine at the time considered rebellions to be successful when the revolutionaries are (1) in complete control of all governmental machinery, (2) there exists no organized resistance, and (3) acquiescence of the people. See also John Bassett Moore, *A Digest of International Law*, vol. 1 (Government Printing Office, 1906), 139.

amended, the Civil Code, Penal Code, and the session laws of the Legislative Assembly enacted before the revolution on July 6th 1887, comprised the legal order of the Hawaiian State and remained the law of the land during the revolution and throughout the subsequent intervention by the United States since January 16th 1893.

Prior to the revolution, the Queen was confirmed as the lawful successor to the throne of her brother King Kalakaua on April 10th 1877,⁸⁹ in accordance with Article 22 of the Hawaiian constitution, and, therefore, capable of negotiating on behalf of the Hawaiian Kingdom the settlement of the dispute with the United States. As chief executives, both the Queen and President were not only authorized, but limited in authority by a written constitution. Similar to United States law, Hawaiian law vests the pardoning power in the executive by constitutional provision, but where the laws differ, though, is who has the pardoning power and when can that power be exercised. Under the U.S. constitution, the President alone has the “power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,”⁹⁰ but under the Hawaiian constitution, the Monarch “by and with the advice of His Privy Council, has the power to grant reprieves and pardons, *after conviction*, for all offences, except in cases of impeachment (emphasis added).”⁹¹ As a constitutional monarchy, the Queen’s decision to pardon, unlike the President, could only come through consultation with Her Privy

⁸⁹ Robert C. Lydecker, *Roster Legislatures of Hawaii: 1841-1918*, (The Hawaiian Gazette Co., Ltd. 1918), 138. Art. 22 of the Hawaiian Constitution provides: “...the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King's life...”

⁹⁰ U.S. CONST., Article II, §2.

⁹¹ 1864 HAWN. CONST., Article 27.

Council, and the power to pardon can only be exercised once the conviction of treason had already taken place and not before.

The Hawaiian constitution also vests the law making power solely in the Legislative Assembly comprised of the “[t]hree Estates of this Kingdom...vested in the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives of the People, sitting together.”⁹² Any change to the constitution, *e.g.* the Queen’s recognition of the 1887 constitution, must be first proposed in the Legislative Assembly and if later approved by the Queen then it would “become part of the Constitution of [the] country.”⁹³ From a constitutional standpoint, the Queen was not capable of recognizing the 1887 constitution without first submitting it for consideration to the Legislative Assembly convened under the lawful constitution of the country; nor was she able to grant amnesty to prevent the criminal convictions of treason, but only after judgments have already been rendered by Hawaiian courts. Another constitutional question would be whether or not the Queen would have the power to grant a full pardon without advise from Her Privy Council. If not, which would be the case, a commitment on the part of the Queen could have strong consideration when Her Privy Council is ultimately convened once the government is restored.

On December 18th 1893, after three meetings with Willis, the Queen finally agreed with the President and provided the following pledge that was dispatched to Gresham on December 20th 1893. An agreement between the two Heads of State had

⁹² *Id.*, Article 45.

⁹³ *Id.*, Article 80.

finally been made for settlement of the international dispute and restoration of the government.

I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both native and foreign born, do hereby and herein solemnly declare and pledge myself that, if reinstated as the constitutional sovereign of the Hawaiian Islands, that I will immediately proclaim and declare, unconditionally and without reservation, to every person who directly or indirectly participated in the revolution of January 17, 1893, a full pardon and amnesty for their offenses, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof, and that I will forbid and prevent the adoption of any measures of proscription or punishment for what has been done in the past by those setting up or supporting the Provisional Government. I further solemnly agree to accept the restoration under the constitution existing at the time of said revolution and that I will abide by and fully execute that constitution with all the guaranties as to person and property therein contained. I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.⁹⁴

The Queen's declaration was dispatched to the President by Willis and represented the final act of negotiation and settlement of the dispute that arose between

⁹⁴ Executive Documents, *supra* note 71, 1269.

the United States and the Hawaiian Kingdom on January 16th 1893. In other words, the dispute was settled and all that remained for the United States President was to restore the Hawaiian Kingdom government, whereupon the Queen was to grant amnesty, after the criminal convictions of the failed revolutionaries, and assume administrative obligations of the so-called provisional government. But despite the Queen's reluctant recognition of the 1887 constitution, Hawaiian constitutional law prevents it from having any legal effect, unless it was first submitted to a lawfully convened Legislative Assembly, which is highly unlikely given its illicit purpose. If the constitution did empower the Queen to recognize the 1887 constitution without the legislature, there would be no need for amnesty since the overthrow of the Hawaiian government was directly linked to the revolution of 1887 as reported by U.S. Special Commissioner James Blount. Furthermore, the United States' duty to restore the government was not dependent on an agreement with the Queen to grant amnesty, but rather a recognized mandate founded in the principles of international law. The push for amnesty by the United States was political, not legal, and, no doubt, was to mitigate the severity of criminal punishment inflicted on the failed revolutionaries, which included U.S. citizens.⁹⁵

Notwithstanding the constitutional limitations and legal constraints placed upon the Queen as Head of State, the agreement to pardon did represent, in a most trying and difficult time for the Queen, the spirit of "mercy and grace" offered to a cabal of criminals who would later defy the offer of pardon, and seek protection of the United States under the guise of annexation. These criminals never intended to be an

⁹⁵ According to §3, Chap. VI, Hawaiian Penal Code, "An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom."

independent State, whether as a provisional government that would “exist until terms of union with the United States of America have been negotiated and agreed upon,”⁹⁶ or when they changed their name to the so-called Republic of Hawai`i that authorized its President “to make a Treaty of Political or Commercial Union [with] ...the United States, subject to the ratification of the Senate.”⁹⁷ These subsequent actions taken by the revolutionaries would no doubt have a profound affect on whether or not the offer of a pardon is still on the table, even when they are posthumously tried for the crime of treason by a restored Hawaiian government.

United States Obligation Established by Executive Agreement

The ability for the U.S. to enter into agreements with foreign States is not limited to treaties, but includes executive agreements, whether jointly with Congress⁹⁸ or under the President’s sole constitutional authority.⁹⁹ While treaties require ratification from the U.S. Senate, executive agreements do not, and U.S. “Presidents have made some 1600 treaties with the consent of the Senate [and] they have made many thousands of other international agreements without seeking Senate consent.”¹⁰⁰ According to Professor Louis Henkin:

⁹⁶ Lydecker, *supra* note 89, 187.

⁹⁷ *Id.*, 198.

⁹⁸ See Chapter 4, 145.

⁹⁹ “The executive branch claims four sources of constitutional authority under which the President may enter into executive agreements: (1) the president’s duty as chief executive to represent the nation in foreign affairs; (2) the president’s authority to receive ambassadors and other public ministers; (3) the president’s authority as commander in chief; and (4) the president’s duty to “take care that the laws be faithfully executed.”

¹⁰⁰ Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed. (Clarendon Press 1996), 215.

Presidents from Washington to Clinton have made many thousands of agreements, differing in formality and importance, on matters running the gamut of U.S. foreign relations. In 1817, the Rush-Bagot Agreement disarmed the Great Lakes. Root-Takahira (1908) and Lansing-Ishii (1917) defined U.S. policy in the Far East. A Gentlemen's Agreement with Japan (1907) limited Japanese immigration into the United States. Theodore Roosevelt put the bankrupt customs houses of Santo Domingo under U.S. control to prevent European creditors from seizing them. McKinley agreed to contribute troops to protect Western legations during the Boxer Rebellion and later accepted the Boxer Indemnity Protocol for the United States. Franklin Roosevelt exchanged over-age destroyers for British bases early during the Second World War. Potsdam and Yalta shaped the political face of the world after the Second World War. Since the Second World War there have been numerous sole agreements for the establishment of U.S. military bases in foreign countries.¹⁰¹

According to the U.S. Foreign Affairs Manual, the “executive branch claims four sources of constitutional authority under which the President may enter into [sole] executive agreements: (1) the president’s duty as chief executive to represent the nation in foreign affairs; (2) the president’s authority to receive ambassadors and other public ministers; (3) the president’s authority as commander in chief; and (4) the president’s duty to ‘take care that the laws be faithfully executed.’”¹⁰² The agreement with the Queen evidently stemmed from the President’s role as “chief executive,” “commander in chief,” and his duty to “take care that the laws be faithfully executed;” and the binding nature of

¹⁰¹ *Id.*, 219.

¹⁰² 11 *Foreign Affairs Manual* 721.2(b)(3), October 25, 1974.

the agreement must be considered confirmed, so long as the agreement is not “inconsistent with legislation enacted by Congress in the exercise of its constitutional authority.”¹⁰³ In *United States v. Belmont*, Justice Sullivan argued that there are different kinds of treaties that did not require Senate approval. The case involved a Russian corporation that deposited some of its funds in a New York bank prior to the Russian revolution of 1917. After the revolution, the Soviet Union nationalized the corporation and sought to seize its assets in the New York bank with the assistance of the United States. The assistance was “effected by an exchange of diplomatic correspondence between the Soviet government and the United States [in which the] purpose was to bring about a final settlement of the claims and counterclaims between the Soviet government and the United States.”¹⁰⁴ Justice Sutherland explained:

That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (article 2, 2), require the advice and consent of the Senate.¹⁰⁵

¹⁰³ *United States v. Pink*, 315 U.S. 203, 229 (1942); see also *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953).

¹⁰⁴ *United States v. Belmont*, 301 U.S. 324, 326 (1937).

¹⁰⁵ *Id.*, 330.

Regarding the constitutional limitations placed upon the Queen in her agreement with the President, international practice views “that a state is bound irrespective of internal limitations by consent given by an agent properly authorized according to international law.”¹⁰⁶ The implementation of the agreement, however, as a matter of domestic law, is whether or not the compact is self-executing or does it need legislation to put it into effect. As previously stated, the Queen was not constitutionally authorized to proclaim the validity of the 1887 Constitution, but she did have the authority, as the chief executive, to assume the administrative costs of the provisional government, and to grant pardons without legislative intervention. As such, the Cleveland-Lili`uokalani agreement of restoration is binding upon both parties and is an international compact maintained under international law, whereby the corresponding and necessary principles of treaty law can be used to ensure its compliance.

United States Breach of the 1893 Cleveland-Lili`uokalani Agreement

In the United States, Congress took deliberate steps to prevent the President from following through with his obligation to restore, which included hearings before the Senate Foreign Relations Committee headed by Senator Morgan, a pro-annexationist and its Chairman in 1894. These Senate hearings sought to circumvent the requirement of international law, where “a crime committed by the envoy on the territory of the receiving State must be punished by his home State.”¹⁰⁷ Morgan’s purpose was to vindicate the illegal conduct and actions of the U.S. Legation and Naval authorities under

¹⁰⁶ Ian Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press 1990), 613.

¹⁰⁷ Oppenheim, *supra* note 73, 252.

U.S. law. Four Republicans endorsed the report with Morgan, but four Democrats submitted a minority report declaring that while they agree in exonerating the commander of the USS Boston, Captain Wiltse, they could not concur in exonerating “the minister of the United States, Mr. Stevens, from active officious and unbecoming participation in the events which led to the revolution in the Sandwich Islands on the 14th, 16th, and 17th of January, 1893.”¹⁰⁸ By contradicting Blount’s investigation, Morgan intended, as a matter of congressional action, to bar the President from restoring the government as was previously agreed upon with the Queen because there was a fervor of annexation among many members of Congress. Cleveland’s failure to fulfill his obligation of the agreement allowed the provisional government to gain strength, and on July 4th 1894, they renamed themselves the Republic of Hawai`i. For the next three years they would maintain their authority by hiring mercenaries and force of arms, arresting and imprisoning Hawaiian nationals who resisted their authority with the threat of execution, and tried the Queen on fabricated evidence with the purpose of her abdicating the throne.¹⁰⁹ In 1897, the Republic signed another treaty of cession with President Cleveland’s successor, William McKinley, but the Senate was unable to ratify the treaty on account of protests by the Queen and Hawaiian nationals. On August 12th 1898, McKinley unilaterally annexed the Hawaiian Islands for military purposes during the Spanish-American War under the guise of a Congressional joint resolution.

¹⁰⁸ Senate Report 227 (February 26, 1894), *Reports of Committee on Foreign Relations 1789-1901* Volume 6, 53rd Congress, at 363.

¹⁰⁹ Two days before the Queen was arrested on charges of misprision of treason, Sanford Dole, President of the so-called Republic of Hawai`i, admitted in an executive meeting on January 14, 1894, that “there was no legal evidence of the complicity of the ex-queen to cause her arrest...” *Minutes of the Executive Council of the Republic of Hawai`i*, at 159 (Hawai`i Archives).

These actions taken against the Queen and Hawaiian subjects are directly attributable and dependent upon the non-performance of President Cleveland's obligation, on behalf of the United States, to restore the Hawaiian government. This is a grave breach of his agreed settlement with the Queen as the Head of State of the Hawaiian Kingdom. The 1893 Cleveland-Lili'uokalani international agreement is binding upon both parties as if it were a treaty, because, as Oppenheim asserts, since "there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty."¹¹⁰ According to Hall, "a valid agreement is therefore concluded so soon as one party has signified his intention to do or to refrain from a given act, conditionally upon the acceptance of his declaration of intention by the other party as constituting an engagement, and so soon as such acceptance clearly indicated."¹¹¹

The Function of the Doctrine of Estoppel

The principle that a State cannot benefit from its own wrongful act is a general principle of international law referred to as estoppel, which was drawn from the common law.¹¹² The rationale for this rule derives from the maxim *pacta sunt servanda*—every treaty in force is binding upon the parties and must be performed by them in good faith,¹¹³ and "operates so as to preclude a party from denying the truth of a statement of

¹¹⁰ Oppenheim, *supra* note 73, 661.

¹¹¹ Hall, *supra* note 69, 383.

¹¹² D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence," 33 *British Yearbook of International Law* 33 (1957): 181.

¹¹³ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 26.

fact made previously by that party to another whereby that other has acted to his detriment.”¹¹⁴ According to I.C. MacGibbon, a legal scholar in international law, underlying “most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation.”¹¹⁵ To ensure consistency in State behavior, the Permanent Court of International Justice, in a number of cases, affirmed the principle “that a State cannot invoke its municipal law as a reason for failure to fulfill its international obligation.”¹¹⁶ This principle was later codified under Article 27 of the 1969 Vienna Convention on the Law of Treaties, whereby “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹¹⁷

In municipal jurisdictions there are three forms of estoppel—estoppel by judgment as in matters of court decisions; estoppel by deed as in matters of written agreement or contract; and estoppel by conduct as in matters of statements and actions. D.W. Bowett states that these forms of estoppel, whether treated as a rule of evidence or as substantive law, is as much a part of international law as they are in municipal law, and due to the diplomatic nature of States relations, he expands the second form of estoppel to include estoppel by “Treaty, Compromis, Exchange of Notes, or other Undertaking in Writing.”¹¹⁸ Brownlie states that because estoppel in international law

¹¹⁴ Bowett, *supra* note 112, 201.

¹¹⁵ I.C. MacGibbon, “Estoppel in International Law,” *International and Comparative Law Quarterly* 7 (1958): 468.

¹¹⁶ *Id.*, 473.

¹¹⁷ *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, Article 27.

¹¹⁸ Bowett, *supra* note 112.

rests on principles of good faith and consistency, it is “shorn of the technical features to be found in municipal law.”¹¹⁹ Bowett enumerates the three essentials establishing estoppel in international law:

1. The statement of fact must be clear and unambiguous.
2. The statement of fact must be made voluntarily, unconditionally, and must be authorized.
3. There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.¹²⁰

It is self-evident that the 1893 Cleveland-Lili`uokalani agreement meets the requirements of the first two essentials establishing estoppel, and, as for the third, reliance in good faith was clearly displayed and evidenced in a memorial to President Cleveland by the Hawaiian Patriotic League on December 27th 1893. As stated in the memorial:

And while waiting for the result of [the investigation], with full confidence in the American honor, the Queen requested all her loyal subjects to remain absolutely quiet and passive, and to submit with patience to all the insults that have been since heaped upon both the Queen and the people by the usurping Government. The necessity of this attitude of absolute inactivity on the part of the Hawaiian people was further indorsed and emphasized by Commissioner Blount, so that, if the Hawaiians have held their peace in a manner that will vindicate their character as law-abiding citizens, yet it can not and must not be construed as

¹¹⁹ Brownlie, *supra* note 43, 641.

¹²⁰ Bowett, *supra* note 112, 202.

evidence that they are apathetic or indifferent, or ready to acquiesce in the wrong and bow to the usurpers.¹²¹

Continued reliance was also displayed by the formal protests of the Queen and Hawaiian political organizations regarding the second treaty of annexation signed in Washington, D.C., on June 16th 1897, between the McKinley administration and the self-proclaimed Republic of Hawai'i. These protests were received and filed in the office of Secretary of State Sherman and continue to remain a record of both dissent and evidence of reliance upon the conclusion of the investigation by President Cleveland and his obligation and commitment to *restitutio in integrum*—restoration of the Hawaiian government. A memorial of the Hawaiian Patriotic League was filed with the United States “Hawaiian Commission” for the creation of the territorial government appears to be the last public act of reliance made by a large majority of the Hawaiian citizenry.¹²² The commission was established on July 9th 1898 after President McKinley signed the joint resolution of annexation on July 7th 1898, and was holding meetings in Honolulu from August through September. The memorial, which was also printed in two Honolulu newspapers, one in the Hawaiian language¹²³ and the other in English,¹²⁴ stated, in part:

WHEREAS: By memorial the people of Hawaii have protested against the consummation of an invasion of their political rights, and have fervently appealed to the President, the Congress and the People of the United States, to refrain from further participation in the wrongful annexation of Hawaii; and

¹²¹ Executive Documents, *supra* note 71, 1295.

¹²² Munroe Smith, “Record of Political Events,” *Political Science Quarterly* 13(4) (Dec. 1898): 752.

¹²³ “Memoriala A Ka Lahui,” *Ke Aloha Aina*, 3 (September 17, 1898).

¹²⁴ “What Monarchists Want,” *The Hawaiian Star*, 3 (September 15, 1898).

WHEREAS: The Declaration of American Independence expresses that Governments derive their just powers from the consent of the governed:

THEREFORE, BE IT RESOLVED: That the representatives of a large and influential body of native Hawaiians, we solemnly pray that the constitutional government of the 16th day of January, A.D. 1893, be restored, under the protection of the United States of America.

There is no dispute between the United States and the Hawaiian Kingdom regarding the illegal overthrow of the Hawaiian government, and the 1893 Cleveland-Lili`uokalani agreement of restoration is the evidence of final settlement. As such, the United States cannot benefit from its non-performance of its obligation of restoring the Hawaiian Kingdom government under the 1893 Cleveland-Lili`uokalani agreement over the reliance held by the Queen and Hawaiian subjects in good faith and to their detriment. Therefore, the United States is estopped from asserting any of the following claims, unless it can show that the 1893 Cleveland-Lili`uokalani agreement had been fulfilled. These claims include:

1. Recognition of any pretended government other than the Hawaiian Kingdom as the lawful government of the Hawaiian Islands;
2. Annexation of the Hawaiian Islands by joint resolution in 1898;
3. Establishment of a U.S. territorial government in 1900;
4. Administration of the Hawaiian Islands as a non-self-governing territory since 1898 pursuant to Article 73(e) of the U.N. Charter;
5. Admission of Hawai`i as a State of the Federal Union in 1959; and,
6. Designating Native Hawaiians as an indigenous people situated within the United States.

The failure of the United States to restore the Hawaiian Kingdom government is a “breach of an international obligation,” and, therefore, an international wrongful act as defined by the 2001 *Responsibility of States for International Wrongful Acts*. The severity of this breach has led to the unlawful seizure of Hawaiian independence, imposition of a foreign nationality upon the citizenry of an occupied State, mass migrations and settlement of foreign citizens, and the economic and military exploitation of Hawaiian territory—all stemming from the U.S. government’s perverse view of military necessity in 1898. In a 1999 report for the United Nations Centennial of the First International Peace Conference, Professor Christopher Greenwood, who also served as associate arbitrator in the *Larsen* case, stated:

Accommodation of change in the case of prolonged occupation must be within the framework of the core principles laid down in the Regulations on the Laws and Customs of War on Land and the Fourth Convention, in particular, the principle underlying much of the Regulations on the Laws and Customs of War on Land, namely that the occupying power may not exploit the occupied territories for the benefit of its own population.¹²⁵

Despite the egregious violations of Hawaiian sovereignty by the United States since January 16th 1893, the principle of estoppel not only serves as a shield that bars the United States from asserting any legal claim over the Hawaiian Islands, but also a shield that protects the continued existence of the Hawaiian Kingdom, the nationality of its citizenry, and its territorial integrity as they existed in 1893. Self-help is a recognized principle of international relations, and, in this case, it is a principle, together with self-

¹²⁵ Christopher Greenwood, *International Humanitarian Law (Laws of War): Revised report prepared for the Centennial of the First International Peace Conference, pursuant to United Nations General Assembly Resolutions A/RES/52/154 and A/RES/53/99* (May 1999), 47.

preservation, that provides the legal justification to compel the United States to comply with the international laws of occupation. Being that the situation is legal in nature and grounded in rights not only secured to sovereign states, but also correlative rights secured to individuals that derive by virtue of the legal order of the state, it is a subject of legal discourse. But there is a difference between a deliberate move to impel compliance under existing law, and legal mobilization and the reform movement. The former is procedural and rule based within an already existing legal system organized to acknowledge and protect enumerated rights, whereas the latter is aspirational and aims to create legal change in a system by employing legal ideas and traditions that seek to persuade, inspire, explain, or justify in public settings.¹²⁶ This is a case of impelling compliance under existing law.

Impel Compliance

For over a century, the U.S. has not complied with international law regarding the Hawaiian Islands, and has exercised executive, legislative and judicial power in the Islands without any lawful authority. The Hawaiian Kingdom is a very small State when compared to the U.S. and other States in the world, but they all have legal parity despite varying degrees of political, economic and military strengths. As a result of being a small reemerging State, Hawai`i does not have the conventional capabilities that larger States employ to impel compliance through the threat or actual intervention of political, economic or military force. All Hawai`i has is its legal position as a subject of international law, and, as a consequence, the profound impact it has on the economy of

¹²⁶ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), 3.

States. States, as players in the economy, rely on law as “a body of predictable and ascertainable standards of behavior allowing each economic factor to maintain a set of relatively safe expectations as to the conduct of other social actors (including the State authorities, in cases of transgression). Thus law became one of the devices permitting economic activities and consolidation and protecting the fruits of such action.”¹²⁷

The U.S. economy is based on free enterprise and competition, which along with other States’ economies they collectively extend to the international level as a global economy. International laws facilitate trade between States, but the business transactions themselves take place within States, whose governments serve as the regulating authorities. Unlike the command economy of the former Soviet Union where the economy is determined and controlled by the government, the United States has a market economy based on capitalism where private enterprise is encouraged and government intervention limited.

In many respects, contracts are the lifeblood of a market economy. Simple one-off, over-the-table transactions are not the stuff of modern commerce, nor have they been since the Industrial Revolution. Rather, complex linked deals are the norm. Contracts allow long-term planning. Contract law provides security for those who act in reliance on the deals struck. Commerce resolves around promises made and promises fulfilled and, if not fulfilled, made good in other ways, backed by law.¹²⁸

¹²⁷ Antonio Cassese, *International Law in a Divided World* (Clarendon Press, 1986), 107.

¹²⁸ Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law*, 2nd ed. (Ashgate Publishing, Ltd., 2005), 10.

The omission of the U.S. to establish a military government to administer Hawaiian law during the occupation has consequently rendered all contracts entered into by individuals within Hawaiian territory since the date of the Cleveland-Lili'uokalani agreement of restoration on December 18th 1893, whether Hawaiian subjects or citizens of foreign States, invalid. The sheer volume of invalid contracts will have a devastating effect on both the U.S. and global economies as the continuity of the Hawaiian State comes to public attention. The doctrine of non-recognition also prevents courts of other countries from recognizing contracts that originate out of an illegal situation. According to Professor Martin Dixon, British courts attempted to get around this doctrine involving private contracts originating out of non-recognized States, “provided that there was no statutory prohibition...and provided that such recognition did not in fact compromise the UK Government in the conduct of its foreign relations.”¹²⁹

These British cases, however, involved the implication of private contracts originating under the authority of governments that did not possess *de facto* recognition, *i.e.* Southern Rhodesia,¹³⁰ Northern Cyprus¹³¹ and East Germany.¹³² Without *de facto* recognition, these States were not subjects of international law, and, as a consequence, provided some latitude for the British courts to address the parameters of the non-recognition doctrine on private law acts as they entered the British legal system. International law only recognizes title to the territory of a State—*dominium*—whereby its

¹²⁹ Martin Dixon, *Textbook on International Law*, 6th ed. (Oxford University Press 2007), 136.

¹³⁰ *Adams v. Adams*, 3 All ER 572 (1970).

¹³¹ *Hesperides Hotels v. Aegean Turkish Holidays*, QB 205 (1978); *B. v. B.*, 2 FLR 707 (2000); *Emin v. Yeldag*, 1 FLR 956 (2002).

¹³² *Carl Zeiss Stiftung v. Rayner & Keeler*, 2 All ER 536 (1966).

government is the agent that exercises *internal* sovereignty over that territory.¹³³ *External* sovereignty, on the other hand, is where a “State must have complete independence in the management of its foreign relations.”¹³⁴ The governments of Southern Rhodesia, Northern Cyprus, and East Germany, were domestic agents contesting for the right to exercise internal sovereignty over a defined territory without *de facto* recognition. Southern Rhodesia, as a British colony, contested British agency; Northern Cyprus continues to contest the agency of the Republic of Cyprus; and East Germany (German Democratic Republic) contested the agency of the Federal Republic of Germany over the whole of the German State, whereby the two States emerged in the aftermath of World War II. The U.S. Supreme Court also recognized certain private law acts done under and by virtue of the Confederate States during the American Civil War, whereby the Confederacy contested the agency of the U.S. Federal Government. Unlike the British cases, where the recognition of certain private law acts, e.g. contracts, took place while these governments were in actual control of the internal sovereignty, the U.S. recognition occurred *postbellum* when the uprising had been defeated. The Confederate States were not recognized as *de facto* governments under international law, or in other words a successful revolution, but rather afforded international recognition as belligerents in a state of civil war within the United States of America.

The abovementioned cases are associated with revolutions, whereby *de facto* recognition is the evidence of the revolution’s success and replacement of the *de jure* government. These cases, however, do not address the validity of contracts arising out of

¹³³ See *Distinguishing Dominion from Real Property*, Chapter 3, p. 78.

¹³⁴ Freeman Snow, *International Law: Lectures Delivered at the Naval War College* (Government Printing Office, 1895), 19.

an unlawful occupation of a recognized State's territory. Professor Krystyna Marek cautions that occupation must not be confused with *de facto* governance. She warns that "assimilation of belligerent occupation and *de facto* government not only enlarges the powers of the occupant, but, moreover, is bound to confuse and undermine the clear notion of identity and continuity of the occupied State."¹³⁵ She explains that a *de facto* government is "an internal State phenomenon [a successful revolution]; [but] belligerent occupation is external to the occupied State. To mistake belligerent occupation for a *de facto* government would mean treating the occupied State as annexed, its continuity as interrupted, its identity as lost and its personality as merged with that of the occupant."¹³⁶ Therefore, according to Oppenheim, the validity of contracts during an occupation is "essentially of municipal law [of the occupied State] as distinguished from International Law."¹³⁷ In other words, the municipal law of the Hawaiian Kingdom determines the validity of contracts in the Hawaiian Islands, not the municipal law of the United States. If the U.S. administered the municipal law of the Hawaiian Kingdom in its occupation of the Hawaiian Islands, contracts would be valid. William E. Hall explains:

Thus judicial acts done under the control of the occupant, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of Municipal Law, remain good.

¹³⁵ Marek, *supra* note 1, 82.

¹³⁶ *Id.*, 83.

¹³⁷ Lassa Oppenheim, *International Law*, 6th ed., vol. II (Longman, Green and Co., 1940), 254.

Were it otherwise, the whole social life of the community would be paralysed by an invasion [that is occupation].”¹³⁸

As a consequence of the 1893 Cleveland-Lili`uokalani agreement of restoration, Queen Lili`uokalani agreed to “assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services,”¹³⁹ and since the provisional government was a direct outgrowth of the 1887 revolution, this recognition must also include all private law acts done under “proper course of administration” that occurred since July 6th 1887 to the date of the consummation of the agreement with President Cleveland on December 18th 1893. Private law acts that took place during this period were recognized as being valid, but private law acts that occurred after the agreement under both the provisional government and its successor the Republic of Hawai`i were not recognized by the lawful government. Consequently, courts of third States could not recognize private acts of individuals that took place subsequent to December 18th 1893, whether under the provisional government or the Republic of Hawai`i, without violating the intent and purpose of the 1893 Cleveland-Lili`uokalani agreement of restoration, which is a binding treaty between the U.S. and the Hawaiian Kingdom under international law, and U.S. Courts, in particular, would be precluded from recognition under the doctrine of *estoppel*.

A restored Hawaiian Kingdom government, though, could exercise “the prerogative power of the [returning] sovereign,”¹⁴⁰ and recognize certain private law acts in similar fashion as U.S. Courts did in the aftermath of the Civil War, which is not

¹³⁸ William Edward Hall, *International Law*, 8th ed. (Clarendon Press, 1924), 579.

¹³⁹ Queen’s Declaration, *supra* note 94.

¹⁴⁰ Benvenisit, *supra* note 14, 72.

legally binding under international law, but prudent. According to Cooley, when the “resistance to the federal government ceased, regard to the best interests of all concerned required that such governmental acts as had no connection with the disloyal resistance to government, and upon the basis of which the people had acted and had acquired rights, should be suffered to remain undisturbed. But all acts don in furtherance of the rebellion were absolutely void, and private rights could not be built up under, or in reliance upon them.”¹⁴¹ In *Texas v. White*, the U.S. Supreme Court held that:

acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.¹⁴²

When the U.S. Congress, however, established by statute the governments of the Territory of Hawai`i in 1900 and later the component State of Hawai`i in 1959, it was in direct contravention of the rule preserving the continuity of the occupied State, and the willful dereliction of administering Hawaiian Kingdom laws. Private law acts during this period were not done according to the municipal laws of the occupied State, but rather the

¹⁴¹ Cooley, *supra* note 18, 190; see also Keppel v. Railroad Co., Chase’s Dec. 167; Cook v. Oliver, 1 Woods 437; Hatch v. Burroughs, 1 Woods 439; Thorington v. Smith, 8 Wall. 1; Horn v. Lockhart, 17 Wall. 570; Sprott v. United States, 20 Wall. 459; Ford v. Surget, 97 U.S. 594; Hanauer v. Doane, 12 Wall. 342; Hanauer v. Woodruff, 15 Wall. 439; Ford v. Surget, 97 U.S. 594.

¹⁴² *Texas v. White*, 74 U.S. 700, 733 (1868).

municipal laws of the occupant State. Despite the creation of these surrogate governments, the U.S. could not claim title to Hawaiian territory without a valid treaty of cession from the Hawaiian Kingdom government. “Without the consent of the invaded State to any change in the territorial *quo ante*,” according to Professor Schwarzenberger, “the rule [on the prohibition of wartime annexation] stands and cannot be affected by any purported action of the Occupying Power or third States.”¹⁴³ Therefore, the governing case regarding the validity of private law acts done during an occupation where the occupant State illegally imposes its legal system within the territory of an internationally recognized, but occupied, State, is the 1970 Advisory Opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Namibia case)*.

The Namibia Case and the Application of the Non-recognition

In 1966, “the General Assembly of the United Nations adopted resolution 2145(XXI), whereby it decided that the Mandate was terminated and that South Africa had no other right to administer the Territory.”¹⁴⁴ This resulted in Namibia coming under the administration of the United Nations, but South Africa refused to withdraw from Namibian territory and consequently the situation transformed into an illegal occupation. As a former German colony, Namibia became a mandate territory under the administration of South Africa after the close of the First World War. According to the

¹⁴³ Georg Schwarzenberger, *International Law*, vol. II (Stevens & Sons Limited, 1968), 168.

¹⁴⁴ *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice*, 1948-1991 (United Nations 1992), 79.

International Court of Justice, “The mandates system established by Article 22 of the Covenant of the League of Nations was based upon two principles of paramount importance: the principle of non-annexation and the principle that the well-being and development of the peoples concerned formed a sacred trust of civilization.”¹⁴⁵ The Court also added, that the “ultimate objective of the sacred trust was self-determination and independence.”¹⁴⁶

Addressing the legal consequences arising for States, the Court concluded that “South Africa, being responsible for having created and maintained that situation, has the obligation to put an end to it and withdraw its administration from the Territory.”¹⁴⁷ The Court explained that by “occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation,” and that both member and non-members “States of the United Nations are under an obligation to recognize the illegality and invalidity of South Africa’s continued presence in Namibia and to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia.”¹⁴⁸ The ICJ, however, clarified that “non-recognition should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, the illegality or invalidity of acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to such acts

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, 80.

¹⁴⁸ *Id.*

as the registration of births, deaths and marriages.”¹⁴⁹ The principle of the doctrine of non-recognition has been codified under Article 41(2) of the *Responsibility of States for International Wrongful Acts* (2001). Professor Crawford states that “no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State.”¹⁵⁰ Recognition of private law acts since December 18th 1893 by the courts of third States, including the U.S. as the responsible State, would directly compromise their governments “in the conduct of its foreign relations”¹⁵¹ and, in particular Article 41(2) of the *Responsibility of States for International Wrongful Acts*.

