

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawaii**

May 13, 2010

**Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii**

REGARDING: Contested Case Request Regarding Conservation District Use Permit (CDUP) HA-3495 for Hawai'i Oceanic Technology, Inc. to establish an Open Ocean Fish Farm

PETITIONERS: Kale Gumapac and Kānaka Council Moku o Keawe
Michael Kumukauoha Lee

LANDOWNER: State of Hawai'i

LOCATION: Offshore of Māla'e Point, North Kohala, Hawai'i

TMK: submerged lands

SUBZONE: Resource

BACKGROUND

On October 23, 2009 the Board of Land and Natural Resources (BLNR) approved Conservation District Use Permit (CDUP) HA-3495 for an open ocean fish farm to be located approximately three miles offshore of Māla'e Point, North Kohala, Hawai'i.

The permit allowed for twelve *oceanspheres* to be evenly distributed in a 247-acre area. Each of the spheres would measure 54 meters in height and 54 meters diameter. The top of each sphere would lay 21 meters below the surface. The spheres would not be anchored, but would maintain their location utilizing a modified Ocean Thermal Energy Conversion (OTEC) engine. The permit allowed for the culture of two pelagic tuna species, *Thunnus albacares* and *T. obesus*.

The Office of Conservation and Coastal Lands (OCCL) received two written petitions for a contested case; one from Kale Gumapac and Kānaka Council Moku o Keawe of Keaau, Hawai'i (**Exhibit 1**), and one from Michael Kumukauoha Lee of 'Ewa Beach, O'ahu (**Exhibit 2**).

SOURCES OF STANDING

Contested cases are held when mandated by due process. A petitioner for a contested case has two potential sources of standing: when so stated in a statute or rule, or when the petitioner can show a property interest entitled to due process protection.

Hawai`i Revised Statutes (HRS) § 183C CONSERVATION DISTRICT does not address standing or mention who may be entitled to request a contested case.

Hawai`i Administrative Rules (HAR) § 13-1-31(b) describes persons or agencies that shall be admitted as parties. Subsection 2 states:

(2) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.

In regards to property interests entitled to due protection, “in order to assert a right to procedural due process, [a plaintiff] must possess an interest which qualifies as ‘property’ within the meaning of the constitution.” Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989).

Additionally, “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” In re Robert’s Tours & Transp., Inc., 104 Hawai`i 98, 106, 85 P.3d 623, 631 (2004) (quoting Board of Regents).

Neither of these sources affords standing to the petitioners.

KALE GUMAPAC AND KĀNAKA COUNCIL MOKU Ō KEAWE PETITION

The petitioners state that they are subjects of the Hawaiian Kingdom, and are protected persons under the 1949 Geneva Convention. They claim an “undivided vested right in all the shoreline of the Hawaiian Kingdom,” as well as piscary rights under the 1846 Organic Act.

The petitioners’ specific grievance is that the Board acted outside their constitutional authority in granting the CDUP, as the only law that applies in the Hawaiian is the Hawaiian Kingdom law.

The claims in this petition are not correct.

In 1959, Congress admitted Hawaii to the Union, See Pub. L. 86-3, 73 Stat. 4 (hereinafter Admission Act). Under the Admission Act, with exceptions not relevant here, “the United States grant[ed] to the State of Hawaii, effective upon its admittance into the Union, the United States; title to all the public lands and other public property within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union.” § 5(b), *id.*, at 5. These lands, “together with the proceeds from the sale or other disposition of [these] lands and the income therefrom, shall be held by [the] State as a public trust” to promote various public purposes, including supporting public education, bettering conditions of Native Hawaiians, developing home ownership, making public improvements, and providing lands for public use.. § 5(f), *id.*, at 6.

Hawaii state law also authorizes the State to use or sell the ceded lands, provide that the proceeds are held in trust for the benefit of the citizens of Hawaii. See *e.g.*, Haw.Rev.Stat §§ 171-45, 171-18 (1983).

Hawaii v. Office of Hawaiian Affairs, 129 S.Ct. 1436, 1440 (2009). Pursuant to the Admission Act, and this Supreme Court Case, there is no doubt that the State has title to its sovereign lands, including the submerged lands and water column at issue in this case.

The petitioners are beneficiaries of the public trust in which this land is held. However, this interest is not “clearly distinguishable from that of the general public,” HAR § 13-1-31(b)(2), nor does it give the petitioners any specific right to use, possess, or occupy the area at issue.

MICHAEL KUMUKAUOHA LEE PETITION

The petitioner requests standing as a Native Hawaiian with a legal right “to raise issues relating to subsistence, cultural and religious practices,” and that Native Hawaiians are “afforded a distinct interest separate from that of the general public.”

The petitioner’s specific grievance is that impacts of the project to native beneficiaries was not adequately addressed in the Environmental Impact Statement, that indigenous rights were thus violated, that the greater Native Hawaiian community was not solicited for comments, and that the project will impact limu, pupumo’o, he’e and other marine stock necessary for cultural practices.

As with the Moku ō Keawe petition, Lee basis his claim on Native Hawaiian protections without identifying his particular interest in or relation to the area subject to the CDUP. Lee identifies cultural practices that occur in the ocean, but does not identify any that occur in the subject area of the CDUP. It is not intuitively likely that any such practices as he lists occur in the subject area, given it is located 20 meters below the surface and 2.6 miles offshore.

Lee does not list any specific gathering rights or practices that will be affected, nor does he explain how he, as a resident of `Ewa Beach, would be entitled to any such rights in the submerged lands offshore of North Kohala.

Lee also fails to provide any support for a claim to any right or entitlement to use the affected property.

CONCLUSION

The petitioners do “not have a legal duty, right, or privilege entitling [them] to a contested case proceeding.”

RECOMMENDATION

That the Board of Land and Natural Resources deny the requests for a contested case in regards to Conservation District Use Permit (CDUP) HA-3495 for an Open Ocean Fish Farm by Kale Gumapac and Kānaka Council Moku ō Keawe and Michael KumuKauoha Lee, and that the Board deny the requests for contested case without a hearing or pursuant to HAR § 13-1-29.1.

Respectfully submitted,



Michael Cain, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



Laura H. Thielen, Chairperson
Board of Land and Natural Resources

HA-10-1

BOARD OF LAND AND NATURAL RESOURCES RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS

PETITION FOR A CONTESTED CASE HEARING

2009 NOV -2 P 12: 13

1. NAME: Kale Gumapac and Kanaka Council Moku O Keawe PHONE: 808-982-9020
FAX: 808-966-6032

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

2. ADDRESS: HC 2 Box 9607, Keaau, HI 96749

Email Address: moku_okeawe@yahoo.com

3. Attorney: Keoni K. Agard Phone: 808-545-2922

4. Address: 700 Richards St., Suite 805, Honolulu, HI 96813

Email Address: keoni.agard@hawaiiantel.net

5. Subject Matter: Hawaii Oceanic Technology, Inc., Application for Open Ocean Fish Farm (CDUA) HA-3495

6. Date of Public Hearing/Board Meeting: October 23, 2009

7. Legal authority under which hearing, proceeding or action is being made:

Article 43, 1907 Hague Convention, IV, whereby an occupant State must administer the laws of the occupied State.

8. Nature of your specific legal interest in the above matter, including tax map key of property affected:

I am a subject of the Hawaiian Kingdom and so are members of the Kanaka Council Moku O Keawe. We are also protected persons as defined under Article 4, 1949 Geneva Convention, IV. Further, as Hawaiian subjects and residents of the Island of Hawai'i, we also have an undivided vested right in all the shorelines of the Hawaiian Kingdom, which include access, gathering and fishing and are directly affected by this permitting process of the Board of Land and Natural Resources. Likewise, the 1846 Organic Act protects our piscary rights.

