

# 1893 Cleveland—Lili`uokalani Executive Agreements

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## ABSTRACT

There is no dispute between the United State and Hawai`i over the illegal overthrow of the Hawaiian government that took place on January 17, 1893, just non-compliance to an already agreed settlement. On October 18, 1893, the U.S. government concluded an investigation of its role in the overthrow, and negotiation for settlement with Queen Lili`uokalani began on November 13, 1893 at the U.S. Legation in Honolulu. On December 18, 1893, settlement was achieved and an agreement was entered between the two countries whereby the United States committed itself to restore the government as it was prior to the unauthorized landing of U.S. troops on January 16, 1893, and once the government was restored, the Queen was bound to grant amnesty to members and supporters of the self-proclaimed provisional government who committed the crime of high treason, which was punishable by death and all property confiscated to the Hawaiian government.

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## 1893 Cleveland-Lili`uokalani Executive Agreements

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On January 17<sup>th</sup> 1893, Queen Lili`uokalani, by explicit grant, “yielded” her executive power to the President of the U.S. to do an investigation of their diplomat and military troops who illegally landed on Hawaiian territory in violation of Hawai`i’s sovereignty. The Queen specifically stated, “That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said Provisional Government. Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest, and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.”<sup>1</sup> The quintessential question is what “authority” did the Queen yield as the “constitutional sovereign”? This authority is specifically stated in the Hawaiian constitution, which declares, “To the King [Queen] belongs the Executive power.” In *Grieve v. Gulick*, 5 Hawai`i 73, 76 (1883), Justice Austin of the Hawaiian Supreme Court stated that, “the Constitution declares [His Majesty] as the executive power of the Government,” which, according to the Indiana Supreme Court, “is the power to ‘execute’ the laws, that is, carry them into effect, as distinguished from the power to make the laws and the power to judge them.”<sup>2</sup>

President Cleveland acknowledged receipt of this conditional grant in March when he received the protest from the Queen through her attorney in fact, Paul Neumann, in Washington, D.C. This acceptance of the conditional grant of Hawaiian executive power to investigate is called the *Lili`uokalani Agreement*. In a report to the President after the investigation was completed, Secretary of State Gresham acknowledged the temporary transfer of the Queen’s executive power by stating, “The Government of Hawaii surrendered its authority under a threat of war, until such time only as the Government of the United States, upon the facts being presented to it, should reinstate the constitutional sovereign.”<sup>3</sup> The President, in his message to Congress, also acknowledged the temporary transfer of executive power. Cleveland stated, the Queen “surrendered not to the provisional government, but to the United States. She surrendered not absolutely and permanently, but temporarily and conditionally until such time as the facts could be considered by the United States.”<sup>4</sup> This was the first of two international agreements to have taken place through an exchange of diplomatic notes committing the President to the

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<sup>1</sup> "Executive Documents on Affairs in Hawaii: 1894-95," *U.S. House of Representatives, 53rd Congress* (Washington: Government Printing Office, 1895), 461.

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

<sup>3</sup> Executive Documents, 462.

<sup>4</sup> *Id.*, 457.

administration of Hawaiian Kingdom law while he investigated the overthrow of the Hawaiian government. The investigation concluded that U.S. Minister John Stevens with the illegal presence of U.S. troops bore the responsibility for the overthrow of the Hawaiian government. As a result, negotiations would ensue whereby a second agreement was sought by the United States to restore the Hawaiian Kingdom government. On the responsibility of State actors, Oppenheim states that “according to special circumstances and conditions the home State may be obliged to disown an act of its envoy, to apologize or express its regret for his behaviour, or to pay damages.”<sup>5</sup> Therefore, on October 18<sup>th</sup> 1893, U.S. Secretary of State Walter Gresham directed U.S. Minister Plenipotentiary Albert Willis to initiate negotiations with Queen Lili’uokalani for settlement and restoration of the Hawaiian Kingdom government. He stated to Willis,

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

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

Having secured the Queen’s agreement to pursue this wise and humane policy, which it is believed you will speedily obtain, you will then advise the executive of the Provisional Government and his ministers of the President’s determination of the question which their action and that of the Queen devolved upon him, and that they are expected to promptly relinquish to her constitutional authority.<sup>6</sup>

On November 13<sup>th</sup> 1893, Willis met with the Queen at the U.S. Legation in Honolulu, “who was informed that the President of the United States had important communications to make to her.”<sup>7</sup> 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.”<sup>8</sup> In his message to the Congress, the President concluded that the “members of the provisional government and their supporters, though not entitled to extreme sympathy, have been led to their present predicament of revolt against the Government...by the indefensible encouragement and assistance of our diplomatic

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<sup>5</sup> Lassa Oppenheim, *International Law: A Treatise, 3rd ed.*, ed. Ronald F. Roxburgh, Vol. II (London: Longmans Green and Co., 1921), 252.

<sup>6</sup> Executive Documents, 464 [Exhibit B].

<sup>7</sup> *Id.*, 1242 [Exhibit C].

<sup>8</sup> *Id.*

representative.”<sup>9</sup> According to Wright, “statements of a decision on fact or policy, authorized by the President, must be accepted by foreign nations as the will of the United States.”<sup>10</sup> Therefore, the Queen saw these conclusions by the President as representing the “will of the United States,” and according to Oppenheim, Willis, who was the U.S. envoy accredited to the Hawaiian Kingdom, represented “his home State in the totality of its international relations,” and that he was “the mouthpiece of the head of his home State and its Foreign Secretary, as regards communications to be made to the State to which he is accredited.”<sup>11</sup>

The President’s investigation also concluded that members of the provisional government and their supporters committed the crime of treason and therefore subject to the pains and penalties of treason under Hawaiian law. On this note, the Queen was then asked by Willis, “[s]hould you be restored to the throne, would you grant full amnesty as to life and property to all those persons who have been or who are now in the Provisional Government, or who have been instrumental in the overthrow of your government?”<sup>12</sup> The Queen refused to grant amnesty and referenced Chapter VI, section 9 of the Penal Code, which states, “[w]hoever shall commit the crime of treason shall suffer the punishment of death and all his property shall be confiscated to the Government.” When asked again if she would reconsider, she responded, “[t]hese people were the cause of the revolution and the constitution of 1887. There will never be any peace while they are here. They must be sent out of the country, or punished, and their property confiscated.”<sup>13</sup> 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.”<sup>14</sup> 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 dispatch to Willis, Gresham adamantly stated, “You will insist upon amnesty and recognition of obligations of the Provisional Government as essential conditions of restoration.”<sup>15</sup> In another communication on December 3<sup>rd</sup> 1893, Gresham directed Willis to continue to negotiate with the Queen, and should she “refuse assent to the written conditions you will at once inform her that the President will cease interposition in her behalf.”<sup>16</sup> Gresham acknowledged that the

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<sup>9</sup> *Id.*, 457.

<sup>10</sup> Quincy Wright, *The Control of American Foreign Relations* (New York: The Macmillan Company, 1922), 22.

<sup>11</sup> Oppenheim, *International Law* (3<sup>rd</sup> ed), 556.

<sup>12</sup> Executive Documents, 1242.

<sup>13</sup> *Id.*

<sup>14</sup> Lili`uokalani, *Hawai`i's Story by Hawai`i's Queen* (Rutland: Charles E. Tuttle Co., Inc., 1964), 247.

<sup>15</sup> Executive Documents, 1191 [Exhibit D].

<sup>16</sup> *Id.* [Exhibit E].

President had a duty to restore 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. He stated "The President feels that by our original interference and what followed we have incurred responsibilities to the whole Hawaiian community, and it would not be just to put one party at the mercy of the other."<sup>17</sup> Gresham also stated "Should the Queen ask whether, if she accedes to conditions, active steps will be taken by the United States to effect her restoration, or to maintain her authority thereafter, you will say that the President can not use force without the authority of Congress."<sup>18</sup>

Members of the provisional government were not aware of the Queen's meeting with Minister Willis at the U.S. Legation, but received notice on November 24<sup>th</sup> of the restoration by dispatch from Lorrin Thurston who was in Washington, D.C.<sup>19</sup> Four days later Sanford Dole, president of the so-called provisional government, informed the executive council that he met that morning with the "military officers of the several companies in regard to the course proposed in case the U.S. forces attempt to restore the Queen. The plan being to resist till forced to yield without firing upon the U.S. troops."<sup>20</sup> Clearly they were determined to give the impression of being a revolutionary government, but did not want to go so far as to commit their lives to a fabricated revolution.

### Hawaiian Constitutional Limitations on the Agreed Settlement

In *Knote v. United States*, Justice Loring stated that the word amnesty has no legal significance in the common law, but arises when applied to rebellions that bring about the rules of international law.<sup>21</sup> He adds that amnesty is the synonym for oblivion and pardon,<sup>22</sup> which is "an act of sovereign mercy and grace, flowing from the appropriate organ of the government."<sup>23</sup> As Cleveland's request for a grant of general amnesty from the Queen was essentially tied to the Hawaiian crime of treason, three questions naturally arise. When did treason actually take place? Was the Queen constitutionally empowered to recognize the 1887 constitution as lawful? And was the Queen empowered under Hawaiian constitutional law to grant a pardon?

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, 1192; the package of exchange of notes that comprised the President's acceptance of the Hawaiian executive power from the Queen and the investigation's conclusion was sent to the Congress by the President on December 18<sup>th</sup> 1893 as *President's Message relating to the Hawaiian Islands*, p. 445-465.

<sup>19</sup> "Executive Council Minutes," *Republic of Hawai'i* (November 24, 1893), 111.

<sup>20</sup> *Id.* (November 28, 1893), 115.

<sup>21</sup> *Knote v. The United States*, 10 U.S. Court of Claims 397, 407 (1875).

<sup>22</sup> *Id.*

<sup>23</sup> *Ex Parte Law*, 85 Georgia 285, 296 (1866); see also *Davies v. McKeeby*, 5 Nevada 369, 373 (1870).

The leaders of the provisional government committed the crime of treason in 1887 when they forced a constitution upon the Queen's predecessor, King Kalakaua, at the point of a bayonet, and organized a new election of the legislature while the lawful legislature remained in term, but out of session. As Blount discovered in his investigation, the purpose of the constitution was to offset the native voting block by placing it in the controlling hands of foreigners where "large numbers of Americans, Germans, English, and other foreigners unnaturalized were permitted to vote..."<sup>24</sup> He concluded these elections "took place with the foreign population well armed and the troops hostile to the crown and people."<sup>25</sup> With the pending retake of the political affairs of the country by the Queen and loyal subjects, the revolutionaries of 1887 found no other alternative but to appeal to the U.S. resident Minister John Stevens to order the landing of U.S. troops in order to provide for their protection with the ultimate aim of transferring the entire territory of the Hawaiian Islands to the United States. By soliciting the intervention of the U.S. troops for their protection, these revolutionaries effectively rendered their 1887 revolution unsuccessful, and transformed the matter from a rebellion to an intervening state's violation of international law.<sup>26</sup> The 1864 Constitution, as amended, the Civil Code, Penal Code, and the session laws of the Legislative Assembly enacted before the revolution on July 6<sup>th</sup> 1887, comprised the legal order of the Hawaiian State and remained the law of the land during the revolution and throughout the subsequent intervention by the United States since January 16<sup>th</sup> 1893.

Prior to the revolution, the Queen was confirmed as the lawful successor to the throne of her brother King Kalakaua on April 10<sup>th</sup> 1877,<sup>27</sup> in accordance with Article 22 of the Hawaiian constitution, and, therefore, capable of negotiating on behalf of the Hawaiian Kingdom the settlement of the dispute with the United States. As chief executives, both the Queen and President were not only authorized, but limited in authority by a written constitution. Similar to United States law, Hawaiian law vests the pardoning power in the executive by constitutional provision, but where the laws differ, though, is who has the pardoning power and when can that power be exercised. Under the U.S. constitution, the President alone has the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,"<sup>28</sup> but under the Hawaiian constitution, the Monarch "by and with the advice of His Privy Council, has the power to grant reprieves and pardons, *after conviction*, for all offences, except in cases of impeachment (emphasis added)."<sup>29</sup> As a constitutional monarchy, the Queen's decision to pardon, unlike the President,

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<sup>24</sup> Executive Documents, 579.

<sup>25</sup> *Id.*

<sup>26</sup> United States doctrine at the time considered rebellions to be successful when the revolutionaries are (1) in complete control of all governmental machinery, (2) there exists no organized resistance, and (3) acquiescence of the people. See also John Basset Moore, *Digest of International Law*, Vol. I (Washington: Government Printing Office, 1906), 139.

<sup>27</sup> Robert C. Lydecker, *Roster Legislatures of Hawaii, 1841-1918* (Honolulu: The Hawaiian Gazette Co., Ltd., 1918), 138. Art. 22 of the Hawaiian Constitution provides: "...the successor shall be the person whom the Sovereign shall appoint with the consent of the Nobles, and publicly proclaim as such during the King's life..."

<sup>28</sup> "U.S. Constitution" (1787), Article II, §2.

<sup>29</sup> "Hawaiian Constitution" (1864), Article 27.

could only come through consultation with Her Privy Council, and the power to pardon can only be exercised once the conviction of treason had already taken place and not before.