Effect of Occupation on United States Courts in Hawai`i

Since Hawaiian law is the only law recognizable under international law, U.S. courts, deriving their authority under U.S. law, are incapable of enforcing contractual obligations within the territory of the Hawaiian State, because, as U.S. Chief Justice Marshall stated, the “jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power,” and that the “jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”¹⁵² The jurisdiction of U.S. courts is not exercised by virtue of a belief in sovereign authority, but rather a qualified sovereign authority recognizable by law. Without first acquiring Hawaiian sovereignty by cession, U.S. courts are *estopped* by the 1893 Cleveland-Lili`uokalani agreement of

¹⁴⁹ *Id.*

¹⁵⁰ Crawford, *supra* note 48, 251.

¹⁵¹ Dixon, *supra* note 129.

¹⁵² *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812).

restoration from exercising jurisdiction within the territory of the Hawaiian Kingdom. This places the courts here in the Hawaiian Islands in a very vulnerable position whereby a defendant can procedurally object to the jurisdiction of the court by pleading that there is a binding agreement of restoration of the Hawaiian Kingdom government, and that there is exists no valid transfer of Hawaiian sovereignty under international law to the U.S. This action taken by the defendant would shift the burden onto the plaintiff to prove that the U.S. did legally acquire Hawaiian sovereignty under international law in order to qualify the jurisdiction of the court, and, thereby, maintain the plaintiff's suit.¹⁵³

In *Doe v. Kamehameha*, Justice Susan Graber, of the Ninth Circuit, stated “When Congress first enacted §1981 in 1866, the Hawaiian Islands were still a sovereign kingdom.”¹⁵⁴ Graber’s observation left a question as to the time, place and manner by which that sovereignty was legally transferred to the United States, which would go to the heart of the court’s jurisdiction. Also, in *Kahawaiola`a v. Norton*, another case that came before the court, the Ninth Circuit also acknowledged that the Hawaiian Kingdom was “a co-equal sovereign alongside the United States until the governance over internal affairs was entirely *assumed* by the United States.”¹⁵⁵ The assumption of governance over internal affairs does not equate to a transfer of sovereignty, which can only take place with the consent of the ceding State, whether by treaty or prescription—a congressional joint resolution notwithstanding.

Another important case at the State of Hawai`i level was *State of Hawai`i v.*

¹⁵³ Rule 12(b)(1), F.R.C.P., and Rule 12(b)(1), H.R.C.P.

¹⁵⁴ *Doe v. Kamehameha*, 416 F.3d 1025, 1048 (9th Cir. 2005).

¹⁵⁵ *Kahawaiola`a v. Norton*, 386 F.3d 1271, 1282 (9th Cir. 2004).

Lorenzo.¹⁵⁶ In that case, Lorenzo claimed to be a citizen of the Hawaiian Kingdom and that the State of Hawai`i courts did not have jurisdiction over him. As a State level case, it had no precedence on the Federal Court, but in substance it could serve as an indication of how a court would view such a position, should they be presented with it. In 1994, the case came before a three-member panel of Intermediate Court of Appeals and Judge Walter Heen delivered the decision. Heen affirmed the lower court's decision denying Lorenzo's motion to dismiss, but explained that "Lorenzo [had] presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state's sovereign nature."¹⁵⁷ In other words, the reason Lorenzo's argument failed was because he "did not meet his burden of proving his defense of lack of jurisdiction."¹⁵⁸ It is abundantly clear that the Hawaiian Kingdom continues to exist "as a state in accordance with recognized attributes of a state's sovereign nature," despite the prolonged occupation since the Spanish-American War.

Under U.S. constitutional law, Federal Courts are classified under three separate headings in line with the first three Articles of the Federal Constitution. Article I Courts are established by Congress,¹⁵⁹ Article II Courts are Military Occupation Courts

¹⁵⁶ 77 Hawai`i 219 (1994).

¹⁵⁷ *Id.*, 221.

¹⁵⁸ *Id.*

¹⁵⁹ These types of courts include, the Armed Services Board of Contract Appeals, Bankruptcy Courts, Board of Patent Appeals and Interferences, Civilian Board of Contract Appeals, Courts-martial, Court of Appeals for the Armed Forces, Court of Appeals for Veteran Claims, Court of Federal Claims, Merit Systems Protection Board, Postal Service Board of Contract Appeals, Social Security Administration's Appeal Council, Tax Court, Territorial Courts, and Trademark Trial and Appeal Board.

established by authority of the President,¹⁶⁰ and Article III Courts are created by the constitution itself.¹⁶¹ While Article I Courts and III Courts are situated within the territorial jurisdiction of the United States, Article II Courts are situated outside of U.S. territory and “were the product of military occupation.”¹⁶² Exceptions to this rule are Courts-martial, being Article I Courts, that are situated on U.S. military bases abroad, and whose jurisdiction is limited to U.S. soldiers. Bederman defines an Article II Court as “a tribunal established: (1) pursuant only to the President’s war-making power under Article II of the Constitution; (2) which exercises either civil jurisdiction or criminal jurisdiction over civilians in peacetime; and (3) was constituted without an Act of Congress or any other legislative concurrence.”¹⁶³ Article II Courts are fully recognized by decisions of Federal Courts.¹⁶⁴

International law and not the domestic laws of the United States determine a State’s sovereign nature. Furthermore, according to the United States Supreme Court, in *The Paquete Habana*, “international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of

¹⁶⁰ These types of courts were established during the Mexican-American War, Civil War, Spanish-American War, and the Second World War, while U.S. troops occupied foreign countries and administered the laws of these States.

¹⁶¹ These types of courts include, the U.S. Supreme Court, Court of Appeals, District Courts, Court of International Trade, Foreign Intelligence Surveillance Court, and the Foreign Intelligence Surveillance Court of Review.

¹⁶² David J. Bederman, “Article II Courts,” *Mercer Law Review* 44 (1992-1993): 826.

¹⁶³ *Id.*, 832.

¹⁶⁴ *Jecker v. Montgomery*, 54 U.S. (13 How.) 498 (1851); *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176 (1857); *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1853); *Mechanics’ & Traders’ Bank v. Union Bank*, 89 U.S. (22 Wal.) 276 (1874); *United States v. Reiter*, 27 F. Cas. 768 (Prov. Ct. La. 1865) (No. 16,146); *Burke v. Miltenberger*, 86 U.S. (19 Wall.) 519 (1873); *New Orleans v. Steamship Co.*, 87 U.S. (20 Wall.) 387 (1874); *In re Vidal*, 179 U.S. 126 (1900); *Santiago v. Nogueras*, 214 U.S. 260 (1909); *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Williamson v. Alldridge*, 320 F. Supp. 840 (1970); *Jacobs v. Froehlke*, 334 F. Supp. 1107 (1971).

right depending on it are duly presented for determination.”¹⁶⁵ In *Nishitani v. Baker*, the Hawai`i Intermediate Court of Appeals specifically made reference to the *Lorenzo* case, and stated that, “although the prosecution had the burden of proving beyond a reasonable fact establishing jurisdiction, the defendant has the burden of proving facts in support of any defense...which would have precluded the court from exercising jurisdiction over the defendant.”¹⁶⁶

There is a presumption against federal jurisdiction and the parties seeking to invoke subject matter jurisdiction must demonstrate that the court is capable to hear the case in the first place. Consent does not confer subject matter jurisdiction nor can its absence be waived. For example, a resident of France and a private school in France cannot confer jurisdiction upon a U.S. District Court to determine an admission policy into the French school, since the school is situated in another State’s jurisdiction. Article III courts do not have extra-territorial jurisdiction and cannot assume jurisdiction within the borders of another sovereign and independent State without violating the foreign State’s territorial integrity. Furthermore, the court cannot exercise the political question doctrine¹⁶⁷ and overrule defendant’s motion, because the very subject-matter of the case took place outside of the territorial jurisdiction of United States. In *Pennoyer v. Neff*, Justice Stephen Field resounds the territorial limits of U.S. courts.

And so it is laid down by jurists, as an elementary principle, that the laws of one

¹⁶⁵ 175 U.S. 677 (1900).

¹⁶⁶ 82 Hawai`i 281, 289 (1996).

¹⁶⁷ The political question doctrine is where a court refuses to hear a political, not legal, issue because it belongs to a coordinate branch of government, the executive or legislative branches. Bouvier’s Law Dictionary, 3rd rev. (1914), 2626, defines it as “one over which the courts decline to take cognizance in view of the line of demarcation between the judicial branch of government, on one hand, and the executive and legislative branches, on the other.”

State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. “Any exertion of authority of this sort beyond this limit,” says Story, “is a mere nullity, and incapable of binding such persons or property in any other tribunals.”¹⁶⁸

Strategy to Begin the Administration of Hawaiian Kingdom law

A viable and practical legal strategy to impel compliance must be based on the legal personality of the Hawaiian State first, and from this premise expose the effect that this status has on the national and global economies—*e.g.* illegally assessed taxes, duties, contracts, licensing, real estate transactions, etc. This exposure will no doubt force States to intercede on behalf of their citizenry, but it will also force States to abide by the doctrine of non-recognition qualified by the *Namibia* case and codified in the *Articles of State Responsibility for International Wrongful Acts*. Parties who entered into contracts within the territorial jurisdiction of the Hawaiian Kingdom, cannot rely on U.S. Courts in the Islands to provide a remedy for breach of simple or sealed contracts, because the courts themselves cannot exercise jurisdiction without a lawful transfer of Hawaiian sovereignty. Therefore, all official acts performed by the provisional government and the Republic of Hawai`i after the Cleveland-Lili`uokalani agreement of restoration on December 18th 1893; and all actions done by the U.S. and its surrogates, being the Territory of Hawai`i and the State of Hawai`i, for and on behalf of the Hawaiian Kingdom since the occupation began on August 12th 1898, cannot be recognized as legal

¹⁶⁸ *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877)

and valid without violating international law. The only exceptions, according to the *Namibia* case, are the registration of births, deaths and marriages.

A temporary remedy to this incredible quandary, which, no doubt, will create economic ruination for the U.S., is for the Commander of the U.S. Pacific Command to establish a military government and exercise its legislative capacity, under the laws of occupation. By virtue of this authority, the commander of the military government can provisionally legislate and proclaim that all laws having been illegally exercised in the Hawaiian Islands since January 17th 1893 to the present, so long as they are consistent with Hawaiian Kingdom laws and the law of occupation, shall be the provisional laws of the occupier.¹⁶⁹ The military government will also have to reconstitute all State of Hawai`i courts into Article II Courts in order for these contracts to be enforceable, as well as being accessible to private individuals, whether Hawaiian subjects or foreign citizens, in order to file claims in defense of their rights secured to them by Hawaiian law. All Article I Courts, *e.g.* Bankruptcy Court, and Article III courts, *e.g.* Federal District Court, that are currently operating in the Islands are devoid of authority as Congress and the Judicial power have no extraterritorial force, unless they too be converted into Article II Courts. The military government's authority exists under and by virtue of the authority of the President, which is provided under Article II of the U.S. Constitution.

The military government should also provisionally maintain, by decree, the executive branches of the Federal and State of Hawai`i governments in order to continue services to the community headed by the Mayors of Hawai`i island, Maui, O`ahu and Kaua`i, who should report directly to the commander of the military government. The

¹⁶⁹ See von Glahn, *supra* note 12.

Pacific Command Commander will replace the function of the State of Hawai'i Governor, and the State of Hawai'i's legislative branch, *i.e.* the State Legislature and County Councils, would also be replaced by the legislative authority of the military government. The Legislative Assembly of the Hawaiian Kingdom can take up the lawfulness of these provisional laws when it reconvenes during the transitional stage of ending the occupation. At that point, it can determine whether or not to enact these laws into Hawaiian statute or replace them altogether with new statutes.¹⁷⁰

Without having its economic base spiral out of control, the U.S. is faced with no other alternative but to establish a military government. But another serious reason to establish a military government, aside from the economic factor, is to put an end to war crimes having been committed and are currently being committed against Hawaiian subjects by individuals within the Federal and State of Hawai'i governments. Their willful denial of Hawai'i's true status as an occupied State does not excuse them of criminal liability under laws of occupation, but ultimate responsibility, however, does lie with the U.S. President, Congress and the Supreme Court. "War crimes," states von Glahn, "played an important part of the deliberations of the Diplomatic Conference at Geneva in 1949. While the attending delegates studiously eschewed the inclusion of the terms 'war crimes' and 'Nuremberg principles' (apparently regarding the latter as at best representing particular and not general international law), violations of the rules of war had to be, and were, considered."¹⁷¹

Article 146 of the Geneva Convention provides that the "High Contracting Parties

¹⁷⁰ See Feilchenfeld, *supra* note 21.

¹⁷¹ von Glahn, *supra* note 10, 248.

undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.” According to Axel Marschik, this article provides that “States have the obligation to suppress conduct contrary to these rules by administrative and penal sanctions.”¹⁷² “Grave breaches” enumerated in Article 147, that are relevant to the occupation of the Hawaiian Islands, include: “unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention...[and] extensive destruction and appropriation of property, not justified by military necessity.”¹⁷³ Protected persons “are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹⁷⁴ According to U.S. law, a war crime is “defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party.”¹⁷⁵ Establishing a military government will shore up these blatant abuses of protected persons under one central authority, that has not only the duty, but the obligation, of suppressing conduct contrary to the Hague and Geneva conventions taking place in an occupied State. The United States did ratify both Hague

¹⁷² Axel Marschik, “The Politics of Prosecution: European National Approaches to War Crimes,” (Timothy L. H. McCormack and Gerry J. Simpson, ed.s), *The Law of War Crimes: National and International Approaches* (Kluwer Law International 1997), 72, note 33.

¹⁷³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), Article 147.

¹⁷⁴ *Id.*, Article 4.

¹⁷⁵ 18 U.S. Code §2441(c)(1).

and Geneva Conventions, and is considered one of the “High Contracting Parties.”¹⁷⁶

Thus, the primary objective is to compel the President of the United States, through his Commander of the U.S. Pacific Command, to establish a military government for the administration of Hawaiian Kingdom law. As explained in Chapter 4, the U.S. military does not possess wide discretionary powers in the administration of Hawaiian Kingdom law as it would otherwise have in the occupation of a State it is at war with. Hence, belligerent rights do not extend over territory of a neutral State, and the occupation of neutral territory for military purposes is an international wrongful act.¹⁷⁷ As a result, there exists a continued exploitation of Hawaiian territory for military purposes in willful disregard of the 1893 Cleveland-Lili`uokalani agreement of restoring the Hawaiian government *de jure*. In a neutral State, the Hague and Geneva conventions merely provide guidance for the establishment of a military government.

As per the 1893 Cleveland-Lili`uokalani agreement, the U.S. was obligated to restore the Hawaiian Kingdom government, but instead illegally occupied the Hawaiian Kingdom for military purposes during the Spanish-American War, and has remained in the Hawaiian Islands ever since. The failure to restore the Hawaiian Kingdom government constitutes a breach of an international obligation, as defined by the *Responsibility of States for Internationally Wrongful Acts*,¹⁷⁸ and the breach of this international obligation by the U.S. has “a continuing character [that] extends over the entire period during which the act continues and remains not in conformity with the

¹⁷⁶ Hague Convention No. IV, October 18, 1907, Respecting the Laws and Customs of War on Land, 36 U.S.Stat. 2277; Treaty Series 539; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, Treaties and Other International Acts Series, 3365.

¹⁷⁷ Hague Convention VI (1907), *Rights and Duties of Neutral States*, Article I.

¹⁷⁸ *Id.*, Article 12.

international obligation.”¹⁷⁹ The extended lapse of time has not affected, in the least, the international obligation of the U.S. under the Cleveland-Lili`uokalani agreement, despite over a century of non-compliance and prolonged occupation. More importantly, the U.S. “may not rely on the provisions of its internal law as justification for failure to comply with its obligation.”¹⁸⁰ Preliminary to the restoration of the Hawaiian Kingdom government *de jure*, the U.S. must first abide by the international laws of occupation and administer the laws of the Hawaiian Kingdom. During this period of administration, diligent research will need to be carried out in order to provide a comprehensive plan for an effective transition.

¹⁷⁹ *Id.*, Article 14(2).

¹⁸⁰ *Id.*, Article 31(1).

CONCLUSION

State sovereignty “is never held in suspense,”¹ but is vested either in the State or in the successor State, and in the absence of any “valid demonstration of legal title, or sovereignty, on the part of the United States,” sovereignty, both external and internal, remains vested in the Hawaiian State. Therefore, despite the lapse of time, the 1893 Cleveland-Lili`uokalani Agreement remains legally binding on the United States, and the continuity of the Hawaiian Kingdom as a sovereign State is grounded in the very same principles that the United States and every other State rely upon for their own legal existence. In other words, to deny Hawai`i’s sovereignty would be tantamount to denying the sovereignty of the United States and the entire system the world has come to know as international relations. And recalling U.S. Secretary of State Bayard’s frequently quoted 1887 statement of the rule of law regarding the position of the United States and international obligations, he stated:

If a government could set up its own municipal law as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford not protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties.²

¹ United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 317 (1936).

² Secretary Bayard to Mr. Connery (November 1, 1887), Foreign Relations 751, 753.

In this dissertation, the author has attempted to chart out the overarching themes that address the events of the overthrow in historical, legal and contemporary relevance. Through this narrative, it is undeniable that the United States government, through its agencies since 1893, has manipulated and obfuscated these events for its benefit over and above the rights of the Hawaiian Kingdom and its nationals under international law. Professor Kanalu Young, a Hawaiian historian at the University of Hawai`i at Manoa, argues that:

American scholars developed a military occupation-based historiography predicated on their own misrepresentations of the indigenous and national Hawaiian pasts and their own last century of illegal control here. Selected nineteenth-century primary and secondary sources were then contoured to the needs of the occupier government apparatus to provide school children with knowledge that indoctrinated as it educated.³

It is crucial at this stage to continue this type of research so that eventually Hawai`i, and the world community at large, will have a clearer understanding of these historical events and the profound impact it has today. Rather than focusing attention on reconciling the present, resources and efforts should be redirected in order to develop and foster a reckoning of Hawai`i's history—a reconciliation of the past. For Young, he advocates, “a context-based approach for the development of a body of publishable research that gives life and structure to a Hawaiian national consciousness and connects thereby to the theory of State continuity.”⁴ The challenge for other scholars and practitioners in the fields of political science, history and law is to distinguish between

³ See Young's *Kuleana*, *supra* note 10, at 32.

⁴ *Id.*, at 1.

the rule of law and the politics of power. Rigorous and diligent study into the Hawaiian-American situation is not only warranted by the current legal and political challenges facing Native Hawaiians that the Akaka bill seeks to quell, it is a matter of what is right and just. The ramifications of this study cannot be underestimated, and its consequences are, no doubt, far-reaching. They span from the political and legal to the social and economic venues situated in both the national and international levels. Therefore, in light of the severity of this needed research, analytical rigor is at the core and must not fall victim to political affiliations, partisanship or just plain bias.

Doc #7

**AMERICAN OCCUPATION OF THE HAWAIIAN STATE:
A CENTURY UNCHECKED**

DAVID KEANU SAI*

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- V. CONCLUSION

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I. INTRODUCTION

Following the example set by the *1971 Alaska Native Claims Settlement Act*, in which “the United States returned 40 million acres of land to the Alaskan natives and paid \$1 billion cash for land titles they did not return,”¹ it has become common practice for aboriginal Hawaiians to associate themselves with both the plight and the status of Native Americans and other ethnic minorities throughout the world who had been colonized and dominated in their pursuit of sovereignty. This Hawaiian movement has operated within the ethnic or tribal model of the Native American movement in the United States. It soon became a part of the international indigenous movement. Osorio writes

Ka Lahui Hawai‘i (KLH), the elder organization in the sovereignty movement at sixteen years, is, in 2003, also the largest, with close to 20,000 citizens. KLH’s constitution is based on a nation-within-nation model similar to that of several Native American governments that have treaty relationships and federal recognition with the United States. At the same time, KLH has sought international support through the Unrepresented Peoples Organization (UNPO) and has worked together with other Natives to craft a Declaration of the Rights of Indigenous Peoples within the United Nations.²

In 1993, the U.S. government, apologizing only to the native Hawaiian people, rather than subjects of the Hawaiian Kingdom, for the United States role in the overthrow of the Hawaiian government,³ thus implying that only ethnic Hawaiians constituted the Kingdom,⁴ fertilized the incipient ethnocentrism of the movement. The Resolution provided that

¹ *Hawaiians: Organizing Our People*, a pamphlet produced by the students in “ES221—The Hawaiians” in the Ethnic Studies Program at the University of Hawai‘i, at Manoa, in May 1974, p. 37. The pamphlet is available in the Hamilton Library at the University of Hawai‘i at Manoa.

² Jonathan Kamakawiwo‘ole Osorio, “Ku‘e and Ku‘oko‘a: History, Law, and Other Faiths,” in Sally Engle Merry & Donald Brenneis’ (eds.) *Law & Empire in the Pacific: Fiji and Hawai‘i*, (Santa Fe: School of American Research Press, 2003), 218. Reprint at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 96-97.

³ See U.S. Apology Resolution for the Illegal Overthrow of the Hawaiian Kingdom, 107 Stat. 1510. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 235-240.

⁴ According to the 1890 census done by the Hawaiian Kingdom, the population comprised 48,107 Hawaiian nationals and 41,873 Aliens. Of the Hawaiian national population 40,622 were ethnic Hawaiian and 7,495 were not ethnically Hawaiian. This latter group of Hawaiian nationals comprised, but were not limited, to ethnic Chinese, varied ethnicities of Europeans, Japanese, and Polynesians. According to Hawaiian law a person born on Hawaiian territory acquired Hawaiian nationality, but international law prevents the citizenry of the occupying State from acquiring the nationality of the occupied State, which includes migrants who arrived in Hawai‘i during the American occupation.

“Congress...apologizes to the Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai'i on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.”⁵ The Resolution also created a vacuum for many in the movement to pursue a native Hawaiian nation that centers on Hawaiian ethnicity and culture. Consistent with the Resolution in 2003, Senator Daniel Akaka submitted Senate Bill 344, also known as the Akaka Bill, to the 108th Congress. The Bill's stated purpose is to provide “a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct aboriginal, indigenous, native community to reorganize a Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-determination and self-governance.”⁶

The Akaka Bill's definition of native Hawaiians as indigenous peoples and their right to self-determination is tempered by the U.S. National Security Council's position on indigenous peoples. On January 18, 2001, the Council made known its position to its delegations assigned to the U.N. Commission on Human Rights, the Commission's Working Group on the United Nations (UN) Draft Declaration on Indigenous Rights and to the Organization of American States (OAS) Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations. The Council directed the U.S. delegations to “read a prepared statement that expresses the U.S. understanding of the term ‘internal self-determination’ and indicates that it does not include a right of independence or permanent sovereignty over natural resources.” The Council also directed the “U.S. delegation should support use of the term ‘internal self-determination’ in both the UN and OAS declarations on indigenous rights, defined as follows:

‘Indigenous peoples have a right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development. Indigenous peoples, in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-

⁵ Apology Resolution, *supra* note 3, 1513.

⁶ S. 344, 108th Cong. §19 (2003).

members, as well as ways and means for financing these autonomous functions.”⁷

If the U.S. Congress admitted its involvement in the overthrow of the Hawaiian Kingdom government was indeed illegal, the quintessential question that should be asked is, “What is the legal status of the Hawaiian Kingdom?” before discussing the creation of a new nation, which would only exist under the mandate of U.S. sovereignty. In other words given that a recognized State has legal sovereignty, how did the United States alienate Hawaiian sovereignty under international law. This answer is critical and would determine whether one should act upon a sovereignty already achieved and employ international law as nationals of the Hawaiian State for redress, or seek autonomy within the U.S. State and employ U.S. domestic laws as an “indigenous peoples.” To answer this question we need to step aside from indigenous politics and enter the realm of international law and politics, which, in Political Science, is commonly referred to as International Relations. In this realm, established States are the primary actors and the domestic laws of the United States have no bearing on the Hawaiian-U.S. situation since they apply only to U.S. State territory.

One year following the 1993 Apology resolution, James Anaya authored a law review article concerning the illegal overthrow of the Hawaiian Kingdom and the legal status of 20th century native Hawaiian self-determination. He concluded, “Despite the injustice and illegality of the United States’ forced annexation of Hawaii, it arguably was confirmed pursuant to the international law doctrine of effectiveness. In its traditional formulation, the doctrine of effectiveness confirms *de jure* sovereignty over territory to the extent it is exercised *de facto*, without questioning the events leading to the effective control.”⁸ Anaya cited two international law scholars,⁹ Oppenheim and Hall, to support his contention. A more careful reading, though, shows that Oppenheim explains that the doctrine of effectiveness only applies when a recognized State occupies territories not the dominion of another State. Hall concurs with this description of the doctrine. If the Hawaiian Kingdom was an internationally recognized State at the time of the forced annexation, Anaya’s assertion is a misreading of Oppenheim and Hall.

⁷ “Resolution of the U.S. National Security Council’ position on Indigenous peoples,” (18 January 2001), available at <http://www1.umn.edu/humanrts/usdocs/indigenou.doc.html>.

⁸ James Anaya, “The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs,” *Georgia Law Review* 28 (1994): 329.

⁹ See Lassa Oppenheim, *International Law*, 3rd Ed., (London; New York: Longmans, Green & Co., 1920), 384; and William Hall, *A Treatise on International Law*, (Oxford: Clarendon Press, 1924), 125-6.

Oppenheim clarifies that “[o]nly such territory can be the object of occupation as is no State’s land, whether entirely uninhabited, as e.g. an island, or inhabited by natives whose community is not to be considered as a State.”¹⁰ These native communities that Oppenheim makes reference to became the subjects of colonization, and are known today as *indigenous peoples* or *populations*, which Anaya describes as,

the rubric of indigenous peoples or populations is generally understood to refer to culturally cohesive groups that...suffer inequities within the states in which they live as the result of historical patterns of empire and conquest and that, despite the contemporary absence of colonial structures in the classical form, suffer impediments or threats to their ability to live and develop freely in their original homelands.¹¹

Many writers¹² have relied upon Anaya’s article on native Hawaiian self-determination, which is one of the reasons why the Hawaiian situation

¹⁰ *Id.*, Oppenheim, 383.

¹¹ Anaya, *supra* note 8, 339.

¹² See; ARTICLE: "With a Very Great Blame on Our Hearts": n1 Reparations, Reconciliation, and an American Indian Plea for Peace with Justice, *American Indian Law Review* 27(2002): 1; COMMENT: "Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims," *American Indian Law Review* 22 (1998): 509; ARTICLE: "Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act," *Arizona State Law Journal* 29 (1997): 25; COMMENT: "Ho'olohui: The Rebirth of A Nation," *Asian Law Journal* 5 (1998): 247; ARTICLE: "The New Deal Origins of American Legal Pluralism," *Florida State University Law Review* 29 (2001): 189; NOTE: "Irreconcilable Rights and the Question of Hawaiian Statehood," *Georgia Law Journal* 89 (2001): 501; ARTICLE: "Property Rights of Returning Displaced Persons: The Guatemalan Experience," *Harvard Human Rights Journal* 9 (1996): 145; ARTICLE: "Property Rights of Returning Displaced Persons: The Guatemalan Experience," *Harvard Human Rights Journal* 9 (1996): 145; Recent Developments: "Not because they are Brown, but because of Ea n1: Rice v. Cayetano, 528 U.S. 495 (2000)," *Harvard Journal of Law and Public Policy* 24 (2001): 921; NOTE: "International Law as an Interpretive Force in Federal Indian Law," *Harvard Law Review* 116 (2003): 1751; ARTICLE: "People's Rights or Victim's Rights: Reexamining the Conceptualization of Indigenous Rights in International Law," *Indian Law Journal* 71 (1996): 673; ARTICLE: "Law, Language and Statehood: The Role of English in the Great State of Puerto Rico," *Law and Inequality Journal of Theory and Practice* 17 (1999): 359; ARTICLE: "Pluralisms: The Indian New Deal As A Model," *Margins* 1 (2001): 393; ARTICLE: "What is a Community? Group Rights and the Constitution: The Special Case of African Americans," *Margins* 1 (2001): 51; ARTICLE: "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec," *McGill Law Journal* 45 (2000): 155; ARTICLE: "Not Because They are Brown, But Because of Ea: Why the Good Guys Lost in Rice v. Cayetano, and Why They Didn't Have to Lose," *Michigan Journal of Race and Law* 7 (2002): 317; NOTE: "Ua Mau Ke Ea O Ka Aina: Voting Rights and the Native Hawaiian Sovereignty Plebiscite," *Michigan Journal of Race and Law* 3 (1998): 475; NOTE: "Rice v. Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status," *North Carolina Law Review* 79 (2001): 812; ARTICLE: "Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations," *New York University Annual Survey of American Law* 58 (2003): 659; Part Three: "'Traditional' Legal Perspective: State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization," *Oklahoma City*

has not been addressed within the discourse of international law, which applies to established States, but rather has been pigeon-holed in colonial/post-colonial discourse and the rights of indigenous peoples, which only serves to reify U.S. sovereignty over the Hawaiian Islands—a claim that international law and Hawaiian history fails to support.

In this article I will explain why the international arbitration took place and how the *acting* government,¹³ representing the Hawaiian State in these proceedings, could use international law to expose the prolonged occupation of Hawaiian territory by the United States of America. Section II traces the history of the Hawaiian State and the circumstances of the American occupation. Within this context, section III identifies the steps and actions taken by the *acting* government during and after the arbitration proceedings. Section IV discusses Classical Realist Theory to understand the actions taken by the *acting* government, and the employment of, what I call, *reverse power relation differential*, as a viable alternative to be employed by a reemerging State that has been under prolonged occupation—especially in this case, where the memory by the international community of its international statehood has been the subject of erasure over time. Finally, I conclude that given the dynamics

University Law Review 23 (1998): 353; COMMENT: “Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy,” *Santa Clara Law Review* 41 (2001): 509; “Fifth Annual Tribal Sovereignty Symposium: ‘Save the Whales’ v. Save the Makah: Finding Negotiated Solutions to Ethnodelvelopmental Disputes in the New International Economic Order,” *St. Thomas Law Review* 13 (2000): 155; COMMENT: “Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments,” *Tulane Journal of International and Comparative Law* 10 (2002): 307; ARTICLE: “Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations,” *University of Detroit Mercy Law Review* 76 (1999): 745; COMMENT: “Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual, n1,” *University of Hawai‘i Law Review* 24 (2002): 693; RECENT DEVELOPMENT: “The Akaka Bill: The Native Hawaiians’ Race For Federal Recognition,” *University of Hawai‘i Law Review* 23 (2001): 857; ARTICLE: “Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai‘i,” *University of Hawai‘i Law Review* 18 (1996): 623; ARTICLE: “Cultures In Conflict In Hawai‘i: The Law and Politics of Native Hawaiian Water Rights,” *University of Hawai‘i Law Review* 18 (1996): 71; ARTICLE: “The Kamehameha Schools/Bishop Estate and the Constitution,” *University of Hawai‘i Law Review* 17 (1995): 413; SYMPOSIUM: “Native Americans and the Constitution: Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples fit within Civil Society?,” *University of Pennsylvania Journal of Constitutional Law* 5 (2003): 357; ARTICLE: “Rethinking Alliances: Agency, Responsibility and Interracial Justice,” *UCLA Asian Pacific American Law Journal* 3 (1995): 33; “SYMPOSIUM RACE AND THE LAW AT THE TURN OF THE CENTURY: Righting Wrongs,” *UCLA Law Review* 47 (2000): 1815; ARTICLE: “Empire Forgotten: The United States’s Colonization of Puerto Rico,” *Villanova Law Review* 42 (1997): 1119; ARTICLE: “The Political Status of the Native Hawaiian People,” *Yale Law & Policy Review* 17 (1998): 95.

¹³ The foundation upon which the *acting* Hawaiian government was established can be found in Section 5 of Annex 2 (Dominion of the Hawaiian Kingdom), attached to the Hawaiian Complaint filed with the United Nations Security Council, July 5, 2001. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 397-406.

of the American occupation and the *Larsen case*, the *acting* government is preparing to engage the United States, on behalf of Mr. Larsen, before an international forum.

In the absence of any evidence extinguishing Hawaiian Statehood since the 19th century, the *1907 Hague Regulations* not only imposes the duty and obligations of the occupier, but maintains and protects the international personality of the occupied *State*, notwithstanding the effectiveness of the American occupation.¹⁴ In addition, Crawford, who served as President of the Tribunal in the *Larsen case*, concluded that illegal occupation “does not extinguish the State. And, generally, the *presumption*—in practice a strong one—is in favor of the continuance, and against the extinction, of an established State.”¹⁵

II. THE HISTORY OF THE HAWAIIAN STATE AND THE PROLONGED AMERICAN OCCUPATION

The United Nations standard in defining a State is provided in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.” This codified definition of a State derives from Woolsey’s 19th century definition, which is “a community of persons living within certain limits of territory, under a permanent organization which aims to secure the

¹⁴ Krystinia Marek, *Identity and Continuity of States in Public International Law*, 2nd Ed., (Geneva: Librairie Droz, 1968), 102. Regarding the principle of effectiveness in international law, Prof. Marek explains “A comparison of the scope of the two legal orders, of the occupied and the occupying State, co-existing in one and the same territory and limiting each other, throws an interesting light on one aspect of the principle of effectiveness in international law. In the first place: of these two legal orders, that of the occupied State is regular and ‘normal’, while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is, as has been strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness. It can produce legal effects outside the occupied territory and may even develop and expand, not be reason of its effectiveness, but solely on the basis of the positive international rule safeguarding its continuity. Thus, the relation between effectiveness and title seems to be one of inverse proportion: while a strong title can survive a period of non-effectiveness, a weak title must rely heavily, if not exclusively, on full and complete effectiveness. It is the latter which makes up for the weakness in title. Belligerent occupation presents an illuminating example of this relation of inverse proportion. Belligerent occupation is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned.”