9. The specific disagreement, denial or grievance with the above matter:

The granting of the application by Hawai'i Oceanic Technology, Inc. would manifestly require the Board to act outside the constitutional limitations of its administrative authority, and unlawfully intrude upon, and in effect seize political control over an Executive Agreement entered into between U.S. President Grover Cleveland and the Hawaiian Kingdom's Queen Lili'uokalani to restore the Hawaiian Kingdom government, a usurpation that is in direct violation of the constitutional authority to enter into international agreements

EXHIBIT 1

with foreign States exclusively in the hands of the Executive branch of the Federal government, specifically, the President of the United States. This Executive Agreement acknowledges that the only law to be applied in the Hawaiian Islands is Hawaiian Kingdom law and not U.S. law via the State of Hawai`i. Because the Hawaiian Kingdom has been under a prolonged occupation since the Spanish-American War on August 12, 1898, the application process is also in violation of Article 43, 1907 Hague Convention, IV, whereby the only governmental authority authorized to administer Hawaiian Kingdom law in the territory of the Hawaiian Kingdom, which includes the Island of Hawai`i, is a U.S. military government and not a civilian government.

10. Outline of specific issues to be raised:

See attached Brief in Support of Petition

11. Outline of Basic Facts:

See attached Brief in Support of Petition

12. The relief or remedy to which you seek or deem yourself entitled:

Put a stop to these proceedings until they are done in compliance with the Article 43, 1907 Hague Convention, IV, and the laws of the Hawaiian Kingdom.

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: NOVEMBER 1, 2009

1846 Organic Act Provides Statutory Authority for
Petitioner for this Contested Case Hearing

The legal authority cited below sets forth the piscary rights of “the people of these islands” as it relates to fisheries. The 1846 Organic Act Establishing Executive Departments, Section 1 says in relevant part that:

The entire marine space, without and seaward of the reefs, upon the coasts of the several islands...the fishery of the ocean, from said reefs to the limit of the marine jurisdiction in the first article of this chapter defined, shall be free to the people of these islands (emphasis added).

In describing the first article of this chapter, it states further that:

The jurisdiction of the Hawaiian Islands shall extend and be exclusive for the distance of one marine league seaward, surrounding each of the Islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai, and Niihau, commencing at the low water mark on each of the respective coasts of said islands.

As a person “of these islands”, the petitioner falls within this statute and has rights that are directly affected by the permitting process regarding Hawaii Oceanic Technology, Inc. because the permitting will affect the area that petitioner (for this contested case hearing) has a right to fish.

BRIEF IN SUPPORT OF THE PETITION

I. NATURE OF THE PROCEEDING

The Applicant, Oceanic Technology Inc., has applied for an Open Ocean Fish Farm (CDUA) with the Board of Land and Natural Resources, an agency of the State of Hawai'i, United State of America. Petitioners are native tenants and subjects of the Hawaiian Kingdom that have an undivided vested right in all the shorelines of the Hawaiian Kingdom, which include access, gathering and fishing. This permitting process is not in accordance with the laws of the Hawaiian Kingdom, nor laws proclaimed by the Occupant State, the United States Military in the administration of the laws of occupation. Therefore, this permitting process is illegal and Petitioners seek to put a stop to these proceedings until they are done in accordance with Article 43, 1907 Hague Conventions, IV, and the laws of the Hawaiian Kingdom.

II. STANDARD OF REVIEW

The U.S. Constitution provides that treaties, like acts of Congress, are considered the "supreme law" of the land. See U.S. Constitution Art. VI(2); *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909). And that Executive Agreements entered into by the President under his constitutional authority with foreign States are treaties that do not need ratification by the U.S. Senate. See *United States v. Belmont*, 301 U.S. 324, 326 (1937). Further, the U.S. Supreme court has held that "an act of Congress, passed after a Treaty takes effect, must be respected and enforced, despite any previous or existing Treaty provision on the same subject. See *Alvarez y Sanchez v. United States*, 216 U.S. 167, 175-176 (1910). But this rule can only be applicable as a matter of domestic or municipal law, the international obligation still remaining. See *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934), (while an Act of Congress that conflicted with a treaty provision "would control in our courts as the later expression of our municipal law...the international obligation [would] remain unaffected").

To assist the Board's determination, the Petitioners submit herewith an exchange of diplomatic notes that occurred between October 18, 1893 and December 20, 1893 that comprise the Cleveland-Lili'uokalani Agreement of Restoration, an Executive Agreement between to Heads of State, and which forms the basis and reliance of Petitioners' position. Exhibits are copies from the United States House of Representatives, 53rd Congress, Executive Documents on Affairs in Hawaii: 1894-95, (Government Printing Office, 1895): Exhibit #1—*Secretary of State Gresham to President Cleveland*, October 18, 1893; Exhibit #2—*Secretary of State Gresham to Ambassador Willis*, October 18, 1893; Exhibit #3—*Ambassador Willis to Secretary of State Gresham*, November 16, 1893; Exhibit #4—*Secretary of State Gresham to Ambassador Willis*, November 24, 1893; Exhibit #5—*Secretary of State Gresham to Ambassador Willis*, December 3, 1893; Exhibit #6—*Ambassador Willis to Secretary of State Gresham*, December 19, 1893; and Exhibit #7—*Ambassador Willis to Secretary of State Gresham*, December 20, 1893.

III. SUMMARY OF ARGUMENT

The Petitioners rely on the Executive Agreement between United States President Grover Cleveland and Petitioners' late Queen Lili'uokalani to Restore the Hawaiian Kingdom government on December 18, 1893, the 1907 Hague Convention, IV, and as a Protected Person as defined under Article 4, 1949 Geneva Convention, IV. Both Conventions regulate the occupation of Petitioners' country, which has been occupied since the Spanish-American War on August 12, 1898. In its Arbitral Award in 2001, the Permanent Court of Arbitration in The Hague acknowledged that the Hawaiian Kingdom in the nineteenth century "existed as an independent State recognized as such by the United States of America, the United Kingdom, and various other States."¹ 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."² The Petitioners assert that this Board cannot exercise authority within the territory of the Hawaiian Kingdom without violating the 1893 Executive Agreement, Article 43 of the 1907 Hague

¹ Lance Larsen vs. Hawaiian Kingdom, *International Law Reports* 119 (2001): 566, 581. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 299.

² *Kahawaiola v. Norton*, 386 F.3d 1271, 1282 (9th Cir. 2004).

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.”⁶ 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.”⁷

On November 13th 1893, U.S. Minister Albert Willis requested a meeting with the Queen at the U.S. Legation, “who was informed that the President of the United States had important communications to make to her.”⁸ Willis explained to the Queen of the “President’s sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed.”⁹ 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.”¹⁰ 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?”¹¹ The Queen refused to grant amnesty and referenced Chapter VI, section 9 of the Penal Code, which states, “[w]hoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government.” When asked again if she would reconsider, she responded, “[t]hese people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be

⁶ *Id.*, 455.

⁷ Lassa Oppenheim, *International Law*, 3rd ed., (Longmans, Green and Company 1920), 252.

⁸ Executive Documents, 1242.

⁹ *Id.*

¹⁰ *Id.*, 457.

¹¹ *Id.*, 1242.

sent out of the country, or punished, and their property confiscated.”¹² In the government transcripts of this meeting, it states that the Queen called for beheading as punishment, but the Queen adamantly denied making such a statement. She later explained that beheading “is a form of punishment which has never been used in the Hawaiian Islands, either before or since the coming of foreigners.”¹³ This statement, however, was leaked to newspapers in the United States for political purposes in order to portray the Queen as uncivilized and prevent restoration of the government. Notwithstanding the charge or denial of this statement, the treason statute calls for those convicted of such a high crime to suffer the punishment of death whereby beheading is a means by which an execution is carried out—it does not strengthen or lessen the punishment of death.

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.¹⁴ 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.¹⁵ 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.”¹⁶

On December 18th 1893, after three meetings with Willis, the Queen agreed with the President and provided the following pledge that was dispatched to Secretary of States Gresham on December 20th 1893. An agreement between the two Heads of State had finally been made for settlement of the international dispute and restoration of the government.

I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both

¹² *Id.*

¹³ Lili'uokalani, *Hawai'i's Story by Hawai'i's Queen* (Charles E. Tuttle Co., Inc. 1964), 247.

¹⁴ *Id.*, 1192.

¹⁵ *Id.*

¹⁶ *Id.*

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.¹⁷

B. 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 or under the President's sole constitutional authority.¹⁸ 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."¹⁹ According to Henkin:

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

¹⁷ Executive Documents, 1269.

¹⁸ "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."