The Hawaiian constitution also vests the law making power solely in the Legislative Assembly comprised of the “[t]hree Estates of this Kingdom...vested in the King, and the Legislative Assembly; which Assembly shall consist of the Nobles appointed by the King, and of the Representatives of the People, sitting together.”<sup>30</sup> Any change to the constitution, *e.g.* the Queen’s recognition of the 1887 constitution, must be first proposed in the Legislative Assembly and if later approved by the Queen then it would “become part of the Constitution of [the] country.”<sup>31</sup> From a constitutional standpoint, the Queen was not capable of recognizing the 1887 constitution without first submitting it for consideration to the Legislative Assembly convened under the lawful constitution of the country; nor was she able to grant amnesty to prevent the criminal convictions of treason, but only after judgments have already been rendered by Hawaiian courts. Another constitutional question would be whether or not the Queen would have the power to grant a full pardon without advise from Her Privy Council. If not, which would be the case, a commitment on the part of the Queen could have strong consideration when Her Privy Council is ultimately convened once the government is restored.

### Illegal Overthrow of the Hawaiian Kingdom Government Settled

On December 18<sup>th</sup> 1893, Willis was notified by the Queen’s assistant, Joseph Carter, that she was willing to spare their lives, not, however, their property, which, “should be confiscated to the Government, and they should not be permitted to remain in the Kingdom.”<sup>32</sup> But later that day, the Queen sent a communication to Willis. She stated,

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

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

Asking you to bear to the President and the Government he represents a message of gratitude from me and from my people, and promising, with God’s grace, to prove worthy of the confidence and friendship of your people.”<sup>33</sup>

An agreement between the two Heads of State had finally been made for settlement of the international dispute called the *Restoration Agreement*. Coincident

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<sup>30</sup> *Id.*, Article 45.

<sup>31</sup> *Id.*, Article 80.

<sup>32</sup> Executive Documents, 1267 [Exhibit F].

<sup>33</sup> *Id.*, 1269 [Exhibit G]



with the agreement was the temporary and conditional assignment of executive power by the Queen to the President of the United States, and that the assignment and agreement to restore the Hawaiian government “did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.”<sup>34</sup> Attached to the communication was the following pledge that was dispatched by Willis to Gresham on December 20<sup>th</sup> 1893.

I, Liliuokalani, in recognition of the high sense of justice which has actuated the President of the United States, and desiring to put aside all feelings of personal hatred or revenge and to do what is best for all the people of these Islands, both native and foreign born, do hereby and herein solemnly declare and pledge myself that, if reinstated as the constitutional sovereign of the Hawaiian Islands, that I will immediately proclaim and declare, unconditionally and without reservation, to every person who directly or indirectly participated in the revolution of January 17, 1893, a full pardon and amnesty for their offenses, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof, and that I will forbid and prevent the adoption of any measures of proscription or punishment for what has been done in the past by those setting up or supporting the Provisional Government. I further solemnly agree to accept the restoration under the constitution existing at the time of said revolution and that I will abide by and fully execute that constitution with all the guaranties as to person and property therein contained. I furthermore solemnly pledge myself and my Government, if restored, to assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services, it being my purpose, if restored, to assume the Government precisely as it existed on the day when it was unlawfully overthrown.<sup>35</sup>

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

On the 18<sup>th</sup> ultimo the President sent a special message to Congress communicating copies of the Mr. Blount’s reports and the instructions given to him and you. On the same day, answering a resolution of the House of Representatives, he sent copies of all correspondence since March 4, 1889, on the political affairs and relations of Hawaii, withholding, for sufficient reasons, only Mr. Stevens’ No. 70 of October 8, 1892, and your No. 3 of November 16, 1893. The President therein announced that the conditions of restoration suggested by him to the Queen had not proved acceptable to her,

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<sup>34</sup> *U.S. v. Belmont*, 301 U.S. 324, 330 (1937).

<sup>35</sup> *Id.*

and that since the instructions sent to you to insist upon those conditions he had not learned that the Queen was willing to assent to them. The President thereupon submitted the subject to the more extended powers and wider discretion of Congress, adding the assurance that he would be gratified to cooperate in any legitimate plan which might be devised for a solution of the problem consistent with American honor, integrity, and morality.

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

The matter now being in the hands of Congress the President will keep that body fully advised of the situation, and will lay before it from time to time the reports received from you, including your No. 3, heretofore withheld, and all instructions sent to you. In the meantime, while keeping the Department fully informed of the course of events, you will, until further notice, consider your special instructions upon this subject have been fully complied with.<sup>36</sup>

### United States Obligation Established by Executive Agreements

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.<sup>37</sup> 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."<sup>38</sup> 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 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

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<sup>36</sup> Executive Documents, 1283-1284 [Exhibit H]; the package of exchange of notes that comprised the initial meeting of negotiation on November 13<sup>th</sup> 1893 to the Queen's acceptance on December 18<sup>th</sup> 1893 was sent to the Congress by the President on January 13<sup>th</sup> 1894 as Appendix II, Foreign Relations, Affairs in Hawai'i, p. 1241-1284.

<sup>37</sup> "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."

<sup>38</sup> Louis Henkin, *Foreign Affairs and the United States Constitution*, 2nd ed. (Oxford: Clarendon Press, 1996), 215.

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.<sup>39</sup>

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.’”<sup>40</sup> Both executive agreements to investigate and to restore the Hawaiian Kingdom government 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.”<sup>41</sup> “On various occasions,” according to Moore, “the Executive has entered into an agreement which, because of its provisional character, has been called a *modus vivendi*. Such agreements are usually made pending negotiations, with a view to a permanent settlement of controversies. They take the shape of an exchange of notes or of a formal protocol, and ordinarily are not submitted to the Senate for approval.”<sup>42</sup> Once a permanent settlement has been achieved through negotiations, “[i]t has not been the practice of the Department of State to obtain the approval of the Senate for the settlement of international claims, and a request for Congressional action is not made unless appropriations appear to be necessary.”<sup>43</sup> Justice Frankfurter, in *U.S. v. Pink*, reiterated that the “President’s control of foreign relations includes the settlement of claims is indisputable.”<sup>44</sup> Between 1960 and 1979, the President entered into binding settlements without seeking the advise and consent of the Senate with Bulgaria,<sup>45</sup> Egypt,<sup>46</sup> Hungary,<sup>47</sup> the People’s Republic of China,<sup>48</sup> Japan and the U.S. Trust Territory of the Pacific Islands,<sup>49</sup> Peru,<sup>50</sup> Poland,<sup>51</sup> Rumania,<sup>52</sup> and Yugoslavia.<sup>53</sup>

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<sup>39</sup> *Id.*, 219.

<sup>40</sup> U.S. Government, “Foreign Affairs Manual,” Vol. XI (October 25, 1974), 721.2(b)(3).

<sup>41</sup> *United States v. Pink*, 315 U.S. 203, 229 (1942); see also *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (1953).

<sup>42</sup> John Basset Moore, *A Digest of International Law*, Vol. V (Washington: Government Printing Office, 1906), 214.

<sup>43</sup> Marjorie M. Whiteman, *Digest of International Law*, Vol. XIV (Washington: U.S. Department of State, 1970), 247.

<sup>44</sup> *United States v. Pink*, 315 U.S. 203, 240 (1942).

<sup>45</sup> *Bulgaria*, 14 U.S.T. 969 (1963).

<sup>46</sup> *Egypt*, 27 U.S.T. 4214 (1976).

<sup>47</sup> *Hungary*, 24 U.S.T. 522 (1973).

<sup>48</sup> *People’s Republic of China*, 30 U.S.T. 1957 (1979).

<sup>49</sup> *Japan and the U.S. Trust Territory of the Pacific Islands*, 20 U.S.T. 2654 (1969).

<sup>50</sup> *Peru*, 25 U.S.T. 227 (1974), *Peru*, 27 U.S.T. 3993 (1976).

<sup>51</sup> *Poland*, 11 U.S.T. 1953 (1960).

<sup>52</sup> *Rumania*, 11 U.S.T. 317 (1960).

<sup>53</sup> *Yugoslavia*, 16 U.S.T. 1 (1965).

Of important note to add is that the Cleveland administration held Spain to account to an 1886 executive agreement called the *Mora claim*, while at the same time concluded an agreement with the Queen in 1893. The *Mora claim* spanned the administrations of three Presidents—Cleveland (1885-1889), Harrison (1889-1893), and Cleveland again (1893-1897). At issue was the settlement of the “claim of Antonio Maximo Mora, a naturalized citizen of the United State of Cuban origin, against the government of Spain, growing out of the embargo of his property in Cuba, by paying the sum of \$1,500,000.”<sup>54</sup> When Spain sought to qualify the 1886 agreement with President Cleveland, the U.S. government expressed its confidence that “the Spanish government would not repudiate the arrangement which was deliberately concluded in its name and by its authority.”<sup>55</sup> Secretary of State James Blaine asserted “that by the most formal and sacred of international compacts the faith and honor of the Spanish government” had been “directly pledged.” Under President Harrison, Secretary of State John Foster in February 1893 stated, “The Mora claim has been regarded by this government as already liquidated and adjusted claim, only waiting an appropriation by the Spanish Cortes for its final payment. It should not therefore be placed in the category of unadjusted claims.” And on July 14<sup>th</sup> 1893, Foster’s successor, Secretary of State Gresham declared that the United States “could not recognize parliamentary difficulties in the way of securing an appropriation for the Mora claim as in any way relieving Spain from her distinct and unconditional obligation to pay that claim.”<sup>56</sup> On September 28<sup>th</sup> 1895, Spain paid “\$1,445,142.10 gold coin, which has been placed to the credit of the Secretary of State in payment of the Mora claim.”<sup>57</sup> According to Moore, the “conclusiveness of the settlement was thus finally maintained, in spite of Spain’s contention that the agreement should be treated as having been made subject to the approval of the Cortes (Spanish Parliament).”<sup>58</sup>

In *United States v. Belmont*, Justice Sullivan argued that there are different kinds of treaties that did not require Senate approval. The case involved a Russian corporation that deposited some of its funds in a New York bank prior to the Russian revolution of 1917. After the revolution, the Soviet Union nationalized the corporation and sought to seize its assets in the New York bank with the assistance of the United States. The assistance was “effected by an exchange of diplomatic correspondence between the Soviet government and the United States [in which the] purpose was to bring about a final settlement of the claims and counterclaims between the Soviet government and the United States.”<sup>59</sup> 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

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<sup>54</sup> John Bassett Moore, “Treaties and Executive Agreements,” *Political Science Quarterly* (The Academy of Political Science) 20, no. 3 (Sep. 1905): 385-420, 403.

<sup>55</sup> *Id.*, 404.

<sup>56</sup> *Id.*, 405.

<sup>57</sup> The New York Times, “The Mora Claim Paid,” *The New York Times*, September 29, 1895.

<sup>58</sup> Moore, *Treaties and Executive Agreements*, 407.

<sup>59</sup> *United States v. Belmont*, 310 U.S. 324, 326 (1937).

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.<sup>60</sup>

And Justice Douglas, in *U.S. v. Pink*, cautioned how to interpret executive agreements. He explained, "The exchanges between the President and M. Litvinov must be read not in isolation, but as the culmination of difficulties and dealings extending over fifteen years. And they must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy. The draftsmen of such notes must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder."<sup>61</sup> In other words, the form and substance of executive agreements are comprised of an exchange of diplomatic notes and not laid out in a single document such as a formal contract or treaty.

### United States Breach of the 1893 Executive Agreements

In the United States, Congress took deliberate steps to prevent the President from following through with his legal obligation to administer Hawaiian Kingdom law (*Lili'uokalani Assignment*) and to restore the Hawaiian government (*Restoration Agreement*), 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."<sup>62</sup> Morgan's purpose was to vindicate the illegal conduct and actions of the U.S. Ambassador 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 14<sup>th</sup>, 16<sup>th</sup>, and 17<sup>th</sup> of January, 1893."<sup>63</sup> By contradicting the President's investigation, Morgan intended, as a matter of congressional action, to bar the President from restoring the government as was previously agreed upon with the Queen because there was a fervor of annexation among many members of Congress.

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<sup>60</sup> *Id.*, 330; see also *United States v. Pink*, 315 U.S. 203 (1942); *American International Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (1981); *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

<sup>61</sup> *United States v. Pink*, 315 U.S. 203, 241 (1942).

<sup>62</sup> Oppenheim, *International Law* (3<sup>rd</sup> ed), 252.

<sup>63</sup> U.S. Senate, "Senate Report 227," *Reports of Committee on Foreign Relations 1789-1901*, Vol. VI (53rd Congress, February 26, 1894), 363.

This constituted an encroachment on the President's executive authority and a violation of the separation of powers doctrine. Cleveland's failure to fulfill his obligation under both agreements allowed the provisional government to gain strength, and on July 4<sup>th</sup> 1894, they renamed themselves the Republic of Hawai'i. For the next three years they would maintain their power by hiring mercenaries and force of arms, arresting and imprisoning Hawaiian nationals who resisted them with the threat of execution, and criminally tried the Queen on fabricated evidence with the purpose of her abdicating the throne.<sup>64</sup> 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 subjects. On August 12<sup>th</sup> 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 the United States' obligation to administer Hawaiian law and to restore the Hawaiian Kingdom 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 agreements are 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."<sup>65</sup> 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."<sup>66</sup>

### Function of the Doctrine of Estoppel

The principle that a State cannot benefit from its own wrongful act is a general principle of international law referred to as estoppel, which was drawn from the common law.<sup>67</sup> 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,<sup>68</sup> and "operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another

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<sup>64</sup> 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..." "Executive Council Minutes," *Republic of Hawai'i* (January 14, 1894), 159.