¹⁵ James Crawford, *The Creation of States in International Law*, (Oxford: Clarendon Press, 1979), 417.

prevalence of justice by self-imposed law. The organ of the state by which its relations with other states are managed is the government.”¹⁶

Accepted as a rule of international law since the 19th century, a nation may possess the qualifications of a State, but the recognition aspect of the State is crucial and vital. The recognition of statehood must come from already established States within the Family of Nations, which have signaled their admittance of the new State into the exclusive family. “International Law does not say that a State is not in existence as long as it is not recognized, but it takes no notice of it before its recognition. It is exclusively through recognition that a State becomes an International Person and a subject of International Law.”¹⁷ Once a State is recognized it exists as a coequal in the Family.

A. Recognition of Hawai`i as an Independent State

Examples of nations achieving 19th century statehood recognition include: Greece (by Great Britain, France and Russia) in 1830; Belgium (by Great Britain, Austria, France, Prussia and Russia) in 1831;¹⁸ Hawai`i (by Belgium, United States, Great Britain, and France) in 1843; and Turkey (by Great Britain, Austria, France, Prussia, Sardinia and Russia) in 1856.¹⁹ Regarding the recognition of Hawaiian Statehood, the British and French Governments entered into a joint declaration on November 28, 1843 at the Court of London. The declaration stated

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands [Hawaiian Islands] of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the

¹⁶ Theodore Woolsey, *Introduction to the Study of International Law*, (New York: C. Scribner's Sons, 1878), 34.

¹⁷ Lassa Oppenheim, *International Law, 1st Ed.*, (London; New York: Longmans, Green & Co., 1905), 108.

¹⁸ Oppenheim, *supra* note 9, 73.

¹⁹ *Id.*, 74. Oppenheim identifies the Ottoman Empire as Turkey by stating “In the Peace Treaty [1856], Turkey is expressly received as a member into the Family of Nations.” Article VII of the 1856 Treaty of Paris concerning Turkish independence states “Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Austria, His Majesty the Emperor of the French, His Majesty the King of Prussia, His Majesty the Emperor of All the Russias, and His Majesty the King of Sardinia, declare the Sublime Porte admitted to participate in the advantages of the Public Law and System (Concert) of Europe. Their Majesties engage, each on his part, to respect the Independence and the Territorial Integrity of the Ottoman Empire; Guarantee in common the strict observance of that engagement; and will, in consequence, consider any act tending to its violation as a question of general interest.”

Sandwich Islands as an Independent State, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed.²⁰

Both the Hawaiian Kingdom and Turkey serve as examples of the Law of Nations transcending the Eurocentric and Christian-based community of States that began its formation since the 1648 Peace Treaty of Westphalia. Hawai`i was the first non-European State to be admitted into the Family of Nations, and Turkey was the first non-Christian State. Oppenheim, in his 1920 treatise, identified forty-one sovereign States as members of the Family of Nations in the 19th century,²¹ notwithstanding his mistaken omission of the Hawaiian State. These states included,

Austria-Hungary, Belgium, Bolivia, Chile, Colombia, Costa Rica, Denmark, Dominican Republic (Santo Domingo), Ecuador, El Salvador (San Salvador), France, Germany, Great Britain, Greece, Guatemala, Haiti, Honduras, Italy, Japan, Liberia, Lichtenstein, Luxemburg, Montenegro, Netherlands (Holland), Nicaragua, Norway-Sweden, Paraguay, Peru, Portugal, Roumania, Russia, Serbia, Spain, Switzerland, Turkey, Uruguay, United States of America, United States of Argentina, United States of Brazil, United States of Mexico, United States of Venezuela.

According to state discourse, once recognition of the State is achieved it possesses exclusive authority in the administration of its territory, commonly referred to as sovereignty. The sovereignty of a recognized State in the 19th century entailed:

the uncontrolled exclusive exercise of the powers of the state; that is, both of the power of entering into relations with other states, and of the power of governing its own subjects. This power is supreme within a certain territory, and supreme over its own subjects wherever no other sovereignty has jurisdiction.²²

These attributes of State sovereignty are consistent with the more contemporary definition provided by Brownlie as “(1) a jurisdiction, *prima facie* exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising

²⁰ 1843 Anglo-Franco Declaration, Executive Documents of the United States House of Representatives, 53d Congress, 1894-95, Appendix II, Foreign Relations, (1894), 120. Hereinafter “Executive Documents,” available at <http://libweb.hawaii.edu/libdept/hawaiian/annexation/blount.html>. (accessed 1 June 2004). Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 114.

²¹ Oppenheim, *supra* note 9, 188-191.

²² Woolsey, *supra* note 16, 35.

from customary law and treaties on the consent of the obligor.”²³ Thus, international law protects the legal status of an already established State from the unilateral acts made against it by any of its coequals in the Family of Nations without its consent.

As a recognized State, the Hawaiian Kingdom entered into extensive diplomatic and treaty relations with other States.²⁴ In particular, the Hawaiian Kingdom has five treaties with the United States of America: December 20, 1849,²⁵ May 4, 1870,²⁶ January 30, 1875,²⁷ September 11, 1883,²⁸ and December 6, 1884.²⁹ Treaties are contracts entered between two nations, but whether the contract is regulated by the Law of Nations is entirely dependent upon the status of the parties being States, as “[t]he Law of Nations is a law for the intercourse of states with one another, not a law of individuals.”³⁰ Furthermore “the Law of Nations is a law between, not above, the several states, and is, therefore...called International Law.”³¹

Having been established as a recognized State and bona fide member of the Family of Nations, Hawai`i was regarded in the 19th century as a legal person of equal sovereignty with other States. The Tribunal, in *Larsen* held at the Permanent Court of Arbitration, recognized Hawaiian Statehood in its Arbitral Award, when it held, *inter alia*, “in the nineteenth century the Hawaiian Kingdom existed as an independent

²³ Ian Brownlie, *Principles of Public International Law*, 4th Ed., (Oxford: Clarendon Press, 1990), 287.

²⁴ Great Britain (Nov. 16, 1836 and July 10, 1851), The Free Cities of Bremen (Aug. 7, 1851) and Hamburg (Jan. 8, 1848), France (July 17, 1839), Austria-Hungary (June 18, 1875), Belgium (Oct. 4, 1862), Denmark (Oct. 19, 1846), Germany (March 25, 1879), France (Oct. 29, 1857), Japan (Aug. 19, 1871), Portugal (May 5, 1882), Italy (July 22, 1863), The Netherlands (Oct. 16, 1862), Russia (June 19, 1869), Samoa (March 20, 1887), Switzerland (July 20, 1864), Spain (Oct. 29, 1863), Sweden and Norway (July 1, 1852). These treaties can be found in their original form at the Hawai`i State Archives, Honolulu, Hawaiian Islands.

²⁵ 9 Stat. 178. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 115-122.

²⁶ 16 Stat. 1113. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 123-125.

²⁷ 19 Stat. 625. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 126-128.

²⁸ 23 Stat. 736. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 129-133.

²⁹ 25 Stat. 1399. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 134-135.

³⁰ Oppenheim, *supra* note 9, 2.

³¹ *Id.*

State recognised as such by the United States of America, the United Kingdom and various other States, including by exchanges of diplomatic or consular representatives and the conclusion of treaties.”³² Hawai`i became a full member of the Universal Postal Union on January 1st 1882. At the time it was occupied it maintained more than ninety Legations and Consulates throughout the world.³³

The principle of State equality before international law is “an invariable quality derived from their International Personality. Whatever inequality may exist between States as regards their size, population, power, degree of civilization, wealth, and other qualities, they are nevertheless equals as International Persons.”³⁴ Oppenheim also cautions that “legal equality must not be confounded with political equality.”³⁵ And further notes that “Great Powers do not enjoy any superiority of right, but only a priority of action.”³⁶

B. United States’ violation of Hawaiian State sovereignty

On January 16, 1893, United States resident Minister John L. Stevens met and conspired with a small group of individuals to overthrow the constitutional government of the Hawaiian Kingdom. His part of the conspiracy was to land U.S. troops to assist in the governmental overthrow and prepare for the annexation of the Hawaiian Islands to the United States. A treaty was signed on February 14, 1893, between a provisional government established and as a result of U.S. intervention, and the Secretary of State James Blaine. President Benjamin Harrison then submitted the treaty to the United States Senate for ratification. The election for the U.S. President was held in 1892 and resulted in Grover Cleveland defeating the incumbent Benjamin Harrison. Cleveland’s inauguration was not until March 1893, and having received notice by a Hawaiian envoy commissioned by Queen Lili`uokalani that the overthrow and so-called revolution derived from illegal intervention by U.S. diplomats and military personnel, withdrew the treaty. Cleveland then appointed James H. Blount, a former U.S. Representative from Georgia and former chair of the House Committee on Foreign Affairs, as

³² *Larsen Case (Lance Larsen vs. Hawaiian Kingdom)*, 119 International Law Reports (5 February 2001) 581. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 244-283.

³³ See Thomas G. Thrum, “Hawaiian Register and Directory for 1893,” *Hawaiian Almanac and Annual* (1892): 140-141.

³⁴ Oppenheim, *supra* note 9, 196.

³⁵ *Id.*, 198.

³⁶ *Id.*, 199.

special commissioner to investigate the terms of the so-called revolution and to report his findings.

The Blount investigation found that the United States legation assigned to the Hawaiian Kingdom, together with United States Marines and Naval personnel, were directly responsible for the illegal overthrow of the Hawaiian government.³⁷ The report also detailed the culpability of the United States government in violating international laws, and Hawaiian State territorial sovereignty. On December 18, 1893 President Grover Cleveland addressed the Congress and he described the United States government's actions as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress."³⁸ Thus he acknowledged that through such acts the government of a peaceful and friendly people was overthrown. Cleveland further stated that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair"³⁹ and called for the restoration of the government of the Hawaiian Kingdom. Cleveland's action is in line with Marek's explanation that

It is a well-known rule of customary international law that third States are under a clear duty of non-intervention and non-interference in civil strife within a State. Any such interference is an unlawful act, even if, far from taking the form of military assistance to one of the parties, it is merely confined to premature recognition of the rebel government.⁴⁰

President Cleveland declined to resubmit the annexation treaty to the Senate. He also failed to follow through in his commitment to reinstate Hawai'i's constitutional government, *restitutio in integrum*, more as a result of U.S. national domestic political reasons than international legal obligations. The Hawaiian Kingdom was thrown into civil unrest as a result of the U.S. illegal 1893 intervention. Five years lapsed before Cleveland's presidential successor, William McKinley, entered into a second treaty of annexation with the same individuals who participated in the illegal overthrow with the U.S. legation in 1893, and who called themselves the Republic of Hawai'i. This second treaty was signed on June 16, 1897 in Washington, D.C., and submitted to the Senate for approval.

³⁷ See "Report of James Blount," Executive Documents, *supra* note 20, 567. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 136-192.

³⁸ *Id.*, "President Cleveland's Message," 456. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 201-213, 211.

³⁹ *Id.*

⁴⁰ Marek, *supra* note 14, 64.

Her Majesty Queen Lili`uokalani was in the United States and protested the second annexation attempt of the country. While in Washington, D.C., the Queen filed a diplomatic protest in the U.S. State Department on June 18, 1897, that stated, *inter alia*, that this second attempt to procure a treaty of annexation

...ignores, not only all professions of perpetual amity and good faith made by the United States in former treaties with the sovereigns representing the Hawaiian people, but all treaties made by those sovereigns with other and friendly powers, and it is thereby in violation of international law. ...by treating with the parties claiming at this time the right to cede said territory of Hawai`i, the Government of the United States receives such territory from the hands of those whom its own magistrates (legally elected by the people of the United States, and in office in 1893) pronounced fraudulently in power and unconstitutionally ruling Hawai`i.⁴¹

The Presidents of Hawaiian national organizations in the islands also filed additional protests in the U.S. State Department. These political organizations were the Men and Women's Hawaiian Patriotic League (Hui Aloha `Aina), and the Hawaiian Political Association (Hui Kalai`aina). In addition, a petition of 21,169 signatures of Hawaiian nationals protesting annexation was filed with the U.S. Senate.⁴² On account of these protests, the Senate was unable to garner enough votes to ratify the 1897 treaty.

C. United States' violation of Hawaiian Neutrality

On April 25, 1898, the U.S. Congress declared war on Spain and made it retroactive to April 21. The following day, President McKinley issued a proclamation that stated, "[i]t being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."⁴³ In *The Paquete Habana*, the U.S. Supreme Court explained that "the proclamation clearly manifests the general policy of the government to conduct the war in accordance

⁴¹ "Protest of Queen Lili`uokalani, June 17, 1897, U.S. State Department," available at <http://libweb.hawaii.edu/libdept/hawaiian/annexation/protest/liliu5.html>. (accessed 1 June 2004). Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 227-229, 229.

⁴² See "Hawaiian Patriotic League's Petition Against Annexation of Hawaii, September 11, 1897," available at <http://libweb.hawaii.edu/libdept/hawaiian/annexation/petition.html>. (accessed 1 June 2004).

⁴³ 30 Stat. 1770.

with the principles of international law sanctioned by the recent practice of nations.”⁴⁴

Battles were fought in the Spanish colonies of Puerto Rico and Cuba, as well as the Spanish colonies of the Philippines and Guam. After U.S. Admiral Dewey defeated the Spanish Fleet in the Philippines on May 1, 1898, the *U.S.S. Charleston*, a protected cruiser, was re-commissioned on May 5, 1898, and ordered to lead a convoy of 2,500 troops to reinforce Admiral Dewey in the Philippines and Guam. These troops were boarded on the transport ships of the *City of Peking*, the *City of Sidney* and the *Australia*. In a deliberate violation of Hawaiian neutrality during the war as well as international law, the convoy, on May 21st, set a course to the Hawaiian Islands for re-coaling purposes. The convoy arrived in Honolulu on June 1st, taking on 1,943 tons of coal before it left the islands on the 4th of June.⁴⁵ A second convoy of troops bound for the Philippines, on the transport ships the *China*, *Zelandia*, *Colon*, and the *Senator*, arrived in Honolulu on June 23rd and took on 1,667 tons of coal.⁴⁶

As soon as it became apparent that the so-called Republic of Hawai`i had welcomed the U.S. naval convoys and assisted in re-coaling their ships, a formal protest was lodged with the Republic by H. Renjes, Spanish Vice-Counsel in Honolulu on June 1, 1898. U.S. Minister Harold Sewall, from the U.S. Legation in Honolulu, notified Secretary of State William R. Day of the Spanish protest in a dispatch dated June 8.⁴⁷ Renjes declared,

In my capacity as Vice Consul for Spain, I have the honor today to enter a formal protest with the Hawaiian Government against the constant violations of Neutrality in this harbor, while actual war exists between Spain and the United States of America.⁴⁸

The 1871 Treaty of Washington between the United States and Great Britain⁴⁹ addressed the issue of State neutrality by providing, *inter alia*, that “A Neutral Government is bound...not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purposes of the renewal or augmentation of military supplies or arms, or the recruitment of men.”

⁴⁴ *The Paquete Habana*, (1900) 175 U.S. 712.

⁴⁵ U.S. Minister to Hawai`i Harold Sewall to U.S. Secretary of State William R. Day, No. 167, 4 June 1898, Dispatches, Hawai`i Archives.

⁴⁶ *Id.*, No. 175, 27 June 1898.

⁴⁷ *Id.*, No. 168, 8 June 1898.

⁴⁸ *Id.*

⁴⁹ 17 Stat. 863.

Because of U.S. intervention in 1893 and the subsequent creation of puppet governments, the United States took complete advantage of its own creation in the islands during the Spanish-American war and violated Hawaiian neutrality. Marek states

puppet governments are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements, however correct in form; failing a genuine contracting party, such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant.⁵⁰

In an article published by the *American Historical Review* in 1931, Bailey stated,

...although the United States had given formal notice of the existence of war to the other powers, in order that they might proclaim neutrality, and was jealously watching their behavior, she was flagrantly violating the neutrality of Hawaii.⁵¹

On July 6, 1898, the United States Congress passed a joint resolution purporting to annex the Hawaiian State. President McKinley signed the resolution the following day. U.S. Representative Thomas H. Ball, of Texas, characterized the effort to annex the Hawaiian State by joint resolution as "a deliberate attempt to do unlawfully that which can not be lawfully done."⁵² Regarding this decision, United States constitutional scholar Westel Willoughby wrote,

The constitutionality of the annexation of Hawai'i, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act...Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force—confined in its operation to the territory of the State by whose legislature it is enacted."⁵³

⁵⁰ Marek, *supra* note 14, 114.

⁵¹ Thomas A. Bailey, "The United States and Hawaii During the Spanish-American War," *The American Historical Review* 36, issue 3 (April 1931): 557.

⁵² United States Congressional Record, 55th Congress, 2nd Session, vol. XXXI, 5975.

⁵³ Westel Willoughby, *The Constitutional Law of the United States*, 2nd Ed., (New York: Baker, Voorhis and Co., 1929), 427.

The joint resolution also attempted to abrogate the international treaties the Hawaiian Kingdom had with other States by stating that “the existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations.” In 1996, a legal opinion from the U.S. Department of Justice rebuked the notion that congressional acts are superior to international treaties, and opined that “the unilateral modification or repeal of a provision of a treaty by Act of Congress, although effective as a matter of domestic law, will not generally relieve the United States of the international legal obligations that it may have under that provision.”⁵⁴ The opinion also quoted a 1923 letter from then Secretary of State Charles Evan Hughes (later Chief Justice of the U.S. Supreme Court) to the Secretary of the Treasury. Hughes wrote that

a judicial determination that an act of Congress is to prevail over a treaty does not relieve the Government of the United States of the obligations established by a treaty. The distinction is often ignored between a rule of domestic law which is established by our legislative and judicial decisions and may be inconsistent with an existing Treaty, and the international obligation which a Treaty establishes. When this obligation is not performed a claim will inevitably be made to which the existence of merely domestic legislation does not constitute a defense and, if the claim seems to be well founded and other methods of settlement have not been availed of, the usual recourse is arbitration in which international rules of action and obligations would be the subject of consideration.⁵⁵

While Hawai`i was clearly not a participant in the hostilities of the Spanish-American War, the United States occupied the Hawaiian Islands for the purpose of waging the war against Spain in the Philippines and Guam, as well as fortifying the islands as a military outpost for the defense of the United States in future conflicts with the convenience of the puppet government it installed in 1893. Even more disturbing is that the United States Senate, in secret session on May 31, 1898, admitted to violating Hawaiian neutrality. The Senate admission of violating international law was made more than a month before it voted to pass the so-called annexation resolution on July 6th. Senator Henry Cabot Lodge stated that,

...the [McKinley] Administration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received and complications

⁵⁴ Christopher Schroeder, “Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligation Under an Existing Treaty,” *Opinions of the Office of Legal Counsel of the U.S. Department of Justice* 19 (1995): 393.

⁵⁵ “Letter from the Secretary of State to the Secretary of the Treasury, Feb. 19, 1923,” quoted in Green Haywood Hackworth, *Digest of International Law* 5 (1943): 194-195.

with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity.⁵⁶

The transcripts of these secret hearings were suppressed for more than seventy years and could not be accessed by the public until the last week of January 1969, after a historian noted there were gaps in the Congressional Records.⁵⁷ The Senate later passed a resolution authorizing the U.S. National Archives to open the records. The Associated Press in Washington, D.C., reported that “the secrecy was clamped on during a debate over whether to seize the Hawaiian Islands—called the Sandwich Islands then—or merely developing leased areas of Pearl Harbor to reinforce the U.S. fleet at Manila Bay.”

In this secret session, one of the topics discussed was the admitted violation of Hawaiian neutrality by the McKinley Administration and the liability it incurred due to the precedent set by the United States in the *Alabama claims* arbitration against Great Britain just after the American Civil War.⁵⁸ These actions show clear intent, *in fraudem legis*, to mask the violation of international law by a disguised annexation. Marek asserts that “a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State.”⁵⁹

Since 1900, Hawai`i has played a role in every U.S. armed conflict. Because of this, it has been used as the headquarters, since 1947, of the single largest combined U.S. military presence in the world, the U.S. Pacific Command.⁶⁰ Brigadier General Macomb, U.S. Army

⁵⁶ Secret Session of the U.S. Senate, 31 May 1898, 55th Congress, 2nd Session, 156.

⁵⁷ “Secret Debate on U.S. Seizure of Hawaii Revealed,” *Honolulu Star-Bulletin newspaper*, (1 February 1969), A1-2.

⁵⁸ See Caleb Cushing, *The Treaty of Washington: its Negotiation, Execution, and the Discussions Relating Thereto*, (New York: Harper & Brothers, 1873), 280. The *Alabama claims* arbitration centered on the damages incurred by warships built for the Confederate Navy in Liverpool, England. One of these ships, the *C.S.S. Alabama*, captured fifty-eight Union merchant ships before it was finally sunk in a sea battle against the U.S.S. *Kearsarge* in 1864. In 1871, under the Presidency of Ulysses S. Grant, the United States was able to secure Great Britain’s consent to submit the dispute to arbitration in Geneva, Switzerland. The Tribunal determined that Great Britain violated its neutrality under international law and found the British government liable to the United States in the amount of \$15,500,000.00 in gold.

⁵⁹ Marek, *supra* note 14, 110.

⁶⁰ U.S. Pacific Command was established in the Hawaiian Islands as a unified command on January 1, 1947, as an outgrowth of the command structure used during World War II, available at <http://www.pacom.mil/>. Located at Camp Smith, which overlooks Pearl Harbor on the island of O`ahu, the Pacific Command is headed by a four star Admiral who reports directly to the Secretary of Defense concerning operations and the Joint Chiefs of Staff for administrative purposes. That Admiral is the Commander-in-Chief, Pacific Command. The Pacific Command’s responsibility stretches from North

Commander, District of Hawai`i, stated, “O`ahu is to be encircled with a ring of steel, with mortar batteries at Diamond Head, big guns at Waikiki and Pearl Harbor, and a series of redoubts from Koko Head around the island to Wai`anae.”⁶¹ U.S. Territorial Governor Wallace Rider Farrington also stated, “Every day is national defense in Hawai`i.”⁶²

D. Explosion of U.S. National Population during Occupation

The last census done in the Hawaiian Kingdom in 1890 listed the entire population at 89,990. Here follows the breakdown by nationality:

Hawaiian nationals.....	48,107
Aboriginals (pure/part).....	40,622
Hawaiian born foreigners.....	7,495
Portuguese.....	4,117
Chinese and Japanese.....	1,701
Other White foreigners.....	1,617
Other nationalities.....	60
Aliens.....	41,873
United States nationals.....	1,928
Chinese nationals.....	15,301
Japanese nationals.....	12,360
Portuguese nationals.....	8,602
British nationals.....	1,344
German nationals.....	1,034
French nationals.....	70
Polynesians.....	588
Other nationalities.....	60

According to the United States Census of the population in the Hawaiian Islands from 1900 to 1950, migration from the continental U.S. and its territories in fifty years totaled 293,379.⁶³ Here follows the breakdown by year.

America’s west coast to Africa’s east coast and both the North and South Poles. It is the oldest and largest of the United States’ nine unified military commands, and is comprised of Army, Navy, Marine Corps, and Air Force service components, all headquartered in Hawai`i. Additional commands that report to the Pacific Command include U.S. Forces Japan, U.S. Forces Korea, Special Operations Command Pacific, U.S. Alaska Command, Joint Task Force Full-Accounting, Joint Interagency Task Force West, the Asia-Pacific Center for Security Studies, and the Joint Intelligence Center Pacific in Pearl Harbor.

⁶¹ William C. Addleman, *History of the United States Army in Hawai`i, 1849-1939*, (Hawaii War Records Depository, Hamilton Library, University of Hawaii, Manoa), 9.

⁶² I.Y. Lind, “Ring of Steel: Notes on the Militarization of Hawai`i,” *Social Process in Hawai`i* 31, (1984-85), 25.

⁶³ “Table 18. Country of Birth, for Hawai`i, Urban and Rural, 1950, and for Hawai`i, 1900 to 1940,” *U.S. Census of Population: 1950, Department of Commerce*, 52-18.

1900.....	<u>4,290</u>
Other U.S. territories or possessions.....	6
Continental U.S.....	4,284
1910.....	<u>11,674</u>
Puerto Rico.....	3,510
Philippine Islands.....	2,372
Other U.S. territories or possessions.....	104
Continental U.S.....	5,688
1920.....	<u>32,322</u>
Puerto Rico.....	2,581
Philippine Islands.....	18,728
Other U.S. territories and possessions.....	56
Continental U.S.....	10,957
1930.....	<u>85,282</u>
Puerto Rico.....	2,181
Philippine Islands.....	52,672
Other U.S. territories and possessions.....	238
Continental U.S.....	30,191
1940.....	<u>92,211</u>
Puerto Rico.....	1,848
Philippine Islands.....	35,778
Other U.S. territories and possessions.....	361
Continental U.S.....	54,224
1950.....	<u>67,600</u>
Puerto Rico.....	1,178
American Samoa.....	463
Other U.S. territories and possessions.....	319
Continental U.S.....	65,640

On April 30, 1900, the U.S. Congress passed “*An Act to Provide a Government for the Territory of Hawaii*.”⁶⁴ Regarding U.S. nationals, section 4 of the 1900 Act stated that

all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii. And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight and all the citizens of the United States who shall hereafter reside

⁶⁴ 31 Stat. 141.

in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii.

In addition to this Act, the 14th Amendment of the United States Constitution also provided that individuals born in the Hawaiian islands since 1900 would acquire U.S. citizenship. It states, in part, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.”⁶⁵ Under these American municipal laws, the putative U.S. national population exploded in the Hawaiian Kingdom from a meager 1,928 out of a total population of 89,990, in 1890, to 423,174 out of a total population of 499,794 in 1950.⁶⁶ In 1890, the aboriginal Hawaiian constituted 85% of the Hawaiian national population, whereas in 1950, the aboriginal Hawaiian population, now being categorized as U.S. nationals, numbered 86,091⁶⁷ out of 423,174, being a mere 20%.

Beginning in 1900, the putative U.S. nationals in the occupied *State* of the Hawaiian Kingdom sought inclusion of the Territory of Hawai`i as an American State in the United States union. The first statehood bill was introduced in Congress in 1919, but was not able to pass because the U.S. Congress did not view the Hawaiian Islands as a fully incorporated territory, but rather as a territorial possession. This attitude by the United States toward Hawai`i is what prompted the legislature of the Territory of Hawai`i to enact a “Bill of Rights,” on April 26, 1923,⁶⁸ asserting the Territory’s right to U.S. Statehood. Beginning with the passage of this statute, a concerted effort by the American nationals residing in the Hawaiian Kingdom sought U.S. Statehood. By 1950 the U.S. migration allegedly reached a total 293,379. These migrations stand in direct violation of Article 49 of the Fourth Geneva Convention, which provides that the “Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”⁶⁹

The object of U.S. Statehood was finally accomplished in 1950 when two special elections were held amongst the occupier’s population for 63 delegates to draft a constitution for the State of Hawaii in convention. Registered voters constituted 141,319, and votes cast for the delegates

⁶⁵ On the subject of the occupying State unilaterally imposing its national laws within the territory of the occupied State, e.g. see Feilchenfeld, *infra* note 86.

⁶⁶ “Table 8, Race and Nativity, by sex, for Hawaii, Urban and Rural, 1950 and for Hawaii, 1900 to 1950,” *supra* note 63, 52-13.

⁶⁷ *Id.*

⁶⁸ Act 86 (H.B. No. 425), 26 April 1923.

⁶⁹ See Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287. Hereinafter “Fourth Geneva Convention.”

were 118,704.⁷⁰ A draft constitution for the State of Hawaii was ratified by a vote of 82,788 to 27,109 on November 7, 1950. On March 12th, 1959, the U.S. Congress approved the statehood bill and it was signed into law on March 18th, 1959.⁷¹ In a special election held on June 27th, 1959, three propositions were submitted to vote. First, “Shall Hawaii immediately be admitted into the Union as a State?”; second, “The boundaries of the State of Hawaii shall be as prescribed in the Act of Congress approved March 18, 1959, and all claims of this State to any areas of land or sea outside the boundaries prescribed are hereby irrevocably relinquished to the United States”; third, “All provisions of the Act of Congress approved March 18, 1959, reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people.” The U.S. nationals accepted all three propositions by 132,938 votes to 7,854. On July 28th, 1959, two U.S. Hawaii Senators and one Representative were elected to office, and on August 21, 1959, the President of the United States proclaimed that the process of admitting Hawaii as a State of the U.S. Union was complete. On September 17, 1959, the permanent representative of the United States to the United Nations reported to the Secretary General that the Hawaiian Islands had become the 50th State of the U.S. Union. The entire process was dependent upon U.S. Congressional authority and not international law.

Every action taken within the territory of the Hawaiian Islands by the United States since January 17, 1893 directly violates the 1849 Hawaiian-American treaty, in particular, Article VIII:

and each of the two contracting parties engage that the citizens or subjects of the other residing in their respective States shall enjoy their property and personal security, in as full and ample manner of their own citizens or subjects, of the subjects or citizens of the most favored nation, but subject always to the laws and statutes of the two countries respectively.⁷²

In 1988, Kmiec, *acting* Assistant Attorney General, Office of Legal Counsel for the Department of Justice, raised questions about Congress’s authority to annex the Hawaiian Islands by municipal legislation. He concluded that it was “unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended

⁷⁰ “Population and Voting Data by County, Territory of Hawai’i, 1900-1950,” *University of Hawai’i*, (28 October 1955).

⁷¹ 73 Stat. 4.

⁷² 1849 Hawaiian-American Treaty, *supra* note 25.

territorial sea.”⁷³ Consistent with the question of Congress’s legal ability to annex the Hawaiian Islands, the Opinion also raises questions of Congressional authority concerning the 1959 Statehood Act and the boundaries of the State of Hawai’i as provided in the second proposition of the special election held on June 27, 1959. Kmiec could not find that Congress has authority to establish boundaries for a State that is beyond the United States’ territorial sea. Kmiec opined,

the Supreme Court in *Louisiana* recognized that this power [of Congress to admit new states into the union] includes ‘the power to establish state boundaries.’ 363 U.S. at 35. The Court explained, however, that it is not this power, but rather the President’s constitutional status as the representative of the United States in foreign affairs, which authorizes the United States to claim territorial rights in the sea for the purpose of international law. The Court left open the question of whether Congress could establish a state boundary of more than three miles beyond its coast that would constitute an overriding claim on behalf of the United States under international law. Indeed, elsewhere in its opinion the Court hints that congressional action cannot have such an effect.⁷⁴

Craven, also concluded “the [1959] plebiscite did not attempt to distinguish between ‘native’ Hawaiians or indeed nationals of the Hawaiian Kingdom and the resident ‘colonial’ population who vastly outnumbered them.”⁷⁵

E. United States’ violation of the International Law of Occupation to date

In discussing the occupation of a neutral State, the Arbitral Tribunal in *Coenca Brothers vs. Germany* (1927) concluded “the occupation of Salonika by the armed forces of the Allies constitutes a violation of the neutrality of that country.”⁷⁶ Later, in the *Chevreau case* (1931), the Arbitrator concluded that the status of the British forces while occupying

⁷³ Douglas Kmiec, “Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea,” *Opinions of the Office of Legal Counsel of the U.S. Department of Justice* 12 (1988): 262.

⁷⁴ *Id.*

⁷⁵ Dr. Matthew Craven, Reader in International Law, University of London, SOAS, authored a legal opinion for the *acting* Hawaiian Government concerning the continuity of the Hawaiian Kingdom, and the United States’ failure to properly extinguish the Hawaiian State under international law (12 July 2002), para. 5.3.6. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 311-347, 341.

⁷⁶ *France vs. Great Britain*, 7 Mixed Arbitral Tribunals, (1928), 686.

Persia—a neutral State in the First World War—was analogous to “belligerent forces occupying enemy territory.”⁷⁷ Feilchenfeld asserts

Section III of the Hague Regulations applies expressly only to territory which belongs to an enemy and has been occupied without the consent of the sovereign. It is, nevertheless, usually held that the rules on belligerent occupation will also apply where a belligerent, in the course of the war, occupies neutral territory, even if the neutral power should have failed to protest against the occupation.⁷⁸

Therefore, the United States forces, while occupying Hawai`i, being a neutral State, fell under the rules set forth in the 1907 Hague Convention, IV, Respecting the Laws and Customs of War on Land.⁷⁹ Oppenheim also states that an occupant State on neutral territory “does not possess such a wide range of rights with regard to the occupied country and its inhabitants as he possesses in occupied enemy territory.”⁸⁰

Article 43 of the 1907 Hague Convention, IV, delimits the power of the occupant and serves as a fundamental bar upon its free agency within an occupied neutral State. Although the United States signed and ratified the Hague Regulations,⁸¹ which was subsequent to the intervention and occupation of the Hawaiian Kingdom in 1898, the “text of Article 43 was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law.”⁸² Graber also states “nothing distinguishes

⁷⁷ *Chevreau case*, *American Journal of International Law* 27 (1933): 153.

⁷⁸ Ernst Feilchenfeld, *The International Economic Law of Belligerent Occupation*, (Washington: Carnegie Endowment for International Peace, 1942), 8.

⁷⁹ Czar Nicholas II of Russia called for the first multilateral Peace Conference in August of 1898 to begin the codification of the Laws of War. During the summer of 1899 the conference convened and was attended by representatives of twenty-six *States* who met at The Hague, Netherlands. A subsequent Peace Conference was later convened by Great Britain in 1907 at The Hague, and attended by forty-four *States* that further clarified the Laws of War. The text of Article 43 remained unchanged in both the 1899 and 1907 Conventions.

⁸⁰ Lassa Oppenheim, *International Law*, 7th Ed., (New York: David McKay Co., 1948-1952), 241.

⁸¹ Signed at The Hague October 18, 1907; ratification advised by the U.S. Senate March 10, 1908; ratified by the President of the United States February 23, 1909; ratification deposited with the Netherlands Government November 27, 1909; proclaimed February 28, 1910.

