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## ***What does TWA Flight 800 and the Hawaiian Kingdom have in common?***

by David Keanu Sai

In 1996, TWA Flight 800 crashed eight miles off the coast of New York bound for Paris, France, and in 1898, the United States began an illegal occupation of the Hawaiian Kingdom that has existed for over a century. Both events are indeed tragic, one from a familial perspective and the other from an international perspective, but both are fundamentally tied to the effect of Congressional authority.

The Death on the High Seas Act (DOHSA) was originally passed in 1920 by the U.S. Congress to make it easier for widows of seamen to recover damages for future earnings when death occurs in international waters. The airline industry has also used the law to limit damages when a plane crashes more than three miles from the coast of the United States.

Primarily, plaintiffs cannot recover non-pecuniary damages such as loss of society (e.g., love, affection and companionship), pain and suffering, and mental anguish. The Act also bars punitive damages.

Affecting this Act was U.S. Presidential Proclamation no. 5928 of December 27, 1988, asserting "...the territorial sea of the United States henceforth extends to 12 nautical miles from the

estate representatives of the 213 victims filed suit against Trans World Airlines. The 2nd Circuit Court of Appeals, affirming the lower court, ruled on March 29, 2000 that, pursuant to Proclamation no. 5928, the DOHSA applied only to waters at least 12 nautical miles from the coast. Since the court concluded that the 1920 U.S. legislature intended high seas to mean non-territorial or international waters, DOHSA did not apply because the TWA deaths occurred over federal territorial waters between 3 and 12 nautical miles.

In its defense, TWA asserted that the crash falls within the DOHSA, because the Act applies to crashes that occur "...on the high seas beyond a marine league [or three nautical miles] from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States." TWA also asserts that Proclamation no. 5928 did not alter this Federal statute, because the proclamation itself stated: "Nothing in this Proclamation: (a) extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom..."

Before President Reagan signed Presidential Proclamation no. 5928, the Office of Legal Counsel (OLC), Department of Justice, was requested to draft a legal opinion for the State Department's legal adviser concerning Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea. In addition to the proposed Presidential proclamation, the OLC was also asked to comment on H.R. 5069, a bill in Congress that would extend the territorial sea by legislation. The 2nd Circuit Court of Appeals, in the TWA Flight 800 case, relied on the 1988 OLC opinion as a basis for its decision.

Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, in answer to these inquiries, completed the opinion on October 4, 1988. He concluded:

*"The President has the authority to issue a proclamation extending the jurisdiction of the United States over the territorial sea from three to twelve miles out.*

*The President also has the authority to assert the United States' sovereignty over the extended territorial sea, although most such claims in the nation's*

### Key Points

- **The Hawaiian Kingdom was recognized as an independent State in 1842 by the United States of America**
- **The President, not Congress, represents the United States in foreign affairs**
- **The Congress has no authority beyond the territorial sea**

baselines of the United States determined in accordance with international law." Families of crash victims could construe the proclamation to mean that the airline industry could not be protected by DOHSA's bar to punitive damages, if one of its planes had crashed within the twelve-mile limit, now being the territorial sea of the United States.

On the evening of July 17, 1996, a TWA jetliner bound for Paris from Kennedy Airport exploded in midair and crashed into the Atlantic Ocean eight miles off the coast of New York. The crash of TWA Flight 800 occurred within the newly acquired nine miles of the territorial sea, and the relatives and

*history have been executed by treaty.*

*There is serious question whether Congress has the authority either to assert jurisdiction over an expanded territorial sea for purposes of international law or to assert the United States' sovereignty over it.*

*The domestic law effect on federal statutes of the extension of the territorial sea is to be determined by examining Congress' intent in enacting each affected statute."*

Arriving at these conclusions, the OLC separated and distinguished the legal definitions of the territorial sea from the high seas. In this regard the opinion stated:

"The territorial sea is the belt of water immediately adjacent to the coast of a nation. The territorial sea extends from the nation's coast to a distance of up to twelve miles from the coast, the maximum breadth now permitted by international law. Although the United States and some other nations continue to follow the historical practice of adhering to a three-mile territorial sea, most nations now assert sovereignty over a twelve-mile territorial sea. A nation is sovereign in its territorial sea. Indeed, a nation has the same sovereignty over the territorial sea as it has over its land territory. By contrast, a nation is not sovereign over the high seas..."

From this premise it went on to distinguish the legal basis of the President's ability to assert sovereignty beyond the territorial sea under both international, as well as constitutional, law; and the limitation on Congress from asserting sovereignty beyond the territorial sea. Concerning the limitation of Congressional authority to assert sovereignty, the 1988 OLC Opinion stated:

"We next consider whether H.R. 5069, which provides for the establishment of a territorial sea twelve miles wide, is within the constitutional power of Congress. H.R. 5069 states, 'The sovereignty of the United States exists in accordance with international law over all areas that are part of the territorial sea of the United States.' Congress, however, has never asserted jurisdiction or sovereignty over the territorial sea on behalf of the United States. 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 only if it possesses a specific constitutional power therefor.