<sup>65</sup> Oppenheim, *International Law* (3<sup>rd</sup> ed), 661.

<sup>66</sup> Hall, *Treatise on International Law*, 383.

<sup>67</sup> D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence," *British Yearbook of International Law* 33 (1957): 176-202, 181.

<sup>68</sup>United Nations, "Vienna Convention on the Law of Treaties," 1155 *U.N.T.S.* 331, Article 26.

whereby that other has acted to his detriment.”<sup>69</sup> According to MacGibbon, a legal scholar in international law, underlying “most formulations of the doctrine of estoppel [preclusion] in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation.”<sup>70</sup> 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.”<sup>71</sup> 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.”<sup>72</sup>

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.”<sup>73</sup> Bowett enumerates the three essentials establishing estoppel in international law:

1. The statement of fact must be clear and unambiguous.
2. The statement of fact must be made voluntarily, unconditionally, and must be authorized.
3. There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.<sup>74</sup>

It is self-evident that both executive agreements did meet the first two essential requirements establishing estoppel, and, as for the third, reliance in good faith was clearly displayed and evidenced in a memorial to President Cleveland by the Hawaiian Patriotic League on December 27<sup>th</sup> 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

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<sup>69</sup> Bowett, *Estoppel*, 201.

<sup>70</sup>I.C. MacGibbon, “Estoppel in International Law,” *International and Comparative Law Quarterly* 7 (1958): 468-513, 468.

<sup>71</sup> *Id.*, 473.

<sup>72</sup> *Vienna Convention on the Law of Treaties*, Article 27.

<sup>73</sup> Ian Brownlie, *Principles of Public International Law*, 4th ed. (New York: Clarendon Press, 1990), 641.

<sup>74</sup> Bowett, 202.

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.<sup>75</sup>

Continued reliance was also displayed by the formal protests of the Queen and Hawaiian political organizations regarding the second treaty of annexation signed in Washington, D.C., on June 16<sup>th</sup> 1897, between the McKinley administration and the self-proclaimed Republic of Hawai'i. In her diplomatic protest, the Queen reminded President McKinley that "official protests [were] made by me on the seventeenth day of January, 1893...with the assurance that the case [would be] referred to the United States of America for arbitration,"<sup>76</sup> and "that I was at the date of their investigations the constitutional ruler of my people."<sup>77</sup> She concluded "that the Government of the United States receives such territory from the hands of those whom its own magistrates (legally elected by the people of the United States, and in office in 1893) pronounced fraudulently in power and unconstitutionally ruling Hawaii."<sup>78</sup> 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.<sup>79</sup> The Congressional Commission was established on July 9<sup>th</sup> 1898 after President McKinley signed the joint resolution of annexation on July 7<sup>th</sup>, and was holding meetings in Honolulu from August through September. The memorial, which was also printed in two Honolulu newspapers, one in the Hawaiian language<sup>80</sup> and the other in English,<sup>81</sup> clearly states the reliance of the citizenry on the agreement of restoration. The memorial 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.

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<sup>75</sup> Executive Documents, 1295.

<sup>76</sup> Lili'uokalani, *Hawai'i's Story by Hawai'i's Queen*, 354. Reprinted *Hawaiian Journal of Law and Politics* 1 (2004): 227-229.

<sup>77</sup> *Id.*, 355.

<sup>78</sup> *Id.*, 356.

<sup>79</sup> Munroe Smith, "Record of Political Events," *Political Science Quarterly* 13, no. 4 (December 1898): 745-776, 752.

<sup>80</sup> Hui Aloha Aina, "Memoriala A Ka Lahui," *Ke Aloha Aina newspaper*, September 17, 1898: 3.

<sup>81</sup> The Hawaiian Star, "What Monarchists Want," September 15, 1898: 3.



The failure of the United States to administer Hawaiian Kingdom law and restore the Hawaiian Kingdom government is a “breach of an international obligation,” and, therefore, an international wrongful act as defined by the 2001 *Responsibility of States for International Wrongful Acts*. The severity of this breach has led to the unlawful seizure of Hawaiian independence, imposition of a foreign nationality upon the citizenry of an occupied State, mass migrations and settlement of foreign citizens, and the economic and military exploitation of Hawaiian territory—all stemming from the U.S. government’s perverse view of military necessity in 1898. In a 1999 report for the United Nations Centennial of the First International Peace Conference, Greenwood, who also served as associate arbitrator in the *Larsen* case, stated:

Accommodation of change in the case of prolonged occupation must be within the framework of the core principles laid down in the Regulations on the Laws and Customs of War on Land and the Fourth Convention, in particular, the principle underlying much of the Regulations on the Laws and Customs of War on Land, namely that the occupying power may not exploit the occupied territories for the benefit of its own population.<sup>82</sup>

Despite the egregious violations of Hawaiian sovereignty by the United States since January 16<sup>th</sup> 1893, the principle of estoppel not only serves as a shield that bars the United States from asserting any legal claim over the Hawaiian Islands, but also a shield that protects the continued existence of the Hawaiian Kingdom, the nationality of its citizenry, and its territorial integrity as they existed in 1893. Self-help is a recognized principle of international relations, and, in this case, it is a principle, together with self-preservation, that provides the legal justification to compel the United States to comply with the international laws of occupation. Being that the situation is legal in nature and grounded in rights not only secured to sovereign states, but also correlative rights secured to individuals that derive by virtue of the legal order of the state, it is a subject of legal discourse. But there is a difference between a deliberate move to impel compliance under existing law, and legal mobilization and the reform movement. The former is procedural and rule-based within an already existing legal system organized to acknowledge and protect enumerated rights, whereas the latter is aspirational and aims to create legal change in a system by employing legal ideas and traditions that seek to persuade, inspire, explain, or justify in public settings.<sup>83</sup> This is a case of impelling compliance under existing law.

### A Century of Non-Compliance to International Law

For over a century, the U.S. has not complied with international law regarding the Hawaiian Islands, and has exercised executive, legislative and judicial

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<sup>82</sup> Christopher Greenwood, "International Humanitarian Law (Laws of War): Revised report prepared for the Centennial of the First International Peace Conference, pursuant to United Nations General Assembly Resolutions," *A/RES/52/154 & A/RES/53/99* (May 1999), 47.

<sup>83</sup> Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), 3.

power in the Islands without any lawful authority. The Hawaiian Kingdom is a very small State when compared to the U.S. and other States in the world, but all States have legal parity despite varying degrees of political, economic and military strengths. As a result of being a small reemerging State, Hawai'i does not have the conventional capabilities that larger States employ to impel compliance through the threat or actual intervention of political, economic or military force. Hawai'i has only its legal position as a subject of international law, and, as a consequence, the profound impact it has on the economy of States. States, as players in the economy, rely on law as "a body of predictable and ascertainable standards of behavior allowing each economic factor to maintain a set of relatively safe expectations as to the conduct of other social actors (including the State authorities, in cases of transgression). Thus law became one of the devices permitting economic activities and consolidation and protecting the fruits of such action."<sup>84</sup>

The U.S. economy is based on free enterprise and competition, which along with other States' economies they collectively extend to the international level as a global economy. International laws facilitate trade between States, but the business transactions themselves take place within States, whose governments serve as the regulating authorities. Unlike the command economy of the former Soviet Union where the economy is determined and controlled by the government, the United States has a market economy based on capitalism where private enterprise is encouraged and government intervention limited.

In many respects, contracts are the lifeblood of a market economy. Simple one-off, over-the-table transactions are not the stuff of modern commerce, nor have they been since the Industrial Revolution. Rather, complex linked deals are the norm. Contracts allow long-term planning. Contract law provides security for those who act in reliance on the deals struck. Commerce revolves around promises made and promises fulfilled and, if not fulfilled, made good in other ways, backed by law.<sup>85</sup>

The failure of the U.S. to establish a military government to administer Hawaiian law has rendered all contracts entered into within Hawaiian territory since the *Restoration Agreement* (December 18<sup>th</sup> 1893), whether Hawaiian subjects or citizens of foreign States, invalid. The sheer volume of invalid contracts will have a devastating effect on both the U.S. and global economies as the continuity of the Hawaiian State comes to public attention. The doctrine of non-recognition also prevents courts of other countries from recognizing contracts that originate out of an illegal situation. According to Dixon, British courts attempted to get around this doctrine involving private contracts originating out of non-recognized States, "provided that there was no statutory prohibition...and provided that such recognition did not in fact compromise the UK Government in the conduct of its foreign relations."<sup>86</sup>

These British cases, however, involved the status of private contracts originating under the authority of governments that did not possess *de facto*

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<sup>84</sup> Antonio Cassese, *International Law in a Divided World* (Clarendon Press, 1986), 107.

<sup>85</sup> Geraint G. Howells and Stephen Weatherill, *Consumer Protection Law, 2nd* (Hants: Ashgate Publishing, Ltd., 2005), 10.

<sup>86</sup> Martin Dixon, *Textbook on International Law, 6th ed.* (Oxford: Oxford University Press, 2007), 136.

recognition, *i.e.* Southern Rhodesia,<sup>87</sup> Northern Cyprus<sup>88</sup> and East Germany.<sup>89</sup> Without *de facto* recognition, these States were not subjects of international law, and, as a consequence, provided some latitude for the British courts to address the parameters of the non-recognition doctrine on private law acts as they entered the British legal system. International law only recognizes title to the territory of a State—*dominium*—whereby its government is the agent that exercises *internal* sovereignty over that territory. *External* sovereignty, on the other hand, is where a “State must have complete independence in the management of its foreign relations.”<sup>90</sup> The governments of Southern Rhodesia, Northern Cyprus, and East Germany, were domestic agents contesting for the right to exercise internal sovereignty over a defined territory without *de facto* recognition. Southern Rhodesia, as a British colony, contested British agency; Northern Cyprus continues to contest the agency of the Republic of Cyprus; and East Germany (German Democratic Republic) contested the agency of the Federal Republic of Germany over the whole of the German State, whereby the two States emerged in the aftermath of World War II. The U.S. Supreme Court also recognized certain private law acts done under and by virtue of the Confederate States during the American Civil War, whereby the Confederacy contested the agency of the U.S. Federal Government. Unlike the British cases, where the recognition of certain private law acts, e.g. contracts, took place while these governments were in actual control of the internal sovereignty, the U.S. recognition occurred *postbellum* when the uprising had been defeated. The Confederate States were not recognized as *de facto* governments under international law, or in other words a successful revolution, but rather afforded international recognition as belligerents in a state of civil war within the United States of America.

The abovementioned cases are associated with revolutions, whereby *de facto* recognition is the evidence of the revolution’s success and replacement of the *de jure* government. These cases, however, do not address the validity of contracts arising out of an unlawful occupation of a recognized State’s territory. Marek cautions that occupation must not be confused with *de facto* governance. She warns that “assimilation of belligerent occupation and *de facto* government not only enlarges the powers of the occupant, but, moreover, is bound to confuse and undermine the clear notion of identity and continuity of the occupied State.”<sup>91</sup> Marek explains that a *de facto* government is “an internal State phenomenon [a successful revolution]; [but] belligerent occupation is external to the occupied State. To mistake belligerent occupation for a *de facto* government would mean treating the occupied State as annexed, its continuity as interrupted, its identity as lost and its personality as merged with that of the occupant.”<sup>92</sup> Therefore, according to

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<sup>87</sup> *Adams v. Adams*, 3 All ER 572 (1970).

<sup>88</sup> *Hesperides Hotels v. Aegean Turkish Holidays*, 1 All ER 277 (1978); *Emin v. Yeldag*, 1 FLR 956 (2002).

<sup>89</sup> *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd.*, 2 All ER 536 (1966).

<sup>90</sup> Freeman Snow, *International Law: Lectures Delivered at the Naval War College* (Washington, D.C.: Government Printing Press, 1895), 19.

<sup>91</sup> Marek, 82.

<sup>92</sup> *Id.*, 83.

Oppenheim, the validity of contracts during an occupation is “essentially of municipal law [of the occupied State] as distinguished from International Law.”<sup>93</sup> In other words, the municipal law of the Hawaiian Kingdom determines the validity of contracts in the Hawaiian Islands, not the municipal law of the United States. If the U.S. administered the municipal law of the Hawaiian Kingdom in its occupation of the Hawaiian Islands, contracts would be valid. Hall explains:

Thus judicial acts done under the control of the occupant, when they are not of a political complexion, administrative acts so done, to the extent that they take effect during the continuance of his control, and the various acts done during the same time by private persons under the sanction of Municipal Law, remain good. Were it otherwise, the whole social life of the community would be paralysed by an invasion [that is occupation].<sup>94</sup>

As a consequence of the *Restoration Agreement*, Queen Lili`uokalani agreed to “assume all the obligations created by the Provisional Government, in the proper course of administration, including all expenditures for military or police services,”<sup>95</sup> and since the provisional government was a direct outgrowth of the 1887 revolution, this recognition must also include all private law acts done under “proper course of administration” that occurred since July 6<sup>th</sup> 1887 to the date of the consummation of the agreement with President Cleveland on December 18<sup>th</sup> 1893. Private law acts that took place during this period were recognized as being valid, but private law acts that occurred after the agreement under both the provisional government and its successor the Republic of Hawai`i were not recognized by the lawful government. Consequently, courts of third States could not recognize private acts of individuals that took place subsequent to December 18<sup>th</sup> 1893, whether under the provisional government or the Republic of Hawai`i, without violating the intent and purpose of the 1893 Cleveland-Lili`uokalani executive agreements, which is a binding treaty between the U.S. and the Hawaiian Kingdom under international law, and U.S. Courts, in particular, would be precluded from recognition under the doctrine of *estoppel*.