⁸² Eyal Benvenisti, *The International Law of Occupation*, (New Jersey: Princeton University Press, 1993), 8.

the writing of the period following the 1899 Hague code from the writing prior to that code.”⁸³ Benvenisti explains that the

foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty. From the principle of inalienable sovereignty over a territory spring the constraints that international law imposes upon the occupant. The power exercising effective control within another’s sovereign territory has only temporary managerial powers, for the period until a peaceful solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign.⁸⁴

One distinction between *sovereignty* and *authority* is that the former is inalienable and belongs to the occupied State, while the latter is temporary and is an administrative role acted upon by the occupant State. The United States government’s failure to adhere to the commands of international law regarding occupation is not evidence proving the termination of the Hawaiian State anymore than possession of stolen property proves the possessor to be a true owner. On this note, Benvenisti states,

modern occupants came to prefer, from a variety of reasons, not to establish such a direct administration. Instead, they would purport to annex or establish puppet states or governments, make use of existing structures of government, or simply refrain from establishing any form of direct administration. In these cases, the occupants would tend not to acknowledge the applicability of the law of occupation to their own or their surrogates’ activities, and when using surrogate institutions, would deny any international responsibility for the latter’s actions. Acknowledgment of the status of the occupant is the first and the most important initial indication that the occupant will respect the law of occupation. Such an acknowledgement is also likely to restrict the occupant’s future actions and limit its claims regarding the ultimate status of that territory.⁸⁵

By acknowledging the status of the United States as an occupant, Feilchenfeld’s comment can be better appreciated when he writes,

⁸³ Doris Graber, *The Development of the Law of Belligerent Occupation 1863-1914*, (New York: Columbia University Press, 1949), 143.

⁸⁴ Benvenisti, *supra* note 82, 5.

⁸⁵ *Id.*

under Article 43 of the Hague Regulations the occupant must respect the laws in force in the country 'unless absolutely prevented.' A total displacement of national laws and the introduction at large of the national law of the occupant would violate Article 43 and also the rules on the maintenance of fundamental institutions.⁸⁶

In other words, all U.S. municipal laws imposed within the territory of the Hawaiian State, since 1898 to the present, are a direct violation of Article 43 of the Hague Regulations. Furthermore, Article 47 of the Fourth Geneva Convention provides that "the benefit under the Convention shall not be affected by any change introduced, as a result of the occupation of a territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."⁸⁷ Marek explains that Article 47 enumerates two measures, which, in this particular case, can be applied to the Hawaiian-American situation.

One is premature annexation... In other words, even in an illegally annexed occupied territory the Convention retains its validity, thereby not only continuing to protect the civilian population, but, it is submitted, further emphasizing the separate identity and continuity of the occupied State, without which such protection would not be possible. The second is any interference by the occupant with the existing institutions or government, that is to say with the existing and continuing legal order of the occupied State. It is precisely here that the possibility of a puppet government is clearly included. Should any such changes result in the creation by the occupant of a puppet government or puppet State, this fact will be non-existent in the eyes of the Convention, which will continue to apply in the occupied territory. That territory will consequently retain the legal status it enjoyed before the occupation and prior to the changes in question.⁸⁸

International laws of occupation mandate an occupying government to administer the laws of the occupied State during the occupation, in a role similar to that of a trustee (occupying State) and beneficiary (occupied State) relationship. Thus, it cannot impose its own domestic laws without violating international law. This principle is clearly laid out in article 43 of the Hague Regulations, which states, "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as

⁸⁶ Feilchenfeld, *supra* note 78, 89.

⁸⁷ Fourth Geneva Convention, *supra* note 69.

⁸⁸ Marek, *supra* note 14, 118.

possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country.”

In a recent article published in the *Chinese Journal of International Law* concerning the *Larsen case*, Dumberry also notes that the law of occupation

as defined in the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore, the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.⁸⁹

III. THE HAWAIIAN KINGDOM AT THE PERMANENT COURT OF ARBITRATION

In 2001 the *American Journal of International Law* published a commentary by Bederman & Hilbert on the *Larsen case*.⁹⁰ As part of the legal team, we were well aware of the impact this case would cause on the international plane concerning *justiciability of indispensable third parties*, which in this case was the United States of America, and the use of the United Nations Commission on International Trade Law rules in non-commercial contracts. But the substantive issue of what the *Larsen*

⁸⁹ Patrick Dumberry, “The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law,” *Chinese Journal of International Law* 2, issue 1 (2002): 682.

⁹⁰ David J. Bederman & Kurt R. Hilbert, “Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii” *American Journal of International Law* 95 (2001): 927. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 82-91. Bederman & Hilbert state “Hawaiians never directly relinquished to the United States their claim of inherent sovereignty either as a people or over their national lands.” (928). However, it is not clear what the authors meant by using the term *inherent sovereignty* as contradistinguished from *state sovereignty*, which is used to describe the legal competence of the Hawaiian State. The term *inherent sovereignty* has no juridical meaning on the international plane, but it is a term used within the United States to identify the limited sovereignty of the Native American Indian tribes when compared to the States of the American Union. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991): “Indian tribes are ‘domestic dependent nations,’ which exercise *inherent sovereign authority* over their members and territories.” This language was also inserted in the 1993 Congressional Resolution apologizing only to native Hawaiians on behalf of the United States for the illegal overthrow of the Hawaiian Kingdom on January 17, 1893 (U.S. Public Law 103-150). The 1993 Apology Resolution erroneously categorize the native Hawaiians as an Indian tribe and not as part of the nationals of an occupied state. *Brownlie* states “In general, ‘sovereignty’ characterizes powers and privileges resting on customary law and independent of the particular consent of another state.” *Brownlie*, *supra* note 23, 290.

case represented far surpassed these juridical issues that have to be wrestled with by future litigants in the international courts.

Central to the *Larsen case* was the continued existence of the Hawaiian Kingdom as an independent State under international law, and the prolonged occupation of its territory by the United States of America. In the latter part of the 19th century, international law provided only two modes of territorial acquisition in which one State could acquire the territory of another State when not at war with each other, namely: (1) treaty of cession,⁹¹ or (2) prescription,⁹² which is a claim similar to adverse possession whereby an international tribunal must validate and confirm title of the claimant State. The United States' claim to the Hawaiian Islands does not fall under any of the foregoing modes of acquisition. Instead, the United States relies on its Congressional authority. Since 1898, United States municipal laws have been imposed within the territory of the Hawaiian State without its consent. Oppenheim explains that "the Law of Nations and Municipal Law differ...regarding the relations they regulate. Municipal Law regulates relations between the individuals under the sway of a State and the relations between this State and those individuals. International Law, on the other hand, regulates relations between the member-States of the Family of Nations."⁹³ He concludes that "just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law."⁹⁴

A. The Larsen Case

The *Larsen case* was a consequence of the failure of the United States to abide by the international laws of occupation. In particular, the failure on the part of the United States, as an occupant State, to administer the laws of the occupied State in accordance with Article 43 of the 1907 Hague Convention, IV. Under Article II of the Special Agreement to arbitrate, the issue to be determined by the Tribunal was defined as follows:

The Arbitral Tribunal is asked to determine, on the basis of the Hague Conventions IV and V of 18 October 1907, and the rules and principles of international law, whether the rights of the Claimant under international law as a Hawaiian subject are

⁹¹ Oppenheim, *supra* note 9, 376-82.

⁹² *Id.*, 400-3.

⁹³ *Id.*, 25.

⁹⁴ *Id.*

being violated, and if so, does he have any redress against the Respondent Government of the Hawaiian Kingdom?

As Professor James Crawford, SC, President of the Arbitral Tribunal, stated, “thus the issue *in rem*, the point is that, if the Hawaiian Kingdom continues to exist, its existence is *in rem*. It is not *in personam*. The Hawaiian Kingdom does not exist solely in the opinion of Mr. Larsen. It exists.”⁹⁵ Bederman & Hilbert assert,

[a]t the center of the PCA proceeding was...that the Hawaiian Kingdom continues to exist and that the Hawaiian Council of Regency (representing the Hawaiian Kingdom) is legally responsible under international law for the protection of Hawaiian subjects, including the claimant. In other words, the Hawaiian Kingdom was legally obligated to protect Larsen from the United States’ “unlawful imposition [over him] of [its] municipal laws” through its political subdivision, the State of Hawai‘i. As a result of this responsibility, Larsen submitted, the Hawaiian Council of Regency should be liable for any international law violations that the United States committed against him.⁹⁶

B. *Arbitral Award*

In its award, the Tribunal stated that the “dispute submitted to the Tribunal was a dispute not between the parties to the arbitration agreement but a dispute between each of them and a third party [the United States of America].”⁹⁷ As a result, “the Tribunal is precluded from the consideration of the issues raised by the parties by reason of the fact that the United States of America is not a party to the proceedings and has not consented to them.”⁹⁸ The Tribunal explained it

cannot determine whether the Respondent [the *acting* government] has failed to discharge its obligations towards the Claimant [Larsen] without ruling on the legality of the acts of the United States of America. Yet that is precisely what the Monetary Gold principle precludes the Tribunal from doing. As the International Court explained in the East Timor case, “the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the

⁹⁵ See transcripts of the oral hearings at the Permanent Court of Arbitration, *Larsen vs. the Hawaiian Kingdom*, 11 December 2000, 167, available at http://www.alohaquest.com/arbitration/transcript_001207.htm

⁹⁶ Bederman & Hilbert, *supra* note 90, 928.

⁹⁷ Larsen Case, *supra* note 32, 594.

⁹⁸ *Id.*, 598.

lawfulness of the conduct of another State which is not a party to the case” (ICJ Reports, 1995, p. 90, para. 29).⁹⁹

The Tribunal, however, did keep the window open for the possibility of the parties to pursue the question of responsibility of the *acting* government under fact-finding instead, stating “[t]he Tribunal notes that the interstate fact-finding commissions so far held under the auspices of the Permanent Court of Arbitration have not confined themselves to pure questions of fact but have gone on, expressly or by clear implication, to deal with issues of responsibility for those facts.”¹⁰⁰ On March 23, 2001, the parties jointly requested the Tribunal to be reconstituted into a Fact-finding Commission of Inquiry under the PCA.¹⁰¹

C. Hawaiian Kingdom Lodges Complaint with United Nations Security Council

While the fact-finding proceedings were pending, the *acting* government acted upon the legal interests of the Hawaiian State by filing a Complaint with the United Nations Security Council on July 5, 2001. The Complaint was filed under the council presidency of China in accordance with Article 35(2) of the United Nations Charter, which provides that “a State which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purpose of the dispute, the obligations of pacific settlement provided in the present Charter.”

Under the provision set forth in Article 36(1) of the U.N. Charter, the Security Council was requested to investigate the Hawaiian Kingdom question, in particular, the merits of the complaint, and to recommend appropriate procedures or methods of adjustment.¹⁰² Mindful of the veto power on the Council of the United States, the intent of the complaint was to apprise, and not necessarily initiate any proceedings—it was a request for recommendations. The filing of the complaint occurred while China served as President of the Security Council for the month of July 2001. After a detailed and lengthy telephone discussion with the Chinese

⁹⁹ *Id.*, 596.

¹⁰⁰ *Id.*, 597.

¹⁰¹ “Agreement between the Parties to Request the Arbitral Tribunal to be Reconstituted as a Commission of Inquiry pursuant to the Permanent Court of Arbitration Optional Rules for Fact-finding Commission of Inquiry,” available at http://www.AlohaQuest.com/arbitration/letter_010323.htm

¹⁰² “Hawaiian Kingdom Complaint filed with the United Nations Security Council,” available at <http://hawaiiakingdom.org/united-nations.shtml>. Reprinted without annexes, at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 286-449.

legal counsel in New York City regarding the legal continuity of the Hawaiian State and the *Larsen case*—an assertion she was unable to deny—a courier from the Security Council headquarters was dispatched to the ground floor of the United Nations building to receive and log-in the Hawaiian complaint in accordance with Article 35(2) of the U.N. Charter.

*D. Hawaiian Kingdom Accepts Jurisdiction of
International Court of Justice*

The following month, the *acting* government submitted a General Declaration with the Registrar accepting jurisdiction of the International Court of Justice (ICJ). The cover letter, dated August 30, 2001, stated, *inter alia*,

...I have been instructed by my government to submit to the Registrar of the International Court of Justice, provided herein as an enclosure, my government's Declaration accepting jurisdiction of the International Court of Justice in accordance with the conditions prescribed by United Nations Security Council Resolution no. 9 (15 October 1946) in virtue of the powers conferred upon the Security Council by Article 35, paragraph 2, of the Statute of the International Court of Justice.

Both the Security Council Complaint and the ICJ Declaration were subjects of a law review article published in the Chinese Journal of International Law.¹⁰³ In September of 2001, the *acting* government approached Larsen's counsel and requested the proceedings at the Permanent Court of Arbitration be terminated so that the legal interests of the parties in the *Larsen case* could be consolidated under the principle of diplomatic interposition. The request was on condition the Hawaiian Kingdom take up Larsen's case at the United Nations level, including the ICJ, thus raising Larsen's dispute from a private interest to a dispute between States.¹⁰⁴ In other words, the *acting* government would represent Larsen in international proceedings against the United States. An agreement to settle was reached on September 21, 2001 and filed with the Registry of the Permanent Court of Arbitration who

¹⁰³ Dumberry, *supra* note 89, 671-5.

¹⁰⁴ Examples of private interests becoming state interests in proceedings before the International Court of Justice include: *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, 19 International Law Reports 507 (July 22, 1952); *Ambatielos (Greece v. United Kingdom)*, 20 International Law Reports 547 (May 19, 1953); *Nottebohm Case (Liechtenstein v. Guatemala)*, 22 International Law Reports 349 (April 6, 1955); *Interhandel Case (Switzerland v. United States)*, 27 International Law Reports 475 (March 21, 1959); and *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1961 International Court of Justice Rep. 8 (April 10).

thereafter terminated the proceedings.¹⁰⁵ Bederman & Hilbert concede that the dispute in the *Larsen case* is legitimate.

Because international tribunals lack the power of joinder that national courts enjoy, it is possible—as a result of procedural maneuvering alone—for legitimate international legal disputes to escape just adjudication. For example, in *Larsen*, the United States commanded an enviable litigation posture: even though the United States admitted its illegal overthrow of the Hawaiian Kingdom, it repeatedly refused to consent to international arbitration. Larsen was thus forced to engage in the artful pleading of a claim against his own, ostensible government. In a weird inversion of the normal principles of diplomatic protection, Larsen was compelled to argue that his own government failed to protect him.¹⁰⁶

IV. EMPLOYING REALIST THEORY TO UNDERSTAND THE ACTIONS TAKEN BY THE *ACTING* HAWAIIAN GOVERNMENT

Existing treatises on International Law and Politics have ignored the Hawaiian State of the 19th century, or simply assumed it was extinguished by United States municipal legislation under the doctrine of effectiveness. To ignore this context omits a range of factors, which International Law and Classical Realist Theory (CRT) is able to provide, including not only the critical issue of why the Hawaiian State continues to exist under international law, but also how the Hawaiian State, in a realist school of thought, can use international law and certain organs at the international venue to its advantage and expose the American occupation. “Classical realists theory contains essentially two points of focus: international systems level of analysis and the state...”¹⁰⁷ Public international law, which is a law between established States, provides the rules or peremptory norms (*jus cogens*), and the realist acts upon these peremptory norms to pursue a particular political course of action. CRT can be employed to understand the actions taken by a State that has been under prolonged occupation, and the theory is able to discern between municipal law and international law—a crucial factor in the Hawai'i-U.S. relation. Between 1843 and 1898, the relationship between the two States was reciprocal, but from 1898 to the present the United States has been unilaterally exerting its municipal legislation over the Hawaiian Islands without first extinguishing the Hawaiian State under international

¹⁰⁵ “Agreement between Lance Paul Larsen and the Hawaiian Kingdom for the settlement of the case in the Permanent Court of Arbitration concerning alleged liabilities of the Hawaiian Kingdom government.” Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 284-285.

¹⁰⁶ Bederman & Hilbert, *supra* note 90, 933.

¹⁰⁷ James E. Dougherty & Robert L. Pfaltzgraff, Jr., *Contending Theories of International Relations: A Comprehensive Survey 5th Ed.*, (New York: Longman, 2001), 63.

law.¹⁰⁸

Realist theory “consists in ascertaining facts and giving them meaning through reason.”¹⁰⁹ Central to the CRT school of thought is the self-preservation of the State, which is employed as part of the State’s national interest to include objectives and techniques that can be strategically and tactically played out. Morgenthau, a classical realist, explained that in order to

give meaning to the factual raw material of foreign policy, we must approach political reality with a kind of rational outline, a map that suggests to us the possible meanings of foreign policy. In other words, we put ourselves in the position of a statesman who must meet a certain problem of foreign policy under certain circumstances, and we ask ourselves what the rational alternatives are from which a statesman may choose who must meet this problem under these circumstances (presuming always that he acts in a rational manner), and which of these rational alternatives this particular statesman, acting under these circumstances, is likely to choose.¹¹⁰

A. Key Elements of Classical Realist Theory

Dougherty & Pfaltzgraff¹¹¹ identify six key elements in the CRT school of thought as: (1) the international system is based on States as the key actors; (2) States exist in a condition of legal sovereignty in which nevertheless there are gradations of capabilities, with greater and lesser States as actors; (3) international politics is a struggle for power in an anarchic setting in which nation-States inevitably rely on their own capabilities to ensure their survival; (4) States are unitary actors and that domestic politics can be separated from foreign policy; (5) States are rational actors characterized by a decision-making process leading to choices based on national interest; and (6) the concept of power.

To the classical realist, power depends on economic, political and military capabilities of a State, but for the Hawaiian State—being without economic, political or military capabilities due to prolonged occupation—it is its legal sovereignty that cannot be affected by the conventional power wielding of the United States, and for that reason limits the conflictual relationship within the juridical framework. Dougherty & Pfaltzgraff also assert that “power is situational, or

¹⁰⁸ Craven, *supra* note 75.

¹⁰⁹ Hans J. Morgenthau, *Politics Among Nations*, 6th Ed. (New York: Alfred A. Knopf, Inc., 1985), 4.

¹¹⁰ *Id.*, 5.

¹¹¹ Dougherty & Pfaltzgraff, *supra* note 107, 63-4.

dependent on the issue, object, or goal for which it is employed.”¹¹² In other words, power is employed differently depending on the situation. For the *acting* government, the situation is prolonged occupation, but the legal presumption when asserting occupation is the continued existence of the Hawaiian State, which is its legal sovereignty. Brownlie adds that the “sovereignty of and equality of states represent the basic constitutional doctrine of the laws of nations, which governs a community consisting primarily of states having a uniform legal personality.”¹¹³

B. *Reverse Power Relation Differential*

Because legal parity of States is the presumption, and not the exception, under international law, the dynamics of power will change if an already established State reemerges as a player in the international system and employs self-help. Emphasis is not upon *what* the reemerging State will assert, but rather on the *capability* of the receiving unit, in this case the United States or an international organization, to *deny* what the reemerging State is asserting. In other words, power, in this sense, is not what is *exerted*, but rather what is *acquired* from the reaction of the receiving unit. Therefore, it is the Hawaiian State, itself, that is the object of power within the international system, and the wielding of this object could indeed force the receiving unit to do something it wouldn't normally do. This is what I will call a *reverse power relation differential*, which can only be tactically employed when the asserting unit is in control of a particular situation it chooses to engage in and is able to respond to the reaction of the receiving unit in a manner that benefits the asserting unit—a form of passive aggression. When the re-emerging State employs *reverse power relation differential*, it must be a rational actor “characterized by a decision-making process leading to choices based on national interest,”¹¹⁴ and ever mindful that “international politics is a struggle for power in an anarchic setting in which nation-states inevitably rely on their own capabilities to ensure their survival.”¹¹⁵ As States and international institutions rely on international law as the basis of their own existence, this tactic, when properly employed, has a profound effect upon a receiving unit, which cannot afford to be put in a position as to deny its very own existence under international law. This is a powerful tactic when employed properly.

An example of employing *reverse power relation differential* occurred in

¹¹² *Id.*, 75.

¹¹³ Brownlie, *supra* note 23.

¹¹⁴ Dougherty & Pfaltzgraff, *supra* note 107, 64.

¹¹⁵ *Id.*, 63.

the early stages of the arbitration, where it was recommended by the Secretary General of the PCA that in order to maintain the integrity of the arbitration proceedings the *acting* government should provide a formal invitation for the United States to join in the arbitration. This action would elicit one of two responses that would be crucial to the proceedings. Firstly, if the United States had legal sovereignty over the Hawaiian Islands, via it being the fiftieth State of its union, it could demand that the PCA terminate these proceedings citing intervention by the international court upon U.S. sovereignty without its consent. This would have set in motion a separate hearing by the PCA where the *acting* government would be able respond to the U.S. claim.¹¹⁶ Secondly, if the United States chose not to intervene, this non-action would indicate to the court that it doesn't have a presumption of sovereignty or "interest of a legal nature" over the Hawaiian Islands.

On March 3, 2000, the *acting* government notified the U.S. State Department's legal counsel in Washington, D.C., Mr. John Crook of the arbitration proceedings. An invitation was extended for the United States to join in and the discussion was reduced to writing and made a part of the record at the Registry of the PCA.¹¹⁷ Thereafter, the United States notified the Secretary General of the PCA that it had no intention to intervene and requested that the parties to the arbitration consent to the United States' access to all pleadings and transcripts of the proceedings. The *acting* government and Larsen's counsel, intending that the arbitration be transparent, willingly consented to the United States' request and the U.S. Embassy in The Hague retrieved the necessary information throughout the proceedings. Here the *acting* government was able to get the United States to do something it wouldn't normally do by employing the *reverse power relation differential*.

V. CONCLUSION

¹¹⁶ Article 62 of the Statute of the International Court of Justice provides "1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request." The Tribunal in the *Larsen case* relied upon decisions of the International Court Justice to guide them concerning justiciability of third States, e.g. *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)* (1953-1954); *East Timor (Portugal v. Australia)* (1991-1995) and *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (1989-1993). In the event that the United States chose to intervene to prevent the *Larsen case* from going further because it had "an interest of a legal nature which may be affected by the decision," it is plausible that the Tribunal would look to Article 62 of the Statute for guidance.

¹¹⁷ "Letter confirming telephone conversation with U.S. State Department relating to arbitral proceedings at the Permanent Court of Arbitration, March 3, 2000." Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 241-243.

The recent Iraqi conflict and subsequent occupation has greatly enhanced the political and legal climate of the international community. The conflict has triggered open discussion, at every level, of States rights as defined by the international laws of war and occupation. This dialogue of States rights has now made the 1907 Hague Regulations and the 1949 Geneva Convention a common language spoken worldwide. Second, Hawai'i played a major role in the Iraqi conflict, because a large number of the U.S. military engaged in the fighting in Iraq came out of the United States Pacific Command (PACOM), headquartered in Hawai'i, and attached to the United States Central Command (CENTCOM) for combat operations. These included sixty thousand troops from the 1st Marine Expeditionary Force, and forty-seven warships,¹¹⁸ nine of which were based at Pearl Harbor, Hawai'i.¹¹⁹ This is yet another example of Hawaiian neutrality being consistently violated by the United States since the Spanish-American War, 1898.

Given the prolonged occupation of the Hawaiian Islands and the presumed continuity of the Hawaiian State, in the absence of any evidence to the contrary, the U.S. has continuously violated Hawaiian neutrality in many major conflicts to date and has utilized Hawaiian territory and its seaports to become the superpower it is today. Hawaiian territory not only serves as the headquarters for the largest and oldest of the nine unified military commands of the U.S. Department of Defense in the world, it also reluctantly serves as a prime target. Under the international laws of occupation, the emphasis is always directed upon the regime of the occupier and not upon the nationals of the occupied State. This reasoning is to ensure the occupier's compliance with the laws of occupation—a compliance that has gone unchecked for over a century.

Scheffer asserts that the victim or victims of an occupier's violation of international law "could bring an action in U.S. federal courts against officials of the [occupant State] under the Alien Tort Statute provided that the occupying power is the alleged responsible party and the jurisdictional requirements of that law are satisfied."¹²⁰ The Alien Tort Statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹²¹ In *Ex parte Quirin*,

¹¹⁸ See GlobalSecurity.org, "U.S. Forces Order of Battle – 7 April," at http://www.globalsecurity.org/military/ops/iraq_orbat_toe.htm (accessed 7 April 2003).

¹¹⁹ These ships include four Submarines (USS Honolulu, USS Cheyenne, USS Columbia, and the USS Pasadena), two Destroyers (USS Fletcher and the USS Paul Hamilton), one Cruiser (USS Chosin), and two Frigates (USS Crommelin and the USS Reuben James).

¹²⁰ David J. Scheffer, "Beyond Occupation Law," *American Journal of International Law* 97 (2003): 858.

¹²¹ 28 U.S.C. 1350.

the U.S. Supreme Court explained that “[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of...individuals.”¹²²

In addition to civil liability, Scheffer adds that “[t]he War Crimes Act of 1996, as amended at least with respect to certain crimes that may arise during an occupation, also creates a new basis for criminal liability under U.S. law.”¹²³ And on the international plane, he also explains that the government of an occupied State

may even find reason to seek to challenge the [occupant State] before the International Court of Justice over alleged violations of occupation law and to seek reparations, particularly if the occupation extends over a long period of time. The occupying power[] also may be exposed to bilateral or multilateral diplomatic or economic retaliation for their decisions and actions that must comply with the high standards of occupation law.¹²⁴

Aside from these legal and political revelations, the discourse is shifting from an indigenous optic that has operated within the American State apparatus and its municipal legislation, to one of a Hawaiian State optic that operates within the framework of International Relations between established States and international law. All else aside, though, the *acting* government is preparing to engage the United States, on behalf of *Larsen*, before an international court, which will bring to the forefront a basic fundamental question—the legal competency of whether or not the *acting* government can serve as the provisional organ of the Hawaiian State in its representation of *Larsen*.

“Diplomatic” or *de facto* recognition cannot be sought by the *acting* government from other States, but rather, it is limited to pursue “juristic” recognition of *de facto* officers that assumed the reins of a *de jure* government whose legal order has been maintained by an objective rule of international law. Recognition of a *de facto* government is political and acts of pure policy by States,¹²⁵ because they attempt to change or alter the legal order of an already established and recognized personality—whereas, juristic recognition of *de facto* officers does not affect the legal order of a State that has been the subject of prolonged occupation. It is within this context that the *acting* government, as *de facto* officers, cannot claim to represent the people *de jure*, but only, at

¹²² *Ex parte Quirin*, 317 U.S. 27.

¹²³ Scheffer, *supra* note 123, 859.

¹²⁴ *Id.*

¹²⁵ See Marek, *supra* note 14, p. 158.

this time, represent the legal order of the Hawaiian State as a result of the limitations imposed by the laws of occupation and the duality of two legal orders existing in one in the same territory.¹²⁶ Therefore, given the legal complexity of the Hawaiian-American situation, it is only sound and prudent that an international court provide an independent constitutive review of the formation of the *acting* government devoid of politics.

¹²⁶ See Dumbery, *supra* note 89.

Doc #8

A Slippery Path towards Hawaiian Indigeneity:

An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its use and practice in Hawai'i today

BY DAVID KEANU SAI*

Abstract

On January 17, 2007, a bill was re-introduced in the U.S. Senate to grant tribal sovereignty to Native Hawaiians as the indigenous people of Hawai'i, a similar status afforded Native American tribes on the continental United States. The difference, however, is that Native Hawaiians were citizens of an internationally recognized sovereign State, whereas Native Americans were a dependent nation within a sovereign State. Great Britain and France were the first to recognize Hawai'i's sovereignty in 1843 by proclamation and the United States in 1849 by treaty. This paper questions the hegemonic assumptions about the history of law and politics in the Hawaiian Islands by providing an analysis and comparison between Hawaiian State sovereignty and Hawaiian Indigeneity and its use and practice in Hawai'i today.

I. Introduction

When the Senate opened its 2007 session, Senator Daniel Akaka (D-Hawai'i) re-introduced a bill entitled "The Native Hawaiian Government Reorganization Act of 2007" (S. 310). This piece of legislation was brought before the Senate on January 17 to mark the one hundred and fourteenth anniversary of the United States' overthrow of the Hawaiian Kingdom government. The bill's purpose is to form a native Hawaiian governing entity in order to negotiate with the State of Hawai'i and the Federal government on behalf of the native people of the Hawaiian Islands. According to Senator Akaka, the bill "would provide parity in federal policies that empower other indigenous peoples, American Indians, and Alaskan Natives, to participate in a government-to-government relationship with the United States."¹ An earlier version of the bill (S. 147) failed to receive enough votes in the Senate in June 2006. The act, otherwise known as the "Akaka Bill," is a by-product of a 1993 resolution passed by Congress in apology to native Hawaiians for the 1893 overthrow of the Hawaiian Kingdom.²

The Akaka Bill provides that the "Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States," and that the native Hawaiians are "the native people of the Hawaiian archipelago that is now part of the United States, [and] are indigenous, native people of the United States."³ The bill, like the 1993 resolution, assumes the native Hawaiian population to be an indigenous people *within* the United States similar to Native Americans, and served as the foundation of political thought regarding native Hawaiians' relationship with the Federal and State governments. In the seminal case *Cherokee Nation v. Georgia*, the Supreme Court recognized Native American tribes as "domestic dependent nations," and not independent and sovereign States.⁴ The court explained:

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign

1. Press Release, Office of Senator Daniel Akaka, Akaka Bill Introduced in Senate and House (Jan. 17, 2007), <http://akaka.senate.gov/public/index.cfm?FuseAction=PressReleases.Home> (follow "2007" hyperlink; then follow hyperlink for press release title).

2. S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993), *reprinted in* 1 HAW. J.L. & POL. 290 (Summer 2004) [hereinafter *Apology*].

3. Native Hawaiian Government Reorganization Act, S. 310, 110th Cong. (2007).

4. See *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1832).

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nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.⁵

As an alternative viewpoint to that which takes for granted U.S. sovereignty exercised by virtue of the plenary power of Congress over indigenous peoples situated within its territory, this article challenges the hegemonic assumptions about the history of law and politics in the Hawaiian Islands. The author does so by providing an analysis of Hawaiian sovereignty under international law since the nineteenth century. This includes an analysis of the current erroneous identification of native Hawaiians as an indigenous group of people within the United States, rather than nationals of an extant sovereign, but occupied, State. This countervailing thesis will be carried out on five levels: (1) the sovereignty of the Hawaiian Islands as a subject of international law; (2) United States' history of violating Hawaiian sovereignty and ultimate occupation of the islands; (3) the administration of Hawaiian Kingdom law by the United States as mandated under the international laws of occupation; (4) the rise of Hawaiian Indigeneity and the sovereignty movement; and (5) righting the wrong and the mandate for restitution. Finally, the paper concludes by urging scholars and practitioners in the fields of political science, history and law to rigorously engage the subject of Hawaiian sovereignty without being confined to apologist formalities or political leanings.

The Hawaiian Kingdom, of which the native Hawaiian population comprised the majority of the citizenry, has consistently been portrayed in contemporary scholarship as a vanquished aspirant that ultimately succumbed to U.S. power through colonization and superior force. Recent works such as Professor Sally Merry's *Colonizing Hawai'i: the Cultural Power of Law* (2000), Professor Jonathan Osorio's *Dismembering Lahui [the Nation]* (2002), Robert Stauffer's *Kahana: How the Land was Lost* (2004), and Professor Noenoe Silva's *Aloha Betrayed: Native Hawaiian Resistance to American Colonialism* (2004) evidence this paradigmatic view and portray the Hawaiian Kingdom as a failed experiment that could not compete with nor survive against dominant western powers.⁶ This

5. *Id.*

6. SALLY MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* (Princeton University Press 2000); JONATHAN OSORIO, *DISEMBEERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887* (University of Hawai'i Press 2002); ROBERT STAUFFER, *KAHANA: HOW THE LAND WAS LOST* (University of Hawai'i Press 2004); NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* (Duke University Press 2004). See also David Keanu Sai, *Kahana: How the Land Was Lost*, 15 (1) THE

point of view frames the U.S. takeover of the Hawaiian Islands as *fait accompli*—a history no different than other western, colonial takeovers of indigenous people and their lands throughout the world. Merry, whose theoretical framework is colonial/post-colonial, fashions the nineteenth century Hawaiian Kingdom into an imperialistic dichotomy of conflicting cultures and people. Osorio concluded that, the Hawaiian Kingdom “never empowered the Natives to materially improve their lives, to protect or extend their cultural values, nor even, in the end, to protect that government from being discarded,” because the system itself was foreign and not Hawaiian.⁷ Stauffer stated that, “the government that was overthrown in 1893 had, for much of its fifty-year history, been little more than a *de facto* unincorporated territory of the United States . . . [and] the kingdom’s government was often American-dominated if not American-run.”⁸ Silva concluded that the overthrow “was the culmination of seventy years of U.S. missionary presence.”⁹ These views only serve to bolster a history of domination by the United States that further relegates the native Hawaiian, as an indigenous group of people, to a position of inferiority and at the same time elevates the United States to a position of political and legal superiority, notwithstanding the United States’ recognition of the Hawaiian Kingdom as a co-equal sovereign State and a subject of international law. Indigenous sovereignty, being a subject of United States domestic law, had become the lens through which Hawai’i’s legal and political history is filtered.

Since the hearing of the *Lance Larsen vs. Hawaiian Kingdom* case at the Permanent Court of Arbitration (1999-2001),¹⁰ however, scholarship has begun to shift this paradigm from an intrastate — within the context of U.S. law and politics, to an interstate point of view — as between two internationally recognized political units.¹¹ It is through this shift that

CONTEMPORARY PACIFIC: A JOURNAL OF ISLAND AFFAIRS 237 (2005) (book review).