¹⁹ Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed. (Clarendon Press 1996), 215.

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.²⁰

The U.S. Foreign Affairs Manual provides that there are “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.’”²¹ 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 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.”²²

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

²⁰ *Id.*, 219.

²¹ 11 *Foreign Affairs Manual* 721.2(b)(3), October 25, 1974.

²² *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).

final settlement of the claims and counterclaims between the Soviet government and the United States.”²³ 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.²⁴

C. 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.”²⁵ Morgan’s purpose was to vindicate the illegal conduct and actions of the U.S. Legation and Naval authorities under U.S. law. Four Republicans endorsed the report with Morgan, but four Democrats submitted 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.”²⁶ 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

²³ *United States v. Belmont*, 301 U.S. 324, 326 (1937).

²⁴ *Id.*, 330.

²⁵ Oppenheim, *International Law* (3rd ed), 252.

²⁶ Senate Report 227 (February 26, 1894), *Reports of Committee on Foreign Relations 1789-1901* Volume 6, 53rd Congress, at 363.

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.²⁷ 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.

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."²⁸ 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."²⁹

D. 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

²⁷ 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).

²⁸ Oppenheim, *International Law* (3rd ed), 661.

²⁹ Hall, *Treatise on International Law*, 383.

law.³⁰ 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,³¹ and “operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment.”³² According to 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.”³³ 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.”³⁴ 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.”³⁵

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. 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.” Brownlie states that because estoppel in international law rests on principles of good faith and consistency, it is “shorn of the technical features to be found in municipal law.”³⁶ 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.

³⁰ D.W. Bowett, “Estoppel Before International Tribunals and its Relation to Acquiescence,” 33 *British Yearbook of International Law* 33 (1957): 181.

³¹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 26.

³² Bowett, *Estoppel*, 201.

³³ I.C. MacGibbon, “Estoppel in International Law,” *International and Comparative Law Quarterly* 7 (1958): 468.

³⁴ *Id.*, 473.

³⁵ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 27.

³⁶ Ian Brownlie, *Principles of Public International Law*, 4th ed. (Clarendon Press 1990), 641.

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.³⁷

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 evidence that they are apathetic or indifferent, or ready to acquiesce in the wrong and bow to the usurpers.³⁸

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 in September and appears to be the last public act of reliance made by a large majority of the Hawaiian citizenry.³⁹ The commission was established on July 9th 1898 after President McKinley signed the joint resolution of annexation on July 7th 1898, and was

³⁷ Bowett, *Estoppel*, 202.

³⁸ Executive Documents, 1295.

³⁹ Munroe Smith, “Record of Political Events,” *Political Science Quarterly* 13(4) (Dec. 1898): 752.

holding meetings in Honolulu from August through September. The memorial, which was also printed in two Honolulu newspapers, one in the Hawaiian language⁴⁰ and the other in English,⁴¹ stated, in part:

WHEREAS: By memorial the people of Hawaii have protested against the consummation of an invasion of their political rights, and have fervently appealed to the President, the Congress and the People of the United States, to refrain from further participation in the wrongful annexation of Hawaii; and

WHEREAS: The Declaration of American Independence expresses that Governments derive their just powers from the consent of the governed:

THEREFORE, BE IT RESOLVED: That the representatives of a large and influential body of native Hawaiians, we solemnly pray that the constitutional government of the 16th day of January, A.D. 1893, be restored, under the protection of the United States of America.

There is no dispute between the United States and the Hawaiian Kingdom regarding the illegal overthrow of the Hawaiian government, and the 1893 Cleveland-Lili'uokalani 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.

⁴⁰ "Memoriala A Ka Lahui," *Ke Aloha Aina*, 3 (September 17, 1898).

⁴¹ "What Monarchists Want," *The Hawaiian Star*, 3 (September 15, 1898).

Since Hawaiian law is the only law recognizable under international law, the Board of Land and Natural Resources deriving its authority under and by virtue of the 1959 Admission Act of the State of Hawai'i (U.S. Public Law 86-3, 73 U.S. Stat. 4), cannot assert authority within the territory of the Hawaiian Kingdom, without violating the 1893 Cleveland-Lili'uokalani agreement of restoration (Executive Agreement).

E. International Laws of Occupation

According to Benvenisti, the continuity of an occupied State's sovereignty stems from "the principle of inalienable sovereignty over a territory," which "spring the constraints that international law imposes upon the occupant."⁴² 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."⁴³ Patriotic societies and many of the Hawaiian citizenry boycotted the ceremony, and "in particular they protested the fact that it was occurring against their will."⁴⁴

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."⁴⁵ 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

⁴² Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993), 5.

⁴³ *Territory of Hawai'i v. Mankichi*, 190 U.S. 197, 210 (1903).

⁴⁴ Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (Tom Coffman/Epicenter 1999), 322.

⁴⁵ Benvenisti, *Law of Occupation*, 6.

occupied State.”⁴⁶ 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,”⁴⁷ 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.⁴⁸ Article 43 of the 1899 Hague Regulations, which remained the same under the 1907 amended Hague Regulations, delimits the power of the occupant and serves as a fundamental bar on its free agency within an occupied neutral State.⁴⁹ 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.”⁵⁰ Graber also states that “nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to that code.”⁵¹ Consistent with this understanding of the international law of occupation during the Spanish-American war, 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.”⁵² This instruction to apply the local laws of the occupied State is the basis of Article 43 of the Hague Regulations.

Since occupation of the Hawaiian Kingdom since 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

⁴⁶ Marek, *Identity and Continuity of States*, 110.

⁴⁷ *The Paquete Habana*, 175 U.S. 677, 712 (1900).

⁴⁸ Senate Transcripts, *supra* note 70.

⁴⁹ 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.

⁵⁰ Benvenisti, *Law of Occupation*, 8.

⁵¹ Doris Graber, *The Development of the Law of Belligerent Occupation: 1863-1914*, (Columbia University Press 1949), 143.

⁵² Munroe Smith, “Record of Political Events,” *Political Science Quarterly* 13(4) (Dec. 1898): 748.

State) and beneficiary (occupied State) relationship.⁵³ 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, 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.⁵⁴

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.”⁵⁵ Hawai‘i’s sovereignty is maintained and protected as a subject of international law, in spite of the absence of a diplomatically recognized government since 1893. In other words, the United States should have administered Hawaiian Kingdom law as defined by its constitution and statutory laws, similar to the U.S. military’s administration of Iraqi law in Iraq with portions of the law suspended due to military necessity.⁵⁶ 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

⁵³ Benvenisti, *Law of Occupation*, 6; see von Glahn, *Law Among Nations*, 785-794; and von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957), 95-221.

⁵⁴ 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.

⁵⁵ von Glahn, *Law Among Nations*, 774.

⁵⁶ David J. Scheffer, “Beyond Occupation Law,” *American Journal of International Law* 97(4) (October 2003): 842-860.

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.⁵⁷ (emphasis added)

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.⁵⁸ 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."⁵⁹ Therefore, as Craven states, "the continuity of the Hawaiian Kingdom, in other words, may be refuted only by

⁵⁷ "The Law of Land Warfare", *U.S. Army Field Manual 27-10*, (July 1956), §358.

⁵⁸ 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, *Identity and Continuity of States*, 102.

⁵⁹ 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.

reference to a valid demonstration of legal title, or sovereignty, on the part of the United States.⁶⁰ No such evidence of “a valid demonstration of legal title, or sovereignty,” exists.

F. Civilian Government Established in Violation of the Laws of Occupation

In view of the blatant violation of Hawai`i’s sovereignty after January 16th 1893, clearly 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.⁶¹ 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.⁶²

In addition to this Act, the Fourteenth Amendment of the United States Constitution was applied to individuals born in the Hawaiian Islands.⁶³ 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 1950.⁶⁴ The native Hawaiian population,

⁶⁰ 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.

⁶¹ 31 U.S. Stat. 141.

⁶² *Id.*

⁶³ *Territory of Hawai`i v. Mankichi*, 190 U.S. 197, 210 (1903). 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.”