A restored Hawaiian Kingdom government, though, could exercise “the prerogative power of the [returning] sovereign,”<sup>96</sup> and recognize certain private law acts in similar fashion as U.S. Courts did in the aftermath of the Civil War. According to Cooley, when the “resistance to the federal government ceased, regard to the best interests of all concerned required that such governmental acts as had no connection with the disloyal resistance to government, and upon the basis of which the people had acted and had acquired rights, should be suffered to remain undisturbed. But all acts done in furtherance of the rebellion were absolutely void, and private rights could not be built up under, or in reliance upon them.”<sup>97</sup> In *Texas v. White*, the U.S. Supreme Court held that:

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<sup>93</sup> Lassa Oppenheim, *International Law: A Treatise*, 6th ed., ed. Hersch Lauterpacht, Vol. II (London: Longman, Green and Co., 1940), 254.

<sup>94</sup> Hall, 579.

<sup>95</sup> Queen’s Declaration, December 18, 1893.

<sup>96</sup> Benvenisit, 72.

<sup>97</sup> Thomas Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown, and Company, 1898), 190; see also *Keppel v. Railroad Co.*, Chase’s Decision

acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.<sup>98</sup>

When the U.S. Congress, however, established by statute the governments of the Territory of Hawai`i in 1900 and later the component State of Hawai`i in 1959, it was in direct contravention of the rule preserving the continuity of the occupied State, and the willful dereliction of administering Hawaiian Kingdom laws. Private law acts during this period were not done according to the municipal laws of the occupied State, but rather the municipal laws of the occupant State. Despite the creation of these surrogate governments, the U.S. could not claim title to Hawaiian territory without a valid treaty of cession from the Hawaiian Kingdom government. "Without the consent of the invaded State to any change in the territorial *quo ante*," according to Schwarzenberger, "the rule [on the prohibition of wartime annexation] stands and cannot be affected by any purported action of the Occupying Power or third States."<sup>99</sup> Therefore, the governing case regarding the validity of private law acts done during an occupation where the occupant State illegally imposes its legal system within the territory of an internationally recognized, but occupied, State, is the 1970 Advisory Opinion of the International Court of Justice on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (Namibia case)*.

### **The Namibia Case and the Application of the Non-recognition Doctrine**

In 1966, "the General Assembly of the United Nations adopted resolution 2145(XXI), whereby it decided that the Mandate was terminated and that South Africa had no other right to administer the Territory."<sup>100</sup> This resulted in Namibia coming under the administration of the United Nations, but South Africa refused to withdraw from Namibian territory and consequently the situation transformed into an illegal occupation. As a former German colony, Namibia became a mandate territory under the administration of South Africa after the close of the First World War. According to the International Court of Justice, "The mandates system

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167 (1868); *Cook v. Oliver*, 1 Woods 437; *Hatch v. Burroughs*, 1 Woods 439; *Thorington v. Smith*, 8 Wallace 1 (1868); *Horn v. Lockhart*, 17 Wallace 570 (1873); *Sprott v. United States*, 20 Wallace 459 (1874); *Ford v. Surget*, 97 U.S. 594 (1878); *Hanauer v. Doane*, 12 Wallace 342 (1870); *Hanauer v. Woodruff*, 15 Wallace 439 (1872).

<sup>98</sup> *Texas v. White*, 74 U.S. 700 (1868).

<sup>99</sup> Georg Schwarzenberger, *International Law*, Vol. II (London: Stevens & Sons Ltd., 1968), 168.

<sup>100</sup> United Nations, *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1948-1991* (1992), 79.

established by Article 22 of the Covenant of the League of Nations was based upon two principles of paramount importance: the principle of non-annexation and the principle that the well-being and development of the peoples concerned formed a sacred trust of civilization.”<sup>101</sup> The Court also added, that the “ultimate objective of the sacred trust was self-determination and independence.”<sup>102</sup>

Addressing the legal consequences arising for States, the Court concluded that “South Africa, being responsible for having created and maintained that situation, has the obligation to put an end to it and withdraw its administration from the Territory.”<sup>103</sup> The Court explained that by “occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation,” and that both member and non-members “States of the United Nations are under an obligation to recognize the illegality and invalidity of South Africa’s continued presence in Namibia and to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia.”<sup>104</sup> The ICJ, however, clarified that “non-recognition should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, the illegality or invalidity of acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate cannot be extended to such acts as the registration of births, deaths and marriages.”<sup>105</sup> The principle of the doctrine of non-recognition has been codified under Article 41(2) of the *Responsibility of States for International Wrongful Acts* (2001). Crawford states that “no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State.”<sup>106</sup> Recognition of private law acts since December 18<sup>th</sup> 1893 by the courts of third States, including the U.S. as the responsible State, would directly compromise their governments “in the conduct of its foreign relations”<sup>107</sup> and, in particular Article 41(2) of the *Responsibility of States for International Wrongful Acts*.

### Limited and Conditional Jurisdiction of U.S. Courts in the Territory of the Hawaiian Kingdom

There are three jurisdictions, which Courts of the U.S. exercise: *territorial*, *subject matter* and *personal*. *Territorial* jurisdiction applies to the territorial sovereignty of the State and all persons within it, *subject matter* to a particular court in hearing the case, and *personal* over the person or persons themselves. Without territorial jurisdiction, a court cannot exercise subject matter and/or personal jurisdiction. In the Hawaiian Islands, the U.S. possesses a *conditional* grant of

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, 80.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Crawford, *The International Law Commission's Articles on State Responsibility*, 251.

<sup>107</sup> Dixon, 129.

territorial jurisdiction from Queen Lili`uokalani on January 17<sup>th</sup> 1893 under the *Lili`uokalani Assignment*, which is the administration and enforcement of Hawaiian Kingdom laws until the Hawaiian Kingdom government is restored in accordance with the *Restoration Agreement*.

According to Schiffman, U.S. "courts have established that despite [an executive agreement's] status under the Supremacy Clause, a treaty does not generally create private rights that are enforceable in the courts. However, a treaty will create individually enforceable rights if it is deemed to be 'self-executing.'"<sup>108</sup> Therefore, since the executive power was accepted by the President and acted upon in the investigation, negotiation and settlement with the Queen, which is clear evidence of self-execution, only Federal courts can possess jurisdiction in the Hawaiian Islands, in particular, Article II Courts, which are Military Courts under a Military Government that has yet to be established. Between December 18<sup>th</sup> 1893 and August 12<sup>th</sup> 1898, the U.S. military was not on Hawaiian soil, but yet the President still retained the temporary and conditional grant of executive power from the Queen to administer Hawaiian Kingdom law. But since Hawai`i was again occupied on August 12<sup>th</sup> 1898 during the Spanish-American War and has since remained, the U.S. military is now on Hawaiian territory and, not only according to the *Lili`uokalani Assignment*, but also Article 43 of the Hague Regulations, they must administer Hawaiian Kingdom law and prepare for the restoration of the Hawaiian Kingdom government. Being that the State of Hawai`i's governing body is a political component of a Federated government, the Federal Courts would hold exclusive territorial jurisdiction by virtue of the Queen's conditional and temporary grant of executive power since January 17<sup>th</sup> 1893 and are limited to the provisional administration of Hawaiian Kingdom law until the executive power can be returned to the Hawaiian Executive after the government of the Hawaiian Kingdom is restored in accordance with the *Restoration Agreement*.

Under U.S. Constitutional law, Federal Courts are classified under three separate headings in line with the first three Articles of the Federal Constitution. Article I Courts are established by Congress,<sup>109</sup> Article II Courts are Military Government Courts and Military Tribunals established by authority of the President,<sup>110</sup> and Article III Courts are created by the constitution itself.<sup>111</sup> While Article I Courts and III Courts are situated within the territorial jurisdiction of the United States, Article II Courts are situated outside of U.S. territory and "were the

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<sup>108</sup> Howard S. Schiffman, "Breard and Beyond: The Status of Consular Notification and Access under the Vienna Convention," *Cardozo Journal of International and Comparative Law* 8 (2000): 27-60, 35.

<sup>109</sup> These types of courts include, the Armed Services Board of Contract Appeals, Bankruptcy Courts, Board of Patent Appeals and Interferences, Civilian Board of Contract Appeals, Courts-martial, Court of Appeals for the Armed Forces, Court of Appeals for Veteran Claims, Court of Federal Claims, Merit Systems Protection Board, Postal Service Board of Contract Appeals, Social Security Administration's Appeal Council, Tax Court, Territorial Courts, and Trademark Trial and Appeal Board.

<sup>110</sup> These types of courts were established during the Mexican-American War, Civil War, Spanish-American War, and the Second World War, while U.S. troops occupied foreign countries and administered the laws of the these States.

<sup>111</sup> These types of courts include, the U.S. Supreme Court, Court of Appeals, District Courts, Court of International Trade, Foreign Intelligence Surveillance Court, and the Foreign Intelligence Surveillance Court of Review.

product of military occupation,”<sup>112</sup> and “are generally based upon the occupant’s customary and conventional duty to govern occupied territory and to maintain law and order.”<sup>113</sup> Exceptions to this rule are Courts-martial, being Article I Courts, that are situated on U.S. military bases abroad, and whose jurisdiction is limited to U.S. soldiers. Bederman defines an Article II Court as “a tribunal established: (1) pursuant only to the President’s war-making power under Article II of the Constitution; (2) which exercises either civil jurisdiction or criminal jurisdiction over civilians in peacetime; and (3) was constituted without an Act of Congress or any other legislative concurrence.”<sup>114</sup> Article II Courts are fully recognized by decisions of Federal Courts.<sup>115</sup>

U.S. Chief Justice Marshall asserted, the “jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power,” and that the “jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”<sup>116</sup> Consequently, Hawaiian law is the only law recognizable under international law within the territory of the Hawaiian Kingdom, and that the authority of Federal courts are limited by virtue of the *Lili`uokalani Assignment* to administer Hawaiian Kingdom law. This places the courts here in the Hawaiian Islands in a very vulnerable position whereby a defendant can procedurally object to the subject matter jurisdiction of the court by pleading that there is a binding agreement of restoration of the Hawaiian Kingdom government, and that by virtue of the conditional and temporary grant of Hawaiian executive power only Federal courts, in particular Article II Courts, can exercise subject matter and personal jurisdiction in the administration of Hawaiian Kingdom law. This action taken by the defendant would shift the burden onto the plaintiff to prove that both the *Lili`uokalani Assignment* and *Restoration Agreement* do not exist in order to maintain the plaintiff’s suit.<sup>117</sup>

In *Doe v. Kamehameha* (2005), Justice Susan Graber, of the Ninth Circuit, stated “in 1866, the Hawaiian Islands were still a sovereign kingdom.”<sup>118</sup> Graber’s observation left a question as to the time, place and manner by which that sovereignty was transferred to the U.S., which would go to the heart of the court’s jurisdiction. Also, in *Kahawaiola`a v. Norton* (2004), another case that came before

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<sup>112</sup> David J. Bederman, “Article II Courts,” *Mercer Law Review* 44 (1992-1993): 825-879, 826.

<sup>113</sup> *United States Law and Practice Concerning Trials of War Criminals by Military Commissions, Military Government Courts and Military Tribunals*, 3 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 103, 114 (1948).

<sup>114</sup> *Id.*, 832.

<sup>115</sup> *Jecker v. Montgomery*, 54 U.S. 498 (1851); *Leitensdorfer v. Webb*, 61 U.S. 176 (1857); *Cross v. Harrison*, 57 U.S. 164 (1853); *Mechanics’ & Traders’ Bank v. Union Bank*, 89 U.S. 276 (1874); *United States v. Reiter*, 27 Federal Case 768 (1865); *Burke v. Miltenberger*, 86 U.S. 519 (1873); *New Orleans v. Steamship Co.*, 87 U.S. 387 (1874); *In re Vidal*, 179 U.S. 126 (1900); *Santiago v. Noguera*, 214 U.S. 260 (1909); *Madsen v. Kinsella*, 343 U.S. 341 (1952); *Williamson v. Alldrige*, 320 F. Supp. 840 (1970); *Jacobs v. Froehlke*, 334 F. Supp. 1107 (1971).

<sup>116</sup> *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812).

<sup>117</sup> *Federal Rules of Criminal Procedure* (2009), Rule 12(b)(1); *Federal Rules of Civil Procedure* (2007), Rule 12(b)(1); *Hawai`i Rules of Civil Procedure* (1980), Rule 12(b)(1); and *Hawai`i Rules of Penal Procedure* (1977), Rule 12(b)(1).