7. See OSORIO, *supra* note 6, at 257.

8. See STAUFFER, *supra* note 6, at 73.

9. See Silva, *supra* note 6, at 202.

10. See *Lance Larsen vs. Hawaiian Kingdom*, 119 INT’L L. REP. 566 (2001), reprinted in 1 HAW. J.L. & POL. 299 (Summer 2004).

11. Works on this topic include: David Bederman & Kurt Hilbert, *Arbitration—UNCITRAL Rules—justiciability and indispensable third parties—legal status of Hawaii* 95 AM. J. INT’L L. 927 (2001); Patrick Dumberry, *The Hawaiian Kingdom Arbitration Case and the Unsettled Question of the Hawaiian Kingdom’s Claim to Continue as an Independent State under International Law*, 2(1) CHINESE J. INT’L L. 655 (2002); David Keanu Sai, *American Occupation of the Hawaiian State: A Century Gone Unchecked*, 1 HAW. J.L. & POL. 46 (Summer 2004); Kanalu Young, *An Interdisciplinary Study of the term “Hawaiian”*, 1 HAW. J.L. & POL. 23 (Summer 2004); Matthew Craven, *Hawai’i, History, and International Law*, 1 HAW. J.L. & POL. 6 (Summer 2004); Jonathan Osorio, *Ku’e and Ku’oko’a: History, Law, And Other Faiths*, in LAW

scholars are now revisiting contemporary assumptions regarding the history of the Hawaiian Islands. As the Hawaiian State gains more attention as a subject of international law, a comprehensive overview of the history of the Hawaiian Islands since the nineteenth century is necessary. This would ensure that misinterpretations, whether by chance or design, can be corrected in light of accurate theoretical frameworks.

II. Hawaiian Sovereignty

In 2001, the Permanent Court of Arbitration in The Hague acknowledged that the Hawaiian Islands, in the nineteenth century, “existed as an independent State recognized as such by the United States of America, the United Kingdom, and various other States.”¹² Furthermore, in 2004, the Ninth Circuit Court of Appeals also acknowledged the status of the Hawaiian Islands in the nineteenth century as a “coequal sovereign alongside the United States.”¹³ In order, though, to fully appreciate and understand the terms “independent State” and “coequal sovereign,” we need to know these terms as they were understood then. Sovereignty in the nineteenth century was understood to be of two forms — internal and external, and defined in Henry Wheaton’s renowned 1836 treatise of international law.

Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws . . . External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies.¹⁴

The terms state, government and sovereignty are not synonymous in international law, but rather are distinct from each other. A state is a “body of people occupying a definite territory and politically organized”¹⁵ under one government, being the “agency of the state,”¹⁶ that exercises

& EMPIRE IN THE PACIFIC, FIJI AND HAWAI’I 213 (Sally Engle Merry and Donald Brenneis, eds., 2003); Kanalu Young, *Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780-2001*, 2 HAW. J.L. & POL. 1 (Summer 2006); Kamana Beamer, *Mapping the Hawaiian Kingdom: A Colonial Venture?*, 2 HAW. J.L. & POL. 34 (Summer 2006); Umi Perkins, *Teaching Land and Sovereignty—A Revised View*, 2 HAW. J.L. & POL. 97 (Summer 2006).

12. See *Larsen*, *supra* note 10, at 581.

13. *Kahawaiola’a v. Norton*, 386 F.3d 1271, 1282 (9th Cir. 2004).

14. HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 27 (Clarendon Press 1936).

15. BLACK’S LAW DICTIONARY 1407 (6th ed. 1990).

16. *Id.* at 695.

sovereignty, which is the “supreme, absolute, and uncontrollable power by which an independent state is governed.”¹⁷ In other words, sovereignty, both internal and external, is an attribute of an independent State, while the government exercising sovereignty is the State’s physical agent. In the sixteenth century, French jurist and political philosopher Jean Bodin stressed the importance that “a clear distinction be made between the form of the state, and the form of the government, which is merely the machinery of policing the state.”¹⁸ Nineteenth century political philosopher Professor Frank Hoffman also emphasizes that a government “is not a State any more than a man’s words are the man himself,” but “is simply an expression of the State, an agent for putting into execution the will of the State.”¹⁹ Professor Quincy Wright, a twentieth century American political scientist, also concluded that, “international law distinguishes between a government and the state it governs.”²⁰ Therefore, a sovereign State would continue to exist despite its government being overthrown by military force. Two contemporary examples illustrate this principle of international law, the overthrow of the Taliban (Afghanistan) in 2001 and Saddam Hussein (Iraq) in 2003, whereby the former has been a recognized sovereign State since 1919,²¹ and the latter since 1932.²²

With regard to the recognition of external sovereignty, there are two aspects — recognition of sovereignty and the recognition of government. External sovereignty cannot be recognized without the initial recognition of the government representing the State, and once recognition of sovereignty is granted, Professor Lassa Oppenheim asserts that it “is incapable of withdrawal”²³ by the recognizing States. Professor Georg Schwarzenberger also asserts, that “recognition estops [precludes] the State which has recognized the title from contesting its validity at any future time.”²⁴ Therefore, recognition of a sovereign State is a political act with

17. *Id.* at 1396.

18. JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* 56 (B. Blackwell 1955).

19. FRANK SARGENT HOFFMAN, *THE SPHERE OF THE STATE OR THE PEOPLE AS A BODY-POLITIC* 19 (G.P. Putnam’s Sons, 1894).

20. Quincy Wright, *The Status of Germany and the Peace Proclamation*, 46(2) AM. J. INT’L L. 299, 307 (Apr. 1952).

21. Manley O. Hudson, *Afghanistan, Ecuador, and the Soviet Union in the League of Nations*, 29 AM. J. INT’L L. 109, 110 (1935).

22. Manley O. Hudson, *The Admission of Iraq to Membership in the League of Nations*, 27 AM. J. INT’L L. 133 (1933).

23. LASSA OPPENHEIM, *INTERNATIONAL LAW* 137 (3d ed. 1920).

24. Georg Schwarzenberger, *Title to Territory: Response to a Challenge*, 51(2) AM. J. INT’L L. 308, 316 (1957).

legal consequences.²⁵ The recognition of governments, though, which could change form through constitutional or revolutionary means subsequent to the recognition of State sovereignty, is a purely political act and can be retracted by another government for strictly political reasons. Cuba is a clear example of this principle, where the U.S. withdrew the recognition of Cuba's government under President Fidel Castro, but at the same time this political act did not mean Cuba ceased to exist as a sovereign State. In other words, sovereignty of an independent State, once established, is not dependent upon the political will of other governments, but rather the objective rules of international law. According to Wheaton:

The recognition of any State by other States, and its admission into the general society of nations, may depend . . . upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever be its ruler, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State.²⁶

Since Hawai'i existed as a co-equal sovereign alongside the United States of America in the nineteenth century, international laws — not United States domestic laws regarding indigenous sovereignty of a native people, provide the basis upon which to determine whether or not the Hawaiian State continues to exist, despite the illegal overthrow of its government on January 17, 1893.

A. International Recognition of Hawaiian State Sovereignty

By 1849, the Hawaiian Islands was the first Polynesian nation to be recognized as an independent and sovereign State by the British, French and the United States of America. Great Britain and France explicitly and formally recognized Hawaiian sovereignty on November 28, 1843 by joint proclamation at the Court of London, and the United States followed on December 20, 1849 with recognition by treaty.²⁷ The Anglo-French proclamation stated:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands [Hawaiian Islands]

25. GERHARD VON GLAHN'S, *LAW AMONG NATIONS* 85 (6th ed. 1992).

26. See WHEATON, *supra* note 14, at 15.

27. Treaty with the Hawaiian Islands, 9 Stat. 977 (1849), *reprinted in* 1 HAW. J.L. & POL. 115 (Summer 2004) [hereinafter *1849 Treaty*]. In 1842, President John Tyler did recognize the independence of the Hawaiian Islands, but did so without any formal declaration or treaty.

of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich Islands as an *Independent State*, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed (emphasis added).²⁸

As a recognized State, the Hawaiian Islands became a full member of the Universal Postal Union on January 1, 1882, maintained more than ninety legations and consulates throughout the world,²⁹ and entered into extensive diplomatic and treaty relations with other States that included Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan, Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States.³⁰ Regarding the United States, the Hawaiian Kingdom entered into five treaties: 1849 Treaty of Friendship, Commerce and Navigation;³¹ 1875 Treaty of Reciprocity;³² 1883 Postal Convention Concerning Money Orders;³³ and the 1884 Supplementary Convention to the 1875 Treaty of Reciprocity.³⁴ The Hawaiian Islands was also recognized within the international community as a neutral State, a status expressly noted in treaties with the Kingdom of Spain in 1863 and the Kingdom of Sweden and Norway in 1852. Article XXVI of the 1863 Hawaiian-Spanish treaty provides:

All vessels bearing the flag of Spain, shall, in time of war, receive every possible protection, short of active hostility, within the ports and waters of the Hawaiian Islands, and Her Majesty the Queen of Spain engages to respect, *in time of war the neutrality of the Hawaiian Islands*, and to use her good offices with all the other powers having treaties with the

28. United States House of Representatives, 53d Cong., Executive Documents on Affairs in Hawaii: 1894-95, 120 (Government Printing Office 1895), *reprinted in* 1 HAW. J.L. & POL. 114 (Summer 2004) [hereinafter *Executive Documents*].

29. THOMAS THRUM, *Hawaiian Register and Directory for 1893*, in HAWAIIAN ALMANAC AND ANNUAL 140, 140 (1892).

30. These treaties, except for the 1875 Hawaiian-Austro/Hungarian treaty, which is at the Hawai'i State Archives, can be found in TREATIES AND CONVENTIONS CONCLUDED BETWEEN THE HAWAIIAN KINGDOM AND OTHER POWERS, SINCE 1825 (1887): Belgium (Oct. 4, 1862) at 71; Bremen (Mar. 27, 1854) at 43; Denmark (Oct. 19, 1846) at 11; France (July 17, 1839; Mar. 26, 1846; Sept. 8, 1858), at 5, 7 and 57; French Tahiti (Nov. 24, 1853) at 41; Germany (March 25, 1879) at 129; Great Britain (Nov. 13, 1836 and March 26, 1846) at 3 and 9; Great Britain's New South Wales (Mar. 10, 1874) at 119; Hamburg (Jan. 8, 1848) at 15; Italy (July 22, 1863) at 89; Japan (Aug. 19, 1871; Jan. 28, 1886) at 115 and 147; Netherlands (Oct. 16, 1862) at 79; Portugal (May 5, 1882) at 143; Russia (June 19, 1869) at 99; Samoa (Mar. 20, 1887) at 171; Spain (Oct. 9, 1863) at 101 [hereinafter *1863 Spanish Treaty*]; Sweden and Norway (Apr. 5, 1855) at 47; and Switzerland (July 20, 1864) at 83.

31. See *1849 Treaty*, *supra* note 27.

32. 19 Stat. 625 (1875), *reprinted in* 1 HAW. J.L. & POL. 126 (Summer 2004).

33. 23 Stat. 736 (1883), *reprinted in* 1 HAW. J.L. & POL. 129 (Summer 2004).

34. 25 Stat. 1399 (1884), *reprinted in* 1 HAW. J.L. & POL. 134 (Summer 2004).

same, to induce them to adopt the same policy toward the said Islands.³⁵ (emphasis added)

International law in the nineteenth century provided that only by way of conquest, whether by treaty or subjugation,³⁶ or by treaty of cession could an independent States' entire and complete sovereignty be extinguished, thereby merging the former State into that of a successor State. The establishment of the United States is a prime example of this principle at work through a voluntary merger of sovereignty. After the revolution, Great Britain recognized the former thirteen British colonies as "free Sovereign and independent States" in a confederation by the 1782 Treaty of Paris,³⁷ but these States later relinquished their external sovereignties in 1789 into a single federated State, which was to be thereafter referred to as the United States of America. The United States was the successor State of the thirteen former sovereign States by voluntary merger or cession.

B. United States' Violation of Hawaiian State Sovereignty

After two failed attempts to acquire the Hawaiian Islands by a treaty of cession in 1893 and 1897 through a puppet government installed through military intervention, the United States President, with the authority of Congress, unilaterally seized the Hawaiian Islands for military purposes during the Spanish-American war on August 12, 1898. Political action taken by Queen Lili'uokalani and the Hawaiian citizenry prevented the

35. See *1863 Spanish Treaty*, *supra* note 30, at 108.

36. Oppenheim defines subjugation as ancillary to the conquest of a State during war. "Conquest is only a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory. Such annexation makes the enemy State cease to exist, and thereby brings the war to an end. And such ending of war is named subjugation, it is conquest followed by subjugation, and not conquest alone, which gives title, and is a mode of acquiring territory." The United States was not at war with Hawai'i, only Spain, but seized Hawai'i's territory as a base for military operations against Spain. Subjugation, as a mode of acquiring territory in the nineteenth century, could only be applied to countries at war with each other and not applied to neutral countries occupied by one belligerent State in order to wage the war against the other belligerent State. See OPPENHEIM, *supra* note 23, at 394.

37. Article I of the 1782 Treaty of Paris provided that, "His Britannic Majesty acknowledges the said United States, Viz New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free Sovereign and independent States; That he treats with them as such; And for himself, his Heirs and Successors, relinquishes all Claims to the Government, Propriety, and territorial Rights of the same, and every part thereof; and that all Disputes which might arise in future, on the Subject of the Boundaries of the said United States, may be prevented, It is hereby agreed and declared that the following are, and shall be their Boundaries, viz." WILLIAM MACDONALD, DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 205 (The Macmillan Company 1923).

United States from acquiring the country's sovereignty through fraud and deception, but it could not prevent the seizure and subsequent occupation of the islands for military purposes.

On January 16, 1893, United States resident Minister John L. Stevens met and conspired with a small group of individuals to overthrow the constitutional government of the Hawaiian Kingdom. His part of the conspiracy was to land U.S. troops to assist a small group of businessmen and prepare for the annexation of the Hawaiian Islands to the United States by cession and not conquest. A treaty was signed on February 14, 1893, between a provisional government established as a result of U.S. intervention, and Secretary of State James Blaine. President Benjamin Harrison thereafter submitted the treaty to the United States Senate for ratification in accordance with the U.S. Constitution. The election for the U.S. Presidency, which had already taken place in 1892, resulted in Grover Cleveland defeating the incumbent Benjamin Harrison, but Cleveland's inauguration would not be until March 1893. After entering office, Cleveland received notice by a Hawaiian envoy commissioned by Queen Lili'uokalani that the overthrow and so-called revolution derived from illegal intervention by U.S. diplomats and military personnel. He withdrew the treaty from the Senate, and appointed James H. Blount, a former U.S. Representative from Georgia and former Chairman of the House Committee on Foreign Affairs, as special commissioner to investigate the terms of the so-called revolution and to report his findings.

The Blount investigation found that the United States Legation assigned to the Hawaiian Kingdom, together with United States Marines and Naval personnel, were directly responsible for the illegal overthrow of the Hawaiian government with the ultimate goal of transferring the Hawaiian Islands to the United States from an installed government.³⁸ Blount reported that, "in pursuance of a prearranged plan, the Government thus established hastened off commissioners to Washington to make a treaty for the purpose of annexing the Hawaiian Islands to the United States."³⁹ The report also detailed the culpability of the United States government in violating international laws, and Hawaiian State territorial sovereignty. On December 18, 1893 President Grover Cleveland addressed the Congress and described the United States' action as an "act of war, committed with the participation of a diplomatic representative of the

38. See *Executive Documents*, *supra* note 28, at 567, reprinted in 1 HAW. J.L. & POL. 136 (Summer 2004).

39. *Id.* at 587, reprinted in 1 HAW. J.L. & POL. 167 (Summer 2004).

United States and without authority of Congress."⁴⁰ Cleavelands' address also acknowledged that, through such acts, the government of a peaceful and friendly people was overthrown. He further stated that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair,"⁴¹ and committed to Queen Lili'uokalani that the Hawaiian government would be restored.

It is a well-known rule of customary international law that third States are under a clear duty of non-intervention and non-interference in civil strife within a State. Any such interference is an unlawful act, even if, far from taking the form of military assistance to one of the parties, it is merely confined to premature recognition of the rebel government.⁴²

Though President Cleveland refused to resubmit the annexation treaty to the Senate, he failed to follow through in his commitment to re-instate the constitutional government as a result of partisan wrangling in the U.S. Congress.⁴³ In a deliberate move to further isolate the Hawaiian Kingdom from any assistance from other countries, and to reinforce and protect the puppet government installed by U.S. officials, the Senate and House of Representatives each passed similar resolutions in 1894 strongly warning other countries "that any intervention in the political affairs of these islands by any other Government will be regarded as an act unfriendly to the United States."⁴⁴ The Hawaiian Kingdom was thrown into civil unrest as a result. Four years lapsed since the overthrow before Cleveland's presidential successor, William McKinley, entered into a second treaty of cession with the same individuals who participated in the illegal overthrow with the U.S. Legation in 1893, and were now calling themselves the Republic of Hawai'i. This second treaty was signed on June 17, 1897 in Washington, D.C., but would "be taken up immediately upon the convening of Congress next December."⁴⁵

Queen Lili'uokalani was in the United States at the time of the signing of the treaty and protested the second annexation attempt of the country. While in Washington, D.C., the Queen filed a diplomatic protest with the United States Department of State on June 17, 1897. The Queen stated, in

40. *Id.* at 456, reprinted in 1 HAW. J.L. & POL. 201 (Summer 2004).

41. *Id.*

42. KRYSZYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 64 (2d ed. 1968).

43. 3 RALPH KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893: THE KALAKAUA DYNASTY 647 (University of Hawai'i Press 1967).

44. 26 CONG. REC. 5499 (1894).

45. *Hawaiian Treaty to Wait; Senator Morgan Suggests that It Be Taken Up at This Session Without Result*, N.Y. TIMES, July 25, 1897, at 3.

part:

I, Lili'uokalani of Hawai'i, by the will of God named heir apparent on the tenth day of April, A.D. 1877, and by the grace of God Queen of the Hawaiian Islands on the seventeenth day of January, A.D. 1893, do hereby protest against the ratification of a certain treaty, which, so I am informed, has been signed at Washington by Messrs. Hatch, Thurston, and Kinney, purporting to cede those Islands to the territory and dominion of the United States. I declare such a treaty to be an act of wrong toward the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of international rights both toward my people and toward friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and, finally, an act of gross injustice to me.⁴⁶

Hawaiian political organizations in the Islands also filed additional protests with the Department of State in Washington, D.C. These organizations were the Men and Women's Hawaiian Patriotic League (Hui Aloha 'Aina), and the Hawaiian Political Association (Hui Kalai'aina).⁴⁷ In addition, a petition of 21,169 signatures of Hawaiian subjects protesting annexation was filed with the Senate when it convened in December 1897.⁴⁸ As a result of these protests, the Senate was unable to garner enough votes to ratify the so-called treaty, but events would quickly change as war loomed over the horizon. The Queen and her people would find themselves at the mercy of the United States military once again, as they did when U.S. troops disembarked the *U.S.S. Boston* in Honolulu harbor without permission from the Hawaiian government on January 16, 1893. However, the legal significance of these protests would serve as a fundamental bar to any future claim the United States may assert over the Hawaiian Islands by acquisitive *prescription*. "*Prescription*," according to Professor Gerhard von Glahn, "means that a foreign state occupies a portion of territory claimed by a state, encounters no protest by the 'owner,' and exercises rights of sovereignty over a long period of time."⁴⁹

An example of a claim to "*prescription*" can be found in the *Chamizal* arbitration, in which the United States claimed prescriptive title to Mexican land. The Rio Grande River that separated the U.S. city of El Paso and the Mexican city of Juarez moved, through natural means, into Mexican territory thereby creating six hundred acres of dry land on the

46. LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 354 (Charles E. Tuttle Co., Inc. 1964), reprinted in 1 HAW. J.L. & POL. 227 (Summer 2004).

47. TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII 268 (Tom Coffman/Epicenter 1999).

48. See SILVA, *supra* note 6, at 145-159. See also COFFMAN, *supra* note 47, at 273-287.

49. See VON GLAHN, *supra* note 25, at 371.

U.S. side of the river.⁵⁰ Over the protests of the Mexican government who called for the renegotiation of the territorial boundaries established since the 1848 treaty of Guadalupe Hidalgo that ended the Mexican-American War, the State of Texas granted land titles to

American citizens; the United States Government... erected... a custom-house and immigration station; the city authorities of El Paso... erected school houses; the tracks as well as stations and warehouses, of American owned railroads and street railway have been placed thereon.⁵¹

In 1911, an arbitral commission established by the two States rejected the United States' claim to prescriptive title and ruled in favor of Mexico. Professor Ian Brownlie, drawing from the 1911 award, confirmed that, "possession must be peaceable to provide a basis for prescription, and, in the opinion of the Commissioners, diplomatic protests by Mexico prevented title arising." Brownlie further concludes that, "failure to take action which might lead to violence could not be held to jeopardize Mexican rights."⁵² In other words, protests by the Queen and Hawaiian subjects loyal to their country had a significant legal effect in barring the U.S. from any possible future claim over Hawai'i by *prescription* — failure to continue the protests, which could lead to violence, was found not to jeopardize vested rights.

On April 25, 1898, Congress declared war on Spain and on the following day, President McKinley issued a proclamation which stated in part, "It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."⁵³ The Supreme Court later explained that, "the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations."⁵⁴ Clearly, the McKinley administration was ensuring, before the international community, that the war would be conducted in compliance with international law.

Battles were fought in the Spanish colonies of Puerto Rico and Cuba, as well as the Spanish colonies of the Philippines and Guam. After Commodore George Dewey defeated the Spanish Fleet in the Philippines on May 1, 1898, the *U.S.S. Charleston*, a protected cruiser, was re-

commissioned on May 5, 1898, and ordered to lead a convoy of 2,500 troops to reinforce Dewey in the Philippines and Guam. These troops were boarded on the transport ships of the *City of Peking*, the *City of Sidney* and the *Australia*. In a deliberate violation of Hawaiian neutrality during the war as well as international law, the convoy, on May 21st, set a course to the Hawaiian Islands for re-coaling purposes. The convoy arrived in Honolulu on June 1st and took on 1,943 tons of coal before it left the islands on the 4th of June.⁵⁵ A second convoy of troops bound for the Philippines, on the transport ships the *China*, *Zelandia*, *Colon*, and the *Senator*, arrived in Honolulu on June 23rd and took on 1,667 tons of coal.⁵⁶ During this time, the supply of coal for belligerent ships entering a neutral port was regulated by international law.

Major General George Davis, Judge Advocate General for the U.S. Army, notes that "during the American Civil War, the British Government [as a neutral State] (on January 31, 1862) adopted the rule that a belligerent armed vessel was to be permitted to receive, at any British port, a supply of coal sufficient to enable her to reach a port of her own territory, or nearer destination."⁵⁷ The Philippine Islands were not U.S. territory, but the territory of Spain. As soon as it became apparent that the so-called Republic of Hawai'i, a puppet government of the U.S. since 1893, had welcomed the U.S. naval convoys and assisted in re-coaling their ships, a formal protest was lodged by H. Renjes, Spanish Vice-Counsel in Honolulu on June 1, 1898. Minister Harold Sewall, from the U.S. Legation in Honolulu, notified Secretary of State William R. Day of the Spanish protest in a dispatch dated June 8th.⁵⁸ Renjes declared:

In my capacity as Vice Consul for Spain, I have the honor today to enter a formal protest with the Hawaiian Government against the constant violations of Neutrality in this harbor, while actual war exists between Spain and the United States of America.⁵⁹

The 1871 Treaty of Washington between the United States and Great Britain addressed the issue of State neutrality during war, and provided that, a "neutral government is bound... not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purposes of the renewal or augmentation of

50. "El Chamizal" *Dispute Between the United States and Mexico*, 4(4) AM. J. INT'L L. 925 (1910).

51. *Id.* at 926.

52. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 157 (4th ed. 1990); see also *Chamizal Arbitration Between the United States and Mexico*, 5 AM. J. INT'L L. 782 (1911).

53. Proclamation No. 8, 30 Stat. 1770 (Apr. 26, 1898).

54. *The Paquete Habana*, 175 U.S. 712 (1900).

55. Dispatch from Harold Sewall, U.S. Minister to Hawai'i, to William R. Day, U.S. Secretary of State, No. 167 (June 4, 1898) (on file with the Hawai'i State Archives) [hereinafter *Sewall to Day*].

56. *Id.* at No. 175 (June 27, 1898).

57. GEORGE B. DAVIS, *THE ELEMENTS OF INTERNATIONAL LAW* 430, note 3 (Harper & Brothers Publishers 1903).

58. See *Sewall to Day*, *supra* note 54, at No. 168 (June 8, 1898).

59. *Id.*

military supplies or arms, or the recruitment of men.”⁶⁰ Consistent with the 1871 Treaty, Major General Davis, states that as “hostilities in time of war can only lawfully take place in the territory of either belligerent, or on the high seas, it follows that neutral territory, as such, is entitled to an entire immunity from acts of hostility; it cannot be entered by armed bodies of belligerents, because such an entry would constitute an invasion of the territory, and therefore of the sovereignty, of the neutral.”⁶¹ In an article published by the *American Historical Review* in 1931, Bailey stated, “although the United States had given formal notice of the existence of war to the other powers, in order that they might proclaim neutrality, and was jealously watching their behavior, she was flagrantly violating the neutrality of Hawaii.”⁶² Bailey continued,

[t]he position of the United States was all the more reprehensible in that she was compelling a weak nation to violate the international law that had to a large degree been formulated by her own stand on the Alabama claims. Furthermore, in line with the precedent established by the Geneva award, Hawaii would be liable for every cent of damage caused by her dereliction as a neutral, and for the United States to force her into this position was cowardly and ungrateful. At the end of the war, Spain or cooperating power would doubtless occupy Hawaii, indefinitely if not permanently, to insure payment of damages, with the consequent jeopardizing of the defenses of the Pacific Coast.⁶³

Due to U.S. intervention in 1893 and the subsequent creation of a puppet government, the United States took complete advantage of its own creation in the islands during the Spanish-American War and violated Hawaiian neutrality. Professor Krystyna Marek argues that:

Puppet governments are organs of the occupant and, as such form part of his legal order. The agreements concluded by them with the occupant are not genuine international agreements, however correct in form; failing a genuine contracting party, such agreements are merely decrees of the occupant disguised as agreements which the occupant in fact concludes with himself. Their measures and laws are those of the occupant.⁶⁴

After the defeat of the Spanish Pacific Squadron in the Philippines, Congressman Francis Newlands (D-Nevada), submitted a joint resolution for the annexation of the Hawaiian Islands to the House Committee on Foreign Affairs on May 4, 1898.⁶⁵ Six days later, hearings were held on

60. Treaty between the United States and Great Britain, 17 Stat. 863 (1871).

61. See DAVIS, *supra* note 57, at 429.

62. T.A. Bailey, *The United States and Hawaii During the Spanish-American War*, 36(3) AM. HIST. REV. 557 (Apr. 1931).

63. *Id.*

64. See MAREK, *supra* note 42, at 114.

65. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30

the Newlands Resolution, and in testimony submitted to the Committee, U.S. Naval Captain Alfred Mahan explained the military significance of the Hawaiian Islands to the United States. Captain Mahan stated:

It is obvious that if we do not hold the islands ourselves we cannot expect the neutrals in the war to prevent the other belligerent from occupying them; nor can the inhabitants themselves prevent such occupation. The commercial value is not great enough to provoke neutral interposition. In short, in war we should need a larger Navy to defend the Pacific coast, because we should have not only to defend our own coast, but to prevent, by naval force, an enemy from occupying the islands; whereas, if we preoccupied them, fortifications could preserve them to us. In my opinion it is not practicable for any trans-Pacific country to invade our Pacific coast without occupying Hawaii as a base.⁶⁶

General John Schofield of the U.S. Army also provided testimony to the Committee that justified the seizure of the Islands. He stated:

We got a preemption title to those islands through the volunteer action of our American missionaries who went there and civilized and Christianized those people and established a Government that has no parallel in the history of the world, considering its age, and we made a preemption which nobody in the world thinks of disputing, provided we perfect our title. If we do not perfect it in due time, we have lost those islands. Anybody else can come in and undertake to get them. So it seems to me the time is now ripe when this Government should do that which has been in contemplation from the beginning as a necessary consequence of the first action of our people in going there and settling those islands and establishing a good Government and education and the action of our Government from that time forward on every suitable occasion in claiming the right of American influence over those islands, absolutely excluding any other foreign power from any interference.⁶⁷

On May 17, 1898, Congressman Robert Hitt (R-Illinois) reported the Newlands Resolution out of the House Committee on Foreign Affairs, and debates ensued in the House until the resolution was passed on June 15th.⁶⁸ However, on March 31st, long before the resolution reached the Senate on June 16th, the Senators had already begun engaging the topic of annexation. During a debate on the Revenue Bill for the maintenance of the war, the topic of the annexation caused Senator David Turpie (D-Indiana) to propose a motion which had the Senate entering into secret executive session. According to Senate rule thirty-five, the galleries were therefore ordered cleared and the doors closed to the public. The significance of these session transcripts, however, would later prove their

Stat. 750 (1898).

66. 31 CONG. REC. 5771 (1898).

67. *Id.*

68. *Id.* at 6019.

importance.⁶⁹

C. United States' Annexation by Congressional Resolution

From June 16th to July 6th, the resolution of annexation was in the Senate chambers, where the final test of whether or not the annexationists could succeed in their scheme would take place. Under international law, only by treaty, whether by cession or conquest, can an owner State, as the grantor, transfer its territorial sovereignty to another State, the grantee, "since cession is a bilateral transaction."⁷⁰ A joint resolution of Congress, on the other hand, is not only a unilateral act, but also municipal legislation whereby international law has imposed "strict territorial limits on national assertions of legislative jurisdiction."⁷¹ Therefore, in order to give the impression of conformity to cessions recognizable under international law, the House resolution embodied the text of the failed treaty. On this note, Senator Augustus Bacon (D-Georgia) sarcastically remarked that, the

... [the] friends of annexation, seeing that it was impossible to make this treaty in the manner pointed out by the Constitution, attempted then to nullify the provision in the Constitution by putting that treaty in the form of a statute, and here we have embodied the provisions of the treaty in the joint resolution which comes to us from the House.⁷²

Regarding Congressional authority to annex, the proponents relied on Article IV, section 3 of the U.S. Constitution, which provides that, "New States may be admitted by the Congress into this Union." Annexationists in both the House and Senate relied on the precedent set by the 28th Congress when it annexed Texas by joint resolution on March 1, 1845.⁷³ Opponents, however, argued that the precedent is misplaced because Texas was admitted as a State, whereas Hawai'i was not being annexed as a State, but rather, as a territory. Supporters of annexation, like Senator Stephen Elkin (R-West Virginia), reasoned that if Congress could annex a State, why could it not annex territory?⁷⁴ Thus, on July 6, 1898, the United States Congress passed the joint resolution purporting to annex Hawaiian territory, and President McKinley signed the resolution on the following day, which proclaimed that the cession of the Hawaiian Islands had been

69. Associated Press, *Secret Debate on U.S. Seizure of Hawaii Revealed*, HONOLULU STAR-BULLETIN, Feb. 1, 1969, at A1.

70. See OPPENHEIM, *supra* note 23, at 376.

71. GARY BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 493 (3d ed. 1996).

72. See CONG. REC., *supra* note 66, at 6150.

73. CONG. GLOBE, 28th Cong., 2d Sess. 372 (1845).

74. See CONG. REC., *supra* note 66, at 6149.

"accepted, ratified, and confirmed."⁷⁵

Like a carefully rehearsed play, the annexation ceremony of August 12, 1898, between the self-proclaimed Republic of Hawai'i and the United States, was scripted to appear to have the semblance of international law.⁷⁶ On a stage fronting 'Iolani Palace in Honolulu, the following exchange took place between U.S. Minister Harold Sewell and Republic President Sanford Dole.⁷⁷

Mr. SEWELL: "Mr. President, I present to you a certified copy of a joint resolution of the Congress of the United States, approved by the President on July 7, 1898, entitled "Joint Resolution to provide for annexing the Hawaiian Islands to the United States. This joint resolution accepts, ratifies and confirms, on the part of the United States, the cession formally consented to and approved by the Republic of Hawaii."

Mr. DOLE: A treaty of political union having been made, and the cession formally consented to and approved by the Republic of Hawaii, having been accepted by the United States of America, I now, in the interest of the Hawaiian body politic, and with full confidence in the honor, justice and friendship of the American people, yield up to you as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands.

Mr. SEWALL: In the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government.

The event of annexation, through cession, is a matter of legal interpretation, and according to Professor Hans Kelsen, a renowned legal scholar, what transforms an "event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation."⁷⁸ He goes on to state that, the "legal meaning of this act is derived from a 'norm' [standard or rule] whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation."⁷⁹ The norm, in this particular case, is U.S. constitutional and international law, and whether or not Congress could annex foreign territory.

It is a constitutional rule of American jurisprudence that its legislative branch, the Congress, is not part of the treaty making power, only the

75. See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, *supra* note 65.

76. See *Apology*, *supra* note 2.

77. LORRIN A. THURSTON, *THE FUNDAMENTAL LAW OF HAWAII* 253 (The Hawaiian Gazette Co., Ltd. 1904).

78. HANS KELSEN, *PURE THEORY OF LAW* 3 (University of California Press 1967).

79. *Id.* at 4.