⁶⁴ United States Bureau of the Census, *General characteristics—Hawai`i*, 18 (U.S. Government Printing Office 1952).

which accounted for 85% of the total citizenry in 1890, accounted for a mere 20% (only 86,091 of 423,174) of the total population by 1950.⁶⁵

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.”⁶⁶ Benvenisti asserts that the purpose of Article 49 “is to protect the interests of the occupied population, rather than the population of the occupant.”⁶⁷ Benvenisti also goes on to state that civilian migration and settlement in an occupied State is questionable under Article 43 of the Hague Regulation, since it cannot be “deemed a matter of security of the occupation forces, and it is even more difficult to demonstrate its contribution to ‘public order and civil life.’”⁶⁸

In 1946 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.⁶⁹ 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 2004.⁷⁰ It can be argued that Hawai‘i was deliberately treated as a non-self-governing territory or colonial possession in order to conceal the United States’ prolonged occupation of an independent and sovereign State for military purposes. The reporting of Hawai‘i as a non-self-governing territory also coincided with the United States establishment of the headquarters for the U.S. Pacific Command (PACOM) on the Island of O‘ahu. If the United Nations had been aware of Hawai‘i’s continued legal status

⁶⁵ *Id.*

⁶⁶ Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

⁶⁷ Benvenisti, *Law of Occupation*, 140.

⁶⁸ *Id.*

⁶⁹ *Transmission of Information under Article 73e of the Charter*, December 14, 1946, United Nations General Assembly Resolution 66(I).

⁷⁰ *Kahawaiola v. Norton*, 386 F.3d 1271, at 1282 (9th Cir. 2004).

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.⁷¹ 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.⁷² None of the territories on the list of non-self-governing territories, with the exception of Hawai`i, were recognized sovereign States.

G. Transforming the Territory into a State of the Federal Union

“For most people,” according to 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.”⁷³ The first statehood bill was introduced in Congress in 1919, but failed because Congress did not view the Hawaiian Islands as an incorporated territory.⁷⁴ Advocates for statehood in the islands assumed the Hawaiian Islands were a part of the United States since 1898, but it appears that 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.⁷⁵ 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

⁷¹ U.N. General Assembly Resolution 66 (I).

⁷² *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).

⁷³ Coffman, *Nation Within*, 322.

⁷⁴ *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.

⁷⁵ “Transcript of the Senate Secret Session on Seizure of the Hawaiian Islands, May 31, 1898,” *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 280.

26th 1923, asserting their perceived right of becoming an American State of the Union.⁷⁶ 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 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 1950.⁷⁷

On March 12th 1959, the U.S. Congress approved the statehood bill and it was signed into law on March 15th 1959.⁷⁸ 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.”⁷⁹ 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.⁸⁰

In 1988, Kmiec, raised questions concerning not only the legality of congressional action in annexing the Hawaiian Islands by joint resolution, but also Congress’ authority to establish boundaries for the State of Hawai`i that lie beyond the territorial seas of the United States’ western coastline. Although 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

⁷⁶ Act 86 (H.B. No. 425), Territory of Hawai`i, 26 April 1923.

⁷⁷ *Cessation of the transmission of information*, 100.

⁷⁸ 73 U.S. Stat. 4.

⁷⁹ *Cessation of the transmission of information*, 100.

⁸⁰ *Id.*

claim territorial rights in the sea for the purpose of international law.”⁸¹ There is no legal basis for any U.S. claim of sovereignty over the Hawaiian Islands, even under acquisitive prescription.

H. War Crimes

In the *Flick trial*, the U.S. Military Tribunal stated, “International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality.”⁸² The tribunal defined a crime for private citizens as any “person without regard to the nationality or the capacity in which he acted, is deemed to have committed a crime...if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission.”⁸³ The tribunal also stated “that responsibility of an individual for infractions of international law is not open to question. In dealing with property located outside his own State, he must be expected to ascertain and keep within the applicable law. Ignorance thereof will not excuse guilt but may mitigate punishment.”⁸⁴

Article 146 of the Geneva Convention provides that the “High Contracting Parties 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 Marschik, this article provides that “States have the obligation to suppress conduct contrary to these rules by administrative and penal sanctions.”⁸⁵ “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

⁸¹ 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, 252.

⁸² *Trial of Friedrich Flick and Five Others, United States Military Tribunal, Nuremberg*, 9 Law Reports of Trials of Law Criminals (United Nations War Crime Commission) 1, 18 (1949)

⁸³ *Id.*, 19.

⁸⁴ *Id.*, 23.

⁸⁵ 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.

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.”⁸⁶ 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.”⁸⁷ 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.”⁸⁸ The United States did ratify both Hague and Geneva Conventions, and is considered one of the “High Contracting Parties.”⁸⁹

Occupation does not change the legal order of the occupied State, and according to 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.”⁹⁰ Greenwood states that the Hague Regulations developed “a body of rules to regulate the way in which an occupying power governed occupied territory and to hold the difficult balance among the conflicting interests of the occupant, the displaced sovereign and the population of the occupied territory.”⁹¹ 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.”⁹² 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

⁸⁶ Geneva Convention, IV, Relative to the Protection of Civilian Persons in Time of War (1949), Article 147.

⁸⁷ *Id.*, Article 4.

⁸⁸ 18 U.S. Code §2441(c)(1).

⁸⁹ 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.

⁹⁰ Krystyna Marek, *Identity and Continuity of States in Public International Law*, 2nd ed., (Librairie Droz 1968), 80.

⁹¹ Christopher Greenwood, “The International Law of Occupation,” *The American Journal of International Law* 90 (1996): 712 (bookreview).

⁹² *Id.*

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.⁹³

IV. CONCLUSION

State sovereignty “is never held in suspense,”⁹⁴ 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 Kingdom. 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. In *U.S. v. Belmont*, the Court qualified the powers of the President to negotiate international agreements without regard to State laws or policies. The Court stated:

The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that, if a treaty does not supersede existing state laws as far as they contravene its operation, the treaty would be ineffective. “To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.” And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government, and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions,

⁹³ *Compiled Laws of the Hawaiian Kingdom* (Hawaiian Gazette 1884), 2.

⁹⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936).

government. Accordingly, the Petitioners respectfully request that this Board stop these proceedings until they are executed in compliance with Article 43, 1907 Hague Convention, IV, and the laws of the Hawaiian Kingdom through a military government established by the Commander of the Pacific Command.

Dated: Honolulu, Hawaii, October 31, 2009

Respectfully submitted,

*Keoni K. Agard for
Kale Gumapac*

Keoni K. Agard
Attorney for Kale Gumapac and
Kanaka Council Moku o Keawe

1893 EXECUTIVE AGREEMENT BETWEEN PRESIDENT CLEVELAND
AND QUEEN LILI'UOKALANI

Documents comprising the 1893 Cleveland-Lili'uokalani Agreement of Restoration (Executive Agreement) are copies from United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawaii: 1894-95*, (Government Printing Office, 1895):

- Exhibit A— *U.S. Secretary of State Gresham to U.S. President Cleveland*, October 18, 1893;
- Exhibit B— *U.S. Secretary of State Gresham to U.S. Ambassador Willis*, October 18, 1893;
- Exhibit C— *U.S. Ambassador Willis to U.S. Secretary of State Gresham*, November 16, 1893;
- Exhibit D— *U.S. Secretary of State Gresham to U.S. Ambassador Willis*, November 24, 1893;
- Exhibit E— *U.S. Secretary of State Gresham to U.S. Ambassador Willis*, December 3, 1893;
- Exhibit F— *U.S. Ambassador Willis to U.S. Secretary of State Gresham*, December 19, 1893; and
- Exhibit G— *U.S. Ambassador Willis to U.S. Secretary of State Gresham*, December 20, 1893.

Exhibit "A"

53D CONGRESS, } HOUSE OF REPRESENTATIVES. { Ex. Doc. 1,
3d Session. } Part 1.

APPENDIX II

FOREIGN RELATIONS

OF THE

UNITED STATES

1894

AFFAIRS IN HAWAII

WASHINGTON
GOVERNMENT PRINTING OFFICE
1895



DEPARTMENT OF STATE,
Washington, October 18, 1893.

The PRESIDENT:

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

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

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

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

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

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

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

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

GOVERNMENT BUILDING,
Honolulu, January 17, 1893.