<sup>118</sup> *Doe v. Kamehameha*, 416 F.3d 1025, 1048 (2005).



the court, the Ninth Circuit also acknowledged that the Hawaiian Kingdom was “a co-equal sovereign alongside the United States until the governance over internal affairs was entirely *assumed* by the United States.”<sup>119</sup> The assumption of governance over internal affairs does not equate to a transfer of Hawai‘i’s territorial sovereignty, which can only take place with the consent of the ceding State, whether by treaty or prescription—a congressional joint resolution notwithstanding. Instead, there exists a conditional and temporary transfer of Hawaiian executive power that is limited to the administration of Hawaiian Kingdom law.

Another important case at the State of Hawai‘i level was *State of Hawai‘i v. Lorenzo* (1994).<sup>120</sup> In that case, Lorenzo claimed to be a citizen of the Hawaiian Kingdom and that the State of Hawai‘i courts did not have jurisdiction over him. In 1994, the case came before a three-member panel of the Intermediate Court of Appeals and Judge Walter Heen delivered the decision. Heen affirmed the lower court’s decision denying Lorenzo’s motion to dismiss, but explained that “Lorenzo [had] presented no factual (or legal) basis for concluding that the Kingdom exists as a state in accordance with recognized attributes of a state’s sovereign nature.”<sup>121</sup> In other words, the reason Lorenzo’s argument failed was because he “did not meet his burden of proving his defense of lack of jurisdiction.”<sup>122</sup> In *Nishitani v. Baker* (1996), the Hawai‘i Intermediate Court of Appeals specifically made reference to *Lorenzo*, and stated that, “although the prosecution had the burden of proving beyond a reasonable fact establishing jurisdiction, the defendant has the burden of proving facts in support of any defense...which would have precluded the court from exercising jurisdiction over the defendant.”<sup>123</sup> It is clear that the Hawaiian Kingdom continues to exist “as a state in accordance with recognized attributes of a state’s sovereign nature,” by virtue of the *Lili‘uokalani Assignment* and the *Restoration Agreement*. International law and not the domestic laws of the United States determine a State’s sovereign nature. Furthermore, according to the United States Supreme Court, in *The Paquete Habana* (1900), “international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for determination.”<sup>124</sup> There is a presumption against jurisdiction and the parties seeking to invoke subject matter jurisdiction must demonstrate that the court is capable of hearing the case in the first place. Consent does not confer subject matter jurisdiction nor can its absence be waived. U.S. courts do not have extra-territorial jurisdiction and cannot exercise jurisdiction within the borders of another sovereign and independent State without an explicit grant from that State, *i.e.* *Lili‘uokalani Assignment*. In *Pennoyer v. Neff* (1877), Justice Stephen Field resounds the territorial limits of U.S. courts.

And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is

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<sup>119</sup> *Kahawaiolaa v. Norton*, 386 F.3rd 1271, 1282 (2004).

<sup>120</sup> *State of Hawai‘i v. Lorenzo*, 77 Hawai‘i (U.S.) 219 (1994).

<sup>121</sup> *Id.*, 221.

<sup>122</sup> *Id.*

<sup>123</sup> *Nishitani v. Baker*, 82 Hawai‘i (U.S.) 281, 289 (1996).

<sup>124</sup> *The Paquete Habana*, 175 U.S. 677 (1900).

allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. “Any exertion of authority of this sort beyond this limit,” says Story, “is a mere nullity, and incapable of binding such persons or property in any other tribunals.”<sup>125</sup>

## Enforceable Rights and Standing in U.S. Courts

What are enforceable rights under an international compact (executive agreement) that is self-executing and therefore a justiciable issue before U.S. Courts? These are individual rights protected under a treaty. Of the two executive agreements, the *Lili'uokalani Assignment* is self-executing, while the *Restoration Agreement* is non-self-executing. According to Leary, “A self-executing treaty is one which is applied directly by the courts without implementing legislation; a non-self-executing treaty is one which requires implementing legislation.”<sup>126</sup> In *Whitney v. Robertson*, only if “the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, [will] they have the force and effect of a legislative enactment,” and be enforceable by the courts.<sup>127</sup> Evidence that the temporary grant of executive power was ratified and executed under the sole authority of the President and therefore self-executing and enforceable in the courts, is the fact that the Presidential investigation, negotiation and settlement with the Queen took place by virtue of the operative nature of the assignment. As a matter of foreign relations, it fell within the President’s constitutional authority to enter into sole executive agreements, and a “duly executed treaty is the supreme law of the land and State and local laws must yield to its provisions.”<sup>128</sup> The *Restoration Agreement*, however, could be argued to be non-self-executing on two grounds: *first*, the Queen was advised by Willis that “the President can not use force without the authority of Congress,”<sup>129</sup> implying the need for implementing legislation; and *second*, the act of restoration has not yet taken place. In *Foster v. Neilson*, Chief Justice Marshall explained “when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the Judicial Department.”<sup>130</sup> Therefore, “the intention of the United States determines whether an agreement is to be self-executing...or should await implementation by legislation or appropriate executive or administrative action.”<sup>131</sup>

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<sup>125</sup> *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

<sup>126</sup> Virginia A. Leary, *International Labour Conventions and National Law* (The Hague: Martinus Nijhoff Publishers, 1982), 65.

<sup>127</sup> *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); also restated in *Medellin v. Texas*, 552 U.S. 9 (2008).

<sup>128</sup> *Republic of Finland v. Town of Pelham*, 270 N.Y.S.2d 661, 664 (1966).

<sup>129</sup> Executive documents, 1192.

<sup>130</sup> *Foster & Elam v. Neilson*, 27 U.S. 253, 314 (1829).

<sup>131</sup> The American Law Institute, *Restatement of the Law Third: Restatement of the Law the Foreign Relations Law*, Vol. I (St. Paul, Minn.: American Law Institute Publishers, 1986), 46

Are there enforceable rights by third parties under the *Lili'uokalani Assignment*, which is to administer Hawaiian Kingdom law? To determine whether a third party to an agreement has enforceable rights, Federal courts have invoked the “third party beneficiary” test. Section 302(1) of the Restatement (Second) of Contracts states that:

Unless otherwise agreed between promisor [U.S. government] and promisee [Hawaiian government], a beneficiary [residents in the Islands] of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either: (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance [administration of Hawaiian law].<sup>132</sup>

In the case of the *Lili'uokalani Assignment*, the United States, as the *promisor*, accepted the temporary grant of executive power from the Hawaiian Kingdom, as the *promisee*, to investigate the facts of the overthrow of the Hawaiian Kingdom government. The investigation determined that, the “lawful Government of Hawaii was overthrown without the drawing of a sword or the firing of a shot by a process every step of which, it may be safely asserted, is directly traceable to and dependent for its success upon the agency of the United States acting through its diplomatic and naval representatives.”<sup>133</sup> Consequently, Cleveland “instructed Minister Willis to advise the Queen and her supporters of [his] desire to aid in the restoration of the status existing before the lawless landing of the United States forces at Honolulu on the 16th of January last, if such restoration could be effected upon terms providing for clemency as well as justice to all parties concerned,”<sup>134</sup> which provided the basis and intent for the *Restoration Agreement*. Underlying first executive agreement is for the *promisor* to administer Hawaiian Kingdom law for the *promisee* until the executive power is returned. And in the *Restoration Agreement*, the roles reversed whereby the Hawaiian Kingdom, as the *promisor*, promised to the United States, as the *promisee*, to grant a full pardon after the government was reinstated. The *beneficiaries* of the *Lili'uokalani Assignment* are residents of the Hawaiian Islands who are obligated to adhere as well as to benefit from Hawaiian Kingdom law.

§6 of the Hawaiian Civil Code, provides that, “The laws are obligatory upon all persons, whether subjects of this kingdom, or citizens or subjects of any foreign State, while within the limits of this kingdom, except so far as exception is made by the laws of nations in respect to Ambassadors or others. The property of all such persons, while such property is within the territorial jurisdiction of this kingdom, is also subject to the laws.”<sup>135</sup> Since the laws are obligatory upon all persons within the islands, irrespective of nationality, there is a corresponding duty upon the government to enforce and administer the laws of the Hawaiian Kingdom, which is now temporarily vested with the Federal government, by its President. According to

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<sup>132</sup> The American Law Institute, *Restatement of the Law, Second, Contracts 2d* (Washington, D.C.: American Law Institute Publishers, 2007), §302.

<sup>133</sup> Executive Documents, 455.

<sup>134</sup> *Id.*, 458.

<sup>135</sup> "Compiled Laws of the Hawaiian Kingdom (Civil Code)" (1884), §6.

Hershey, ““One of the essential or fundamental rights of a State flowing from territorial sovereignty is that of jurisdiction over practically all things and persons on its territory. By virtue of its personal supremacy or sovereignty, it may, in addition, exercise a limited jurisdiction over its nationals traveling or residing in foreign lands, who are thus subject to a double or concurrent jurisdiction.”<sup>136</sup>

### Constitutional Rights of Third Party Beneficiaries

Constitutional protection of the civil rights of the *beneficiaries* to be acknowledged and protected by the United States, as the *promisee*, include the right to “life, liberty, and the right of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness (Article 1)”; the right to “worship God according to the dictates of their own consciences (Article 2)”; the right to “freely speak, write, and publish their sentiments on all subjects, being responsible for the abuse of that right, and no law shall be enacted to restrain the liberty of speech, or of the press, except such laws as may be necessary for the protection of His Majesty the King and the Royal Family (Article 3)”; the right “to assemble, without arms, to consult upon the common good, and to petition the King or Legislative Assembly for redress of grievances (Article 4)”; the right to the “writ of Habeas Corpus belongs to all men, and shall not be suspended, unless by the King, when in cases of rebellion or invasion, the public safety shall require its suspension (Article 5)”; the right that no “person shall be subject to punishment for any offense, except on due and legal conviction thereof, in a Court having jurisdiction of the case (Article 6)”; the right that no “person shall be held to answer for any crime in which the right of trial by Jury has been heretofore used, it shall be held inviolable forever, except in actions of debt or assumpsit in which the amount claimed is less than Fifty Dollars (Article 7)”; the right that no “person shall be required to answer again for an offense, of which he has been duly convicted, or of which he has been duly acquitted upon a good and sufficient indictment (Article 8)”; the right that no “person shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law (Article 9)”; the right that no “person shall sit as a judge or juror, in any case in which his relative is interested, either as plaintiff or defendant, or in the issue of which the said judge or juror, may have, either directly or through a relative, any pecuniary interest (Article 10)”; that “involuntary servitude, except for crime, is forever prohibited in this Kingdom; whenever a slave shall enter Hawaiian Territory, he shall be free (Article 11)”; that every “person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and effects; and no warrants shall issue, but on probable cause, supported by oath or affirmation, and describing the place to be searched, and the persons or things to be seized (Article 12).”

In regard to the civil rights of resident aliens, the Hawaiian Supreme Court, in *Bankruptcy of S.C. Allen* (1875), stated that foreign nationals in the Islands “rely on

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<sup>136</sup> Amos H. Hershey, *The Essentials of International Public Law* (New York: Macmillan Company, 1912), 159

the numerous treaty provisions which secure them all the civil rights which subjects have 'to enjoy their property in as full and ample a manner as subjects.' —American Treaty, Article 8. 'Full and perfect protection in regard to their property and the same right as native subjects.' —British Treaty, Article 8. 'The same protection as regards their properties as native subjects,' etc. —Bremen Treaty, Article 2."<sup>137</sup> Therefore, by virtue of the *Lili'uokalani Assignment*, Hawaiian subjects or citizens or subjects of any foreign State while within Hawaiian territory are third party *beneficiaries*, and it is the duty of the Federal government to acknowledge and protect these rights as if it was the Hawaiian Kingdom government itself.

If a court does not possess jurisdiction, whether subject matter or personal, and proceeds to prosecute or litigate the case in the Hawaiian Islands, it is a violation of the defendant's civil rights under Hawaiian constitutional law, whereby the defendant is vested with enforceable rights under the *Lili'uokalani Assignment* as a third party *beneficiary*, which goes to his legal standing in the court. According to *Flast v. Cohen* (1962), the U.S. Supreme Court qualified a litigant's standing as having "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."<sup>138</sup> In *Charles Dana v. B.F. Angel & B.F. Snow* (1855), Hawaiian Justice Robertson reiterated, "It would be matter of surprise as well as regret, if in a system of jurisprudence that has been matured by the wisdom of ages, adequate remedies were not provided for the violation of every important civil right" under Hawaiian Kingdom law.<sup>139</sup>

In *Dayton Development Co. v. Gilman Financial Services, Inc.* (2005), the Federal Court stated "In order for a third party to have a right to sue, the contract must be undertaken for plaintiff's direct benefit and the contract itself must affirmatively make this intention clear... If the intent is not express on the face of the contract, its implication at least must be so strong as to be practically an express declaration."<sup>140</sup> In another Federal case, *Hairston v. Pac. 10 Conference* (1996), the Court stated, "to create a third party beneficiary contract, the parties must intend that the promisor assume direct obligation to the intended beneficiary at the time they enter into the contract... To determine the contracting parties' intent, the court should construe the contract as a whole, in light of the circumstance under which it was made."<sup>141</sup> And in *Camco Oil Corporation v. Vander Laan*, "in order for a third party to recover on a contract to which he is not a party, it must clearly be shown that the contract was intended for his benefit."<sup>142</sup> Examples of enforceable rights under self-executing treaties include: *Kolovrat v. Oregon* (1961), the court enforced a Yugoslav citizen's right under the U.S.-Serbia treaty to inherit personal property located in Oregon;<sup>143</sup> *Clark v. Allen* (1947), the court enforced a German citizen's

<sup>137</sup> *Bankruptcy of S.C. Allen*, 6 Hawai'i 146, 147 (1875).