Senate when in executive session.⁸⁰ In other words, without proper ratification there can be no cession of territorial sovereignty recognizable under international law, and the joint resolution is but a mere example of the legislative branch attempting to assert its authority beyond its constitutional capacity. Douglas Kmiec, *acting* U.S. Assistant Attorney General, explains that because “the President — not the Congress — has the constitutional authority to act as the representative of the United States in foreign affairs, Congress may proclaim jurisdiction or sovereignty over the territorial sea for international law purposes if it possesses a specific constitutional power.”⁸¹

United States governance is divided under three separate headings of the U.S. Constitution. Article I vests the legislative power in the Congress, Article II vests the executive power in the President, and Article III vests the judicial power in various national courts, the highest being the Supreme Court. Of these three powers, only the President has the ability to extend his authority beyond U.S. territory, as he is “the constitutional representative of the United States in its dealings with foreign nations.”⁸² The joint resolution, therefore, was not only incapable of annexing the Hawaiian Islands because it had no extra-territorial force, but it also violated the terms of Article VII of the so-called treaty, which called for ratification to be done “by the President of the United States, by and with the advice and consent of the Senate.”⁸³ A *joint resolution* is a legislative action of Congress, while a Senate *resolution of ratification* is an executive action in concurrence with the President by virtue of his authority under Article II, not under Article I of the U.S. Constitution. Article II, section 2 provides that the President “shall have the power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.”⁸⁴ A clear and relevant example of a senate resolution in executive session took place in 1850, when the U.S. Senate ratified the Hawaiian-American Treaty of Friendship, Commerce and Navigation. Senator William King (D-Alabama) submitted the following resolution of ratification that passed by unanimous consent:

80. U.S. CONST. art. II, § 2, cl. 2.

81. Douglas Kmiec, Department of Justice, *Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea*, in 12 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 238, 250 (1988).

82. *United States v. Louisiana*, 363 U.S. 1, 35 (1960).

83. HENRY E. COOPER, REPORT OF THE MINISTER OF FOREIGN AFFAIRS TO THE PRESIDENT OF THE REPUBLIC OF HAWAII 13 (Honolulu Star Press 1898); *see also* THURSTON, *supra* note 77, at 245.

84. *Id.* at 727.

Resolved (two thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the treaty of friendship, commerce, and navigation between the United States of America and His Majesty the King of the Hawaiian Islands, concluded at Washington the 20th day of December, in the year eighteen hundred and forty-nine.⁸⁵

Senator King’s resolution was the standard form to date for ratification of international treaties, and it is clearly formatted so it could not be misconstrued to be a law or legislative action.⁸⁶ Although the joint resolution of annexation did incorporate the text of the treaty, it was, nevertheless, a Congressional law and not a resolution of ratification as proclaimed by Minister Sewell at the annexation ceremonies in Honolulu.⁸⁷ A Senate *resolution of ratification* is not a legislative act, but an executive function under the President’s treaty making power. The resolution is the evidence of the “advise and consent of the senate” required under Article II, section 2 of the U.S. Constitution. Only the President and not the Congress, according to Kmiec, has the “constitutional authority to assert either sovereignty over an extended territorial sea or jurisdiction over it under international law on behalf of the United States.”⁸⁸

Another blow to the annexation scheme was the reliance on Texas as a precedent for congressional authority to extend U.S. sovereignty and jurisdiction beyond U.S. territory. In fact, Congressman Hugh Dinsmore (D-Arkansas) correctly stated in debate that Texas was never annexed by joint resolution.⁸⁹ To clarify this, Professor William Adam Russ, Jr., a history scholar and political scientist, notes the manner in which Texas was admitted as a state, and concludes the annexationists’ use of Texas was an “absurdity.”⁹⁰ Russ explains that,

[t]he resolution merely signified the willingness of the United States to admit Texas as a state if it fulfilled certain conditions, such as acceptance of annexation. Obviously, if Texas refused, there would be neither annexation of a territory nor admission of a state. Moreover, there was a time limit that Texas had to present to Congress a duly ratified state constitution on or before January 1, 1846. The Texan

85. 8 UNITED STATES SENATE, 31ST CONG., EXECUTIVE JOURNAL OF THE SENATE OF THE UNITED STATES 120 (1849).

86. When the Senate Foreign Relations Committee reports out the treaty, the Committee also proposes a resolution of ratification usually in this form: *Resolved, (two-thirds of the Senators present concurring, therein), That the Senate advise and consent to the ratification of [or accession to] the [official treaty title]*. *See* S. REP. NO. 106-71, at 123 (2001).

87. *See* THURSTON, *supra* note 77.

88. *See* KMIEC, *supra* note 81, at 242.

89. *See* CONG. REC., *supra* note 66, at 5778.

90. WILLIAM ADAM RUSS, JR., THE HAWAIIAN REPUBLIC, 1894-1898, AND ITS STRUGGLE TO WIN ANNEXATION 327 (Associated Universities Presses, 1992).

Congress adopted the joint resolution on June 21, 1845, accepting the American offer. A special convention which met on July 4, 1845, accepted annexation and wrote a state constitution. In October, 1845, the people in a referendum not only ratified the constitution but also voted to accept annexation. Thus annexation was, in effect, accepted three times. On December 28, 1845, a bill to admit the new state was signed by President Polk, and formal admission took place on February 19, 1846, with the seating of Texan members in both houses of Congress.⁹¹

If one were to look at this within the interpretive context of international law — a law between and not within independent states, there is serious doubt whether Texas was a State of the Union through Congressional legislation. On April 12, 1845, Texas entered into a treaty of annexation with the United States, but the Senate, like it did with Hawai'i, failed to ratify the proposed cession.⁹² The failure to ratify, no doubt, was attributed to the fact that Mexico did not recognize "the independence or separate existence of Texas," and maintained that Texas was still Mexican.⁹³ What followed since, in the eyes of international law, was the legislation of two separate Congresses conversing across the great divide of two separate territorial sovereignties, that of Texas via Mexico and the United States. It wasn't until the end of the Mexican-American War that a peace treaty was signed on February 2, 1848, whereby Mexico formally released its sovereignty over its northern territories, which included the Texan territory, and accepted the Rio Grande as the new boundary separating itself from Texas as a State of the American Union.⁹⁴ This raises a problem as to what the legal status of the so-called State of Texas was during the time between its formal admission into the United States on February 19, 1846 and the final proclamation of the Treaty of Peace with Mexico on July 4, 1848. According to William Adam Russ, the solution to this paradox,

... is to say that Congress (precedent or no precedent) enacts into law whatever it can get a majority of its members, a majority of the people, and a majority of the Supreme Court, to believe is constitutional at any

91. *Id.*

92. 4 HUNTER MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 697, 699 (Government Printing Office, 1934).

93. *Id.*

94. Article V of the 1848 Treaty of Peace provides: "The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or Opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico..." Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mexico, art. V, Feb. 2, 1848, 9 Stat. 922.

one time. In other words, legality or constitutionality consists in what the Congress and/or the Court may believe is legal or constitutional today; tomorrow the decision may be different.⁹⁵

Many government officials and constitutional scholars were at a loss in explaining how a joint resolution could have extra-territorial force in annexing Hawai'i, a foreign and sovereign State, because during the 19th century, as Gary Born states, "American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction."⁹⁶ In 1824, in *The Apollon*, the U.S. Supreme Court illustrated this view by asserting that, "the legislation of every country is territorial,"⁹⁷ and that the "laws of no nation can justly extend beyond its own territory," for it would be "at variance with the independence and sovereignty of foreign nations."⁹⁸ The court also explained that, "however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction."⁹⁹ Consequently, Congressman Thomas H. Ball (D-Texas) characterized the annexation of the Hawaiian State by joint resolution as "a deliberate attempt to do unlawfully that which can not be lawfully done."¹⁰⁰ From the U.S. Justice Department's Office of Legal Counsel, Kmiec also concluded that it was "unclear which constitutional power Congress exercised when it acquired Hawaii by joint resolution."¹⁰¹ And Professor Westel Willoughby, a constitutional scholar and political scientist, summed it all up when he stated:

The constitutionality of the annexation of Hawai'i, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act... Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force — confined in its operation to the territory of the State by whose legislature it is enacted.¹⁰²

As a legislative body empowered to enact laws that are limited to governing U.S. territory, Congress could no more annex the Hawaiian

95. See RUSS, *supra* note 90, at 330.

96. See BORN, *supra* note 71, at 493.

97. *Rose v. Himely*, 8 U.S. 241, 279 (1808).

98. *The Apollon*, 22 U.S. 362, 370 (1824).

99. *Id.*

100. See CONG. REC., *supra* note 66, at 5975.

101. See KMIEC, *supra* note 81, at 262.

102. WESTEL WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 427 (Baker, Voorhis & Co. 2d ed. 1929).

Islands in 1898 as matter of military necessity during the Spanish-American War than it could annex Afghanistan today as a matter of military necessity during the American war on terrorism. Without a treaty of cession, the sovereignty of the Hawaiian State remains unaffected by foreign legislation of any State.

D. Intent of the Newlands Resolution

The true intent and purpose of the 1898 joint resolution of annexation would not be known until the last week of January 1969, after a historian noted there were gaps in the congressional records. The transcripts of the Senate's secret session 70 years earlier were made public after the Senate passed a resolution authorizing the U.S. National Archives to open the records. The Associated Press in Washington, D.C. reported that "the secrecy was clamped on during a debate over whether to seize the Hawaiian Islands—called the Sandwich Islands then—or merely developing leased areas of Pearl Harbor to reinforce the U.S. fleet at Manila Bay."¹⁰³ Concealed by the debating rhetoric of congressional authority to annex foreign territory, the true intent of the Senate, as divulged in these transcripts, was to have the joint resolution serve merely as consent, on the part of the Congress, for the President to utilize his war powers in the occupation and seizure of the Hawaiian Islands as a matter of military necessity.

On May 31, 1898, just a few weeks after the defeat of the Spanish fleet in Manila Bay in the Philippines, and with the knowledge that Hawaiian neutrality had deliberately been violated by the McKinley administration, the Senate entered into its secret session. On this day, Senator Henry Cabot Lodge (R-Maine) argued that, the "Administration was compelled to violate the neutrality of those islands, that protests from foreign representatives had already been received, and complications with other powers were threatened, that the annexation or some action in regard to those islands had become a military necessity."¹⁰⁴ According to William Edward Hall, "the rights of occupation may be placed upon the broad foundation of simple military necessity,"¹⁰⁵ but occupation by necessity is a belligerent right limited to States at war with each other. Hall also states that,

103. Associated Press, *Secret Debate on U.S. Seizure of Hawaii Revealed*, HONOLULU STAR-BULL., Feb. 1, 1969, at A1.

104. *Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898*, 1 HAW. J. L. & POL. 230, 280 (2004) [hereinafter *Senate Transcripts*].

105. WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 559 (Oxford Univ. Press 8th ed. 1904).

[i]f occupation is merely a phase in military operations, and implies no change in the legal position of the invader with respect to the occupied territory and its inhabitants, the rights which he possesses over them are those which in the special circumstances represent his general right to do whatever acts are necessary for the prosecution of his war.¹⁰⁶

The Senate would take full advantage of their perceived right of belligerency in the war against Spain and justify the occupation of the Hawaiian Islands as a matter of necessity and self-preservation.¹⁰⁷

At the time of the Spanish-American War, authorities on U.S. military occupations included the seminal case *Ex parte Milligan*, and U.S. Army 1st Lieutenant William E. Birkhimer's publication "Military Government and Martial Law." In 1892, Birkhimer wrote the first of three editions that distinguished between military government and martial law — the "former is exercised over enemy territory; the latter over loyal territory of the State enforcing it."¹⁰⁸ Birkhimer sought to expound on what Chief Justice John Marshall noted in his dissenting opinion in *Ex parte Milligan* regarding military government and martial law that exist under U.S. law.¹⁰⁹ According to Birkhimer, the distinction is important whereby "military government is . . . placed within the domain of international law, while martial law is within the cognizance of municipal law."¹¹⁰

After careful review of the transcripts of the secret session, it is very likely that the Senators, particularly Senator John Morgan (D-Alabama), were not only familiar with Birkhimer's publication, but also with Chief Justice Marshall's statement regarding the establishment of a military government on foreign soil. Marshall stated that military government is established "under the direction of the President, with the express or implied sanction of Congress."¹¹¹ Relevant passages from Birkhimer on this subject include:

... The instituting military government in any country by the commander of a foreign army there is not only a belligerent right, but often a duty. It is incidental to the state of war, and appertains to the law of nations.

... The commander of the invading, occupying, or conquering army rules the country with supreme power, limited only by international law, and the orders of his government.

106. *Id.*

107. See CONG. REC., *supra* note 66.

108. WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 1 (Hudson 1892).

109. *Ex parte Milligan*, 71 U.S. 2, 142 (1866).

110. See BIRKHIMER, *supra* note 108.

111. *Id.*

... As commander-in-chief the President is authorized to direct the movements of the naval and military forces, and to employ them in the manner he may deem most effectual to harass, conquer, and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States.

Senator Morgan, an ardent annexationist, knew first hand the limitation of exercising sovereignty beyond a State's borders when he served as a member of the Senate's Foreign Relations Committee in 1884. In 1882, the American schooner *Daylight* was anchored outside the Mexican harbor of Tampico when a Mexican gunship collided with the *Independencia* during a storm.¹¹² The Mexican authorities took the position that any claim for damages by the owners of the schooner should be prosecuted through its own tribunals and not through diplomatic channels, but the United States emphatically denied this claim.¹¹³ U.S. Secretary of State Frederick Frelinghuysen explained to Senator Morgan in a letter that, it was the "uniform declaration of writers on public law [that] in an international point of view, either the thing or the person made the subject of the jurisdiction must be within the territory, for no sovereignty can extend its process beyond its own territorial limits."¹¹⁴

As evidenced in Morgan's exchange with Senator William Allen (P-Nebraska) in the secret session, the joint resolution was never intended to have any extra-territorial force, but was simply an "enabler" for the President to occupy the Hawaiian Islands.¹¹⁵ In other words, it was not a matter of U.S. constitutional law, but merely served as an "express sanction" of the Congress to support the President as their commander-in-chief in the war against Spain. Morgan, who was fully aware of the two failed attempts to annex Hawai'i by a treaty of cession, attempted to apply a perverse reasoning of military jurisdiction over the Hawaiian Islands. The term annexation, as used in these transcripts, was not in the context of affixing or bringing together two separate territories. Instead, it was a matter of arrogating Hawaiian territory for oneself without right, but

112. 6 JOHN BASSET MOORE, A DIGEST OF INTERNATIONAL LAW 679 (U.S. Gov't Printing Off. 1906).

113. *Id.*

114. Letter from Frederick Frelinghuysen, Secretary of State, to Senator John Morgan (May 17, 1884), reprinted in *Papers Relating to the Foreign Relations of the United States* 359 (U.S. Gov't Printing Off. 1885). It was later determined by a General Claims Commission (United States and Mexico) convened to hear the *Daylight Case*, docket no. 353 (1927), that it did occur "in Mexican waters and Mexican law is applicable. The law in force in Mexico at the time of the collision contained no presumption in favor of ships at anchor or in favor of sailing ships in collision with steamers." *Judicial Decisions Involving Questions of International Law*, 21 AM. J. INT'L L. 791 (1927).

115. See *Senate Transcripts*, supra note 104.

justified, in his eyes, under the principle of military necessity.

Mr. ALLEN: I do not desire to interrupt the Senator needlessly, but I want to understand his position. I infer the Senator means that Congress shall legislate and establish a civil government over territory before it is conquered and that that legislation may be carried into execution when the country is reduced by force of our arms?

Mr. MORGAN: What I mean is, the President having no prerogative powers, but deriving his powers from the law, that Congress shall enact a law to enable him to do it, and not leave it to his unbridled will and judgment.

Mr. ALLEN: Would it not be just as wise, then, to provide a code of laws for the government of a neutral territory in anticipation that within five or six months we might declare war against that power and reduce its territory?

Mr. MORGAN: I am not discussing the wisdom of that.

Mr. ALLEN: Would it not be exceptional because we have never before had a foreign war like this, or anything approximating to it. All I am contending for at this time, and all I intend to contend for at any time, is that the President of the United States shall have the powers conferred upon him by Congress full and ample, but that he shall understand that they come from Congress and do not come from his prerogative, or whatever his powers may be merely as the fighting agent of the United States, the Commander-in-Chief of the Army and Navy of the United States.

Mr. ALLEN: That would arise from his constitutional powers as Commander-in-Chief of the Army and the Navy.

Mr. MORGAN: No; his constitutional powers as Commander-in-Chief of the Army and the Navy are not defined in that instrument. When he is in foreign countries he draws his powers from the laws of nations, but when he is at home fighting rebels or Indians, or the like of that, he draws them from the laws of the United States, for the enabling power comes from Congress, and without it he cannot turn a wheel.¹¹⁶

These transcripts are as integral to the Newlands Resolution as if it were written in the resolution itself. According to Justice Noah Swayne of the U.S. Supreme Court in 1874, "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law."¹¹⁷ The intent of the Senate was to utilize the President's war powers and not the congressional authority to annex. Ironically, it was the U.S. Supreme Court in *Territory of Hawai'i v. Mankichi* that resounded this principle and, in particular, referenced Swayne's statement when the court was faced with the question of whether or not the Newlands Resolution extended the U.S.

116. *Id.* at 269-70.

117. *Smythe v. Fiske*, 90 U.S. 374, 380 (1874).

Constitution over the Hawaiian Islands.¹¹⁸ Unfortunately, due to the injunction of secrecy imposed by the Senate in 1898 regarding these transcripts, the Supreme Court had no access to these records when it arrived at its decision in 1903. Thus, the Supreme Court created a legal fiction to be used as a qualifying source for the Newlands Resolution's extra-territorial effect. According to L.L. Fuller, a legal fiction "may sometimes mean simply a false statement having a certain utility, whether it was believed by its author or not," and "an expedient but false assumption."¹¹⁹ The utility of *Mankichi* would later prove useful when questions arose regarding the annexation of territory by legislative action.¹²⁰ Because Congressional legislation could neither annex Hawaiian territory, nor affect Hawaiian sovereignty, there is a strong legal basis that Hawai'i remained a sovereign state under international law when the U.S. unilaterally seized the Hawaiian Islands by way of a joint resolution. According to Professor Eyal Benvenisti, this legal basis stems from "the principle of inalienable sovereignty over a territory," which "spring the constraints that international law imposes upon the occupant."¹²¹

E. American Occupation of the Hawaiian Islands

While Hawai'i was clearly not a participant in the hostilities of the Spanish-American War, the United States occupied the Hawaiian Islands for the purpose of waging the war against Spain, as well as fortifying the islands as a military outpost for the defense of the United States in future conflicts with the convenience of the puppet government it installed on January 17, 1893. "Though the resolution was passed July 7, [1898] the formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States."¹²² Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony, and "in particular they protested the fact that it was occurring against their will."¹²³

The "power exercising effective control within another's sovereign

118. Territory of Hawai'i v. *Mankichi*, 190 U.S. 197, 212 (1903).

119. L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 369 (1930).

120. Christopher Schroeder, Department of Justice, *Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations under an Existing Treaty*, in 20 OPINIONS OF THE OFFICE OF LEGAL COUNSEL 389, 398 n.19 (1996).

121. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 5-6 (Princeton Univ. Press 1993).

122. See *Mankichi*, *supra* note 118, at 209-10.

123. See COFFMAN, *supra* note 47, at 322.

territory has only temporary managerial powers," and, during "that limited period, the occupant administers the territory on behalf of the sovereign."¹²⁴ The actions taken by the McKinley administration, with the consent of the Congress by joint resolution, clearly intended to mask the violation of international law as if the annexation took place by treaty. As Marek states, "a disguised annexation aimed at destroying the independence of the occupied State, represents a clear violation of the rule preserving the continuity of the occupied State."¹²⁵ In fact, President McKinley proclaimed that the Spanish-American War would "be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice,"¹²⁶ and acknowledged the constraints and protection international laws provided to all sovereign states, whether belligerent or neutral. As noted by Senator Henry Cabot Lodge during the Senate's secret session, Hawai'i, as a sovereign and neutral state, was no exception when it was occupied by the United States during its war with Spain.¹²⁷ Article 43 of the 1899 Hague Regulations, which remained the same under the 1907 amended Hague Regulations, delimits the power of the occupant and serves as a fundamental bar on its free agency within an occupied neutral State.¹²⁸ Although the United States signed and ratified both Hague Regulations, which post-date the occupation of the Hawaiian Islands, the "text of Article 43," according to Benvenisti, "was accepted by scholars as mere reiteration of the older law, and subsequently the article was generally recognized as expressing customary international law."¹²⁹ Professor Doris Graber also states, that "nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code."¹³⁰ Consistent with this understanding of the international law of occupation during the Spanish-American War, Professor Munroe Smith reported that the "military

124. See BENVENISTI, *supra* note 121, at 6.

125. See MAREK, *supra* note 42, at 110.

126. *The Paquette Habana*, 175 U.S. 677, 712 (1899).

127. See *Senate Transcripts*, *supra* note 104.

128. The United States signed the 1899 Hague Regulations respecting Laws and Customs of War on Land at The Hague on July 29th 1899 and ratified by the Senate March 14th 1902. See Hague Convention II, Jul. 29, 1899, 32 Stat. 1803. The 1907 Hague Regulations respecting Laws and Customs of War on Land was signed at The Hague October 18th 1907 and ratified by the Senate March 10th 1908. See Hague Convention IV, Oct. 18, 1907, 36 Stat. 2277. The United States also signed the 1907 Hague Regulations respecting the Rights and Duties of Neutral Powers at The Hague on October 18th 1907 and ratified by the Senate on March 10th 1908. See Hague Convention V, Oct. 18, 1907, 36 Stat. 2310.

129. See BENVENISTI, *supra* note 121, at 8.

130. DORIS GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION: 1863-1914*, 143 (Columbia University Press 1949).

governments established in the territories occupied by the armies of the United States were instructed to apply, as far as possible, the local laws and to utilize, as far as seemed wise, the services of the local Spanish officials."¹³¹ This instruction to apply the local laws of the occupied State is the basis of Article 43 of the Hague Regulations.

With specific regard to occupying neutral territory, the Arbitral Tribunal, in its 1927 case, *Coenca Brothers vs. Germany*, concluded that "the occupation of Salonika by the armed forces of the Allies constitutes a violation of the neutrality of that country."¹³² Later, in the 1931 case, *In the matter of the Claim Madame Chevreau against the United Kingdom*, the Arbitrator concluded that the status of the British forces while occupying Persia (Iran) — a neutral State in the First World War — was analogous to "belligerent forces occupying enemy territory."¹³³ Oppenheim observes that an occupant State on neutral territory "does not possess such a wide range of rights with regard to the occupied country and its inhabitants as he possesses in occupied enemy territory."¹³⁴ Although the Hague Regulations apply only to territory belonging to an enemy, Professor Ernst Feilchenfeld states, "it is, nevertheless, usually held that the rules on belligerent occupation will also apply where a belligerent, in the course of the war, occupies neutral territory, even if the neutral power should have failed to protest against the occupation."¹³⁵ Despite the fact that Hawai'i was a neutral state at the time of its occupation during the Spanish-American War, the law of occupation is not only applied with equal force and effect, but the occupier is also greatly shorn of its belligerent rights in Hawaiian territory as a result of the Islands' neutrality.

F. International Laws of Occupation

Since 1900, the U.S. migration to Hawai'i, predominantly military personnel, has grown exponentially.¹³⁶ Because of its military presence and strategic location, Hawai'i has played a role in nearly every U.S. armed conflict. In 1911, Brigadier General Montgomery Macomb, U.S. Army

131. Munroe Smith, *Record of Political Events*, 13(4) POL. SCI. Q. 745, 748 (Dec. 1898).

132. *Coenca Brothers v. Germany*, Greco-German Mixed Arbitral Tribunal, Case No. 389 (1927), reprinted in ANN. DIG. PUB. INT'L L CASES, YEARS 1927 AND 1928 570, 571 (Longmans, Green and Co. 1931).

133. *In the Matter of the Claim Madame Chevreau Against the United Kingdom*, 27 AM. J. INT'L L. 153, 160 (1933).

134. LASSA OPPENHEIM, INTERNATIONAL LAW 241 (7th ed. 1948-52).

135. ERNST FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 8 (Carnegie Endowment for International Peace 1942).

136. See *U.S. Census*, *infra* note 152.

Commander, District of Hawai'i, stated, "O'ahu is to be encircled with a ring of steel, with mortar batteries at Diamond Head, big guns at Waikiki and Pearl Harbor, and a series of redoubts from Koko Head around the island to Wai'anae."¹³⁷ U.S. Territorial Governor Wallace Rider Farrington in 1924 also stated, "Every day is national defense in Hawai'i."¹³⁸ Most notably, Hawai'i has been the headquarters, since 1947, for the single largest combined U.S. military presence in the world, the U.S. Pacific Command.¹³⁹

Notwithstanding the magnitude of the United States' malfeasance that has taken place since the American occupation during the Spanish-American War, international law mandates that an occupying government administer the laws of the occupied State during the occupation, in a role similar to that of a trustee (occupying State) and beneficiary (occupied State) relationship.¹⁴⁰ Thus, it cannot impose its own domestic laws without violating international law. This principle is clearly laid out in Article 43 of the Hague Regulations, which states, "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country." Referring to the American occupation of Hawai'i, Patrick Dumberry states:

... the 1907 Hague Convention protects the international personality of the occupied State, even in the absence of effectiveness. Furthermore,

137. William Addleman, *History of the United States Army in Hawai'i, 1849-1939*, 9 (Hawaii War Records Depository, Hamilton Library, University of Hawaii, Manoa).

138. Ian Lind, *Ring of Steel: Notes on the Militarization of Hawai'i*, 31 SOC. PROCESS IN HAW. 25 (1984-85).

139. U.S. Pacific Command was established in the Hawaiian Islands as a unified command on 1 January 1947, as an outgrowth of the command structure used during World War II. Located at Camp Smith, which overlooks Pearl Harbor on the island of O'ahu, the Pacific Command is headed by a four star Admiral who reports directly to the Secretary of Defense concerning operations and the Joint Chiefs of Staff for administrative purposes. That Admiral is the Commander-in-Chief, Pacific Command. The Pacific Command's responsibility stretches from North America's west coast to Africa's east coast and both the North and South Poles. It is the oldest and largest of the United States' nine unified military commands, and is comprised of Army, Navy, Marine Corps, and Air Force service components, all headquartered in Hawai'i. Additional commands that report to the Pacific Command include U.S. Forces Japan, U.S. Forces Korea, Special Operations Command Pacific, U.S. Alaska Command, Joint Task Force Full-Accounting, Joint Interagency Task Force West, the Asia-Pacific Center for Security Studies, and the Joint Intelligence Center Pacific in Pearl Harbor. U.S. Pacific Command, <http://www.pacom.mil> (last visited Mar. 28, 2008).

140. See BENVENISTI, *supra* note 121, at 6; See VON GLAHN, *supra* note 25, at 785-794; and GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY; A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 95-221 (University of Minnesota Press 1957).

the legal order of the occupied State remains intact, although its effectiveness is greatly diminished by the fact of occupation. As such, Article 43 of the 1907 Hague Convention IV provides for the co-existence of two distinct legal orders, that of the occupier and the occupied.¹⁴¹

According to Professor Gerhard von Glahn, there are three distinct systems of law that exist in an occupied territory: “the indigenous law of the legitimate sovereign, to the extent that it has not been necessary to suspend it; the laws (legislation, orders, decrees, proclamations, and regulations) of the occupant, which are gradually introduced; and the applicable rules of customary and conventional international law.”¹⁴² Hawai’i’s sovereignty is maintained and protected as a subject of international law, in spite of the absence of a diplomatically recognized government since 1893. In other words, the United States should have administered Hawaiian Kingdom law as defined by its constitution and statutory laws, similar to the U.S. military’s administration of Iraqi law in Iraq with portions of the law suspended due to military necessity.¹⁴³ A U.S. Army regulation on the law of occupation recognizes not only the sovereignty of the occupied State, but also bars the annexation of the territory during hostilities because of the continuity of the invaded State’s sovereignty. In fact, U.S. Army regulations on the laws of occupation not only recognize the continued existence of the sovereignty of the occupied State, but,

... confers upon the invading force the means of exercising control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. It is therefore unlawful for a belligerent occupant to annex occupied territory or to create a new State therein while hostilities are still in progress.¹⁴⁴ (emphasis added)

When appropriate legal and political theoretical frameworks are used it becomes clear that the United States cannot claim to be the successor State of the Hawaiian Kingdom under international law. Current scholarship on this subject has been plagued by *presentism* that reinforces the present with the past, and Professor Frederick Olafson warns that, “by tying interpretation so closely to the active and parochial interests of the interpreter” current scholarship has ironically “opened the door to a willful

141. See Dumberry, *supra* note 11, at 682.

142. See VON GLAHN, *supra* note 25, at 774.

143. David J. Scheffer, *Beyond Occupation Law*, 97(4) AM. J. INT’L L. 842-860 (Oct. 2003).

144. “The Law of Land Warfare”, *U.S. Army Field Manual 27-10* §358 (July 1956).

exploitation of the past in the service of contemporary interests.”¹⁴⁵ To break this cycle, legal scholars and political scientists should utilize alternative theoretical frameworks, which seek to explain Hawai’i’s relationship with the United States and not limit the scholarship to mere critique. Furthermore, in the absence of any evidence extinguishing Hawai’i’s sovereignty during or since the nineteenth century, international law not only impose duties and obligations on an occupier, but also maintains and protects the international personality of the occupied State, notwithstanding the effectiveness and propaganda attributed to prolonged occupation.¹⁴⁶ Professor James Crawford explains that, belligerent occupation “does not extinguish the State. And, generally, the *presumption* — in practice a strong one — is in favor of the continuance, and against the extinction, of an established State.”¹⁴⁷ Therefore, as stated by Professor Matthew Craven, a Professor of International Law who has done extensive research on the continuity of the Hawaiian State, “the continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States.”¹⁴⁸

G. Congress Establishes Civil Government

Notwithstanding the blatant violation of Hawai’i’s sovereignty since January 16, 1893, the U.S. never intended to comply with international

145. Frederick Olafson, *Interpretation and the Dialectic of Action*, 69 (20) J. OF PHILOSOPHY 718, 719 (1972).

146. Regarding the principle of effectiveness in international law, Marek explains, “A comparison of the scope of the two legal orders, of the occupied and the occupying State, co-existing in one and the same territory and limiting each other, throws an interesting light on one aspect of the principle of effectiveness in international law. In the first place: of these two legal orders, that of the occupied State is regular and ‘normal’, while that of the occupying power is exceptional and limited. At the same time, the legal order of the occupant is, as has been strictly subject to the principle of effectiveness, while the legal order of the occupied State continues to exist notwithstanding the absence of effectiveness. It can produce legal effects outside the occupied territory and may even develop and expand, not be reason of its effectiveness, but solely on the basis of the positive international rule safeguarding its continuity. Thus, the relation between effectiveness and title seems to be one of inverse proportion: while a strong title can survive a period of non-effectiveness, a weak title must rely heavily, if not exclusively, on full and complete effectiveness. It is the latter which makes up for the weakness in title. Belligerent occupation presents an illuminating example of this relation of inverse proportion. Belligerent occupation is thus the classical case in which the requirement of effectiveness as a condition of validity of a legal order is abandoned.” See MAREK, *supra* note 42, at 102.

147. A presumption is a rule of law where the finding of a basic fact will give rise to the existence of a presumed fact, until it is rebutted. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, 701 (Oxford Press, 2d ed. 2006).

148. Matthew Craven, *Continuity of the Hawaiian Kingdom*, 1 HAW. J.L. & POL. 508, 512 (Summer 2004).

laws when it annexed Hawai'i by joint resolution, and proceeded to treat the Hawaiian Islands as if it were an incorporated territory by cession. On April 30, 1900, the U.S. Congress passed an act establishing a civil government to be called the Territory of Hawai'i.¹⁴⁹ Regarding U.S. nationals, section 4 of the 1900 Act stated:

... all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii. And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii.¹⁵⁰

In addition to this Act, the Fourteenth Amendment of the United States Constitution was applied to individuals born in the Hawaiian Islands.¹⁵¹ Under these U.S. laws, the putative population of U.S. "citizens" in the Hawaiian Kingdom exploded from a meager 1,928 (not including native Hawaiian nationals) out of a total population of 89,990 in 1890, to 423,174 (including native Hawaiians, who were now "citizens" of the U.S.) out of a total population of 499,794 in 1950.¹⁵² The native Hawaiian population, which accounted for 85% of the total population in 1890, accounted for a mere 20% (only 86,091 of 423,174) of the total population by 1950.¹⁵³

According to international law, the migration of U.S. citizens to these islands, which included both military personnel and civilians, is a direct violation of Article 49 of the Fourth Geneva Convention, which provides that the occupying power shall not "transfer parts of its own civilian population into the territory it occupies."¹⁵⁴ Benvenisti asserts that the purpose of Article 49 "is to protect the interests of the occupied population, rather than the population of the occupant."¹⁵⁵ Benvenisti also goes on to state that civilian migration and settlement in an occupied State is questionable under Article 43 of the Hague Regulations, since it cannot be

149. An Act to Provide a Government for the Territory of Hawaii, 31 Stat. 141 (1900).

150. *Id.*

151. See Territory of Hawai'i v. Mankichi, *supra* note 118; The 14th Amendment states, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." U.S. CONST., amend. XIV, § 1.

152. United States Bureau of the Census, *General characteristics—Hawai'i*, 18 (U.S. Government Printing Office 1952) [hereinafter *U.S. Census*].