SIR: I acknowledge receipt of your valued communication of this day, recognizing the Hawaiian Provisional Government, and express deep appreciation of the same. We have conferred with the ministers of the late Government, and have made demand upon the marshal to surrender the station house. We are not actually yet in possession of the station house, but as night is approaching and our forces may be insufficient to maintain order, we request the immediate support of the United States forces, and would request that the commander of the United States forces take command of our military forces, so that they may act together for the protection of the city.

Respectfully, yours,

SANFORD B. DOLE,
Chairman Executive Council.

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

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

The above request not complied with.

STEVENS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

W. Q. GRESHAM.

[Confidential.]

Mr. Gresham to Mr. Willis.

No. 4.]

DEPARTMENT OF STATE,
Washington, October 18, 1893.

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

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

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

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

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

Exhibit "B"

Mr. Gresham to Mr. Blount.

No. 2.]

DEPARTMENT OF STATE,
Washington, May 22, 1893.

SIR: I inclose herewith the letter of the President recalling Mr. John L. Stevens, your predecessor in the mission to the Hawaiian Islands, with an office copy of the same.

Mr. Stevens, having taken his departure from Honolulu, you will, at the same time you ask an audience for the purpose of presenting your letters of credence, request the privilege of delivering Mr. Stevens' letters of recall in view of his departure before they could reach him.

I am, etc.,

W. Q. GRESHAM.

Mr. Gresham to Mr. Blount.

No. 5.]

DEPARTMENT OF STATE,
Washington, June 23, 1893.

SIR: I transmit for your information a copy of a note of the minister of Hawaii, touching the recall by the Provisional Government of the commission appointed last January, for the purpose of negotiating terms for the union of the Hawaiian Islands with the United States, and announcing his readiness to resume the subject at any convenient time.

I am, etc.

W. Q. GRESHAM.

Mr. Adee to Mr. Willis.

No. 2.]

DEPARTMENT OF STATE,
Washington, September 28, 1893.

SIR: I inclose herewith a letter from the President recalling Mr. James H. Blount as envoy extraordinary and minister plenipotentiary of the United States to the Hawaiian Islands, with an office copy thereof. This letter you will present to the President of the Provisional Government, with your letter of credence, having previously sent the copy to the foreign office, and explain that Mr. Blount is unable to present it in person by reason of his having resigned the office while in the United States.

I am, etc.,

ALVEY A. ADEE,
Acting Secretary.*Mr. Gresham to Mr. Willis.*

[Confidential.]

No. 4.]

DEPARTMENT OF STATE,
Washington, October 18, 1893.

SIR: Supplementing the general instructions* which you have received with regard to your official duties, it is necessary to communicate to you, in confidence, special instructions for your guidance in so far as

*Similar to the instructions sent to Mr. Blount under date of May 22, 1893.

concerns the relation of the Government of the United States towards the *de facto* Government of the Hawaiian Islands.

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

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

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

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

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

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

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

You will, however, at the same time inform the Queen that when reinstated the President expects that she will pursue a magnanimous

course by granting full amnesty to all who participated in the movement against her, including persons who are or have been officially or otherwise connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution. All obligations created by the Provisional Government in due course of administration should be assumed.

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

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

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

I am, etc.,

W. Q. GRESHAM.

Mr. Gresham to Mr. Willis.

[Telegram.]

DEPARTMENT OF STATE,
Washington, November 24, 1893.

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

W. Q. GRESHAM.

Mr. Gresham to Mr. Willis.

[Telegram.]

DEPARTMENT OF STATE,
Washington, December 3, 1893.

SIR: Your dispatch, which was answered by steamer on the 25th of November, seems to call for additional instructions.

Should the Queen refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf, and that while he deems it his duty to endeavor to restore to the sovereign the constitutional government of the Islands, his further efforts in that direction will depend upon the Queen's unqualified agreement that all obligations created by the Provisional Government in a proper course of administration shall be assumed, and upon such pledges by her as will 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. The President feels that by our original interference and what followed we have incurred responsibilities to the whole Hawaiian community, and it would not be just to put one party at the mercy of the other.

Exhibit "C"

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

TRANSMITTING

Certain further information relating to the Hawaiian Islands.

JANUARY 13, 1894.—Referred to the Committee on Foreign Affairs and ordered to be printed.

To the Congress:

I transmit herewith copies of all dispatches from our minister at Hawaii relating in any way to political affairs in that country, except such as have been heretofore laid before the Congress.

I also transmit a copy of the last instructions sent to our minister, dated January 12, 1894, being the only instructions to him not already sent to the Congress.

In transmitting certain correspondence with my message, dated December 18, 1893, I withheld a dispatch from our present minister, numbered 3, and dated November 16, 1893, and also a dispatch from our former minister, numbered 70, and dated October 8, 1892. Inasmuch as the contents of the dispatch of November 16, 1893, are referred to in the dispatches of a more recent date now sent to Congress, and inasmuch as there seems no longer to be sufficient reason for withholding said dispatch, a copy of the same is herewith submitted. The dispatch, numbered 70, and dated October 8, 1892, above referred to, is still withheld for the reason that such a course still appears to be justifiable and proper.

GROVER CLEVELAND.

EXECUTIVE MANSION, *January 13, 1894.*

Mr. Willis to Mr. Gresham.

No. 3.]

LEGATION OF THE UNITED STATES,
Honolulu, November 16, 1893.

SIR: In the forenoon of Monday the 13th instant, by prearrangement, the Queen, accompanied by the royal chamberlain, Mr. Robertson, called at the legation. No one was present at the half-hour interview which followed, her chamberlain having been taken to another room and Consul-General Mills, who had invited her to come, remaining in the front of the house to prevent interruption.

After a formal greeting, the Queen was informed that the President of the United States had important communications to make to her and she was asked whether she was willing to receive them alone and in confidence, assuring her that this was for her own interest and safety. She answered in the affirmative.

I then made known to her the President's sincere regret that, through the unauthorized intervention of the United States, she had been obliged to surrender her sovereignty, and his hope that, with her consent and cooperation, the wrong done to her and to her people might be redressed. To this, she bowed her acknowledgments.

I then said to her, "The President expects and believes that when reinstated you will show forgiveness and magnanimity; that you will wish to be the Queen of all the people, both native and foreign born; that you will make haste to secure their love and loyalty and to establish peace, friendship, and good government." To this she made no reply. After waiting a moment, I continued: "The President not only tenders you his sympathy but wishes to help you. Before fully making known to you his purposes, I desire to know whether you are willing to answer certain questions which it is my duty to ask?" She answered, "I am willing." I then asked her, "Should 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?" She hesitated a moment and then slowly and calmly answered: "There 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." I then said, repeating very distinctly her words, "It is your feeling that these people should be beheaded and their property confiscated?" She replied, "It is." I then said to her, "Do you fully understand the meaning of every word which I have said to you, and of every word which you have said to me, and, if so, do you still have the same opinion?" Her answer was, "I have understood and mean all I have said, but I might leave the decision of this to my ministers." To this I replied, "Suppose it was necessary to make a decision before you appointed any ministers, and that you were asked to issue a royal proclamation of general amnesty, would you do it?" She answered, "I have no legal right to do that, and I would not do it." Pausing a moment she continued, "These people were the cause of the revolution and 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." I then said, "I have no further communication to make to you now, and will have none until I hear from my Government, which will probably be three or four weeks."

Nothing was said for several minutes, when I asked her whether she was willing to give me the names of four of her most trusted friends, as I might, within a day or two, consider it my duty to hold a consultation with them in her presence. She assented, and gave these names: J. O. Carter, John Richardson, Joseph Nawahi, and E. C. Macfarlane.

I then inquired whether she had any fears for her safety at her present residence, Washington Square. She replied that she did have some fears, that while she had trusty friends that guarded her house every night, they were armed only with clubs, and that men shabbily dressed had been often seen prowling about the adjoining premises—a schoolhouse with large yard. I informed her that I was authorized by the President to offer her protection either on one of our war ships

or at the legation and desired her to accept the offer at once. She declined, saying she believed it was best for her at present to remain at her own residence. I then said to her that at any moment, night or day, this offer of our Government was open to her acceptance.

The interview thereupon, after some personal remarks, was brought to a close.