We have identified two instances in which the United States acquired territory by legislative action. In 1845, the United States annexed Texas by joint resolution. Several earlier proposals to acquire

Texas after it gained its independence from Mexico in 1836 had failed. In particular, in 1844 the Senate rejected an annexation treaty negotiated with Texas by President Tyler. Congress then considered a proposal to annex Texas by joint resolution of Congress. Opponents of the measure contended that the United States could only annex territory by treaty. Supporters of the measure relied on Congress' power under Article IV, Section 3 of the Constitution to admit new states into the nation. These legislators emphasized that Texas was to enter the nation as a state, and that this situation was therefore distinguishable from prior instances in which the United States acquired land by treaty and subsequently governed it as territories. Congress' power to admit new states, it was argued, was the basis of constitutional power to affect the annexation. Congress approved the joint resolution, President Polk signed the measure, and Texas consented to the annexation in 1845.

The United States also annexed Hawaii by joint resolution in 1898. Again, the Senate had already rejected an annexation treaty, this one negotiated by President McKinley with Hawaii. And again,

Congress then considered a measure to annex the land by joint resolution. Indeed, Congress acted in explicit reliance on the procedure followed for the acquisition of Texas. As the Senate Foreign Relations Committee report announced, "[t]he joint resolution for the annexation of Hawaii to the United States...brings that subject within reach of the legislative power of Congress under the precedent that was established in the annexation of Texas." This argument,

however, neglected one significant nuance: Hawaii was not being acquired as a state. Because the joint resolution annexing Texas relied on Congress' power to admit new states, 'the method of annexing Texas did not constitute a proper precedent for the annexation of a land and people to be retained as a possession or in a territorial condition.' Opponents of the joint resolution stressed this distinction. Moreover, as one constitutional scholar wrote:

The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested

## Key Problems

- **The Congress cannot annex territory that lies beyond the United States territorial sea**
- **The Congress can admit new States into the Union but cannot determine the boundaries for that State if it's situated beyond the territorial sea**
- **The President of the United States did not extinguish the Hawaiian Kingdom as an independent State**

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.

Notwithstanding these constitutional objections, Congress approved the joint resolution and President McKinley signed the measure in 1898. Nevertheless,

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## Key Recommendations

- **Verify the status of the Hawaiian Kingdom as an Independent State under international law**
  - **Educate the populace, both national and international, of the Hawaiian Kingdom from original source documentation**
  - **Utilize the international forms of conflict resolution to bring an end to the century's long occupation**
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resolution. Accordingly, it is doubtful that the acquisition of Hawaii can serve as an appropriate precedent for a congressional assertion of sovereignty over an extended territorial sea.

We believe that the only clear congressional power to acquire territory derives from the constitutional power of Congress to admit new states into the union. The admission of Texas is an example of the exercise of this power. Additionally, the Supreme Court in Louisiana recognized that this power includes 'the power to establish state boundaries.' The Court explained, however, that it is not this power, but rather the President's constitutional status as the representative of the United States in foreign affairs, which authorizes the United States to claim territorial rights in the sea for the purpose of international law. The Court left open the question of whether Congress could establish a state boundary of more than three miles beyond its coast that would constitute an overriding claim on behalf of the United States under international law. Indeed, elsewhere in its opinion the Court hints that congressional action cannot have such an effect.

In the time permitted for our review we are unable to resolve the matter definitively, but we believe that

H.R. 5069 raises serious constitutional questions. We have been unable to identify a basis for the bill in any source of constitutional authority. Because of these concerns, we believe that, absent a treaty, the proposed proclamation represents the most defensible means of asserting sovereignty over the territorial sea."

In 1893, a U.S. Presidential investigation concluded that its diplomatic and military representatives violated international law by intervening in Hawaiian Kingdom affairs, and supported the illegal takeover of its constitutional government. The U.S. refused to remedy the situation. For the next five years the puppet regime, installed by the 1893 U.S. intervention, sought annexation to the United States at any cost, but failed to procure a treaty of annexation due to protests by nationals of the Hawaiian Kingdom.

Since 1898 to the present, Congress, absent a treaty, has asserted U.S. sovereignty over the Hawaiian Islands, which far exceeds its territorial sea by two thousand four hundred miles. Under international law, the Hawaiian Kingdom being an independent State since 1842, continues to be independent until extinguished before an international tribunal. To date, the United States has made no claim before an international tribunal extinguishing the Hawaiian State under international law, but rather has relied exclusively on its Congressional authority in its claim over the Hawaiian Islands.

Both the tragic crash of TWA Flight 800 and the illegal occupation of the Hawaiian Kingdom center on the effectiveness or non-effectiveness of Congressional authority and the limitation of United States sovereignty. In the former, Trans World Airlines cannot rely on international jurisdiction, which would limit the claims by families of the victims under the DOHSA; while in the latter case, the United States of America cannot rely on its domestic laws and put the claims of the Hawaiian Kingdom and its nationals under the plenary power of its Congress, without being in violation of the law of nations.

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