<sup>138</sup> *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>139</sup> *Charles Dana v. B.F. Angel & B.F. Snow*, 1 Hawai'i 196, 197 (1855) (quoting *Hadden vs. Spader*, 20 Johns. 554, 562 (1822)).

<sup>140</sup> *Dayton Development Co. v. Gilman Financial Services, Inc.*, 419 F.3d 852 (8<sup>th</sup> Cir. 2005).

<sup>141</sup> *Hairston v. Pac. 10 Conference*, 101 F.3d 913, 920 n. 4 (7<sup>th</sup> Cir. 1997).

<sup>142</sup> *Camco Oil Corp. v. Vander Laan*, 220 F.2d 897, 899 (5<sup>th</sup> Cir. 1955).

<sup>143</sup> *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

right to inherit property in California;<sup>144</sup> *Bacardi Corp. of American v. Domenech* (1940), the court enforced a foreign trademark owner's rights under Pan-American Trade-Mark treaty;<sup>145</sup> *Nielson v. Johnson* (1929), the court enforced a Danish citizen's right under U.S.-Denmark treaty to be free of discriminatory taxation;<sup>146</sup> *Jordan v. Tashiro* (1928), the court enforced the U.S.-Japan treaty allowing Japanese citizens to conduct trade in the United States;<sup>147</sup> *Cheung Sum Shee v. Nagle* (1925), the court held that U.S.-China treaty prevented mandatory exclusion of wives and minor children of Chinese merchants under Immigration Act of 1924;<sup>148</sup> *Hauenstein v. Lynham* (1879), the court enforced a treaty assuring Swiss citizen's right to inherit property in Virginia;<sup>149</sup> and in *Society for Propagation of the v. New Haven* (1823), the court enforced the 1783 treaty with Great Britain preventing Town of New Haven from seizing lands held under a British corporation.<sup>150</sup>

### U.S. Courts Bound to Take Judicial Notice of Hawaiian Independence

On November 28<sup>th</sup> 1843, Great Britain and France explicitly and formally recognized Hawaiian sovereignty by joint proclamation at the Court of London, and the United States followed on July 6<sup>th</sup> 1844 by letter of Secretary of State John C. Calhoun.<sup>151</sup> The Hawaiian Kingdom was the first Polynesian and non-European nation to be recognized as an independent and sovereign State. The Anglo-French proclamation stated:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of the French, taking into consideration the existence in the Sandwich Islands of a government capable of providing for the regularity of its relations with foreign nations, have thought it right to engage, reciprocally, to consider the Sandwich Islands [Hawaiian Islands] as an *Independent State*, and never to take possession, neither directly or under the title of Protectorate, or under any other form, of any part of the territory of which they are composed (emphasis added).<sup>152</sup>

As an internationally recognized State, the Hawaiian Kingdom became a full member of the Universal Postal Union on January 1<sup>st</sup> 1882, maintained more than ninety legations and consulates throughout the world,<sup>153</sup> and entered into extensive diplomatic and treaty relations with other States that included Austria-Hungary, Belgium, Bremen, Denmark, France, Germany, Great Britain, Hamburg, Italy, Japan,

<sup>144</sup> *Clark v. Allen*, 331 U.S. 503 (1947).

<sup>145</sup> *Bacardi Corp. of American v. Domenech*, 311 U.S. 150 (1940).

<sup>146</sup> *Nielson v. Johnson*, 279 U.S. 47 (1929).

<sup>147</sup> *Jordan v. Tashiro*, 278 U.S. 123 (1928).

<sup>148</sup> *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925).

<sup>149</sup> *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

<sup>150</sup> *Society for Propagation of the v. New Haven*, 21 U.S. (8 Wheat.) 464 (1823).

<sup>151</sup> Robert C. Wyllie, "Report of the Minister of Foreign Affairs," Foreign Affairs, Hawaiian Kingdom (1845), 4.

<sup>152</sup> Executive Documents, 120. Reprinted in *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 114.

<sup>153</sup> Hawaiian Almanac and Annual, "Hawaiian Register and Directory for 1893," *Hawaiian Almanac and Annual*, 1892, 140.

Netherlands, Portugal, Russia, Spain, Sweden-Norway, Switzerland and the United States.<sup>154</sup> Regarding the United States, the Hawaiian Kingdom entered into four treaties: 1849 Treaty of Friendship, Commerce and Navigation;<sup>155</sup> 1875 Treaty of Reciprocity;<sup>156</sup> 1883 Postal Convention Concerning Money Orders;<sup>157</sup> and the 1884 Supplementary Convention to the 1875 Treaty of Reciprocity.<sup>158</sup> The Hawaiian Kingdom was also recognized within the international community as a neutral State as expressly stated in treaties with the Kingdom of Spain in 1863 and the Kingdom of Sweden and Norway in 1852, and in the 21<sup>st</sup> century, both the Permanent Court of Arbitration in The Hague and the U.S. Federal Ninth Circuit Court of Appeals acknowledged the Hawaiian Kingdom's legal status as a sovereign State.<sup>159</sup>

On December 18<sup>th</sup> 1893, President Cleveland delivered a message to Congress and stated "that the Government of the Queen...was undisputed and was both the *de facto* and the *de jure* government,"<sup>160</sup> and that the provisional government was "neither a government *de facto* nor *de jure*."<sup>161</sup> This position of the President regarding the Hawaiian Kingdom government was confirmed under both the *Lili'uokalani Assignment* and the *Restoration Agreement* as well as acknowledged by the Congress in two separate resolutions passed by the House of Representatives and Senate. The House resolution of February 7<sup>th</sup> 1894, stated "that the annexation of the Hawaiian Islands to our country, or the assumption of a protectorate over them by our Government, is uncalled for and inexpedient; that the people of that country should have absolute freedom and independence in pursuing their own line of policy, and that foreign intervention in the political affairs of the islands will not

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<sup>154</sup> These treaties, except for the 1875 Hawaiian-Austro/Hungarian treaty, which is at the Hawai'i Archives, can be found in Elele, *Treaties and Conventions Concluded between the Hawaiian Kingdom and other Powers, since 1825* (Honolulu: Elele Book, Card and Job Print, 1887): Belgium (Oct. 4, 1862) at 71; Bremen (March 27, 1854) at 43; Denmark (Oct. 19, 1846) at 11; France (July 17, 1839, March 26, 1846, September 8, 1858), at 5, 7 and 57; French Tahiti (Nov. 24, 1853) at 41; Germany (March 25, 1879) at 129; Great Britain (Nov. 13, 1836 and March 26, 1846) at 3 and 9; Great Britain's New South Wales (March 10, 1874) at 119; Hamburg (Jan. 8, 1848) at 15; Italy (July 22, 1863) at 89; Japan (Aug. 19, 1871, January 28, 1886) at 115 and 147; Netherlands (Oct. 16, 1862) at 79; Portugal (May 5, 1882) at 143; Russia (June 19, 1869) at 99; Samoa (March 20, 1887) at 171; Spain (Oct. 9, 1863) at 101; Sweden and Norway (April 5, 1855) at 47; and Switzerland (July 20, 1864) at 83.

<sup>155</sup> *Treaty with the Hawaiian Kingdom*, 9 U.S. Statutes 977. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 115.

<sup>156</sup> *Commercial Reciprocity between the United States and the Hawaiian Kingdom*, 19 U.S. Statutes 625. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 126.

<sup>157</sup> *Postal Convention between the United States and the Hawaiian Kingdom*, 23 U.S. Statutes 736. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 129.

<sup>158</sup> *Supplementary Convention between the United States and the Hawaiian Kingdom*, 25 U.S. Statutes 1399. Reprinted at *Hawaiian Journal of Law & Politics* 1 (Summer 2004): 134.

<sup>159</sup> In *Larsen v. Hawaiian Kingdom*, 119 ILR 566, 581 (2001), the Permanent Court of Arbitration in The Hague acknowledged the Hawaiian Kingdom to have "existed as an independent State recognized as such by the United States of America, the United Kingdom, and various other States." The Federal 9<sup>th</sup> Circuit Court, in *Kahawaiola 'a v. Norton*, 386 F.3d 1271 (2004), also acknowledged the Hawaiian Kingdom as "a co-equal sovereign alongside the United States;" and in *Doe v. Kamehameha*, 416 F.3d 1025, 1048 (2005), the Court stated that, "in 1866, the Hawaiian Islands were still a sovereign kingdom."

<sup>160</sup> Executive Documents, 451.

<sup>161</sup> *Id.*, 453.

be regarded with indifference by the Government of the United States."<sup>162</sup> And the Senate resolution of May 31<sup>st</sup> 1894 stated, "That of right-it-belongs wholly to the people of the Hawaiian Islands to establish and maintain their own form of Government and domestic policy; that the United States ought in no wise to interfere therewith, and that any intervention in the political affairs of these islands by any other Government will be regarded as an act unfriendly to the United States."<sup>163</sup>

In *Jones v. United States*, Justice Gray proclaimed that, "All courts of justice are bound to take judicial notice...of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive."<sup>164</sup> Therefore, the President's message to Congress, the executive agreements, and the two resolutions passed by the House of Representatives and the Senate are "public acts of the legislature and executive," and, according to *Jones*, binds all U.S. courts to take judicial notice. Under international law, this acknowledgement of the sovereignty of a foreign power cannot be withdrawn, and according to Schwarzenberger, "recognition estops the State which has recognized the title from contesting its validity at any future time."<sup>165</sup>

### State of Hawai`i Claims to Concurrent Jurisdiction with Federal Courts Rebuttable

In *Belmont* and *Pink*, the Court gave effect to the express terms of the executive agreement that extinguishes all underlying claims of relief sought under State law. The *Restoration Agreement* expressly calls for the restoration of the Hawaiian Kingdom government and the granting of amnesty, and that the State of Hawai`i cannot claim to be the restored Hawaiian Kingdom government established by order of the President. Instead, the State of Hawai`i was established by an Act of Congress in 1959,<sup>166</sup> which was in violation of the separation of powers doctrine, and the recognized principle of the "exclusive power of the President as the sole organ of the federal government in the field of international relations."<sup>167</sup> According to Born, "American courts, commentators, and other authorities understood international law as imposing strict territorial limits on national assertions of legislative jurisdiction."<sup>168</sup> In *Rose v. Himely* (1807), the U.S. Supreme Court

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<sup>162</sup> The New York Times, "Sides with the President: The House Adopts the McCreary Hawaiian Resolutions," *The New York Times*, February 7, 1894 [Exhibit I].

<sup>163</sup> The New York Times. "Sound Doctrine as to Hawaii," *The New York Times*, February 7, 1894 [Exhibit J].

<sup>164</sup> *Jones v. United States*, 137 U.S. 202, 213 (1890).

<sup>165</sup> Georg Schwarzenberger, "Title to Territory: Response to a Challenge," *American Journal of International Law* 51, no. 2 (1957): 308-324, 316.

<sup>166</sup> "State of Hawai`i Admissions Act," 73 U.S. Statutes 4 (1959).

<sup>167</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); see also *United States v. Belmont*, 301 U.S. 324, 330 (1937); *United States v. Pink*, 315 U.S. 203, 230 (1942); and *United States v. Louisiana*, 363 U.S. 1, 35 (1960).

<sup>168</sup> Gary Born, *International Civil Litigation in United States Courts*, 3rd ed. (The Hague: Kluwer Law International, 1996), 493.



illustrated this view by asserting, “that the legislation of every country is territorial.”<sup>169</sup> In *The Apollon* (1824), the Court stated that the “laws of no nation can justly extend beyond its own territory” for it would be “at variance with the independence and sovereignty of foreign nations,”<sup>170</sup> and in *U.S. v. Belmont*, Justice Sutherland resounded, “our Constitution, laws and policies have no extraterritorial operation, unless in respect of our own citizens.”<sup>171</sup> The Court also explained, “however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction.”<sup>172</sup>

The two executive agreements are both Federal matters under the exclusive authority of the President by virtue of Article II of the U.S. Constitution. State of Hawai`i courts cannot exercise subject matter jurisdiction without violating Federal laws, notwithstanding the general principle that there is a presumption that State courts possess concurrent jurisdiction with Federal courts over Federal matters. In *Gulf Offshore Co. v. Mobil Oil Corporation* (1981), the Court stated, “the presumption of concurrent jurisdiction can be rebutted by...a clear incompatibility between state court jurisdiction and federal interests.”<sup>173</sup> The *Lili`uokalani Assignment* divests State of Hawai`i courts from exercising subject matter jurisdiction over matters being exclusively Federal because the executive agreement binds the Federal government to administer Hawaiian Kingdom law. Therefore, the presumption of concurrent jurisdiction by the State of Hawai`i courts over Federal matters is rebuttable because of a “clear incompatibility between state court jurisdiction and federal interests.”