Upon reflection, I concluded not to hold any consultation at present with the Queen's friends, as they have no official position, and furthermore, because I feared, if known to so many, her declarations might become public, to her great detriment, if not danger, and to the interruption of the plans of our Government.

Mr. J. O. Carter is a brother of Mr. H. A. P. Carter, the former Hawaiian minister to the United States, and is conceded to be a man of high character, integrity, and intelligence. He is about 55 years old. He has had no public experience. Mr. Macfarlane, like Mr. Carter, is of white parentage, is an unmarried man, about 42 years old, and is engaged in the commission business. John Richardson is a young man of about 35 years old. He is a cousin of Samuel Parker, the half-caste, who was a member of the Queen's cabinet at the time of the last revolution. He is a resident of Maui, being designated in the directory of 1889 as "attorney at law, stock-raiser, and proprietor Bismark livery stable." Richardson is "half-caste." Joseph Nawaki is a full-blooded native, practices law (as he told me) in the native courts, and has a moderate English education. He has served twenty years in the legislature, but displays very little knowledge of the structure and philosophy of the Government which he so long represented. He is 51 years old, and is president of the native Hawaiian political club.

Upon being asked to name three of the most prominent native leaders, he gave the names of John E. Bush, R. W. Wilcox, and modestly added, "I am a leader." John E. Bush is a man of considerable ability, but his reputation is very bad. R. W. Wilcox is the notorious half-breed who engineered the revolution of 1889. Of all these men Carter and Macfarlane are the only two to whom the ministerial bureaus could be safely entrusted. In conversation with Sam Parker, and also with Joseph Nawaki, it was plainly evident that the Queen's implied condemnation of the constitution of 1887 was fully indorsed by them.

From these and other facts which have been developed I feel satisfied that there will be a concerted movement in the event of restoration for the overthrow of that constitution which would mean the overthrow of constitutional and limited government and the absolute dominion of the Queen.

The law referred to by the Queen is Chapter VI, section 9 of the Penal Code, as follows:

Whoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government.

There are, under this law, no degrees of treason. Plotting alone carries with it the death sentence.

I need hardly add, in conclusion, that the tension of feeling is so great that the promptest action is necessary to prevent disastrous consequences,

I send a cipher telegram asking that Mr. Blount's report be withheld for the present, and I send with it a telegram, not in cipher, as follows:

Views of the first party so extreme as to require further instructions.

I am, etc.

ALBERT S. WILLIS.

Exhibit "D"

course by granting full amnesty to all who participated in the movement against her, including persons who are or have been officially or otherwise connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution. All obligations created by the Provisional Government in due course of administration should be assumed.

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

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

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

I am, etc.,

W. Q. GRESHAM.

Mr. Gresham to Mr. Willis.

[Telegram.]

DEPARTMENT OF STATE,
Washington, November 24, 1893.

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

W. Q. GRESHAM.

Mr. Gresham to Mr. Willis.

[Telegram.]

DEPARTMENT OF STATE,
Washington, December 3, 1893.

SIR: Your dispatch, which was answered by steamer on the 25th of November, seems to call for additional instructions.

Should the Queen refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf, and that while he deems it his duty to endeavor to restore to the sovereign the constitutional government of the Islands, his further efforts in that direction will depend upon the Queen's unqualified agreement that all obligations created by the Provisional Government in a proper course of administration shall be assumed, and upon such pledges by her as will 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. The President feels that by our original interference and what followed we have incurred responsibilities to the whole Hawaiian community, and it would not be just to put one party at the mercy of the other.

Exhibit "E"

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

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

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

I am, etc.,

W. Q. GRESHAM.

Mr. Gresham to Mr. Willis.

[Telegram.]

DEPARTMENT OF STATE,
Washington, November 24, 1893.

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

W. Q. GRESHAM.

Mr. Gresham to Mr. Willis.

[Telegram.]

DEPARTMENT OF STATE,
Washington, December 3, 1893.

SIR: Your dispatch, which was answered by steamer on the 25th of November, seems to call for additional instructions.

Should the Queen refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf, and that while he deems it his duty to endeavor to restore to the sovereign the constitutional government of the Islands, his further efforts in that direction will depend upon the Queen's unqualified agreement that all obligations created by the Provisional Government in a proper course of administration shall be assumed, and upon such pledges by her as will 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. The President feels that by our original interference and what followed we have incurred responsibilities to the whole Hawaiian community, and it would not be just to put one party at the mercy of the other.

Should the Queen ask whether, if she accedes to conditions, active steps will be taken by the United States to effect her restoration, or to maintain her authority thereafter, you will say that the President can not use force without the authority of Congress.

Should the Queen accept conditions, and the Provisional Government refuse to surrender, you will be governed by previous instructions. If the Provisional Government asks whether the United States will hold the Queen to fulfillment of stipulated conditions you will say the President, acting under dictates of honor and duty as he has done in endeavoring to effect restoration, will do all in his constitutional power to cause observance of the conditions he has imposed.

I am, etc.,

W. Q. GRESHAM.

Exhibit "F"

Faint, illegible text, possibly bleed-through from the reverse side of the page.

Mr. Willis to Mr. Gresham.

[Confidential.]

No. 15.]

LEGATION OF THE UNITED STATES,
Honolulu, Hawaiian Islands, December 19, 1893.

SIR: In the forenoon of yesterday (Monday, December 18) Mr. Mills met the Queen and Mr. Carter at the Queen's private residence, "Washington Place," when the report of the interview held at the legation on the preceding Saturday was read over and verified..

After the close of Saturday's interview and the withdrawal of the parties, Mr. Carter returned to inquire whether a supplementary statement by the Queen would be received. He informed me that he had held a conversation with her a few minutes after she left the legation, and he believed that on next Monday (this being Saturday) she would desire another interview. I told him that the object of the President was to ascertain her course of action in the event of restoration; that the United States could not dictate the policy of the Queen, if restored, nor interfere in any way with the domestic affairs of her Kingdom. A certain status or condition of affairs existed on the 17th of January, 1893, which was overthrown by our unlawful intervention. If the President, within constitutional limitations, could remedy this wrong, he was willing to do so, and to this extent only and under these circumstances only he inquired as to the future policy of the Queen. Whatever she determined upon, however, must be her voluntary act.

With this explanation I consented to receive further communications from the Queen.

Accordingly, upon learning that the Saturday interview had been verified, I went to Washington Place, where the interview occurred, a report of which I inclose.

Very respectfully,

ALBERT S. WILLIS.

[Inclosure with No. 15.]

DECEMBER 18, 1893.

Mr. CARTER. I am permitted by Her Majesty to say that I have had a conversation with her this morning concerning the first interview you had with her; that I have said to her that I was surprised and pained at the substance of it; that I have felt that the remarks you have made as coming from the President of the United States are entitled to Her Majesty's consideration, and that they are to carry weight as being the expressions of the President, particularly in reference to this first statement, where the President expresses his sincere regret that through "the unauthorized intervention of the United States she had been obliged to surrender her sovereignty, and his hope that, with her consent and coöperation, the wrong done to her and her people might be redressed."

I have explained as clearly as possible the meaning of the words "consent and coöperation;" that he recognizes he alone can not do all that has to be done.

I then referred to this expression as given by you, that the President believes "that when reinstated you will show forgiveness and magnanimity, that you will wish to be Queen of all the people, both native and foreign born, that you will make haste to secure their love and loyalty and to establish peace, friendship and good government."

I have said to her that I have been deeply impressed with that language and I think that perhaps Her Majesty is now more impressed with this language than she was at first, and I say to her that it seems to me good government is impossible without Her Majesty shows a spirit of forgiveness and magnanimity; that this movement against her and her people embraced a large and respectable portion of the foreign element of this community—an element we can not ignore.

I next came to this expression: "Should you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or are now in the Provisional Government, or who have been instrumental in the overthrow of your Government?"

I have said to Her Majesty that it seems to me that the position of Mr. Cleveland is full of difficulties and embarrassments; that as President of the United States he is a ruler among the nations of the earth as Her Majesty was and, I hope, is to be, and that she should make the way as clear to him to carry out his wishes to repair the wrong done as she possibly can, not giving way to any personal feelings in the matter; that she must leave out of consideration in the question any idea of revenge. I told her that I took it as the wish of the President that she should grant amnesty as to life and property.