153. *Id.*

154. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

155. See BENVENISTI, *supra* note 121, at 140.

"deemed a matter of security of the occupation forces, and it is even more difficult to demonstrate its contribution to 'public order and civil life.'"¹⁵⁶

Shortly after the 1900's, when the American citizens who migrated to the Territory of Hawaii began to settle and reside there, there began an attempt to transform the Islands into a state of the American union. "For most people," according to Tom Coffman, "the fiction of the Republic of Hawaii successfully obscured the nature of the conquest, as it does to this day. The act of annexation became something that just happened."¹⁵⁷ The first statehood bill was introduced in Congress in 1919, but failed, as Congress did not view the Hawaiian Islands as an incorporated territory at the time.¹⁵⁸ This puzzled the advocates for statehood in the islands who assumed the Hawaiian Islands were a part of the United States since 1898, but they were unaware of the Senate's secret session that clearly viewed Hawai'i to be an occupied state and not an incorporated territory acquired by a treaty of cession.¹⁵⁹ Thus, the legislature of the imposed civil government in the Islands, without any knowledge of the Senate secret session transcripts, enacted a "Bill of Rights," on April 26, 1923, asserting their perceived right of becoming an American State of the Union.¹⁶⁰ Beginning with the passage of this statute, a concerted effort was made by residents in the Hawaiian Islands to seek entry into the Federal union. The object of American statehood was finally accomplished in 1950 when two special elections were held in the occupied kingdom. As a result of the elections, 63 delegates were elected to draft a constitution that was then ratified on November 7, 1950.¹⁶¹

On March 12, 1959, the U.S. Congress approved the statehood bill. It was signed into law on March 15, 1959,¹⁶² and in a special election held on June 27, 1959, three propositions were submitted to vote.

1. [Whether Hawai'i should] immediately be admitted into the Union as a State;
2. The boundaries of the State of Hawai'i shall be as prescribed in the Act of Congress approved March 18, 1959, and all

156. *Id.*

157. See COFFMAN, *supra* note 47, at 322.

158. *Cessation of the transmission of information under Article 73 e of the Charter: communication from the Government of the United States of America*, G.A. Res. 14/1, Annex, U.N. Doc. A/4226, 100 (Sept. 24, 1959) [hereinafter *Cessation of Info.*].

159. See *Senate Transcript*, *supra* note 104.

160. Act 86 (H.B. No. 425), Territory of Hawai'i, 26 April 1923.

161. See *Cessation of Info.*, *supra* note 158, at 100.

162. An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 (1959).

claims of this State to any areas of land or sea outside the boundaries prescribed are hereby irrevocably relinquished to the United States;

3. All provisions of the Act of Congress approved March 18, 1959, reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawai'i are consented to fully by said State and its people.¹⁶³

The residents in the Islands accepted all three propositions by 132,938 votes to 7,854. On July 28, 1959, two U.S. Hawai'i Senators and one Representative were elected to office, and on August 21, 1959, President Dwight Eisenhower proclaimed that the process of admitting Hawai'i as a State of the Federal Union was complete.¹⁶⁴

In 1988, Kmiec, of the Office of Legal Counsel within the Department of Justice raised questions concerning not only the legality of congressional action in annexing the Hawaiian Islands by joint resolution, but also Congress' authority to establish boundaries for the State of Hawai'i that lie beyond the territorial seas of the United States' western coastline. Although he acknowledged congressional authority to admit new states into the union and its inherent power to establish state boundaries, Kmiec did caution that it was the "President's constitutional status as the representative of the United States in foreign affairs," not Congress, "which authorizes the United States to claim territorial rights in the sea for the purpose of international law."¹⁶⁵ Likewise, congressional legislation, absent a treaty of cession, creates no legal basis for any U.S. claim of sovereignty over the Hawaiian Islands, even under acquisitive prescription.

G. United States Misrepresents Hawai'i before the United Nations

In 1946, prior to the passage of the Statehood Act, the United States once again misrepresented the relationship which existed between the federal government and the Hawaiian Islands. In a report to the United Nations, the United States Ambassador to the U.N. identified Hawai'i as a non-self-governing territory, in accordance with Article 73(e), which had been under the administration of the United States since 1898.¹⁶⁶ The problem, however, is that Hawai'i should never have been placed on the

163. See *Cessation of Info.*, *supra* note 158, at 100.

164. *Id.*

165. See KMIEC, *supra* note 81, at 252.

166. G.A. Res. 66(1), U.N. GAOR, 14th Sess., U.N. Doc. A/64 (Dec. 14, 1946).

list in the first place, as it had already achieved self-governance as a "sovereign independent State" since 1843 — a recognition explicitly granted by the United States itself in 1849 and confirmed more recently by the 9th Circuit Court of Appeals in 2004.¹⁶⁷ One explanation for this discrepancy may be that Hawai'i was deliberately treated as a non-self-governing territory or colonial possession in order to conceal the United States' prolonged occupation of an independent and sovereign State for military purposes. The reporting of Hawai'i as a non-self-governing territory also coincided with the United States establishment of the headquarters for the Pacific Command (PACOM) on the Island of O'ahu.¹⁶⁸ If the United Nations had been aware of Hawai'i's continued legal status as an occupied neutral State, the United States would have been prevented from maintaining their military presence.

The initial Article 73(e) list was comprised of non-sovereign territories under the control of sovereign States such as Australia, Belgium, Denmark, France, Netherlands, New Zealand, United Kingdom and the United States. In addition to Hawai'i, the U.S. also reported their territories of Alaska, American Samoa, Guam, Panama Canal Zone, Puerto Rico and the Virgin Islands.¹⁶⁹ The U.N. General Assembly, in a resolution entitled "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter," defined self-governance in three forms: a sovereign independent State; free association with an independent State; or integration with an independent State.¹⁷⁰ None of the territories on the list of non-self-governing territories, with the exception of Hawai'i, were recognized sovereign States.

Notwithstanding past misrepresentations of Hawai'i before the United Nations by the United States, there are two truths that still remain. First, inclusion of Hawai'i on the United Nations list of non-self-governing territories was an inaccurate depiction of a sovereign state whose rights had been violated; and, second, Hawai'i remains a sovereign and independent State despite the illegal overthrow of its government in 1893 and the prolonged occupation of its territory for military purposes since 1898.

Previously, international relations, as a sub-discipline of political science, was not used as a tool to investigate and/or to understand the

167. See *Kahawaiola 'a v. Norton*, 386 F.3d 1271, 1282 (9th Cir. 2004).

168. See U.S. Pacific Command, *supra* note 139.

169. See G.A. Res. 66(1), *supra* note 166.

170. *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the Charter*, G.A. Res. 1541(XV), U.N. GAOR, 15th Sess., 948 plen. mtg., U.N. Doc. (Dec. 15, 1960).

overthrow of the Hawaiian Kingdom government. Instead, the overthrow and the events that have transpired since then were confined to the framework of United States domestic politics and laws that systematically consigned the Hawaiian situation from an issue of State sovereignty under international law, to a race-based political platform within the legal order of the United States. This situation has been maintained, until now, behind the reified veil of U.S. sovereignty over the Hawaiian Islands. Furthermore, Native Hawaiians are *not* an indigenous people within the United States with the right to internal self-determination, but rather comprise the majority of the citizenry of an occupied State with a right to end the prolonged occupation of their country.

III. Hawaiian Indigeneity and the Sovereignty Movement

The *Hawaiian sovereignty* movement appears to have grown out of a social movement in the islands in the mid 20th century. According to Lawrence Fuchs, a Professor of American Studies, "the essential purpose of the haole [foreigner] elite for four decades after annexation was to control Hawaii; the major aim for the lesser haoles was to promote and maintain their privileged position."¹⁷¹ Within the growing sovereignty movement, "[m]ost Hawaiians," he continues, "were motivated by a dominant and inclusive purpose — to recapture the past."¹⁷² Native Hawaiians at the time were experiencing a sense of revival of Hawaiian culture, language, arts and music — euphoria of native Hawaiian pride. Momi Kamahale states that, "the ancient form of hula experienced a strong revival as the Native national dance for our own cultural purposes and enjoyment rather than as a service commodity for the tourist industry."¹⁷³ Professor Sam No'eau Warner points out that the movement also resulted in the revitalization of "the Hawaiian language through immersion education."¹⁷⁴ Furthermore, Michael Dudley and Keoni Agard credit John Dominis Holt and his 1964 book *On Being Hawaiian* for igniting the resurgence of native Hawaiian consciousness.¹⁷⁵ Within its pages, Holt asserted:

171. LAWRENCE H. FUCHS, *HAWAII PONO: A SOCIAL HISTORY* 68 (1961).

172. *Id.*

173. Momi Kamahale, 'Ilio'ulaokalani: *Defending Native Hawaiian Culture*, 26(2) *AMERASIA J.* 39, 40 (2000).

174. Sam L. No'eau Warner, *The Movement to Revitalize Hawaiian Language and Culture*, in *THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE* 133 (Leanne Hinton and Ken Hale eds., Academic Press 2001).

175. MICHAEL DUDLEY & KEONI AGARD, *A CALL FOR HAWAIIAN SOVEREIGNTY* 107 (1993).

I am a part-Hawaiian who has for years felt troubled concern over the loss of Hawaianness or ethnic consciousness among people like ourselves. So much that came down to us was garbled or deliberately distorted. It was difficult to separate truth from untruth; to clarify even such simple matters for many among us as the maiden name of a Hawaiian grandmother, let alone know anything at all of the Hawaiian past.¹⁷⁶

Historian Tom Coffman explains that, upon arriving in Hawai'i in 1965, he realized that, "the effective definition of history had been reduced to a few years. December 7th 1941, was practically the beginning of time, and anything that might have happened before that was prehistory."¹⁷⁷ Moreover, he admits that when he wrote his first book in 1970 he used Statehood in 1959 as an important benchmark in Hawaiian history.¹⁷⁸ The first sentence in chapter one of this book read, the "year 1970 was only the eleventh year of statehood, so that as a state Hawaii was still young, still enthralled by the right to self-government, still feeling out its role as America's newest state."¹⁷⁹ He later recollected in a subsequent book:

Many years passed before I realized that for Native Hawaiians to survive as a people, they needed a definition of time that spanned something more than eleven years. The demand for a changed understanding of time was always implicit in what became known as the Hawaiian movement or the Hawaiian Renaissance because Hawaiians so systematically turned to the past whenever the subject of Hawaiian life was glimpsed.¹⁸⁰

The native Hawaiian community had been the subject of extreme prejudice and political exclusion since the United States imposed its authority in the Hawaiian Islands in 1898, and the history books that followed routinely portrayed the native Hawaiian as passive and inept. After the overthrow of the Hawaiian Kingdom, according to Holt, the self-respect of native Hawaiians had been "undermined by carping criticism of 'Hawaiian beliefs' and stereotypes concerning our being lazy, laughing, lovable children who needed to be looked after by more 'realistic' adult oriented caretakers came to be the new accepted view of Hawaiians."¹⁸¹ This stereotyping became institutionalized, and is evidenced in the writings by Gavan Daws, who, in 1974, wrote:

The Hawaiians had lost much of their reason for living long ago, when

176. JOHN DOMINIS HOLT, *ON BEING HAWAIIAN* 7 (4th ed. 1995).

177. See COFFMAN, *supra* note 47, at xii.

178. *Id.*

179. TOM COFFMAN, *CATCH A WAVE: A CASE STUDY OF HAWAII'S NEW POLITICS* 1 (1973).

180. See COFFMAN, *supra* note 47, at xxii.

181. See HOLT, *supra* note 176, at 7.

the kapus were abolished; since then a good many of them had lost their lives through disease; the survivors lost their land; they lost their leaders, because many of the chiefs withdrew from politics in favor of nostalgic self-indulgence; and now at last they lost their independence. Their resistance to all this was feeble. It was almost as if they believed what the white man said about them, that they had only half learned the lessons of civilization.¹⁸²

Although the Hawaiian Renaissance movement originally had no clear political objectives, it did foster a genuine sense of inquiry and thirst for an alternative Hawaiian history that was otherwise absent in contemporary history books. According to Silva, "When the stories can be validated, as happens when scholars read the literature in Hawaiian and make the findings available to the community, people begin to recover from the wounds caused by that disjuncture in their consciousness."¹⁸³ As a result, Native Hawaiians began to draw meaning and political activism from a history that appeared to parallel other native peoples of the world who had been colonized, but the interpretive context of Hawaiian history was, at the time, primarily historical and not legal. State sovereignty and international laws were perceived not as a benefit for native peoples, but were seen as tools of the colonizer. According to Professor James Anaya, who specializes in the rights of indigenous peoples, "international law was thus able to govern the patterns of colonization and ultimately to legitimize the colonial order."¹⁸⁴

A. Native Hawaiians Associate with Plight of Native Americans

Following the course Congress set under the 1971 Alaska Native Claims Settlement Act,¹⁸⁵ under which "the United States returned 40 million acres of land to the Alaskan natives and paid \$1 billion cash for land titles they did not return,"¹⁸⁶ it became common practice for Native Hawaiians to associate themselves with the plight of Native Americans and other ethnic minorities throughout the world who had been colonized and dominated by Europe or the United States. The Hawaiian Renaissance gradually branched out to include a political wing often referred to as the "sovereignty movement," which evolved into political resistance of U.S. sovereignty. As certain native Hawaiians began to organize, Professor Linda Tuhiwai Smith observed that this political movement "paralleled the

182. GAVAN DAWES, SHOAL OF TIME 291 (1974).

183. See SILVA, *supra* note 6, at 3.

184. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 22 (2000).

185. 43 U.S.C. §1601 (2000).

186. See DUDLEY & AGARD, *supra* note 175, at 109.

activism surrounding the civil rights movement, women's liberation, student uprisings and the anti-Vietnam War movement."¹⁸⁷

In 1972, an organization called A.L.O.H.A. (Aboriginal Lands of Hawaiian Ancestry) was founded to seek reparations from the United States for its involvement in the illegal overthrow of the Hawaiian Kingdom government in 1893.¹⁸⁸ Frustrated with inaction by the United States, however, it joined another group called *Hui Ala Loa* (Long Road Organization) and together they formed *Protect Kaho'olawe 'Ohana* (P.K.O.) in 1975.¹⁸⁹ P.K.O. was organized to stop the U.S. Navy from utilizing the island of Kaho'olawe, off the southern coast of Maui, as a target range, by openly occupying the island in defiance of the U.S. military. As a result of P.K.O.'s activism, the Navy terminated its use of Kaho'olawe in 1994. Another organization called *'Ohana O Hawai'i* (Family of Hawai'i), which was formed in 1974, even went to the extreme of proclaiming a declaration of war against the United States of America.¹⁹⁰

This political movement also served as the impetus for native Hawaiians to participate in the State of Hawai'i's Constitutional Convention in 1978, which created an Office of Hawaiian Affairs (O.H.A.).¹⁹¹ O.H.A. recognizes two definitions of aboriginal Hawaiian: the term "native Hawaiian" with a lower case "n," and "Native Hawaiian" with an upper case "N," both of which were established by the U.S. Congress.¹⁹² The former is defined by the 1921 Hawaiian Homes Commission Act as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778,"¹⁹³

187. LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES, 113 (1999).

188. See DUDLEY & AGARD, *supra* note 175, at 109.

189. *Id.* at 113.

190. *Id.*

191. Article XII, section 5 of the State of Hawai'i Constitution states: "There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members." Office of Hawaiian Affairs, Planning and Research Office, *Native Hawaiian Data Book 1996*, Appendix, http://www.oha.org/databook/databook1996_1998/go-app.98.html (last visited Apr. 9, 2008).

192. Planning and Research Office, Office of Hawaiian Affairs, *Native Hawaiian Data Book 1996*, Appendix, http://www.oha.org/databook/databook1996_1998/go-app.98.html (last visited Mar. 28, 2008).

193. Hawaiian Homes Commission Act, 1920, Pub. L. No. 34, 42 Stat. 108 [hereinafter

while the latter is defined by the 1993 Apology Resolution as "any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i."¹⁹⁴ The intent of the Apology Resolution was to offer an apology to all Native Hawaiians, without regard to blood quantum, while the Hawaiian Homes Commission Act's definition was intended to limit those receiving homestead lots to be "not less than one-half."¹⁹⁵ O.H.A. services both definitions of Hawaiian.¹⁹⁶ As a governmental agency, O.H.A.'s mission is to:

... malama (protect) Hawai'i's people and environmental resources and OHA's assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.¹⁹⁷

The sovereignty movement created a multitude of diverse groups, each having a separate agenda as well as varying interpretations of Hawaiian history. Operating within an ethnic or tribal optic stemming from the Native American movement in the United States, the sovereignty movement eventually expanded itself to become a part of the global movement of indigenous people who reject colonial "arrangements in exchange for indigenous modes of self-determination that sharply curtail the legitimacy and jurisdiction of the State while bolstering indigenous jurisdiction over land, identity and political voice."¹⁹⁸ Professor Haunani-Kay Trask, an indigenous peoples rights advocate, argues that "documents like the Draft Declaration [of Indigenous Human Rights] are used to transform and clarify public discussion and agitation."¹⁹⁹ Specifically,

Hawaiian Homes Commission Act].

194. See *Apology*, supra note 2.

195. See *Hawaiian Homes Commission Act*, supra note 193.

196. Since 2000, the Office of Hawaiian Affairs have been challenged on federal constitutional grounds that the program is race-based and violates the equal protection clause of the U.S. constitution. These cases included *Rice v. Cayetano*, 528 U.S. 495 (2000), *Carroll v. Nakatani*, 188 F. Supp. 2d 1219 (D. Haw. 2001), *Arakaki v. State of Hawai'i*, 314 F.3d 1091 (9th Cir. 2002), and *Arakaki v. Lingle*, 305 F. Supp. 2d 1161 (D. Haw. 2004). Of these cases, only *Rice v. Cayetano* and *Arakaki v. State of Hawai'i* were successful in removing a racial qualification of native Hawaiian ancestry necessary for voting and running for office as a trustee of the Office of Hawaiian Affairs. The federal court dismissed the other two cases after determining that the plaintiffs did not have standing to sue the State of Hawai'i.

197. Office of Hawaiian Affairs, <http://www.oha.org> (follow "About OHA" hyperlink; then follow "Mission" hyperlink).

198. DUNCAN IVISON, PAUL PATTON & WILL SANDERS, *POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES* 89 (2000).

199. Haunani-Kay Trask, *Settlers of Color and "Immigrant" Hegemony: "Locals" in*

Trask states that "legal terms of reference, indigenous human rights concepts in international usage, and the political linkage of the non-self-governing status of the Hawaiian nation with other non-self-governing indigenous nations move Hawaiians into a world arena where Native peoples are primary and dominant states are secondary, to the discussion."²⁰⁰

This political wing of the renaissance is not in any way connected to the legal position that the Hawaiian Kingdom continued to exist as a sovereign State under international law, but rather, it is consumed with the history of European and American colonialism and the prospect of decolonization. Currently, Hawaiian sovereignty is not viewed as a legal reality, but a political aspiration. Professor Noel Kent states that, the "Hawaiian sovereignty movement is now clearly the most potent catalyst for change," and "during the late 1980s and early 1990s sovereignty was transformed from an outlandish idea propagated by marginal groups into a legitimate political position supported by a majority of native Hawaiians."²⁰¹ Nevertheless, the movement was not legal, but political in nature, and political activism relied on the normative framework of the developing rights of indigenous peoples within the United States and at the United Nations. At both these levels, indigenous peoples were viewed not as sovereign states, but rather "any stateless group" residing within the territorial dominions of existing sovereign states.²⁰²

B. United States Apology and Introduction of the Akaka Bill

In 1993, the U.S. government, maintaining an indigenous and historically inaccurate focus, apologized only to the Native Hawaiian people, rather than the citizenry of the Hawaiian Kingdom, for the United States' role in the overthrow of the Hawaiian government.²⁰³ This implied that only ethnic Hawaiians constituted the kingdom, and fertilized the incipient ethnocentrism of the sovereignty movement. The resolution provided that:

Congress . . . apologizes to the Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of

Hawai'i, 26(2) AMERASIA J. 1, 17 (2000).

200. *Id.*

201. NOEL KENT, *HAWAII: ISLANDS UNDER THE INFLUENCE* 198 (University of Hawaii Press 1993).

202. Jeff J. Corntassel and Tomas Hopkins Primeau, *Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination,"* 17(2) HUMAN RIGHTS QUARTERLY 343, 347 (1995).

203. See *Apology*, supra note 2.

Hawai'i on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.²⁰⁴

The congressional apology rallied many Native Hawaiians, who were not fully aware of the legal status of the Hawaiian Islands as a sovereign state, in the belief that their situation had similar qualities to Native American tribes in the 19th century. The resolution reinforced the belief of a native Hawaiian nation grounded in Hawaiian indigeneity and culture, rather than an occupied State under prolonged occupation. Consistent with the Apology Resolution, in 2003, Senator Daniel Akaka (D-Hawai'i) submitted Senate Bill 344 (S. 344), also known as the Akaka Bill, to the 108th Congress. The Bill, however, failed to reach the floor of the Senate for vote. It was re-introduced by Senator Akaka on January 17, 2007 (S. 310). According to Akaka, the bill's purpose is to provide "a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct, indigenous, native community to reorganize a single Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-determination and self-governance."²⁰⁵

According to Professor Rupert Emerson, a political scientist, there are two major periods when the international community accepted self-determination as an operative right or principle.²⁰⁶ President Woodrow Wilson and others first applied the principle to nations directly affected by the "defeat or collapse of the German, Russian, Austro-Hungarian and Turkish land empires" after the First World War.²⁰⁷ The second period took place after the Second World War, with the United Nations' focusing on disintegrating overseas empires of its member states, "which had remained effectively untouched in the round of Wilsonian self-determination."²⁰⁸ These territories have come to be known as Mandate, Trust, and Article 73(e) territories under the United Nations Charter. By erroneously categorizing Native Hawaiians as a stateless people, the principle of self-determination would underlie the development of legislation such as the Akaka Bill.

C. U.S. National Security Council Defines Indigenous Peoples

The Akaka Bill's identification of Native Hawaiians as an indigenous

204. *Id.* at 1513.

205. S. 310, 110th Cong. § 19 (2007).

206. Rupert Emerson, *Self-Determination*, 65(3) AM. J. INT'L L. 459, 463 (Jul. 1971).

207. *Id.*

208. *Id.*

people with a right to self-determination is informed by the U.S. National Security Council's position on indigenous peoples. On January 18, 2001, the Council made known its position to its delegations assigned to the "U.N. Commission on Human Rights," the "Commission's Working Group on the United Nations (UN) Draft Declaration on Indigenous Rights," and to the "Organization of American States (OAS) Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Populations." The Council directed these delegates to "read a prepared statement that expresses the U.S. understanding of the term internal 'self-determination' and indicates that it does not include a right of independence or permanent sovereignty over natural resources."²⁰⁹ The Council also directed these delegates to support the use of the term *internal self-determination* in both the U.N. and O.A.S. declarations on indigenous rights, and defined Indigenous peoples as having "a right of internal self-determination." By virtue of that right, "they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development."²¹⁰ This resolution sought to constrain the growing political movement of indigenous peoples "who aspire to rule their territorial homeland, or who claim the right to independent statehood under the doctrine of self-determination of peoples."²¹¹

The Akaka Bill falsely identifies native Hawaiians and their right to self-determination through this definition given by the U.S. National Security Council. Furthermore, after four generations of occupation, indoctrination has been so complete that the power relationship between occupier and occupied has become blurred if not effaced. Today, amnesia of the sovereignty of the Hawaiian State has become so pervasive that colonization and decolonization, as social and political theories, has dominated the work of legal scholars and political scientists regarding Hawai'i.

D. Contrast between Hawaiian State Sovereignty and Hawaiian Indigeneity

International laws, as an interpretative context, provides an alternative view to the political and legal history of the Hawaiian Islands, which has

209. National Security Council, United States, *U.S. National Security Council, Position on Indigenous Peoples* (2001), <http://www1.umn.edu/humanrts/usdocs/indigenoudoc.html> (last visited Mar. 28, 2008).

210. *Id.*

211. Milton J. Esman, *Ethnic Pluralism and International Relations*, 17(1-2) CAN. REV. STUD. NATIONALISM 83, 88 (1990).

been consigned under U.S. State sovereignty and the right to internal self-determination of indigenous peoples. By comparing and contrasting the two concepts of Hawaiian State sovereignty and Hawaiian Indigeneity, one can see inherent contradictions and divergence of thought and direction.

<u>Hawaiian State Sovereignty</u>	vs.	<u>Hawaiian Indigeneity</u>
Self-governing		Non-self-governing
Independent		Dependent
Sovereignty Established		Sovereignty Sought
Citizenship (multi-ethnic)		Indigenous (mono-ethnic)
Occupation		Colonization
De-Occupation		De-Colonization

The legal definition of a *colony* is “a dependent political economy, consisting of a number of citizens of the same country who have emigrated therefrom to people another, and remain subject to the mother country.”²¹² According to Professor Albert Keller, who specialized in colonial studies, *colonization* is “a movement of population and an extension of political power,” and therefore must be distinguished from migration.²¹³ The former is an extension of sovereignty over territory not subject to the sovereignty of another State, while the latter is the mode of entry into the territory of another sovereign State. Keller goes on to state that the “so-called ‘interior colonization’ of the Germans [within a non-German State] would naturally be a misnomer on the basis of the definition suggested.”²¹⁴ This is the same as suggesting that the migration of United States citizens into the territory of the Hawaiian Kingdom constituted American colonization and somehow resulted in the creation of an American colony. The history of the Hawaiian Kingdom has fallen victim to the misuse of this term by contemporary scholars in the fields of post-colonial and cultural studies. These scholars have lost sight of the original use and application of the terms colony and colonization, and have remained steadfast in their conclusion that the American presence in the Hawaiian Islands was and is currently colonial in nature. This has been the source of much confusion in the way of legal or political solutions. Professor Slavoj Zizek critically suggests that in post-colonial studies, the use of the term colonization “starts to function as a hegemonic notion and is elevated to a

212. See BLACK’S LAW DICTIONARY, *supra* note 15, at 265.

213. ALBERT GALLOWAY KELLER, COLONIZATION: A STUDY OF THE FOUNDING OF NEW SOCIETIES 1 (Ginn & Company 1908).

214. *Id.* at 2.

universal paradigm, so that in relations between the sexes, the male sex colonizes the female sex, the upper classes colonize the lower classes, and so on.”²¹⁵ In cultural studies he argues that it “effectively functions as a kind of *ersatz*-philosophy, and notions are thus transformed into ideological universals.”²¹⁶

In the legal and political realm, the fundamental difference between the terms *colonization/de-colonization* and *occupation/de-occupation*, is that the colonized must negotiate with the colonizer in order to acquire state sovereignty (e.g. India from Great Britain, Rwanda from Belgium, and Indonesia from the Dutch). Under the latter, State sovereignty is presumed and not dependent on the will of the occupier (e.g. Soviet occupation of the Baltic States, and the American occupation of Afghanistan and Iraq). *Colonization/de-colonization* is a matter that concerns the internal laws of the colonizing State and presumes the colony is not sovereign, while *occupation/de-occupation* is a matter of international law relating to already existing sovereign States. Craven concludes:

For the Hawaiian sovereignty movement, therefore, acceding to their identification as an indigenous people would be to implicitly accede not only to the reality, but also to the legitimacy, of occupation and political marginalization. All they might hope for at that level is formal recognition of their vulnerability and continued political marginalization rather than the status accorded under international law to a nation belligerently occupied.²¹⁷

Thus, when Hawaiian scholars and sovereignty activists, in particular, consistently employ the terms and theories associated with colonization and indigeneity, they are reinforcing the very control they seek to oppose. Hawaiian State sovereignty and the international laws of occupation, on the other hand, not only presume the continuity of Hawaiian sovereignty, but also provides the legal framework for regulating the occupier, despite a history of its non-compliance. As a matter of state sovereignty, and not self-determination of a stateless people, international law is the appropriate legal framework, not only to understand Hawai’i’s prolonged occupation, but also to provide the basis for resolution through reparations.

IV. Righting the Wrong

Restitution, together with compensation and satisfaction, are forms of reparations afforded to an injured party, and can be imposed either

215. SLAVOJ ZIZEK, INTERROGATING THE REAL 92 (Continuum 2005).

216. *Erstaz* is German for an imitation or substitute. *Id.*

217. See Craven, *supra* note 11, at 8.

singularly or collectively depending on the circumstances of the case. There are two recognized systems that provide reparations to an injured party — *remedial justice* where the injured party is a State, and *restorative justice* where the injured party or parties are individuals within a State. Remedial justice addresses compensation and punitive actions, while restorative justice uses reconciliation that attends “to the negative consequences of one’s action through apology, reparation and penance.”²¹⁸ International law is founded on remedial justice, whereas individual States, sometimes with the assistance of the United Nations, employ or facilitate varying forms of restorative justice within their territorial borders where “previously divided groups will come to agree on a mutually satisfactory narrative of what they have been through, opening the way to a common future.”²¹⁹ The Guatemalan Historical Clarification Commission is an example of a restorative justice system which was “established in 1996 as part of the UN-supervised peace accord.”²²⁰ The Commission’s function was to describe “the nature and scope of human rights abuses during the 30-year civil war, 1975-1995.”²²¹ An example of remedial justice can be found in the 1927 seminal *Chorzow Factory* case (Germany v. Poland), which was heard before the Permanent Court of International Justice in The Hague, Netherlands, and described by Professor Dinah Shelton as “the cornerstone of international claims for reparation, whether presented by states or other litigants.”²²² In that case, the court set forth the basic principles governing reparations after breaching an international obligation. The court stated:

The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international

218. ANDREW SCHAAP, *POLITICAL RECONCILIATION* 13 (Routledge 2005).

219. JOHN TORPEY, *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 25 (Rowman & Littlefield 2003).

220. MARK R. AMSTUTZ, *THE HEALING OF NATIONS: THE PROMISE AND LIMITS OF POLITICAL FORGIVENESS* 27 (Rowman & Littlefield Publishers 2005).

221. *Id.*

222. Dinah Shelton, *Righting Wrongs: Reparations in the Articles of State Responsibility*, 96 *AM. J. INT’L L.* 833, 836 (2003).

law.²²³

For the past century, scholars have viewed the overthrow of the Hawaiian government as irreversible and the annexing of the Hawaiian Islands as an extension of U.S. territory legally brought about by a congressional resolution. As a benign verb, the term ‘annexation’ conjures up synonyms such as affix, append, incorporate or bring together. But careful study of the annexation reveals that it was not benign, but a malign act of arrogation on the part of the United States to seize the Hawaiian Islands without legal restraints. Hawai’i’s territory was occupied for military purposes, and in the absence of any evidence extinguishing Hawaiian sovereignty (e.g. a treaty of cession or conquest), international laws not only impose duties and obligations on an occupier, but maintains and protects the international personality of the occupied State, despite the overthrow of its government. As an operative agency of the United States, the U.S. government “is that part of a state which undertakes the actions that, attributable to the state, are subject to regulation by the application of the principles and rules of international law.”²²⁴

Professor Ian Brownlie, a renowned scholar of international law, asserts that if “international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.”²²⁵ *Restitutio in integrum* is the basic principle and primary right of redress for states whose rights have been violated,²²⁶ for “it is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”²²⁷ Sir Gerald Fitzmaurice argues that the “notion of international responsibility would be devoid of content if it did not involve a liability to ‘make reparation in an adequate form.’”²²⁸ When an international law has been violated, the American Law Institute’s *Restatement of the Foreign Relations Law of the United States* emphasizes the “forms of redress that will undo the effect of the violation, such as restoration of the *status quo ante*, restitution, or specific

223. *Germany v. Poland (Chorzow Factory)*, 1928 P.C.I.J. (ser. A), No. 17 at 47.

224. See VON GLAHN, *supra* note 25, at 94.

225. See BROWNLIE, *supra* note 52, at 287.

226. IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I* 211 (Oxford University Press 1983).

227. See *Chorzow Factory*, *supra* note 223, at 29.

228. GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE VOL. I* 6 (Grotius 1986).

performance of an undertaking."²²⁹ According to Crawford:

In the case . . . of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution. Even so, ancillary measures (the return of persons and property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.²³⁰

The underlying function of reparations, through remedial justice, is therefore to restore the injured State to that position as if the injury had not taken place.

A. Articles on State Responsibility for International Wrongful Acts

In 1948, the United Nations established the International Law Commission (ILC), comprised of legal experts from around the world that would fulfill the Charter's mandate of "encouraging the progressive development of international law and its codification."²³¹ State responsibility was one of fourteen topics selected for codification, and the I.L.C. began its work in 1956. Codification, according to Brownlie, "involves the setting down, in a comprehensive and ordered form, of rules or existing law and the approval of the resulting text by a law-determining agency."²³² After nearly half a century, the I.L.C. finally completed the *Articles on Responsibility of States for Internationally Wrongful Acts* on August 9, 2001, and was faced with two options for action by the United Nations. According to Crawford, who served as the I.L.C.'s *Special Rapporteur* for the articles and was a member of the Commission since 1992, the articles could be the subject of "a convention on State responsibility and some form of endorsement or taking note of the articles by the General Assembly."²³³

Members of the Commission were divided on the options and decided upon a two-stage approach that would first get the General Assembly to take note of the articles, which were annexed to a resolution. After some reflection, the commission also thought that maybe a later session of the General Assembly would be best to consider the appropriateness and

229. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §901 (1987).

230. JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 215 (Cambridge University Press 2002).

231. *Id.* at 1.

232. See BROWNLIE, *supra* note 52, at 30.

233. See CRAWFORD, *supra* note 230, at 58.

feasibility of a convention.²³⁴ Crawford suggested that by having the General Assembly initially take note of the Articles by resolution, it could "commend it to States and to international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law."²³⁵ According to Professor David Caron, a legal scholar of international law, the significance of the "work of the ILC is similar in authority to the writings of highly qualified publicists," which is a recognized source of international law.²³⁶ In his fourth report on State Responsibility, Crawford stated that "States, tribunals and scholars will refer to the text, whatever its status, because it will be an authoritative text in the field it covers."²³⁷ There are two conceptual premises that underlie the articles of State responsibility:

1. The importance of upholding the rule of law in the interest of the international community as a whole; and
2. Remedial justice as the goal of reparations for those injured by the breach of an obligation.²³⁸

The codification of international law on State responsibility has been hailed as a major achievement "in the consolidation of the rule of law in international affairs." This is especially true because it "ventured out into the 'hard' field of law enforcement and sanctions, which has been classically considered the Achillean heel of international law."²³⁹ Shelton also lauds, in particular, Article 41's mandate that States not only cooperate in order to bring to an end a serious breach of international law, but that States shall not "recognize as lawful a situation created by a serious breach."²⁴⁰ Despite her view that the articles represent "the most far-

234. G.A. Res. 59/35 of Dec. 2, 2004. See CRAWFORD, *supra* note 230, at 59.

235. Fourth Report on State Responsibility, U.N. Doc. A/CN.4/517, para. 26. See CRAWFORD, *supra* note 230, at 59.

236. Daniel Bodansky, John R. Crook, David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 867 (2002); see also BROWNLIE, *supra* note 226, at 25.