### **Executive Agreements Preempt State of Hawai`i Laws and Policies and Federal Legislation**

In 1918, Petrograd Metal Works, a Russian Company, deposited \$24,438 with a New York City private banking firm, August Belmont & Company. Later that year the Soviet Union nationalized all private businesses, which included Petrograd Metal Works. As a result of the sweeping nationalization of private enterprise by the Soviet government, U.S. nationals could not seek any legal remedies against the Soviet Union until 1933 when President Franklin D. Roosevelt afforded diplomatic recognition of the Soviet government by Executive Order.

Financial claims were among the issues discussed by the Roosevelt administration and Soviet People's Commissar of Foreign Relations Maxime Maximovitch Litvinoff. In a reciprocal agreement signed on 16 November 1933, each side agreed to release and transfer the job of weighing and collecting claims to the government on whose soil the claim was being made. In the Petrograd Metal Works case, this meant that the United States agreed

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<sup>169</sup> *Rose v. Himely*, 8 U.S. 241, 279 (1807).

<sup>170</sup> *The Apollon*, 22 U.S. 362, 370 (1824).

<sup>171</sup> *U.S. v. Belmont*, 301 U.S. 324, 332 (1937); see also *U.S. v. Pink*, 315 U.S. 203, 226 (1942).

<sup>172</sup> *U.S. v. Belmont*, 301 U.S. 324, 332 (1937).

<sup>173</sup> *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

to pursue the claim of the Soviet government on the money withheld by the Belmont firm, in return for Soviet action on claims by Americans against Russian nationals.

The August Belmont Company, however, refused to release the disputed money. The U.S. government responded with a lawsuit. After August Belmont died in 1924, the federal suit named the executors of his estate, Belmont's widow Eleanor and Morgan Belmont. At first, the federal government's claim was dismissed by the U.S. District Court for the Southern District of New York. The court agreed that the Belmont case was within the scope of the Roosevelt-Litvinoff accord. Since the deposit was made in New York and not on Soviet territory, however, the court decided that appropriating the money would amount to confiscation, an act which was against the public policy of both the state of New York and the United States. Dismissal of the case amounted to a decision that the U.S. government was not entitled to sue the Belmont company.<sup>174</sup>

The U.S. government appealed the decision before the U.S. Supreme Court and on May 3<sup>rd</sup> 1937, the New York District Court's decision was reversed in *United States v. Belmont*. Justice Sutherland made clear that there are different kinds of treaties that did not require Senate approval, and when the Soviet Union sought to seize its assets in the New York bank with the assistance of the United States it was "effected by an exchange of diplomatic correspondence between the Soviet government and the United States [in which the] purpose was to bring about a final settlement of the claims and counterclaims between the Soviet government and the United States."<sup>175</sup> The same is true with the *Restoration Agreement* whereby U.S. nationals who committed the crime of treason would be granted amnesty after the government was restored, since according to Hawaiian Penal laws aliens were capable of committing treason in the Kingdom.<sup>176</sup> 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

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<sup>174</sup> Law Library - American Law and Legal Information, *United States v. Belmont - Further Readings*, <<http://law.jrank.org/pages/13507/United-States-v-Belmont.html>> (accessed November 28, 2009).

<sup>175</sup> *United States v. Belmont*, 310 U.S. 324, 326 (1937).

<sup>176</sup> Penal Code of the Hawaiian Islands, Chapter VI, provides: "1. Treason is hereby defined to be any plotting or attempt to dethrone or destroy the King, or the levying of war against the King's government, or the adhering to the enemies thereof giving them aid and comfort, the same being done by a person owing allegiance to this kingdom. 2. Allegiance is the obedience and fidelity due to the kingdom from those under its protection. 3. An alien, whether his native country be at war or at peace with this kingdom, owes allegiance to this kingdom during his residence therein, and during such residence, is capable of committing treason against this kingdom.... 9. Whoever shall commit the crime of treason, shall suffer the punishment of death; and all his property shall be confiscated to the government (emphasis added)."

clause of the Constitution (article 2, 2), require the advice and consent of the Senate.<sup>177</sup>

In *Belmont*, the Court concluded that under no circumstances “could a state policy be found to legally supersede an agreement between the national government and a sovereign foreign power. The external powers of the U.S. government could be exercised without regard to state laws.”<sup>178</sup> The Court also stated, “Plainly, the external powers of the United States are to be exercised without regard to state laws or policies,” and “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist.”<sup>179</sup> In *United States v. Pink* (1942), the Court reiterated, “It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy.... But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.... Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement.”<sup>180</sup> Both *Belmont* and *Pink* were reinforced by *American Insurance Association v. Garamendi* (2003), where the Court reiterated, that “valid executive agreements are fit to preempt state law, just as treaties are,”<sup>181</sup> and that the preemptive power of an executive agreement derives from “the Constitution’s allocation of the foreign relations power to the National Government.” All three cases affirm that the *Lili'uokalani Agreement* preempts all laws and policies of the State of Hawai'i. In *Edgar v. Mite Corporation* (1982), Justice White ruled, “A state statute is void to the extent that it actually conflicts with a valid federal statute; and '[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility.’”<sup>182</sup>

Included in this preemption is Congressional legislation that violates the terms of the two executive agreements and the separation of powers doctrine. Specific legislation include the 1900 Organic Act establishing a government for the Territory of Hawai'i; 1921 Hawaiian Homes Commission Act establishing homesteads for native Hawaiians; 1959 Hawai'i Statehood Act transforming the territory into a State of the Federal Union; and currently U.S. Senate Bill 381 titled “To express the policy of the United States regarding the United States relationship with Native Hawaiians, to provide a process for the reorganization of a Native Hawaiian government,” also known as the Akaka bill. According to Chief Justice Taney, in *Luther v. Borden* (1849):

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<sup>177</sup> *United States v. Belmont*, 310 U.S. 324, 330 (1937); see also *United States v. Pink*, 315 U.S. 203 (1942); *American International Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (1981); *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

<sup>178</sup> Law Library - American Law and Legal Information, *United States v. Belmont - Further Readings*.

<sup>179</sup> *United States v. Belmont*, 301 U. S. 324, 330 (1937).

<sup>180</sup> *United States v. Pink*, 315 U.S. 203, 230 (1942).

<sup>181</sup> *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

<sup>182</sup> *Edgar v. Mite Corporation*, 457 U.S. 624, 631 (1982).

Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled... the power of its courts and other officers is annulled with it.<sup>183</sup>

## Conclusion

There is no dispute between the United States and the Hawaiian Kingdom regarding the illegal overthrow of the Hawaiian government, and the *Restoration Agreement* is the evidence of final settlement. As such, the United States cannot benefit from its non-performance of both the *Lili'uokalani Assignment* and the *Restoration Agreement* over the reliance held by the Queen and Hawaiian subjects in good faith and to their detriment. Therefore, the United States is precluded from asserting any of the following claims, unless it can show that both executive agreements have been carried into effect by its terms and the executive power has been returned to the Hawaiian Executive. 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 with a right to self-determination.

By virtue of the temporary and conditional grant of Hawaiian executive power, the U.S. was obligated to restore the Hawaiian Kingdom government, but instead illegally occupied the Hawaiian Kingdom for military purposes during the Spanish-American War, and has remained in the Hawaiian Islands ever since. The failure to administer Hawaiian Kingdom law under the *Lili'uokalani Assignment* and then to reinstate the Hawaiian government under the *Restoration Agreement* constitutes a breach of an international obligation, as defined by the *Responsibility of States for Internationally Wrongful Acts*,<sup>184</sup> and the breach of this international obligation by the U.S. has “a continuing character [that] extends over the entire period during which the act continues and remains not in conformity with the international obligation.”<sup>185</sup> The extended lapse of time has not affected in the least the international obligation of the U.S. under the both executive agreements; despite over a century of non-compliance and prolonged occupation, and according to Wright, the President binds “himself and his successors in office by executive agreements.”<sup>186</sup> More importantly, the U.S. “may not rely on the provisions of its

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<sup>183</sup> *Luther v. Borden*, 48 U.S. 1, 40 (1849).

<sup>184</sup> United Nations, "Responsibility of States for Internationally Wrongful Acts" (2001), Article 12.

<sup>185</sup> *Id.*, Article 14(2).

<sup>186</sup> Wright, 235.

internal law as justification for failure to comply with its obligation.”<sup>187</sup> Preliminary to the restoration of the Hawaiian Kingdom government *de jure*, the U.S. must first abide by the *Lili`uokalani Assignment* to administer Hawaiian Kingdom law, which is now reinforced under Article 43 of the Hague Convention, IV, which mandates an occupying State to administer the laws of the occupied State. Article 55 of the Hague Convention, IV, also qualifies the occupier only as an administrator and usufructuary,<sup>188</sup> and Articles 50 and 56 of the Geneva Convention, IV, directs the military occupier to cooperate with national and local authorities. During this period of administration, diligent research will need to be carried out in order to provide a comprehensive plan for an effective transition and return of the Hawaiian executive power after the Hawaiian government has been restored.

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<sup>187</sup> Responsibility of States, Article 31(1).

<sup>188</sup> Usufruct is defined as the “right of using and enjoying and receiving the profits of property that belongs to another, and a ‘usufructuary’ is a person who has the usufruct or right of enjoying anything in which he has no property interest.” Henry Campbell Black, *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Company, 1990), 1544.

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## DIPLOMATIC NOTES (Executive Agreements)

Documents comprising the 1893 Cleveland-Lili'uokalani Executive Agreements are copies from Foreign Relations of the United States printed by the United States House of Representatives, 53<sup>rd</sup> 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. Minister Willis*, October 18, 1893;
- Exhibit C— *U.S. Minister Willis to U.S. Secretary of State Gresham*, November 16, 1893;
- Exhibit D— *U.S. Secretary of State Gresham to U.S. Minister Willis*, November 24, 1893;
- Exhibit E— *U.S. Secretary of State Gresham to U.S. Minister Willis*, December 3, 1893;
- Exhibit F— *U.S. Minister Willis to U.S. Secretary of State Gresham*, December 19, 1893; and
- Exhibit G— *U.S. Minister Willis to U.S. Secretary of State Gresham*, December 20, 1893.
- Exhibit H—*U.S. Secretary of State Gresham to U.S. Minister Willis*, January 12, 1894.
- Exhibit I—"Sides with the President: The House Adopts the McCreary Hawaiian Resolutions," *The New York Times*, February 7, 1894.
- Exhibit J—"Sound Doctrine as to Hawaii," *The New York Times*, February 7, 1894.

# Exhibit "A"

## APPENDIX II

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# FOREIGN RELATIONS

OF THE

# UNITED STATES

1894

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## AFFAIRS IN HAWAII

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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.

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[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"

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.

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

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

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

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

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

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

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

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

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

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

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

I am, sir, your obedient servant,

W. Q. GRESHAM.

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*Mr. Gresham to Mr. Willis.*

[Telegram sent through dispatch agent at San Francisco.]

DEPARTMENT OF STATE,  
Washington, November 24, 1893.

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

W. Q. GRESHAM.

# Exhibit “C”

MESSAGE  
FROM THE  
PRESIDENT OF THE UNITED STATES,  
TRANSMITTING  
*Certain further information relating to the Hawaiian Islands.*

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

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*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.*

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*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 Nawahi, 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.

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*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”

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.

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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”

*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 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.

LILIUOKALANI.  
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.

*Mr. Willis to Mr. Gresham.*

[Confidential.]

No. 17.]

LEGATION OF THE UNITED STATES,

*Honolulu, December 20, 1893.*

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

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

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

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

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

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

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

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

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

## Exhibit “H”

Although the situation at the close of the session was deeply discouraging to the community, it was accepted without any intention of meeting it by other than legal means. The attempted *coup d'état* of the Queen followed, and her ministers, threatened with violence, fled to the citizens for assistance and protection; then it was that the uprising against the Queen took place, and, gathering force from day to day, resulted in the proclamation of the Provisional Government and the abrogation of the monarchy on the third day thereafter.

No man can correctly say that the Queen owed her downfall to the interference of American forces. The revolution was carried through by the representatives, now largely reinforced, of the same public sentiment which forced the monarchy to its knees in 1887, which suppressed the insurrection of 1889, and which for twenty years has been battling for representative government in this country. If the American forces had been absent the revolution would have taken place, for the sufficient causes for it had nothing to do with their presence.

I, therefore, in all friendship of the Government of the United States, which you represent, and desiring to cherish the good will of the great American people, submit the answer of my Government to your proposition, and ask that you will transmit the same to the President of the United States for his consideration.

Though the Provisional Government is far from being "a great power" and could not long resist the forces of the United States in a hostile attack, we deem our position to be impregnable under all legal precedents, under the principles of diplomatic intercourse, and in the forum of conscience. We have done your Government no wrong; no charge of discourtesy is or can be brought against us. Our only issue with your people has been that, because we revered its institutions of civil liberty, we have desired to have them extended to our own distracted country, and because we honor its flag and deem that its beneficent and authoritative presence would be for the best interests of all of our people, we have stood ready to add our country, a new star, to its glory, and to consummate a union which we believed would be as much for the benefit of your country as ours. If this is an offense, we plead guilty to it.