Then I went on to the remark that she makes that she feels unsettled and unsafe with these people in the country. I am bound to repeat what Her Majesty said to me, although it may not be in accord with my own views, that she feels that these people should leave the country, or peace and good government can not prevail. She thinks any third attempt at revolution on the part of these people would be very destructive to life and property; that her people have stood about all they can stand of this interference with what they consider their rights.

I have gone into the matter of the constitution with her, because I know our views are not as fully in accord as I wish they were. I have said to Her Majesty that I think she can safely put her cause into the hands of the President of the United States, and say to him unreservedly, "You dictate my policy and I will follow it."

Is Your Majesty satisfied with the statement I have made? Is it correct?

The QUEEN. Yes.

Mr. CARTER. Is it your wish?

The QUEEN. I must think a moment.

Mr. CARTER. But you said you are not seeking the lives of these people.

The QUEEN. Not their lives. I am willing their lives should be spared.

Mr. CARTER. And their property?

The QUEEN. Their property should be confiscated to the Government, and they should not be permitted to remain in the Kingdom.

Mr. CARTER. Is Your Majesty willing that this should be taken by the minister as your wish to-day, that this matter should be put unreservedly in the hands of President Cleveland with this statement. This is said by me as a friend, and I think you have always found me such. In the conversation had with you this morning I asked you as a friend to you and your people that you give it prayerful consideration. You need not sign it if you do not wish. It is your privilege to do as you please. I wish you would read it over, consider it, and give it to Mr. Willis at as early a moment as possible.

The QUEEN. I should like to talk with some of my friends.

Mr. CARTER (to Mr. Willis). Can she see some one in the matter?

Mr. WILLIS. I do not think it would be safe. I take it for granted that in matters of such great importance she has ascertained the wishes of her native people and the leaders, and that she has been in consultation with them upon these general propositions. Is not that true, Your Majesty? I mean as to the general policy to be pursued?

The QUEEN. I have. I must mention here (speaking to Mr. Carter) that I have never consulted you in this matter before. But I have talked the situation over with some of my subjects, and I consider their judgment is wise and in accordance with law, and have come to the conclusion that the statement I gave in my first interview was what the people wished. I had hoped some day I might have a chance to confer with you, Mr. Carter, in these matters.

Mr. WILLIS. I understand, then, that you said that the first interview I had with you embodies the views of the leaders of your people with whom you have been in consultation in the present crisis?

The QUEEN. They do.

Mr. WILLIS. And you have no withdrawal to that to make this morning?

The QUEEN. Although I have never stated to them what I had decided personally, still I feel that there may be some clemency, and that clemency should be that they should not remain in the country.

Mr. WILLIS. That is the extent of the clemency—that they should be removed from the country instead of being punished, according to the laws of the country, with death.

The QUEEN. Yes.

Mr. WILLIS. I understand that there is no withdrawal of your conversation of Saturday with reference to military expenses and police expenses that have been incurred by the Provisional Government. You still insist that those expenses should be met out of property confiscated?

The QUEEN. I feel so.

Mr. WILLIS. I understand that you would not be willing that the constitution as it existed on the 17th of January, 1893, should be established permanently in the Islands, believing, as you stated on Saturday, that it discriminated against your native subjects.

The QUEEN. The constitution I wished to promulgate was an improvement on the constitution of 1887, but since then I have considered further, and think that we ought to have a constitution that would be more suited to the future. I would not like to have the government continue under that constitution.

Mr. WILLIS. In the limitation which you now make as to your clemency, do you include their children or just the parents? Last Saturday you said: "They and their children." Do you still adhere to that judgment?

The QUEEN. I do.

Mr. WILLIS. Both parents and children should be permanently removed from the country and their property confiscated?

The QUEEN. I do, and their property confiscated.

Mr. WILLIS. I desire now to read to you in the express terms the judgment of the President. After citing the fact that Mr. Blount had been sent here to ascertain the facts in connection with this revolution, and after expressing a conclusion based upon Mr. Blount's report, that this revolution resulted largely if not entirely from the improper intervention of our then minister, and of the American troops, and expressing his desire within certain limitations to correct the wrong done, he states as follows:

"On your arrival at Honolulu you will take advantage of an early opportunity to inform the Queen of this determination. * * * You will, however, at the same time inform the Queen that when reinstated the President expects that she will pursue a magnanimous course by granting full amnesty to all who participated in the movement against her, including persons who are or have been officially or otherwise connected with the Provisional Government, depriving them of no right or privilege which they enjoyed before the so-called revolution.

"All obligations created by the Provisional Government, in due course of administration, should be assumed."

I read now from a cipher dispatch which has been sent since my communication of the 14th of November, in which it is stated:

"Should the Queen refuse assent to the written conditions, you will inform her at once [which I now do] that the President will cease interference in her behalf, and while he deems it his duty to endeavor to restore to the sovereign the constitutional government of the islands, his further efforts in that direction depend upon the Queen's unqualified agreement that all obligations created by the Provisional Government in the proper course of administration shall be assumed, and upon such pledge by her as shall prevent 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.

"The President feels that we by our original interference have incurred responsibilities to the whole Hawaiian community, and it would not be just to put one party at the mercy of the other."

The QUEEN. I want to say in regard to the request of Mr. Cleveland asking for complete amnesty—how shall I know that in future our country will not be troubled again, as it has been in the past?

Mr. WILLIS. That is a question of domestic policy of the country which you have to decide largely for yourself. Do you intend to inquire as to whether the United States would support you if restored?

The QUEEN. I do not expect that. The decision I have given is not from any feeling of disrespect to the President nor from a feeling of animosity toward anyone here, but I feel it is a duty I should assume for the benefit of my people.

Mr. WILLIS. I so understand it—that you are of the opinion that under the state of things which existed at the time of this revolution, and also in 1887, that there could not be permanent peace in the islands. That is a matter that the United States has no right to look into or express an opinion upon.

The foregoing has been read to us by Consul-General Mills, and we pronounce it a full and correct report.

Honolulu, H. I., December 18, 1893.

LILUOKAIANI.
J. O. CARTER.

Witness:
ELLIS MILLS.

(On back:) Interview with ex-Queen in presence of Mr. J. O. Carter. Monday, December 18, 1893. This interview occurred at Washington Place, the ex-Queen's private residence.

After this paper was signed, as above, Mr. Mills said to the Queen, in behalf of Mr. Willis, that the reports of the two interviews of Saturday, December 16, and of to-day (Monday, December 18), as attested by her, would be immediately forwarded to the President, and his answer, when received, should be promptly made known to her.

Exhibit "G"

Mr. Willis to Mr. Gresham.

[Confidential.]

No. 16.]

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

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

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

Very respectfully,

ALBERT S. WILLIS.

[Inclosure 1 with No 16.]

WASHINGTON PLACE,
Honolulu, December 18, 1893

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

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

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

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

I am, etc.,

LILIUOKALANI.

[Inclosure 2 with No. 16.]

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

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

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

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

Witness my hand this 18th of December, 1893.

LILIUOKALANI.