237. Fourth Report on State Responsibility, U.N. Doc. A/CN.4/517, para. 22. See CRAWFORD, *supra* note 230, at 59. It should be noted that Professor Crawford's fourth report to the ILC on April 23, 2001, was submitted just three months after serving as President of the Arbitral Tribunal, together with Professor Christopher Greenwood, QC, and Gavan Griffith, QC, in the *Lance Larsen v. Hawaiian Kingdom* case at the Permanent Court of Arbitration. The arbitral award was announced on February 5, 2001; see *Larsen*, *supra* note 10.

238. See Bodansky, Crook, Caron, *supra* note 236, at 838.

239. Lauri Mälksoo, *State Responsibility and the Challenge of the Realist Paradigm: The Demand of Baltic Victims of Soviet Mass Repressions for Compensation from Russia*, 3 BALTIC YEARBOOK OF INT'L LAW 57, 58 (2003).

240. See Shelton, *supra* note 222, at 842.

reaching examples of the progressive development of international law,"²⁴¹ she admits it also highlights "the need to identify the means to satisfy injured parties while ensuring the international community's interest in promoting compliance."²⁴² In 1991, the United Nations Security Council specifically addressed and established a means to satisfy injured parties who suffered from an international wrongful act by a State.

After the first Gulf War, the Security Council established the United Nations Compensation Commission as "a new and innovative mechanism to collect, assess and ultimately provide compensation for hundreds of thousands — or even millions — of claims against Iraq for direct losses stemming from the invasion and occupation of Kuwait."²⁴³ According to United Nations' Secretary General Kofi Annan,

the Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims; it is only in this last respect that a quasi-judicial function may be involved.²⁴⁴

Iraq's invasion and occupation of Kuwait was a violation of Kuwait's territorial integrity and sovereignty, and therefore considered an international wrongful act. It wasn't a dispute so intervention of an international court or arbitral tribunal was not necessary.

An internationally wrongful act must be distinguished from a dispute between States. According to the Articles of State Responsibility, an international wrongful act consists of "an action or omission . . . attributable to the State under international law; and . . . constitutes a breach of an international obligation of the State."²⁴⁵ A dispute, on the other hand, is "a disagreement on a point of law or fact, a conflict of legal views or of interests"²⁴⁶ between two States. Conciliation, arbitration and judicial settlement settle legal disputes that seek to assert existing law, while negotiation, enquiry and mediation provide for the settlement of political disputes that deal with competing political or economic

241. *Id.*

242. *Id.* at 856.

243. John R. Crook, *The United Nations Compensation Commission—A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L. L. Law 144 (1993).

244. The United Nations established a website for the *United Nations Compensation Commission*. The website is an excellent resource of information regarding the claims by states, individuals and businesses against Iraq as well as selected publications. United Nations Compensation Commission, <http://www2.unog.ch/unccl/> (last visited Mar. 28, 2008).

245. See CRAWFORD, *supra* note 230, at 81.

246. Great Britain v. Greece (*Mavrommatis Palestine Concessions*), 1924 P.C.I.J. (ser. A) No. 2, at 11.

interests.²⁴⁷ A claim by a State²⁴⁸ of an internationally wrongful act becomes a dispute, whether legal or political, once the respondent State opposes the claim; but an internationally wrongful act is not dependent on a State's opposing claim, especially if the breach involves the violation of a peremptory norm or *jus cogens*.²⁴⁹ Crawford explains:

Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e. those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself.²⁵⁰

In similar fashion, Hawai'i could find satisfaction through a compensation commission established by the United Nations Security Council that would be capable of addressing the subject of reparations and the effects of a prolonged occupation. In these next sections, I will argue that Hawai'i does not have a dispute with the United States regarding the illegal overthrow of the Hawaiian government and the prolonged occupation of its territory, and therefore, as an international wrongful act, the appropriate venue for remedy could be the Security Council and not an international court or arbitral tribunal, a case similar to the Kuwaiti-Iraqi situation.

B. Negotiating Settlement: 1893 Cleveland-Lili'uokalani Agreement of Restoration

When United States forces and its diplomatic corps overthrew the Hawaiian Kingdom government in 1893 with its aim towards extending its territory through military force, it constituted a serious breach of the Hawaiian State's dominion over its territory and the corresponding duty of non-intervention. Non-interference was a recognized general rule of

247. UNITED NATIONS CHARTER, Article 33.

248. According to Brownlie, a "state presenting an international claim to another state, either in diplomatic exchanges or before an international tribunal, has to establish its qualifications for making the claim, and the continuing viability of the claim itself, before the merits of the claim come into question." See BROWNIE, *supra* note 52, at 477.

249. Article 69 of the 1969 Vienna Convention on the Law of Treaties defines a "peremptory norm or general international law [as] a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." See *Vienna Convention on the Law of Treaties* (1969), United Nations, *Treaty Series*, vol. 1155, p. 331.

250. See CRAWFORD, *supra* note 230, at 162.

international law, or peremptory norm, in the 19th century as it is now, unless the interference was justifiable under the right of the intervening State's self-preservation.²⁵¹ But in order to qualify a State's intervention, the danger to the intervening State "must be great, distinct, and imminent, and not rest on vague and uncertain suspicion."²⁵² The Hawaiian Kingdom posed no threat to the preservation of the United States and after investigating the circumstances that led to the overthrow of the Hawaiian government on January 17, 1893, President Cleveland determined that "the military occupation of Honolulu by the United States . . . was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property."²⁵³ He concluded:

[the] lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may be safely asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.²⁵⁴

On the responsibility of State actors, Oppenheim states that "according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologize or express its regret for his behaviour, or to pay damages."²⁵⁵

On November 13, 1893, U.S. Minister Albert Willis requested a meeting with the Queen at the U.S. Legation, "who was informed that the President of the United States had important communications to make to her."²⁵⁶ Willis explained to the Queen of the "President's sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed."²⁵⁷ The President concluded that the "members of the provisional government and their supporters, though not entitled to extreme sympathy, have been led to their present predicament of revolt against the Government . . . by the indefensible encouragement and assistance of our diplomatic representative."²⁵⁸ Thus, they were rightfully subject to the pains and penalties of treason under Hawaiian law. The Queen was then

251. WHEATON, *supra* note 14, at 100.

252. See KENT, *supra* note 201, at 24.

253. See *Executive Documents*, *supra* note 28, at 452.

254. *Id.* at 455.

255. See OPPENHEIM, *supra* note 23, at 252.

256. See *Executive Documents*, *supra* note 28, at 1242.

257. *Id.*

258. *Id.* at 457.

asked, "[s]hould you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government?"²⁵⁹ She responded, "[t]here are certain laws of my Government by which I shall abide. My decision would be, as the law directs, that such persons should be beheaded and their property confiscated to the Government."²⁶⁰ The Queen referenced Chapter VI, section 9 of the Penal Code, which states, "[w]hoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government." When asked again if she would reconsider the President's request, she responded, "[t]hese people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated."²⁶¹ The interview soon came to a close and Willis submitted his report to U.S. Secretary of State Walter Gresham in Washington, D.C.

In a follow-up instruction sent to Willis on December 3, 1893, Gresham directed the U.S. Minister to continue to negotiate with the Queen.²⁶² Gresham acknowledged that the President had a duty "to restore to the sovereign the constitutional government of the Islands," but it was dependent upon an unqualified agreement of the Queen to assume all administrative obligations incurred by the Provisional Government, grant full amnesty to those individuals instrumental in setting up or supporting the Provisional Government, and to recognize the lawfulness of the so-called 1887 constitution.²⁶³ Gresham directed Willis to convey to the Queen that should she "refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf."²⁶⁴

C. Constitutional Constraints upon the Agreement to Settle

In *Knote v. United States*, Justice Loring correctly stated that the word amnesty has no legal significance in the common law, but arises when applied to rebellions that bring about the rules of international law.²⁶⁵ He added that amnesty is the synonym for oblivion and pardon,²⁶⁶ which is

259. *Id.* at 1242.

260. *Id.*

261. *Id.*

262. *Id.* at 1192.

263. *Id.*

264. *Id.*

265. *Knote v. The United States*, 10 Ct. Cl. 387, 407 (1875).

266. *Id.*

"an act of sovereign mercy and grace, flowing from the appropriate organ of the government."²⁶⁷ As President Cleveland's request for a grant of general amnesty from the Queen was essentially tied to the Hawaiian crime of treason, three questions naturally arise. When did treason actually take place? Was the Queen constitutionally empowered to recognize the 1887 constitution as lawful? And was the Queen empowered under Hawaiian constitutional law to grant a pardon?

The leaders of the provisional government committed the crime of treason in 1887 when they forced a constitution upon the Queen's predecessor, King Kalakaua, at the point of a bayonet, and organized a new election of the legislature while the lawful legislature remained in term, but out of session. As U.S. Special Commissioner James Blount discovered in his investigation, the purpose of the constitution was to offset the native voting block by placing it in the controlling hands of foreigners where "large numbers of Americans, Germans, English, and other foreigners unnaturalized were permitted to vote . . ." ²⁶⁸ He concluded these elections "took place with the foreign population well armed and the troops hostile to the crown and people."²⁶⁹ With the pending retake of the political affairs of the country by the Queen and loyal subjects, the revolutionaries of 1887 found no other alternative but to appeal to the United States resident Minister John Stevens to order the landing of United States troops in order to provide for their protection with the ultimate aim of transferring the entire territory of the Hawaiian Islands to the United States. By soliciting the intervention of the United States troops for their protection, these revolutionaries effectively rendered their 1887 revolution unsuccessful, and transformed the matter from a rebellion to an intervening state's violation of international law.²⁷⁰ The 1864 Constitution, as amended, the civil code, penal code, and the session laws of the Legislative Assembly enacted before the 1887 revolution, comprised the legal order of the Hawaiian state and remained the law of the land during the revolution and throughout the subsequent intervention by the United States since January 16, 1893.

Prior to the 1887 revolution, the Queen was confirmed as the lawful

267. *Ex parte Law*, 35 Ga. 285, 296 (S.D. Ga. 1866); see also *Davies v. McKeeby*, 5 Nev. 369, 373 (1870).

268. See *Executive Documents*, *supra* note 28, at 579.

269. *Id.*

270. United States doctrine at the time considered rebellions to be successful when the revolutionaries are (1) in complete control of all governmental machinery, (2) there exists no organized resistance, and (3) acquiescence of the people. See 1 John Bassett Moore, *A Digest of International Law* 139 (Washington: Gov't Printing Off., 1906).

successor to the throne of her brother King Kalakaua on April 10, 1877,²⁷¹ in accordance with Article 22 of the Hawaiian constitution, and, therefore, capable of negotiating on behalf of the Hawaiian Kingdom the settlement of the dispute with the United States. As chief executives, both the Queen and President were not only authorized, but limited in authority by a written constitution. Similar to United States law, Hawaiian law vests the pardoning power in the executive by constitutional provision, but where the laws differ, though, is who has the pardoning power and when can that power be exercised. Under the U.S. Constitution, the President alone has the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,"²⁷² but under the Hawaiian constitution, the Monarch "by and with the advice of His Privy Council, has the power to grant reprieves and pardons, *after conviction*, for all offences, except in cases of impeachment (emphasis added)."²⁷³ As a constitutional monarchy, the Queen's decision to pardon, unlike the President, could only come through consultation with Her Privy Council, and the power to pardon can only be exercised once the conviction of treason had already taken place and not before.

The Hawaiian constitution also vests the law making power solely in the Legislative Assembly comprised of the "[t]hree Estates of this Kingdom . . . vested in the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives of the People, sitting together."²⁷⁴ Any change to the Constitution (e.g. the Queen's recognition of the 1887 Constitution), must be first proposed in the Legislative Assembly and, if later approved by the Queen, then it would "become part of the Constitution of [the] country."²⁷⁵ From a constitutional standpoint, the Queen was not capable of recognizing the 1887 Constitution without first submitting it for consideration to the Legislative Assembly convened under the lawful constitution of the country; nor was she able to grant amnesty to prevent the criminal convictions of treason, but only after judgments have already been rendered by Hawaiian courts. Another constitutional question would be whether or not the Queen would have the power to grant a full pardon without advice

271. Art. 22 of the Hawaiian Constitution provides: "...the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King's life..." ROBERT C. LYDECKER, *ROSTER LEGISLATURES OF HAWAII: 1841-1918*, 138 (The Hawaiian Gazette Co., Ltd. 1918).

272. U.S. CONST. art. II, § 2.

273. HI CONST. art. 27.

274. *Id.* art. 45.

275. *Id.* art. 80.

from Her Privy Council. If not, which would be the case, a commitment on the part of the Queen could have strong consideration when Her Privy Council is ultimately convened once the government is restored.

On December 18, 1893, after three meetings with Willis, the Queen finally agreed with the President and provided the following pledge that was dispatched to Gresham on December 20, 1893. An agreement between the two Heads of State had finally been made for settlement of the international dispute and restoration of the government.

I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both native and foreign born, do hereby and herein solemnly declare and pledge myself that, if reinstated as the constitutional sovereign of the Hawaiian Islands, that I will immediately proclaim and declare, unconditionally and without reservation, to every person who directly or indirectly participated in the revolution of January 17, 1893, a full pardon and amnesty for their offenses, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof, and that I will forbid and prevent the adoption of any measures of proscription or punishment for what has been done in the past by those setting up or supporting the Provisional Government. I further solemnly agree to accept the restoration under the constitution existing at the time of said revolution and that I will abide by and fully execute that constitution with all the guaranties as to person and property therein contained. I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.²⁷⁶

The Queen's declaration was dispatched to Washington by Willis and represented the final act of negotiation and settlement of the dispute that arose between the United States and the Hawaiian Kingdom on January 16, 1893. In other words, the dispute was settled and all that remained for the United States President was to restore the Hawaiian Kingdom government, whereupon the Queen was to grant amnesty, after the criminal convictions of the failed revolutionaries, and assume administrative obligations of the so-called provisional government. But despite the Queen's reluctant recognition of the 1887 Constitution, Hawaiian constitutional law prevents it from having any legal effect, unless it was first submitted to a lawfully convened Legislative Assembly, which is highly unlikely given its illicit purpose. Furthermore, the United States' duty to restore the government

276. *Executive Documents*, *supra* note 28, at 1269.

was not dependent on an agreement with the Queen to grant amnesty and to recognize the 1887 Constitution, but rather a recognized mandate founded in the principles of international law. The push for amnesty, in particular, by the United States was political, not legal, and, no doubt, was to mitigate the severity of criminal punishment inflicted on the failed revolutionaries, which included U.S. citizens.²⁷⁷

Notwithstanding the constitutional limitations and legal constraints placed upon the Queen as Head of State, the agreement to pardon did represent, in a most trying and difficult time for the Queen, the spirit of "mercy and grace" offered to a cabal of criminals who would later defy the offer of pardon, and seek protection of the United States under the guise of annexation. These criminals never intended to be an independent state, whether as a provisional government that would "exist until terms of union with the United States of America have been negotiated and agreed upon,"²⁷⁸ or when they changed their name to the so-called Republic of Hawai'i that authorized its President "to make a Treaty of Political or Commercial Union [with] . . . the United States, subject to the ratification of the Senate."²⁷⁹ These subsequent actions taken by the revolutionaries would no doubt have a profound effect on whether or not the offer of a pardon is still on the table, even when they are criminally tried in absentia by a restored Hawaiian government.

D. United States Breach of the 1893 Cleveland-Lili'uokalani Agreement

In the United States, Congress took deliberate steps to prevent the President from following through with his obligation to restore, which included hearings before the Senate Foreign Relations Committee headed by Senator John Tyler Morgan, a pro-annexationist and its Chairman in 1894. These Senate hearings sought to circumvent the requirement of international law, where "a crime committed by the envoy on the territory of the receiving State must be punished by his home State."²⁸⁰ While the Senate has no legal effect beyond the territorial borders of the United States, Morgan's purpose was to vindicate the illegal conduct and actions of the U.S. Legation and Naval authorities under U.S. law. Four republicans endorsed the report with Morgan, but four democrats submitted

277. "An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom." Haw. Penal Code chapt. VI, § 3.

278. See LYDECKER, *supra* note 271, at 187.

279. *Id.* at 198.

280. See OPPENHEIM, *supra* note 23, at 252.

a minority report declaring that while they agree in exonerating the commander of the USS Boston, Captain Wiltse, they could not concur in exonerating "the minister of the United States, Mr. Stevens, from active officious and unbecoming participation in the events which led to the revolution in the Sandwich Islands on the 14th, 16th, and 17th of January, 1893."²⁸¹ By contradicting Blount's investigation, Morgan intended, as a matter of congressional action, to bar the President from restoring the government as was previously agreed upon with the Queen because there was a strong fervor of annexation among many members of Congress. Cleveland's failure to fulfill his obligation of the agreement allowed the provisional government to gain strength, and on July 4, 1894, they renamed themselves the Republic of Hawai'i. For the next three years, they would maintain their authority by hiring mercenaries and force of arms, arresting and imprisoning Hawaiian nationals who resisted their authority with the threat of execution, and tried the Queen on fabricated evidence with the purpose of her abdicating the throne.²⁸² In 1897, the Republic signed another treaty of cession with President Cleveland's successor, William McKinley, but the Senate was unable to ratify the treaty on account of protests by the Queen and Hawaiian nationals. On August 12, 1898, McKinley unilaterally annexed the Hawaiian Islands for military purposes during the Spanish-American War under the guise of a Congressional joint resolution.

These actions taken against the Queen and Hawaiian subjects are directly attributable and dependent upon the non-performance of President Cleveland's obligation, on behalf of the United States, to restore the Hawaiian government. This is a grave breach of his agreed settlement with the Queen as the Head of State of the Hawaiian Kingdom. The 1893 Cleveland-Lili'uokalani international agreement is binding upon both parties as if it were a treaty, because, as Oppenheim asserts, since "there exists no other law than International Law for the intercourse of States with each other, every agreement between them regarding any obligation whatever is a treaty."²⁸³ According to Hall, "a valid agreement is therefore concluded so soon as one party has signified his intention to do or to refrain

281. 6 S. COMM. ON FOREIGN RELATIONS, 53D CONG., COMPILATION OF REPORTS OF THE COMM. ON FOREIGN RELATIONS 1789-1901 363 (1894).

282. Two days before the Queen was arrested on charges of misprision of treason, Sanford Dole, President of the so-called Republic of Hawai'i, admitted in an executive meeting on January 14, 1894, that "there was no legal evidence of the complicity of the ex-queen to cause her arrest..." *Minutes of the Executive Council of the Republic of Hawai'i* 159 (on file in the Hawai'i State Archives).

283. See OPPENHEIM, *supra* note 22, at 661.

from a given act, conditionally upon the acceptance of his declaration of intention by the other party as constituting an engagement, and so soon as such acceptance clearly indicated."²⁸⁴

E. The Function of the Doctrine of Estoppel

The principle that a State cannot benefit from its own wrongful act is a general principle of international law referred to as estoppel.²⁸⁵ The rationale for this rule derives from the maxim *pacta sunt servanda* — every treaty in force is binding upon the parties and must be performed by them in good faith,²⁸⁶ and "operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment."²⁸⁷ According to I.C. MacGibbon, a legal scholar in international law, underlying "most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation."²⁸⁸ To ensure consistency in State behavior, the Permanent Court of International Justice, in a number of cases, affirmed the principle "that a State cannot invoke its municipal law as a reason for failure to fulfill its international obligation."²⁸⁹ This principle was later codified under Article 27 of the 1969 Vienna Convention on the Law of Treaties, whereby "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."²⁹⁰

In municipal jurisdictions there are three forms of estoppel — estoppel by judgment as in matters of court decisions; estoppel by deed as in matters of written agreement or contract; and estoppel by conduct as in matters of statements and actions. Professor D.W. Bowett states that these forms of estoppel, whether treated as a rule of evidence or as substantive law, is as much a part of international law as they are in municipal law, and due to the diplomatic nature of States relations, he expands the second form of estoppel to include estoppel by "Treaty, Compromise, Exchange of Notes, or other Undertaking in Writing."²⁹¹ Brownlie states that because estoppel in international law rests on principles of good faith and consistency, it is

284. See HALL, *supra* note 105, at 383.

285. D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRITISH YEARBOOK OF INTERNATIONAL LAW 181 (1957).

286. Vienna Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331.

287. See Bowett, *supra* note 285, at 201.

288. I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L. Q. 468 (1958).

289. *Id.* at 473.

290. Vienna Convention on the Law of Treaties, art. 27, 1155 U.N.T.S. 331.

291. See Bowett, *supra* note 285.

“shorn of the technical features to be found in municipal law.”²⁹² Bowett enumerates the three essentials establishing estoppel in international law:

1. The statement of fact must be clear and unambiguous.
2. The statement of fact must be made voluntarily, unconditionally, and must be authorized.
3. There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.²⁹³

It is self-evident that the 1893 Cleveland-Lili'uokalani agreement meets the requirements of the first two essentials establishing estoppel, and, as for the third, reliance in good faith was clearly displayed and evidenced in a memorial to President Cleveland by the Hawaiian Patriotic League on December 27, 1893. As stated in the memorial:

And while waiting for the result of [the investigation], with full confidence in the American honor, the Queen requested all her loyal subjects to remain absolutely quiet and passive, and to submit with patience to all the insults that have been since heaped upon both the Queen and the people by the usurping Government. The necessity of this attitude of absolute inactivity on the part of the Hawaiian people was further indorsed and emphasized by Commissioner Blount, so that, if the Hawaiians have held their peace in a manner that will vindicate their character as law-abiding citizens, yet it can not and must not be construed as evidence that they are apathetic or indifferent, or ready to acquiesce in the wrong and bow to the usurpers.²⁹⁴

Continued reliance was also displayed by the formal protests of the Queen and Hawaiian political organizations regarding the second treaty of annexation signed in Washington, D.C., on June 16, 1897, between the McKinley administration and the self-proclaimed Republic of Hawai'i. These protests were received and filed in the office of Secretary of State John Sherman and continue to remain a record of both dissent and evidence of reliance upon the conclusion of the investigation by President Cleveland and his obligation and commitment to *restitutio in integrum* — restoration of the Hawaiian government. A memorial of the Hawaiian Patriotic League that was filed with the United States Hawaiian Commission for the creation of the territorial government appears to be the last public act of reliance made by a large majority of the Hawaiian citizenry.²⁹⁵ The Commission was established on July 9, 1898 after President McKinley

292. See BROWNIE, *supra* note 52, at 641.

293. See Bowett, *supra* note 285, at 202.

294. See *Executive Documents*, *supra* note 28, at 1295.

295. See Smith, *supra* note 131, at 752.

signed the joint resolution of annexation on July 7, 1898, and held meetings in Honolulu from August through September. The memorial, which was also printed in two Honolulu newspapers, one in the Hawaiian language²⁹⁶ and the other in English,²⁹⁷ stated, in part:

WHEREAS: By memorial the people of Hawaii have protested against the consummation of an invasion of their political rights, and have fervently appealed to the President, the Congress and the People of the United States, to refrain from further participation in the wrongful annexation of Hawaii; and

WHEREAS: The Declaration of American Independence expresses that Governments derive their just powers from the consent of the governed:

THEREFORE, BE IT RESOLVED: That the representatives of a large and influential body of native Hawaiians, we solemnly pray that the constitutional government of the 16th day of January, A.D. 1893, be restored, under the protection of the United States of America.

There is no dispute between the United States and the Hawaiian Kingdom regarding the illegal overthrow of the Hawaiian government, and the 1893 Cleveland-Lili'uokalani international agreement is the evidence of final settlement. As such, the United States cannot benefit from its non-performance of its obligation of restoring the Hawaiian Kingdom government under the 1893 Cleveland-Lili'uokalani agreement over the reliance held by the Queen and Hawaiian subjects in good faith and to their detriment. Therefore, the United States is estopped from asserting any of the following claims, unless it can show that the 1893 Cleveland-Lili'uokalani agreement had been fulfilled. These claims include:

1. Recognition of any pretended government other than the Hawaiian Kingdom as the lawful government of the Hawaiian Islands;
2. Annexation of the Hawaiian Islands by joint resolution in 1898;
3. Establishment of a U.S. territorial government in 1900;
4. Administration of the Hawaiian Islands as a non-self-governing territory since 1898 pursuant to Article 73(e) of the U.N. Charter;
5. Admission of Hawai'i as a State of the Federal Union in 1959; and,
6. Designating Native Hawaiians as an indigenous people situated within the United States.

The failure of the United States to restore the Hawaiian Kingdom

296. *Memoriala A Ka Lahui*, KE ALOHA AINA, Sept. 17, 1898, at 3.

297. *What Monarchists Want*, THE HAWAIIAN STAR, Sept. 15, 1898, at 3.

government is a "breach of an international obligation," and, therefore, an international wrongful act as defined by the 2001 Articles of State Responsibility for International Wrongful Acts. The severity of this breach has led to the unlawful seizure of Hawaiian independence, imposition of a foreign nationality upon the citizenry of an occupied State, mass migrations and settlement of foreign citizens, and the economic and military exploitation of Hawaiian territory — all stemming from the United States government's perverse view of military necessity in 1898. In a 1999 report for the United Nations Centennial of the First International Peace Conference, Professor Christopher Greenwood stated:

Accommodation of change in the case of prolonged occupation must be within the framework of the core principles laid down in the Regulations on the Laws and Customs of War on Land and the Fourth Convention, in particular, the principle underlying much of the Regulations on the Laws and Customs of War on Land, namely that the occupying power may not exploit the occupied territories for the benefit of its own population.²⁹⁸

Despite the egregious violations of Hawaiian sovereignty by the United States since January 16, 1893, the principle of estoppel not only serves as a shield that bars the United States from asserting any legal claim over the Hawaiian Islands, but also a shield that protects the continued existence of the Hawaiian Kingdom, the nationality of its citizenry, and its territorial integrity as they existed in 1893

F. United Nations Security Council Apprised of the Occupation

Hawai'i's prolonged occupation by the United States is a serious breach of international law and according to the United Nations Charter, the "Security Council may investigate any...situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security,"²⁹⁹ and any member or non-member State "may bring [it] to the attention of the Security Council or of the General Assembly."³⁰⁰

On December 12, 2000, the day after oral hearings were held at the Permanent Court of Arbitration, a meeting took place in Brussels between Dr. Jacques Bihozagara, Ambassador for the Republic of Rwanda assigned

298. CHRISTOPHER GREENWOOD, INTERNATIONAL HUMANITARIAN LAW (LAWS OF WAR): REVISED REPORT PREPARED FOR THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE, PURSUANT TO UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS A/RES/52/154 AND A/RES/53/99, 47 (1999).

299. United Nations Charter, art. 34.

300. *Id.* art. 35.

to Belgium, and the author and two deputy agents representing the acting government of the Hawaiian Kingdom in the *Larsen* case.³⁰¹ Ambassador Bihozagara attended a hearing before the International Court of Justice on December 8, 2000, (*Democratic Republic of the Congo v. Belgium*), where he was made aware of the Hawaiian arbitration case that was also taking place across the hall in the Peace Palace.³⁰² After inquiring into the case, he called for the meeting and wished to convey that his government was prepared to bring to the attention of the United Nations General Assembly the prolonged occupation of the Hawaiian Kingdom by the United States.

Recalling his country's experience of genocide and the length of time it took for the international community to finally intervene as a matter of international law, Ambassador Bihozagara conveyed to the author that the illegal and prolonged occupation of Hawai'i was unacceptable and should not be allowed to continue. Despite the excitement of the offer, apprehension soon took its hold and the acting government could not, in good conscience, accept the offer and put Rwanda in a position of re-introducing Hawai'i's State continuity before the United Nations, when Hawai'i's community, itself, remained ignorant of Hawai'i's profound legal position. The author thanked Ambassador Bihozagara for his government's offer, but the timing was premature. The author conveyed to the ambassador that the gracious offer could not be accepted without placing Rwanda in a vulnerable position of possible political retaliation by the United States, but that the acting government should instead focus its attention on continued exposure of the occupation both at the national and international levels.³⁰³

In line with exposure on the international level, the *acting* government was successful in filing a complaint, as a non-member State, with the United Nations Security Council under the Presidency of China on July 5, 2001.³⁰⁴ Dumberry, who's article in the Chinese Journal of International Law addressed the Hawaiian complaint, stated, "Article 35(2) of the

301. The foundation upon which the *acting* Hawaiian government was established can be found in the Memorial of the Hawaiian Kingdom, *Larsen* case, paragraphs 219-248, http://www.AlohaQuest.com/arbitration/pdf/Memorial_Government.pdf (last visited July 7, 2008); see also Section V, Annex 2 (Dominion of the Hawaiian Kingdom), Hawaiian Complaint filed with the United Nations Security Council, July 5, 2001, paragraphs 5.1-5.34, http://hawaiiiankingdom.org/pdf/Hawaiian_UN_Attach2.pdf (last visited July 7, 2008), *reprinted in* 1 *Haw. J.L. & Pol.* 341, 452-464 (Summer 2004).

302. Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000, p. 182.

303. Strategic Plan of the *acting* Council of Regency, http://hawaiiiankingdom.org/pdf/HK_Strategic_Plan.pdf (last visited July 1, 2008).

304. See Dumberry, *supra* note 11, at 671-672. See also Sai, *supra* note 11, at 74-75.

Charter only grants the right for States which are not members of the United Nations to bring disputes and situations 'to the attention' of the Security Council; it does not oblige the Security Council to actually "consider" the matter brought to its attention."³⁰⁵ Despite the Security Council's failure to consider the matter, the complaint, nevertheless, was not challenged nor quashed by the United States, but instead, according to Dumberry, "the United States, which is a permanent member of the Security Council, has most certainly strongly objected to the inclusion of this Complaint on the agenda, and is likely to have lobbied other States to act in a similar fashion."³⁰⁶ As the Hawaiian complaint remained procedurally unabated, Russian Ambassador Vitaly Churkin, who served as President of the Security Council, was notified by letter dated March 1, 2008 of the acting government's intent to amend the Hawaiian complaint pursuant to the 2001 *Articles on Responsibility of States for International Wrongful Acts*. The amended complaint will seek the active intervention of the United Nations and its member States.

V. Conclusion

State sovereignty "is never held in suspense,"³⁰⁷ but is vested either in the State or in the successor State, and in the absence of any "valid demonstration of legal title, or sovereignty, on the part of the United States," sovereignty, both external and internal, remains vested in the Hawaiian State. Therefore, despite the lapse of time, the 1893 Cleveland-Lili'uokalani Agreement remains legally binding on the United States, and the continuity of the Hawaiian Kingdom as a sovereign State is grounded in the very same principles that the United States and every other State have relied on for their own legal existence. In other words, to deny Hawai'i's sovereignty would be tantamount to denying the sovereignty of the United States and the entire system the world has come to know as international relations. And, recalling U.S. Secretary of State Thomas Francis Bayard's frequently quoted 1887 statement of the rule of law regarding the position of the United States and international obligations, we are reminded that,

If a government could set up its own municipal law as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal regulations as an answer to

305. *Id.* at 671.

306. *Id.* at 672.

307. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936).

demands for the fulfillment of international duties.³⁰⁸

In this article, I have attempted to chart out the overarching themes that address the events of the overthrow in historical, legal and contemporary relevance. Through this narrative, it is undeniable that the United States government, through its agencies since 1893, has manipulated and obfuscated these events for its benefit over and above the rights of the Hawaiian Kingdom and its nationals under international law. Professor Kanalu Young, a Hawaiian historian at the University of Hawai'i at Manoa, argues that:

American scholars developed a military occupation-based historiography predicated on their own misrepresentations of the indigenous and national Hawaiian pasts and their own last century of illegal control here. Selected nineteenth-century primary and secondary sources were then contoured to the needs of the occupier government apparatus to provide school children with knowledge that indoctrinated as it educated.³⁰⁹

It is crucial at this stage to continue this type of research so that eventually Hawai'i and the world community at large will have a clearer understanding of these historical events and the profound impact it has today. Rather than focusing attention on reconciling the present, resources and efforts should be redirected in order to develop and foster a reckoning of Hawai'i's history — a reconciliation of the past. Thus, Professor Young advocates "a context-based approach for the development of a body of publishable research that gives life and structure to a Hawaiian national consciousness and connects thereby to the theory of State continuity."³¹⁰ The challenge for other scholars and practitioners in the fields of political science, history and law is to distinguish between the rule of law and the politics of power. Rigorous and diligent study into the Hawaiian-American situation is not only warranted by the current legal and political challenges facing Native Hawaiians that the Akaka Bill seeks to quell, it is a matter of what is right and just. The ramifications of this study cannot be underestimated, and its consequences are, no doubt, far-reaching. They span from the political and legal to the social and economic venues situated in both the national and international levels. Therefore, in light of the severity of this needed research, analytical rigor is at the core and must not fall victim to political affiliations, partisanship or just plain bias.

308. Correspondence from Thomas Bayard, Secretary of State, to Thomas Connery, U.S. Charge d'Affaires to Mexico (November 1, 1888) (found in *Foreign Relations of the United States* 751, 753).

309. See Young's *Kuleana: Toward a Historiography of Hawaiian National Consciousness*, *supra* note 11, at 32.

310. *Id.* at 1.