THE AMERICAN OCCUPATION OF THE HAWAIIAN KINGDOM: BEGINNING THE TRANSITION FROM OCCUPIED TO RESTORED STATE

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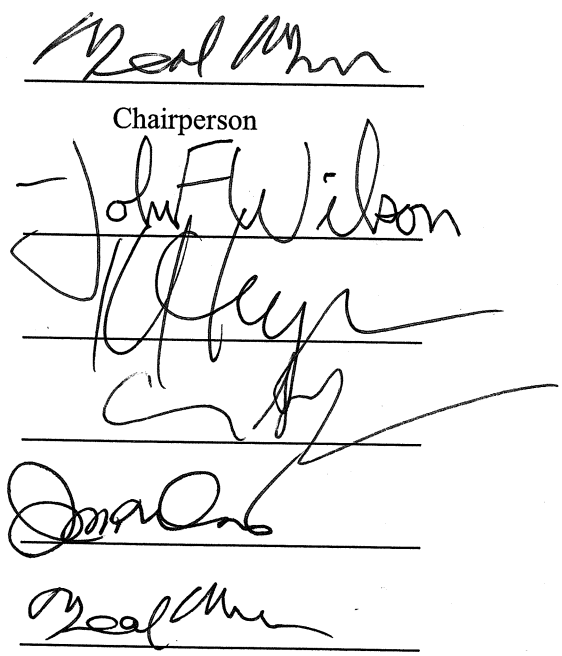
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ABSTRACT

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

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[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

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[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.

[9] *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 Phillamore, 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 Phillamore, *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

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[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]

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[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 writers[37] 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

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[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'olahui: 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] Manley 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

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[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 Molokai[8] 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

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[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 automonous 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 Company[13] 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

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[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*

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[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

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[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 Davis[31] 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; Keaweaheulu, 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.

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[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

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[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

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[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:

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[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.

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[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 in mentioned, with disapprobation, by Captain Kotzbue), 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]

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[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.

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[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]

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[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:

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[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

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[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.

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[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]

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[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 a 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]

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[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

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[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 representatives[83] 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

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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 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

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[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:

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[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 individuals[99] that effectively placed control of the Legislature and Cabinet in the hands of individuals who held foreign allegiances. The constitution reinstituted a bi-cameral legislature and an election of Nobles replaced appointments by the King. Property qualifications were reinstituted 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.] Olelson, 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

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[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-Stifftung 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 is 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

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[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, Minster 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 it's 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]

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[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).

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 5º and 23º north latitude and 154º and 178º west longitude.

Island:	Location:	Square Miles/Acreage:
Hawai'i	19º 30' N 155º 30' W	4,028.2 / 2,578,048
Maui	20º 45' N 156º 20' W	727.3 / 465,472
O'ahu	21º 30' N 158º 00' W	597.1 / 382,144
Kaua'i	22º 03' N 159º 30' W	552.3 / 353,472
Molokai	21º 08' N 157º 00' W	260.0 / 166,400
Lana'i	20º 50' N 156º 55' W	140.6 / 89,984
Ni'ihau	21º 55' N 160º 10' W	69.5 / 44,480
Kaho'olawe	20º 33' N 156º 35' W	44.6 / 28,544
Nihoa	23º 06' N 161º 58' W	0.3 / 192
Molokini	20º 38' N 156º 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	22º 01' N 160º 06' W	0.4 / 256
Ka'ula	21º 40' N 160º 32' W	0.2 / 128
Laysan	25º 50' N 171º 50' W	1.6 / 1,024
Lisiansky	26º 02' N 174º 00' W	0.6 / 384
Palmyra	05º 52' N 162º 05' W	4.6 / 2,944
Ocean (a.k.a. Kure atoll)	28º 25' N 178º 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: LILI`UOKALANI 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

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[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 17th1897. 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 Gehard 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

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[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

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[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]

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[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 base [28]

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]

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[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 Untied 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

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[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

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[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

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[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

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[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

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[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 Paquette 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

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[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;

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[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 visted 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

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[106] *Statute Laws of His Majesty Kamehameha III, vol. 1* (Government Press, 1846), 76.

[107] Gehard 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

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[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

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[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]

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[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] Benvinisti 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

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[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.

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[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 Kamahele 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 Hawaiianness 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]

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[139] Lawrence H. Fuchs, *Hawaii Pono: A Social History*, (Harcourt, Brace & World 1961), 68.

[140] Momi Kamahele, "`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

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[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,

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[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]

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[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"

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[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 is 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

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[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

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[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

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[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/indigenousdoc.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.

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[175] *Id*.

[176] Milton J. Esman, "Ethnic Pluralism and International Relations," *Canadian Review of Studies in Nationalism* 17(1-2) (1990): 88.

Hawaiian State Sovereignty	*vs*.	Hawaiian Indigeneity
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 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 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 Zizek, *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 in 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

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[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

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[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]

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[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, 1843)

[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 Kellog-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

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[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

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[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

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[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

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[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

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[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.

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[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 State[66] 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

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[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]

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[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 Congress[98] 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:

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[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]

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[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.

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[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 language[123] 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

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[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]

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[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 Cyprus[131] 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 Dominium 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

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[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 warmaking 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 the 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 doctrine[167] 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.