Attest:

J. O. CARTER.

BOARD OF LAND AND NATURAL RESOURCES

RECEIVED
DEPT. OF CONSERVATION
COASTAL LANDS

PETITION FOR A CONTESTED CASE HEARING

2009 NOV -2 P 3: 08

1. NAME: Michael Kumukauoha Lee PHONE: 808-683-1954 FAX: None

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

2. ADDRESS: 91-1200 Keaunui Drive Unit 614 'Ewa Beach, HI 96706

Email Address: kilokilopoepoe@hotmail.com, keakuaskahu@yahoo.com

3. Attorney: Pro Se Phone: 808-683-1954

4. Address: 91-1200 Keaunui Drive Unit 614 'Ewa Beach, HI 96706

Email Address: kilokilopoepoe@hotmail.com

5. Subject Matter: Hawaii Oceanic Technology, Inc. Application for Open Ocean Fish Farm (CDUA) HA-3495

6. Date of Public Hearing/Board Meeting: October 23, 2009

7. Legal authority under which hearing, proceeding or action is being made: _____

Hawaii Administrative Rules, Title 13, Dept. of Land and Natural Resources, Sub-Title 1, Administration, Chapter 1, Rules of Practice and Procedure;

Reaffirming the Kingdom of Hawai'i Constitution's protection of the vested native private property rights:

THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII
HAWAIIAN AFFAIRS

TRADITIONAL AND CUSTOMARY RIGHTS

Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]

The Admissions Act -

- §5(i): Submerged lands are part of the Ceded Lands Trust

- §5(f): Native Hawaiians afforded a distinct interest separate from that of the general public

Supreme Court Decision: Kohanaiki vs. Planning Director, County of Hawai'i

- Native Hawaiians have legal standing to raise issues relating to subsistence, cultural and religious practices.
- All government agencies have an enforceable duty to preserve and protect traditional rights under State of Hawai'i Constitution Article XII, section 7 and must give full consideration to cultural and historic values as well as the needs for economic development when implementing the objectives, policies, and SMA guidelines
- Native Hawaiian rights and practices have equal footing with Western real property rights. Hawaiian usage sets the foundation for Common Law, HRS, Section 1-1 and Gathering Rights, HRS, Section 7-1
- Legal principals of the state predate western principals and the Supreme Court has signaled its intention to reject taking challenges to the exercise of traditional rights.

Supreme Court Decision: "Ka Pa'akai o Ka 'Aina v. Land Use Commission"

- Remand to LUC for specific findings
- Reaffirms previous court decisions: western concepts of private property must be balanced with traditional rights of native Hawaiians
- Agencies cannot delegate its obligation to determine impacts

The BLNR was required to go through the three-tiered analysis of what traditional Native Hawaiian practices and resources exist in the project area, how the granting of this particular CDUA would adversely impact these practices and resources, and how to properly mitigate these adverse effects.

Act 50 – Cultural Impact Statement

- Environmental Assessments and Environmental Impact Statements shall address Hawai'i's cultural, traditional and customary rights

§190D-24 Konohiki fishing rights.

- **Fundamental Law of Kingdom of Hawaii Constitution of 1841 Statutes** that is supported under HRS legal principals of the State of Hawai'i predating western principals and must be adhered.

§187A-23 Konohiki rights.

- The rights of the Konohiki are well known, understood and protected by the U.S. Constitution, State of Hawaii Constitution and enforced by HRS based on the Kumulipo.

8. Nature of your specific legal interest in the above matter, including tax map key of property affected:

THE CONSTITUTION OF THE STATE OF HAWAII
ARTICLE XII
HAWAIIAN AFFAIRS

TRADITIONAL AND CUSTOMARY RIGHTS

Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]

The Admissions Act -

- §5(i): Submerged lands are part of the Ceded Lands Trust
- §5(f): Native Hawaiians afforded a **distinct interest separate from that of the general public.**

Coastal Zone Management Act – (Chapter 205A-4):

- Agencies must give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, ...;
- (b) The objectives & policies of this chapter ... shall be binding upon actions within the CZMA by all agencies.
(Chapter 205A-5):
- All agencies shall ensure their rules comply with objectives and policies of the CZMA.

9. The specific disagreement, denial or grievance with the above matter: _____

- Impacts to native beneficiaries under §5(f), not adequately identified or thoroughly assessed in the Environmental Impact Statement.
- Breach of Trust by Trustee, State of Hawai'i of **condemnation of our vested rights, without notice, without jurisdiction, unconstitutional deprivation of due process.**
- **Violation of the injunction from the U.S. Supreme Court**
- The rights of Kanaka Maoli have been violated and circumvented
- Inadequate public outreach/public hearings provided to the native Hawaiian community by Hawai'i Oceanic Technology, Inc. The last public meeting was held prior to the DLNR's decision to extend the deadline for the CDUA, and there have been no public notices or meetings since.
- Greater native Hawaiian community not solicited for comments. Those interviewed for the EIS did not adequately represent the entire native Hawaiian community.

10. Outline of specific issues to be raised: _____

- The ocean has enormous historical, cultural and religious importance for native Hawaiian communities, which could be infringed upon by this new type of ocean use. The medicinal practices, in particular the mawaewae ceremony, of which I am a cultural practitioner, for the first born child, using the pupumo'o, which is a chiton, an invertebrate, will be adversely impacted by the granting of this CDUA and proposed project.
- The limu kilikilihunemawawae, the limu lipe'epe'e, limu kala lau nui nui, limu kala lau li'ili'i, limu kohu, limu maneoneo, limu palahalaha, limu lipoa, limu a'ala ula and limu po'ele'ele will all be adversely impacted and all these limu are used by me as a cultural practitioner in the area of the proposed project;
- Limu 'aki'aki, which is used for the practice of lo'i kalo to ensure the health and well-being of the kalo plant and 'aki'aki, shoreline rush grass which is used for spiritual cleansing will also be adversely impacted.
- The limu 'awa and 'opihi 'awa (invertebrate) are also both heavily used by me for cultural practices.
- Hilu pilikoa fish, Hinalea 'aki lolo fish, loli'ele'ele (black sea cucumber) puhi kauila, and the pao'o fish, which are used in my cultural practices will be adversely effected.
- The he'e, especially when kapu, will be adversely impacted by this proposed project.
- The cultural and psychological impacts on the Kanaka have not been sufficiently addressed.
- Language genocide – traditional names of fish replaced by foreign names
- Undefined terminology in Environmental Assessment
- Restriction of cultural and traditional practices and public access in the area of the project
- Located within the Hawaiian Islands Humpback Whale Natural Marine Sanctuary. The health and protection of marine animals is important to the native Hawaiian community.
- Environmental Assessment fails to disclose the feed formulation, source and ratio. The assessment shows no scientific evidence that a low percentage of wild fish in feed can be achieved. Using wild fish in feed for farmed fish can be massively damaging to forage fish stocks, communities that depend on these types of small fish for food, and ocean ecology. On the other hand, if the feed will be composed of soy, there should be an assessment of the impacts of soy – a terrestrial plant high in estrogen, on the marine environment.
- Impacts of potential escapes of important wild fish stocks and konohiki fishing rights.
- Lack of Notice to its Beneficiaries
- No showing of interest to the Beneficiaries
- Breach of Trust by Trustee, State of Hawai'i
- Absence of consent from Beneficiaries and as Wards of the State of Hawai'i
- Uncompensated use of Trust corpus

. Outline of Basic Facts: _____

- The Office of Conservation and Coastal Lands (OCCL) stated: “there are still unresolved issues regarding the level of environmental and project disclosure, analysis regarding the engineering design of the proposed engine, fish feed components, lack of benthic studies in the project area, and lack of shark, marine mammal and endangered species plans.” These unresolved issues could be to the detriment of native Hawaiian interests.
- Not clear on lease payments to the State of Hawai’i and the Office of Hawaiian Affairs as these are submerged lands and I am a beneficiary of the OHA Trust.
- Farmed fish does not show the negative long term effects on traditional fish and marine life for traditional food sources.
- Public Trust mandates that the State of Hawai’i have a higher level of scrutiny for private commercial uses and to consider the cumulative impact of existing and proposed diversions on trust purposes.
- State of Hawai’i government agencies have an enforceable duty to preserve and protect traditional rights under State of Hawai’i Constitution Article XII Section 7 and the Admissions Act and protect the natural and cultural resources upon which these practices rely upon to survive.
- Failed to identify the effects the project would have on the entire Ahupua’a and the benefit to Trust Beneficiaries pursuant to Ka Pa’akai o Ka ‘Āina Supreme Court Case.

12. The relief or remedy to which you seek or deem yourself entitled: _____

- The CDUA application must be denied as this process is neither legal nor equitable to the Kanaka Maoli, Maka’āinana, native tenants and beneficiaries of this trust. Proper environmental and cultural assessments must be performed pursuant to existing Constitutional, State and County laws and Supreme and Appellate court decisions and proper mitigation of harmful and adverse effects.

MICHAEL KUMUKIAUOHA LEE
Michael Kumukiauoha Lee

The above-named person hereby requests and petitions the Board of Land and Natural Resources for a Contested Case hearing in the matter described above. Dated: Nov. 02, 2009