I am instructed to inform you, Mr. Minister, that the Provisional Government of the Hawaiian Islands respectfully and unhesitatingly declines to entertain the proposition of the President of the United States that it should surrender its authority to the ex-Queen.

This answer is made not only upon the grounds hereinbefore set forth, but upon our sense of duty and loyalty to the brave men whose commissions we hold, who have faithfully stood by us in the hour of trial, and whose will is the only earthly authority we recognize. We can not betray the sacred trust they have placed in our hands, a trust which represents the cause of Christian civilization in the interests of the whole people of these islands.

With assurances of the highest consideration,  
I have, etc.,

SANFORD B. DOLE,  
*Minister of Foreign Affairs.*

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

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*Mr. Willis to Mr. Gresham.*

No. 19.]

DECEMBER 23, 1893.

This communication simply transmits minister's salary account.

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[Telegram.]

WASHINGTON, *January 12, 1894.*

W. A. COOPER,  
*U. S. Dispatch Agent,  
Post-Office Building, San Francisco, Cal.:*

Forward following telegram to Hon. A. S. Willis, U. S. minister,  
Honolulu, by steamer *Mariposa* to-morrow.

W. Q. GRESHAM.

WILLIS,

*Minister, Honolulu.*

WASHINGTON, *January 12, 1894.*

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

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

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

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

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

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



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

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

GRESHAM.

# Exhibit “I”

# SIDES WITH THE PRESIDENT

## THE HOUSE ADOPTS THE M'CREARY HAWAIIAN RESOLUTIONS.

**The Policy of the Administration Sustained—Mr. Boutelle's Fiery Screech Receives Its Quietus—Cummings and Sickles of New-York Give Further Comfort to the Enemy—All Others Pulled True to the Party—The Vote and the Resolutions Adopted.**

WASHINGTON, Feb. 7.—As was indicated by the vote of the House yesterday, the Democrats of that body are with the Administration on the Hawaiian question. The fact was made plain enough to anybody when the House to-day passed the McCreary resolutions and voted down the bumptious propositions of Boutelle.

The opposition was insignificant on the Democratic side, being made up of Sickles and Cummings of New-York, two of the Democrats who voted against the Tariff bill. The Hawaiian resolutions would have been passed yesterday if the Democrats were in the habit of attending more strictly to business.

Before the vote was taken to-day the old question as to what constitutes a quorum came up, and, after some discussion, it was decided that a quorum is not a majority of the legal membership of the House, but a majority of the members elected and living. With that decision 177 members constituted a quorum.

Quigg was not taken into account, the ruling being that a member is not a member to be counted until the House has accepted him on properly prepared and submitted credentials.

Before the ruling was made on the question of a quorum the Republicans did not vote, and seemed to be disposed to force the Democrats to muster a quorum to dispose of the resolution among themselves. After it was decided that 177 should be regarded as a quorum, and it was known that there was a quorum present, the Republicans voted in the negative, and they were assisted, as has been stated, by Cummings and Sickles.

The Hawaiian question is now out of the way in the House, and the Senate will await the pleasure of Senator Morgan before it takes the matter up.

At the opening of the House the Speaker and Mr. Reed (Rep., Me.) got into a parliamentary wrangle as to whether the order by which the absentees were recalled continued after the adjournment. The Chair held that it did. Before the vote was announced, it was seen that the House had almost secured a quorum, if it did not actually have it, and there was an effort made by some members to withdraw or change their votes.

The Speaker held that this could only be done by unanimous consent, and objection was made in each case. The Speaker announced the vote: Yeas, 174; nays, 8; no quorum.

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Mr. Springer (Dem., Ill.) made the point of order that 177 constituted a quorum, and not 179, as had been held. In support of this he cited the ruling of ex-Speaker Reed, in the Fifty-first Congress, holding that a quorum consisted of a majority of the living members and not of all those who had been elected.

Mr. Reed said he was not clear on that point, but was under the impression that he had decided otherwise.

The Speaker read Mr. Reed's decision from the Journal of the Fifty-first Congress, in which it was shown that on an important case, a contested-election case, a point of order was made that a quorum consisted of a majority of the membership of the House and not of the living members; that Speaker Reed, owing to the confusion at the time, could not find the precedents, and so allowed the point temporarily, but, on reviewing the question subsequently and looking up the precedents, decided that a quorum consisted of a majority of the living members.

Mr. Reed replied that in that case he had changed his opinion, and it was evident that the Speaker had changed his.

The Speaker held to the opinion of his predecessor, that a quorum consisted of a majority of the living members, but said that he would submit the question to the House for decision.

Mr. Reed suggested that three of the vacancies had been filled by elections, and that while none of those newly-elected members had been sworn in, the fact that they had been elected might change the status of affairs. The Speaker thought that they were not members until sworn in and that they could not therefore be taken into account.

Mr. Cockran (Dem., N. Y.) contended that a quorum of the House should be a fixed quantity and not a sliding one.

Mr. Bailey (Dem., Texas) took the opposite view, and held that a quorum should consist of a majority of the living members and not of the full membership of the House.

Mr. Rayner (Dem., Md.) made a parliamentary inquiry as to whether it would be in order to lay the pending point of order on the table and order another roll call. The Speaker said it could be done by unanimous consent, and, no objection being offered, the question as to what constituted a quorum was left in statu quo, and the roll was called on the question of agreeing to the pending Hawaiian resolution.

On the second roll call the Populists voted "No," to make a quorum, and the Republicans, seeing they that could not prevent the quorum, changed their tactics and answered to their names. The resolution was thus agreed to by a vote of 177 to 75. The following is the vote in detail:

Yeas—Messrs. Abbott, Alderson, Alexander, Allen, Arnold, Bailey, Baker, (Kan.) Baldwin, Bankhead, Barwig, Bell, (Tex.) Beltzhoover, Black, (Ga.) Black, (Ill.) Blanchard, Bland, Boatner, Branch, Brawley, Breckinridge, (Ark.) Breckinridge, (Ky.) Bretz, Brickner, Brookshire, Brown, Bryan, Bynum, Cabaniss, Cadmus, Campbell, Cannon, (Cal.) Caruth, Catchings, Causey, Clark, (Mo.) Clarke, (Ala.) Cobb, (Ala.) Cobb, (Mo.) Cockran, Cockrell, Compton, Conn. Coombs, Cooper, (Fla.) Cooper, (Ind.) Cooper, (Tex.) Cornish, Covert, Cox, Crain, Crawford, Culberson, Dearmond, Deforest, Denson, Dockery, Donovan, Dunn, Durborow, Edmunds, English, Enloe, Epes, Erdman, Everett, Fithian, Forman, Fyan, Geissenhainer, Goldzler, Goodnight, Gorman, Grady, Gresham, Griffin, Halnes, Hall, (Minn.) Hall, (Mo.) Hammond, Hare, Hatch, Hayes, Heard, Henderson, (N. C.) Holman, Mooker, (Miss.) Houk, (Ohio) Hunter, Kem, Kilgore, Kribbs, Kyle, Lane, Lapham, Latimer, Lawson, Layton, Lester, Lisle, Livingston, Lockwood, Lynch, Maddox, Maguire, Mallory, Marshall, Martin, McAleer, McCreary, (Ky.) McCulloch, McDannold, McDearmon, McEttrick, McGann, McKaig, McLaurin, McMillin, McNagny, McRae, Meredith, Money, Montgomery, Moses, Mutchler, Neill, Oates, O'Neil, Outhwalte, Pascal, Patterson, Paynter, Pearson, Pendleton, (Texas) Pendleton, (West Va.) Pigott, Price, Rayner, Reilly, Richards, Richardson, (Mich.) Richardson, (Tenn.) Ritchie, Robbins, Robertson, Runk, Russell, (Ga.) Ryan, Sayers, Shell, Sibley, Snodgrass, Springer, Stallings, Stevens, Stockdale, Stone, (Ky.) Swanson, Talbert, Talbott, Tarsney, Tate, Taylor, (Ind.) Terry, Tracey, Tucker, Turner, Turpin, Tyler, Warner, Washington, Wells, Wheeler, (Ala.) Williams, (Ill.) Williams, (Miss.) Wilson, (West Va.) Wise, Wolverton—177.

Nays—Messrs. Adams, (Ky.) Adams, (Penn.) Aitken, Apsley, Avery, Baker, (N. H.) Bartholdt, Bell, (Col.) Bingham, Boen, Boutelle, Broderick, Bundy, Bunn, Caldwell, Cannon, (Ill.) Chickering, Cogswell, Cousins, Cummings, Curtis, (Kan.) Curtis, (N. Y.) Dalzell, Davis, (Kan.) Dolliver, Dcolittle, Ellis, (Oregon) Fletcher, Gear, Harmer, Harris, Hartman, Haugen, Haines, Henderson, (Ill.) Hepburn, Hermann, Hitt, Hulick, Johnson, (N. D.) Joy, Kiefer, Lacey, Linton, Loud, Lucas, Marvin, McCleary, (Minn.) McDowell, Meiklejohn, Mercer, Morse, Pence, Powers, Reed, Reyburn, Scranton, Shaw, Sickles, Simpson, Smith, C. W. Stone, (Penn.) W. A. Stone, (Penn.) Strong, Sweet, Thomas, Updegraff, Van Voorhis, (Ohio) Walker, Wanger, Waugh, Wheeler, (Ill.) Wilson, (Ohio) Wilson, (Washington) Woomer—75.

The resolutions submitted by Mr. McCreary, Chairman of the Foreign Affairs Committee, on the 23d of January last, which were passed by this vote, were as follows:

Resolved, First, That it is the sense of this House that the action of the United States Minister in employing United States naval forces, and illegally aiding in overthrowing the constitutional Government of the Hawaiian Islands, in January, 1893, and in setting up in its place a provisional Government, not republican in form, and in opposition to the will of the majority of the people, was contrary to the traditions of our Republic and the spirit of our Constitution, and should be and is condemned.

Second—That we heartily approve the principle announced by the President of the United States that interference with the domestic affairs of an independent nation is contrary to the spirit of American institutions.

And it is further the sense of this House that the annexation of the Hawaiian Islands to our country, or the assumption of

And it is further the sense of this House that the annexation of the Hawaiian Islands to our country, or the assumption of a protectorate over them by our Government, is uncalled for and inexpedient; that the people of that country should have absolute freedom and independence in pursuing their own line of policy, and that foreign intervention in the political affairs of the islands will not be regarded with indifference by the Government of the United States.

As soon as the vote had been announced on the McCreary resolution, Mr. Boutelle (Rep., Me.) called up his privileged resolution of Dec. 23, which declared that it is the

sense of the House that any intervention by the Executive of the United States or its civil or military representatives, without authority of Congress, in the internal affairs of a friendly recognized Government, to disturb or overthrow it, and to aid or abet the substitution or restoration of a monarchy therefor, is contrary to the policy and traditions of the Republic and the letter and spirit of the Constitution, and cannot be too promptly or emphatically reprobated.

The preamble recited that the President had invaded the rights of Congress in instructing Willis to subvert the republican form of government in Hawaii.

Mr. Boutelle demanded the yeas and nays, and the roll was called, resulting in the defeat of his resolution—yeas, 91, nays 161.

After the announcement of the vote, Mr. Boutelle remarked that if that vote was to be understood as an abdication of the powers of the House, he hoped that the gentlemen would interest themselves in finding some friendly monarch somewhere who would restore them.

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## Exhibit “J”

## SOUND DOCTRINE AS TO HAWAII.

The resolution reported yesterday by the Senate Committee on Foreign Affairs and immediately adopted by a unanimous vote in the Senate embodies the absolutely sound doctrine regarding the relation of our Government to Hawaii. The only Senator who made any objection to the resolution was Mr. Mills of Texas, and he simply refrained from voting. Mr. Mills is a man of earnest convictions, and his sole objection to the declaration of policy contained in the resolution was his belief that our Government, having interfered to set up an oligarchy in Hawaii, ought to interfere again so far as to undo its own work. This is manifestly impracticable now, as the consequences of the act of January, 1892, cannot be wiped out. Events cannot be undone, and their results must be accepted, or we shall take the responsibility for further consequences that cannot be foreseen. One interference cannot be cured by another.

The country is to be congratulated on the unanimity with which the Senate has declared that "of right it belongs wholly to the people of Hawaii to establish and maintain their own form of government and domestic policy," and that the United States "ought not in any way to interfere therewith." Some of the Senators may not be willing to admit it, but this is a distinct condemnation of the intervention of Minister Stevens, sustained by the last Administration, and a complete vindication of the policy of the present Administration. It brings the Government back to the sound doctrine, so long maintained, of non-interference in the affairs of foreign nations, strong or weak, and of a recognition of the right of every independent people to determine their form of government and their domestic policy for themselves.

The declaration that any interference in the political affairs of those islands by any other Government "will be regarded as an act unfriendly to the United States" is equally in accordance with our time-honored policy, and will meet the approval of the people of the country, regardless of party. To have any other power, with which we might have complications hereafter, possessing a foothold off our western coast would be a manifest menace, and while we leave Hawaii to the Hawaiians we have a right



to demand that no other nation shall interfere with it. It is fortunate that the differences of view that have been at times so hotly asserted in Congress should have melted into a harmonious acceptance of a perfectly sound statement of policy.

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